

Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction, unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make was made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events, we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one, vesting in them the equitable title, with right to receive the patents; and that the subsequent proceedings of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the court in Illinois, sitting as a court of equity, to have declared that the mortgage made by Bunn, so far as these lands are concerned, created no lien on them, because he had no right, legal or equitable, to them.

The decree of the Supreme Court of that State must be reversed, and the cause remanded to that court for further proceedings in accordance with this opinion; and it is

*So ordered.*

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NATIONAL BANK *v.* WARREN.

The mere non-resistance of a debtor to judicial proceedings in which a judgment was rendered against him, when the debt was due and there was no valid defence to it, is not the suffering and giving a preference under the Bankrupt Act; and the judgment is not avoided by the facts, that he does not file the petition in bankruptcy, and that his insolvency was known to the creditor.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The Tenth National Bank of New York, having an undis-

puted debt against the firm of Sanger & Co., of about \$10,000, endeavored to obtain its money by persuasion, but received only fair words in return. After pursuing this policy for several months, it brought suit against the debtors, Nov. 3, 1870. They received delay and indulgence in its prosecution, and judgment was rendered against them on the 12th of January, 1871. Execution was issued on that day, and a levy made upon their property. Yielding again to their solicitations, the bank did not press an immediate sale under the execution, and on the 24th of February, 1871, bankruptcy proceedings were commenced by their other creditors. The sale upon the execution was stayed by an injunction in the present suit, which was instituted by Warren & Rowe, assignees in bankruptcy of Sanger & Co., to set aside the judgment and execution as fraudulent and void.

This injunction was afterwards modified by allowing a sale, and directing the sheriff to hold the proceeds subject to the order of the court.

The District Court ultimately dismissed the bill with costs. That decree having, on appeal, been reversed by the Circuit Court, the bank brought the case here.

*Mr. A. J. Vanderpoel* for the appellant.

This case is, in substance, identical with *Wilson v. City Bank*, 17 Wall. 473.

There is no evidence whatever of any intent to give the bank a preference. *Partridge v. Dearborn*, 2 Low. 286; *Hoover v. Greenbaum*, 61 N. Y. 305; *Sleek v. Turner*, 76 Pa. St. 142; *Henkelman v. Smith*, 42 Md. 164.

*Mr. Austen G. Fox*, *contra*.

This case comes within the class of cases represented by *Buchanan v. Smith* (16 Wall. 277), and not that represented by *Wilson v. City Bank* (17 id. 473).

The liens obtained by the bank were a preference, and therefore void as against the assignees in bankruptcy.

MR. JUSTICE HUNT, after stating the case, delivered the opinion of the court.

This action goes upon the theory that the mere non-resistance of a debtor to judicial proceedings against him, when the debt is due and there is no valid defence to it, is the suffering



and giving a preference under the Bankrupt Act. This theory is expressly repudiated in the case of *Wilson v. City Bank*, 17 Wall. 473. It is also held in that case that the facts that the debtor does not himself file the petition in bankruptcy under such circumstances, and that the creditor was aware of the insolvency of the debtor, do not avoid the judgment and execution. In the present case, there is not proven a single fact or circumstance tending to show a concurrence or aid on the part of the debtors in obtaining the judgment or securing the payment of the debt. Their only effort was to obtain delay, apparently in the hope of relief from the embarrassments which finally overwhelmed them.

The decree of the Circuit Court must be reversed, and that of the District Court, dismissing the bill with costs, affirmed; and it is

*So ordered.*

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WOLF v. STIX.

A decree dismissing a bill in chancery brought to recover a debt and set aside an alleged fraudulent sale of property, was, on appeal, reversed, and a decree rendered by the Supreme Court of the State against the appellee for the amount of the debt, and an execution awarded. Thereupon the appellee, who, pending the appeal, and more than three years before the date of the decree, had obtained a discharge in bankruptcy, petitioned the Supreme Court to set aside its decree, and either permit him to plead his discharge there, or remand the cause, so that he might plead it in the inferior court. The court, upon the ground that no new defence could be made there, refused the petition, and permitted the decree to stand as entered. *Held*, 1. That upon the face of the record proper no Federal question was raised. 2. That the action upon the subsequent petition did not place the petitioner in a better position to invoke the jurisdiction of this court.

MOTION to dismiss a writ of error to the Supreme Court of the State of Tennessee.

*Mr. Josiah Patterson*, for the defendant in error, in support of the motion.

*Mr. William M. Randolph, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a bill in chancery, filed by Louis Stix & Co. in the