IN RE KING.

Case No. 7,783.

[10 N. B. R. (1874) 104.][1]

District Court.[2]

BANKRUPTCY—PREFERENCE.

1. The burden of proof is on the creditor to show that the creditor procured or suffered his property to be taken on legal process with intent thereby to give a preference.
2. The case of "Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473], cited and followed.

This is an involuntary proceeding for adjudication of bankruptcy, and the single act of bankruptcy alleged in the petition is, that the debtor, Dwight B. King, on the 2d of February, A. D. 1874, being insolvent, and in contemplation of bankruptcy, procured and suffered his property to be taken on legal process, in favor of one Thomas W. Maires, with intent thereby to give a preference to said Maires, and by such disposition of his property to delay and defeat the operation of the act.

W. L. Dayton for petitioning creditor.

E. W. Evans for alleged bankrupt.

The only evidence which embarrasses me in the decision of the case, is the fact, that when the summons was issued, the creditor took it to the debtor, and asked him to acknowledge the service, rather than to the sheriff, to have the service made by him. The writ was tested December 29th and made returnable January 2d, affording sufficient time for the officer to make a personal service, but not for him to leave a copy at the residence or place of business of the defendant. Unexplained, such a circumstance affords strong presumption of collusion between the creditors and the alleged bankrupt, and constitutes the judgment and levy not only an act of bankruptcy, but a fraudulent preference. If the explicit denial of both the creditor and the debtor of all complicity in procuring the preference, was contradicted by either facts or circumstances, I should give little weight to

their testimony. For the parties who enter into such collusions, do not generally hesitate to sustain them by falsehood. They stand, however, not only uncontradicted, but confirmed. Mr. Van Horn, the lawyer whom Mr. Maires employed to obtain judgment on the note, gives a satisfactory explanation of the transaction. He testifies that he alone is responsible for the acknowledgment of service of the summons by the debtor. That the creditor expected and desired him to send the writs to the sheriff; that he and King were personal friends, and he felt a sympathy for him; that he was obliged to urge Maires for some time, before he consented to pursue this friendly course, towards a young and inexperienced man; and that so "suspicious was King, that the acknowledgment involved some trick, that he refused to have anything to do with it, until he had consulted with Van Horn as a friend, and learned of him that Maires could take-no benefit or advantage from it, and that its only legal effect was to save the costs of the sheriff's service. The evidence also negatives the idea of complicity between the creditor and the debtor, in exhibiting the surprise of the latter when he learned of the judgment and execution, and the anger which he manifested towards all the parties concerned in obtaining it. Accepting the case of Wilson v. City Bank of St Paul [17 Wall. (84 V. S.) 473], as the law which governs this court, I must hold that the burden of proof is upon the creditor, and that he has failed to show that the debtor has procured or suffered his property to be taken on legal process, with intent thereby to give a preference, or by such disposition of his property to delay and defeat the operation of the bankrupt act [of 1867 (14 Stat 517)].

[1] [Reprinted by permission.]

[2] [The district, the date of the decision, and the name of the judge are not given in the original report.]

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