Case No. 13,418.

IN RE STEWART.

{1 N. B. R. 278 (Quarto, 42);[1] 1 Am. Law T. Rep. Banki. 16; 15 Pittsb. Leg. J. 222.}

District Court, N. D. Alabama. Feb., 1868.

BANKRUPTCY—SECURED CREDITOR—ORDER TO SELL SECURITY—PROOF OF BALANCE DUE.

A creditor who has a mortgage may apply to the bankrupt court to have the property covered by his lien sold, the proceeds to be applied to the payment of his debt. Should the security fail to satisfy the claim, such creditor may be allowed to prove for the part remaining unpaid, and obtain a dividend thereon.

{Cited in Given v. Smith, Case No. 5,467; Re Brinkman. Id. 1,884; Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Id. 13,643; Re Flanagan, Id. 4,850.}

In the proceedings before the register in this case, Joseph W. Burke, the question arose respecting the disposition of certain mortgaged property of the petitioner, and upon the request of the assignee, the register certified the question to the judge. He certified that the bankrupt. Taylor R. Stewart, filed his petition in bankruptcy on the 4th day of September, 1867, enumerating in his schedule as a creditor "holding security," William Echols, said security being specified as follows: "A deed of trust given to John G. Coltart, to secure George W. Jones and John W. Scruggs, securities for the land mentioned in Schedule B—1." It appears that in the year 1860, the bankrupt, as joint purchaser with one William R. Stewart, bought from Echols the land described in Schedule B—1, giving in payment therefor four promissory notes, each for the sum of $312.50, and payable respectively, in one year, two, three, and four years after date. On those notes George W. Jones and John W. Scruggs were sureties, and to secure them in the liability thus incurred, the bankrupt and his joint tenant made to John G. Coltart

a deed in trust, providing that if any of the said notes should fail to be paid at maturity, the land should be sold by the trustee and the proceeds appropriated to the payment of the debt of Echols. The first three notes were paid at maturity; the last remains unpaid, and is the debt specified in the bankrupt's schedule as due William Echols. Although the creditor Echols is not mentioned as a party to the deed, its terms distinctly prescribe that the proceeds of the property, covered by it, shall be devoted to the payment of his debt, the object seeming to be to secure for the creditor the personal security of Jones and Scruggs, as well as the equitable security afforded by the terms of the deed.

It is well settled that a creditor is entitled to the benefit of the indemnity held by the surety, and can seek in equity to be subrogated to his rights, reach the security, and satisfy his debt. In this sense Echols is secured, as no act of the bankrupt or of the sureties can defeat his equity under the terms of the deed. If the question presented no other feature, and if the security appeared to be sufficient only to pay the debt, the assignee might, under the direction of the court as prescribed in the seventeenth and twentieth sections of the bankrupt act [of 1867; 14 Stat. 524, 526], release all claim to the security upon agreement with the creditor properly controlling the same, but the great difference in the value of the property covered by the deed of trust at the time of its purchase, specified at $1,200, and the present estimated value ($100) set forth in the schedule of the bankrupt, affords in my judgment a proper subject of inquiry. The first section of the bankrupt act provides that the jurisdiction of the district courts of the United States in bankruptcy shall extend to "the collection of the bankrupt's assets and the ascertainment and liquidation of the liens and other specific claims thereon." Section 14 prescribes that "the assignee shall have authority under the order

and direction of the court to redeem or discharge any mortgage or conditional contract, pledge or deposit, or lien on any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same, subject to such mortgage, lien, or other incumbrance." The jurisdiction thus conferred on the court, and the authority given to the assignee under its instructions, in my opinion refers to all liens existing on the property of the bankrupt. If a creditor has a mortgage or pledge for his debt, he may apply to the court to have the same sold, the proceeds thereof applied towards the payment of his debt pro tanto, and if the debt is not fully satisfied out of the security, may prove for the residue. In like manner may the assignee, acting in the general interest of the creditors, apply to have the lien ascertained and liquidated, or for an order directing the sale of the property held as security for any debt existing or provable under the bankruptcy, as the most correct means of ascertaining its true value, and out of the funds in his hands, derived from the sale, may pay to the creditor the amount of his debt covered by the security. By these 51 means the correct status of the creditor may he determined, and should the security fail to satisfy his debt, he may be admitted to prove the part remaining unpaid, and obtain his just proportion of the bankrupt's assets. The register further certified that it was his opinion, that the assignee should apply for an order directing the sale of the property, holding the fund obtained therefrom subject to the lien of this creditor properly asserted in equity, and to the order of the court.

BUSTEED, District Judge, agreed in the conclusions at which the register arrived, and directed the necessary order for the sale of the property by the assignee, to be entered on the proper application.

[1] {Reprinted from 1 N. B. R. 278 (Quarto, 42), by permission.}