

ing of this court to administer the estate. The court does not merely succeed to the interest of the bankrupt, but is vested with power over all the bankrupt's property, unless rights have theretofore vested in others. No interest vested in Pratt & Lambert, nor in the receiver, who was created pursuant to their judgment, after this court had interposed. The doctrine of relation under the New York statute may prevent the intervention of liens intermediate the order and the vesting of the property in the receiver, but it cannot thwart the jurisdiction of this court to take possession of the property, and administer the same according to rights as they existed when the jurisdiction was invoked. Under the New York statute (Code Civ. Proc. §§ 2468, 2469), "when the receiver's title to personal property has become vested," "the title relates back so as to include the personal property of the judgment debtor at the time of the service of the order" of examination. But the receiver's title in this case had not vested. Before such vesting, another court, with a different law of distribution, had seized the property, and assumed its administration. The receiver's title could not vest thereafter. The very judgment on which it was predicated was directed by the statute to be suspended by, and was dischargeable in, the bankruptcy court, and it is not conceivable that such judgment could continue so potent in its operation as to oust this court of its jurisdiction, because a receiver was appointed by virtue of it after such jurisdiction was gained. It follows from these views that the Pratt & Lambert claim may not be allowed. Some of the questions contained herein are so involved that a proper order will be granted to permit a review of the present proceedings, if desired.

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In re WOOD.

(District Court, E. D. North Carolina. August 1, 1899.)

1. BANKRUPTCY—SECURED CREDITORS—JUDGMENT LIENS.

Where a creditor of a bankrupt claims priority of payment out of his estate by virtue of an alleged judgment lien on the property of the estate, the burden is on such claimant to show that he has done everything required by statute to make his judgment attach as a lien.

2. SAME.

In North Carolina, a judgment rendered by a justice of the peace is not a lien on personal property until there is a levy under it, nor on real estate until docketed in the superior court; and a creditor of a bankrupt, who has recovered judgment against him in a justice's court, but not docketed the same in the superior court, nor issued any writ upon it, is not entitled, merely by virtue of his judgment, to priority of payment out of the estate, but must share pro rata with the unsecured creditors.

In Bankruptcy. On review of decision of referee in bankruptcy.

PURNELL, District Judge. This case is certified for review on objection by creditors to the decision of the referee that Boone & Jenkins are entitled to priority, to have their debt paid in full by the

trustee, because they had commenced proceedings against the bankrupt in the court of a justice of the peace, and there obtained judgment, from which judgment the bankrupt, defendant, had taken an appeal to the superior court, where the cause was pending at the time of adjudication in bankruptcy. The estate consists entirely of the proceeds of sale of personal property except five dollars, derived from sale of the reversionary interest in the homestead. There was no levy on the property under execution, attachment, or other process. It does not appear in the record that the justice's judgment was docketed in the superior court, and, the burden to show this being upon the party claiming the lien, it must be held it was not, but that the usual course was pursued, and simply an appeal taken. Presumably, a bond was given, providing for the payment of the debt and costs, should the judgment in the superior court be against the defendant. If this practice under the state law has been pursued, as is presumed, Boone & Jenkins have security for their claim should they be successful in the superior court. But much of this is based on the maxim, "Omnia præsumentur," etc. The record shows Boone & Jenkins have a suit pending in the state superior court on appeal from a judgment of a justice of the peace,—officers by no means infallible, frequently innocent of law, and actually sometimes known to construe the abbreviation affix designating their office, "J. P.," to mean "judgment for plaintiff," which may establish nothing. A judgment, whether in a justice's or the superior court, is not a lien on personal property until there is a levy; neither is it a lien on real estate until docketed in the superior court, and it becomes a judgment of that court. This being so, the holding of the referee was erroneous. Boone & Jenkins are entitled to no priority in bankruptcy, and the ruling of the referee is reversed.

There was, or seems to have been, some neglect on the part of counsel in appearing at the time notice was issued to creditors when the claim of Boone & Jenkins would be heard, and a misunderstanding between counsel and the referee. Bankrupt proceedings owe much of their efficacy and benefit to prompt action on the part of parties concerned. Ordinarily, the judge will uphold referees in refusing to reopen cases to allow creditors who have shown laches in presenting their claims to be heard; but when there is manifest error, as in this case, the judge will look into the record, and correct the error. These parties have no lien, and are entitled to no priority, as shown by the record. Nothing else appearing, they will participate in the distribution as other creditors,—without priority or preference. The dividend sheet, having been made out, and forwarded to the trustee, will be returned to the referee for correction in accordance with this decision, and an extra allowance to the referee of five dollars is allowed him, to be paid by the trustee, for services in this behalf.

## SIMONSON v. SINSHEIMER et al.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1899.)

No. 716.

## 1. BANKRUPTCY—VERIFICATION OF PETITION—WAIVER OF OBJECTIONS.

An objection to a petition in involuntary bankruptcy on the ground of informality or insufficiency in its verification is waived by the tender of a plea and answer on the merits, although the court does not permit the answer to be filed; such objection does not go to the jurisdiction.

## 2. SAME—DEFENSES TO INVOLUNTARY PETITION—AGREEMENT TO COMPROMISE.

It is not a defense to a petition in involuntary bankruptcy that the petitioning creditors had previously agreed to compromise with the debtor on receiving half the amount of their claims, when it appears that the composition has not been paid, and that half of the debts alleged to be due the petitioning creditors would be a sufficient sum to enable them to maintain the petition.

## 3. SAME—PETITIONING CREDITORS—ESTOPPEL.

Where a debtor makes a general assignment for the benefit of his creditors, and judicial proceedings are instituted to enforce and carry out the assignment, creditors who, on being made parties to such proceedings, do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims under the assignment, and participate in the administration of the estate, and suffer the assignee to sell the property and collect the proceeds, involving a delay of several months, and the incurring of costs and expenses, are estopped thereafter to file a petition in involuntary bankruptcy against the assignor, based solely on the ground of the assignment.

Appeal from the District Court of the United States for the District of Kentucky.

For opinion of the court below, see 92 Fed. 904.

This is an appeal from an adjudication in bankruptcy against the three partners of the firm of Simonson, Whiteson & Co. The appeal is prosecuted by one of the partners. The defendants tendered an answer to the petition some days after the time in which they were required to file one, and on motion for leave to file the same the court considered the question whether the answer contained a sufficient defense to the charge of bankruptcy, and found that it did not. The defendants then filed a motion to dismiss the petition on the ground that it was not properly verified. The motion was denied. The questions on this appeal arise upon the verification of the petition and the sufficiency of the answer. The petition filed on February 14, 1899, after setting forth the necessary jurisdictional facts as to the residence and occupation of the defendants, averred that the three petitioning firms were creditors of the defendants, on account of goods sold them, in the aggregate sum of \$10,000, and that defendants had debts amounting to at least \$20,000. The petition further averred that within four months next preceding the filing of the petition the defendants, as partners, committed an act of bankruptcy, in making on the 5th day of December, 1898, an assignment to their bookkeeper, one Leonard Comingor, for the benefit of their creditors; that the firm was then insolvent; that said Comingor on the 5th day of December, 1898, accepted the trust created in said deed of assignment, duly qualified as such assignee, and entered upon the discharge of his duties as such; that he sold stock belonging to the estate of the firm, and had in his hands as the proceeds of the sale of said goods the sum of about \$70,000. T. W. Spindle, as attorney, verified the petition as follows:

"Commonwealth of Kentucky, County of Jefferson. I, T. W. Spindle, do hereby make solemn oath that I am a member of the firm of Kohn, Baird & Spindle, and that the said Kohn, Baird & Spindle are solicitors for all of the petitioners above named, and that all of the statements contained in the fore-