

IN RE MAY.

{2 Cin. Law Bui. (1877) 152.}

District Court, S. D. Ohio.

BANKRUPTCY—HOMESTEAD—EXEMPTION—MORTGAGED  
PROPERTY—PROCEEDS FROM SALE.

1. The head of the family, owning but a single piece of real estate, upon which he resided with his family, but which was mortgaged by himself and wife for more than its value, after condition broken, under the exemption laws of Ohio, is not the owner of a homestead.
2. Such head of family is entitled to hold exempt from execution and sale personal property, to be selected by him, not exceeding in value five hundred dollars.
3. Where all the personal property owned by him at the commencement of the proceedings in bankruptcy was covered by a chattel mortgage, he could make no such selection, and the assignee had no authority to set off the property to him.
4. Under such circumstances, the bankrupt would be entitled to the exemption out of the proceeds of such personal property; and, upon his application, the court would, direct its payment by the assignee.

{In the matter of Henry Hay, a bankrupt.}

E. Devor, for bankrupt.

M. Kary and Howard Douglass, for assignee and general creditors.

SWING, District Judge. This case comes before me upon the application of the bankrupt for the allowance of five hundred dollars in lieu of a homestead. The facts upon which the application is based are as follows: The bankrupt is the head of a family, and, at the time of filing his petition in bankruptcy, was the owner of a house and lot in the town of Piqua, Ohio, and which was then, and now is, occupied by him as the residence of himself and family, and was not the owner of any other real estate. That there are valid mortgages upon said property, in whose execution the

wife of the bankrupt joined, and which, the bankrupt claims, amount to more than the value of the property. The personal property of the bankrupt consisted of a stock of drugs, upon which there was a chattel mortgage of one thousand dollars. This property was sold, and realized to the assignee about fifteen hundred dollars after the payment of the mortgage, and which remains in his hands for distribution.

Among other provisions of the bankrupt law [of 1867 (14 Stat. 517)] relating to exemptions is the following: "And such other property not included in the foregoing exceptions as is exempted from levy and sale on execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by-such state exemption laws in force in the year eighteen hundred and seventy-one." By the laws of Ohio, the head of each family is entitled to hold exempt from sale on execution a homestead, not exceeding in value the sum of one thousand dollars; and, if he be not the owner of a homestead, he is entitled to hold exempt from execution and sale personal property to be selected by him, not exceeding in value five hundred dollars. It is further provided by the laws of Ohio that when a homestead shall be charged with liens, some of which shall preclude the allowance of a homestead to either the head of a family, or the wife, and others of the liens do not preclude the allowance of such homestead, and a sale of such homestead is had, then, of the proceeds of such sale, after the payment of the liens which preclude the allowance of a homestead, the balance, not exceeding five hundred dollars, shall be awarded in lieu of such homestead.

It is objected that the bankrupt is not entitled to the allowance prayed for, because he is the owner of a homestead. If the bank-rapt, within the spirit and

meaning of the Ohio law, is the owner of a homestead, the allowance must be refused. In a general sense, the bankrupt may be said to be the owner of a homestead; he is in the possession of a house and lot, and holds a deed therefor; but he has executed mortgages upon it for a greater amount than the value thereof, and these mortgages are overdue.

The doctrine of the supreme court of Ohio is, that as between the parties to a mortgage and those claiming under them, the legal 1208 title to the mortgaged premises, is Tested In the mortgagee. *Rands v. Kendall*, 15 Ohio, 671; *Allen v. Everly*, 24 Ohio St. 97. And this is in accordance with the decision of the supreme court of the United States in the case of *Probst v. Beach*, 10 Wall. [77 U. S.] 519. It can make no difference that the mortgagee held the legal title for the mortgagor. He could not be divested of it until payment in-full of the amount due upon the mortgage, and he could commence proceedings at once to obtain possession of the premises. Giving to these laws that liberal construction to which exemption laws are entitled, I am of the opinion that the bankrupt was not the owner of a homestead within their spirit and meaning.

It is further objected that the exemption in lieu of a homestead can only exist as to personal property, and that to be selected by the bankrupt; that no demand was made by him before the sale of the property; and that there is now no personal property belonging to the estate which can be selected. It must be kept in mind that the entire personal property from which a selection could have been made had been mortgaged by the bankrupt, and as against the mortgagee he had no right to exemption. Although the amount of the mortgage was less than the value of the property, its lien and title extended to each and every part thereof, and even if demand had been made, the assignee had no light to permit him to take any portion thereof, or to

set off to him any part of it. To have required of him, therefore, to have made a demand upon the assignee for this exemption, would have been requiring of him what the law never does, to do a vain thing. It was the duty of the assignee to proceed and sell the property, and pay the amount of the mortgage upon it, and distribute the balance according to law under the order of the court. This he is ready to do, and I think the bankrupt is entitled, to receive from the fund in lieu of a homestead the sum of five hundred dollars.

It having been suggested that the mortgaged property might bring more than the amount of mortgage liens thereon, the order is suspended until that fact shall be ascertained.

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