

Case No. 3,700.

IN RE DEAN ET AL.

{2 N. B. R. (1874) 89 (Quarto. 29); 15 Pittsb. Leg. J. 581, 583.}¹

District Court, E. D. Missouri.

BANKRUPTCY—FRAUDULENT SALES—REGISTER'S POWERS.

1. A sale of a stock of goods, not made in the usual and ordinary course of business of a debtor, is prima facie evidence of fraud by section 35 of the statute [of 1867 (14 Stat. 534)].
2. The register has power to take affidavits and depositions, in cases not before him, at any time after the petition is filed.

On December 21st, 1867, the petitioners filed their petition to have said [Edwin B.] Dean adjudged a bankrupt, alleging that on November 26th, 1867, said Dean committed divers acts of bankruptcy, in contravention of the provisions of the act of congress approved March 2d, 1867. The acts of bankruptcy alleged in the petition were as follows:
That

on that day, November 26th, he conveyed to his son-in-law, George Kimmel, real estate in Cape Girardeau, of the value of seven thousand dollars, with intent to hinder, delay and defraud his creditors; that on the same day he made and put on record a deed to his father-in-law, C. F. Scheusler, for real estate in Cape Girardeau, of the value of four thousand dollars, with intent to hinder, delay and defraud his creditors; and that on the same day, with like intent, he conveyed to his son-in-law, Thomas F. Garrett, the whole of his stock of merchandise then in his store in Cape Girardeau, of the value of six thousand dollars; and also fraudulently stopped payment of his commercial paper, he being a merchant and trader. Depositions proving the debts of the petitioning creditors and the acts of bankruptcy were filed with the petition. At the same time a petition was also filed praying for an injunction to restrain the said Garrett from selling or disposing of any of the goods conveyed and transferred to him by said Dean; alleging the several acts of bankruptcy; that Dean was insolvent; that on that date, November 26th, he conveyed away all of his property by deeds to different parties; that Garrett knew of Dean's condition and insolvency; that Garrett paid no cash for said stock of goods; that he purchased the same at a discount of twenty-five per cent. below cost, and gave his notes at eighteen months and three years from date in payment; and that said Garrett was himself insolvent and unable to pay his debts, and would not be able to respond in damages to the assignees should said Dean be adjudged a bankrupt.

The court directed a rule to show cause to issue against Dean, and also granted an injunction to restrain Garrett from selling or disposing of the goods until the further order of the court, and made the same returnable on January 6th. On that day Dean appeared and demanded a jury. Garrett filed his answer to the petition with a motion to dissolve the injunction. The hearing of the motion was set down for Thursday, Jan. 16th, when the parties appeared by counsel. The answer of Garrett, alleged that he bought the goods fairly, for a fair consideration, without any knowledge of Dean's insolvency; that the value of the goods was four thousand and eighteen dollars and fifty cents; that twenty-five per cent less than cost at invoice of five thousand four hundred dollars was but a fair deduction, considering the character and condition of the stock; that he paid three hundred and three dollars and ninety cents in cash, and gave seven notes of five hundred dollars each, two payable in eighteen months with interest, and six payable in thirty-six months, and one for two hundred and fourteen dollars at three years.

The counsel for Garrett read a number of affidavits to show that four thousand and eighteen dollars and fifty cents was the par value of the stock; that Garrett was a good business man and in good credit.

Counsel for petitioner read affidavits to show acts of bankruptcy by Dean; that he was largely indebted, was insolvent; and also offered in evidence copies of the conveyances made by Dean, November 24th, and also affidavits to show that said Dean had stated

that he had conveyed away all his property and was worth nothing, and that he intended to secure his children first, friends next, and creditors last. He also read affidavits to show that Garrett was acquainted with Dean's insolvency; that said Garrett had himself failed in 1866, and in 1867 had compromised with his creditors at fifty cents on the dollar, giving long paper of Whitelaw & Garrett (a brother of Thomas F.,) in payment

TREAT, District Judge. It is apparent, from the papers and the evidence presented, that there was a sale of a stock of goods, not made in the usual and ordinary course of business, of the debtor, who was a retail dealer and merchant at Cape Girardeau. The statute (section 35) makes such a sale and transfer prima facie evidence of fraud, and avoids the sale. It appears, from the answer and affidavits filed, that Garrett had been engaged in taking an account of the stock previous to his purchase; that he was present when demand of payment of debts due was made of Dean, and that he therefore knew that Dean was indebted and could not pay his debts; that for a stock of goods, valued, by his own statement, at over four thousand dollars, he paid but three hundred and three dollars in cash, and gave his notes at eighteen months and three years, which, to that extent at least, delayed creditors, and that, as far as Dean was concerned, the transfer was fraudulent and void, and that respondent himself had within a year compromised his own debts, and, therefore, did not appear responsible in damages should Dean be adjudged a bankrupt and an assignee be appointed to take charge of the interest of the creditors. The prima facie case made by the petition was not rebutted and the injunction must be continued. Motion to dissolve injunction overruled.

After the filing of the petitions above referred to, and before service of the rules to show cause, the petitioning creditors proceeded to take depositions at Cape Girardeau, before Alex. Ross, register, having served notice upon both Dean and Garrett.

Respondents, by counsel, moved to suppress the depositions, for the reason that they were taken before the rules to show cause were served upon respondents; and because the register had no authority to take depositions until the cause was referred to him, after a warrant in bankruptcy was issued.

Mr. Whittelsey, for petitioners, referred to section 38 of the act providing that the filing of the petition against the debtors should be deemed to be the commencement of the proceedings, and also as giving authority to the register to take depositions in cases not before him.

TREAT, District Judge. It is apparent, by comparing the different provisions of the act, and section 4 with 38, that registers have power to take affidavits and depositions. Their authority to take proof of debts in all cases, whether pending before them or not, is given by section four. In cases referred to them they act as assistants to the judge and the courts. The filing of the petition is the commencement of proceedings, and after the filing depositions may be taken. In many cases it is essential that the petitioner should take depositions in order to be ready for trial upon the return of the order to show cause. Motion to suppress overruled.

¹ [Reprinted from 2 N. B. R. 89 (Quarto, 29), by permission.]