Case No. 7,728.

IN RE KERR.

[2 N. B. R. 388 (Quarto, 124);[1] 2 Am. Law T. Rep. Bankr. 39.]

District Court, W. D. Missouri. March, 1869.

BANKRUPTCY—JUDGMENT CREDITOR—SOLVENCY OF DEBTOR.

Creditors holding a judgment may order execution to issue and levy upon and sell the property of their debtor, and the bankrupt law [of 1867 (14 Stat, 517)] will protect them in the advantage thus secured, although they may have had, at the time of ordering the execution, doubts as to the solvency of the debtor.

[Cited in Re Dunkle, Case No. 4,160.]

W. W. Kerr was a merchant of Jefferson City. A. Johnson & Co., of St. Louis, obtained a judgment against him on the 8th of August, 1868. Other large claims were held against him in St Louis, upon which suit was threatened. In his embarrassment, Ken- went to St Louis and called a meeting of his creditors, including A. Johnson & Co. All attended and heard from him a statement of his condition, financially. A. Johnson & Co. stated the condition of their claim; that it had matured into judgment, and, retiring, took no further part in the creditors' meeting; but at once, by telegraph to their attorneys here, caused execution to issue and levy to be made, which was done on the 20th of August, 1868. On the same day the creditors of Kerr participating in the meetings ordered him to go into bankruptcy. This he did, filing his petition August 25th, 1868. On the 28th of August, 1868, he was declared and adjudged a bankrupt. The levy was made on the goods in the store, and the day after, by advice of counsel, it was closed by Mr. Kerr. Johnson & Co. were first made acquainted with the fact that they had obtained judgment, by Mr. Kerr himself, on the 28th of August. But they had, however, given instructions to their agents here in due time. Their judgment was for one thousand six hundred and twenty-four dollars and fifty-four cents. Action was brought by Charles F. Lohman, assignee of Kerr, petitioning the court to declare the levy void and of no effect, and for an order directing the sheriff of Cole county, who had made the levy, to deliver the goods levied upon to the assignee. It was alleged in the petition that Johnson & Co., at the time of ordering the execution, knew that Kerr was insolvent, and was about to go into bankruptcy; and that levy and seizure was made to hinder and delay creditors, to give Johnson & Co. a preference, and prevent an equal distribution of assets under the bankrupt law. This respondents deny, affirming that all that was done was in a bona fide effort to collect an honest debt due.

KREKEL, District Judge. The question to be decided is, had Johnson & Co. a right, under the bankrupt law, to order out an execution and direct a levy to be made on the goods of the bankrupt after the interview with Kerr, at the time the latter called his cred-

itors together for the purpose of making terms with them? The court affirms then-right to do so. To hold otherwise would deprive them of the advantages gained by their diligence. Though it be true that the bankrupt law primarily aims at an equal distribution of the bankrupt's estate, yet it can only mean to effect such distribution among creditors who stand in the same relation to the debtor. Johnson & Co. had no lien on the personal property of Kerr by virtue of their judgment, for, under the statutes of Missouri, to obtain a lien on personal property an actual seizure thereof is required. Yet their claim, having matured into a judgment, was in a better condition to enforce payment than the claims of creditors having simply notes or open accounts against Kerr. Johnson & Co. could at any time have taken out an execution, and by a levy secured their debt. None of the other creditors could have done this. The provisions of the bankrupt law countenance, rather than discourage, diligence in the collection of debts; and next, to the equal distribution of the assets of the bankrupt, its special aim seems to be to inculcate and enforce prompt payment of liabilities, and in order to secure that object furnishes suitable remedies. Though Johnson & Co., at the time of ordering out the execution, may have doubted the solvency of Kerr, they were not bound to surrender, to the rest of the creditors, the superior means they had gained to collect their debts, by virtue of the judgment they had obtained, or to lose the benefit thereof by inactivity. The judgment against i£err was obtained on the 8th day of August, 1868, and the execution ordered out and levy made on the 18th day of the same month.

The petition for the benefit of the bankrupt act was filed by Kerr August 25th, 1868, and he was declared a bankrupt August 28th, 1868, so that the levy was made prior to filing-the said petition, and to the adjudication of" bankruptcy. Had there been such delay in ordering out the execution and making the levy as to leave it doubtful in the minds of the court, whether the suit was really instituted to collect debts at that time, a question would have arisen as to whether a creditor in the condition of Johnson & Co. would be permitted to sleep upon the advantages gained, to the injury of other creditors. Were a creditor, for instance, to obtain a judgment for an amount large enough to absorb the greater portion of the assets of his debtor, and hold or use such judgment for the purpose of preventing or obstructing other creditors

in the collection of their debts, courts would see that no undue advantage was taken. There is nothing in this case to justify the conclusion that Johnson & Co. had any such intention or design. What they did appears to have been done in the legitimate pursuit of the collection of an honest debt, and the advantages obtained by their diligence they must be permitted to enjoy. The estimated value of the goods levied on being greater than was supposed to be necessary to satisfy the execution, the court heretofore, on application, ordered the sheriff to deliver them to the assignee, directing the latter to dispose of them, but to hold the proceeds thereof subject to the order of this court It is now ordered and adjudged that Chas. F. Lohman, assignee, pay out of the proceeds aforesaid, the amount of the judgment, interests, and costs, of A. Johnson & Co., and that the balance of the proceeds be considered as part of the estate of said bankrupt, and dealt with accordingly.

[1] {Reprinted from 2 N. B. R. 388 (Quarto, 124 by Permission.}