Case No. 12,729.

IN RE SHEA ET AL.

{2 Biss. 156; 3 N. B. R. 187 (Quarto. 46); 2 Am. Law T. 107; 1 Chi. Leg News, 345; 16 Pittb. Leg. News, 85; 1 Leg. Gaz. 46.}[1]

District Court, D. Indiana. June 25, 1869.

BANKRUPTCY—SUSPENSION OF PAYMENT—PRESUMPTION.

1. The failure of a banker, merchant, or trader, who has suspended payment of his commercial paper, to resume within fourteen days, is prima facie evidence of fraud.

2. Unless such inference is affirmatively rebutted, he will, on a proper creditor's petition, be adjudged a bankrupt.

In bankruptcy. The petition herein was filed by J. H. Heinsheimer and others against Patrick Shea and William Boyle, June 7, 1869, charging that they, being partners, traders, etc., committed an act of bankruptcy, in this, "that within six months next preceding the date of this petition, the said Patrick Shea and William Boyle did commit an act of bankruptcy within the meaning of said act, in that they did, on the 28th of January, 1869, fraudulently suspend and stop the payment of their commercial paper, and did not resume the payment thereof within fourteen days thereafter, and have never paid the same." This "commercial paper," the petition alleges to be a note, dated at Cincinnati, January 27, 1869, for $926.55, payable one day after date, to the order of the petitioners, and executed to them by Shea & Boyle. The defendants filed an answer denying the allegations in the petition.

Reid & Carey, for petitioners.

Hendricks, Hord & Hendricks, for respondents.

MCDONALD, District Judge. {On the trial it is agreed and admitted that if the note in question is "commercial paper" within the meaning of the

bankrupt act, and if the mere fact that the defendants have failed to pay the same up to the time of the filing of the petition, is prima facie evidence of a fraudulent suspension of payment, within the meaning of the thirty-ninth section of the act, then the court shall find for the petitioners. This agreement confines our inquiries to two questions: First, is the note mentioned in the petition "commercial paper?" Second, when traders stop the payment of their commercial paper for fourteen days, and do not afterwards resume it, is this, prima facie, a fraudulent suspension of payment? We will examine these questions. 1207 {First. Is the note in question commercial paper? It is payable on its face to the order of the payees. It is dated at Cincinnati; and, in the absence of any evidence to the contrary, I must, therefore, presume that it was executed in the state of Ohio. We need not cite authorities to show that, in such a case, the lex loci contractus governs the contract. Then, the note being executed in Ohio, it is to he construed by the law of Ohio. The law of Ohio puts notes like this on the same footing as inland bills of exchange. The note is, therefore, commercial paper, within the meaning of the bankrupt act.

{Second. When traders stop payment of their commercial paper for fourteen days, and do not afterwards resume it, is this prima facie evidence of a fraudulent suspension of payment?}[2]

The language of the bankrupt act is, that every person, "who, being a banker, merchant or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy." This question has been much discussed in many of the district courts of the United States; learned judges have given various and different answers to it; and it still remains unsettled. Three views appear to have been taken of it: first, that

the mere failure to pay, or to resume payment, is conclusive evidence of fraud; second, that it is only prima facie evidence of fraud; third, that it is no evidence at all of fraud. Without entering upon a discussion of the reasons upon which different judges have come to these opposite conclusions, I conclude that the failure to pay and to resume payment is prima facie evidence of fraud, and no more. I thus decide, for the following reasons:

1. To hold that such failure to pay and to resume payment is conclusive evidence of fraud, and consequently of an act of bankruptcy, would sometimes be followed by unjust and absurd consequences. If we adopt this rule, then we might force into bankruptcy the wealthiest and most prosperous trader in the country. Suppose a trader to be worth $100,000, and to owe $1,000 on commercial paper. At the time when this paper falls due, some accident befalls him—he is prostrated by sickness—all the money he has on hand is stolen or depreciates greatly in value—or suppose that he is necessarily abroad, and cannot reach home within the fourteen days, and by a mere forgetfulness, did not, before leaving home, provide for paying such commercial paper—in these and many other cases that might be supposed, the creditors would be entitled to file their petition against him in bankruptcy on the next day after the expiration of the fourteen days. But in such cases it would be harsh and absurd to hold that his mere failure to pay before the petition was filed, is conclusive of a fraudulent intent on his part, and to preclude him from offering evidence exculpating him from such intent, and evincing his ability and willingness to pay.

2. It is a point of pride, as well as of duty, that traders shall not suffer their commercial paper to be dishonored. Every one knows that such dishonor seriously affects his commercial reputation and business. It is reasonable, therefore, to presume, when

he fails promptly to honor his commercial paper, either that he does so fraudulently, or is insolvent. For if he can pay, and does not, that is, among traders, a fraud within the meaning of the bankrupt law; and if he is insolvent and cannot pay, but still carries on his trade, this, I think, is, in view of that law, a fraud—at least, he can, in that case, have no reason to complain if his creditors attempt to have him adjudged a bankrupt. I think, therefore, that a banker, merchant or trader who stops the payment of his commercial paper for fourteen days, and does not afterwards resume it before he is proceeded against as a bankrupt, is not to be deemed prima facie innocent of all fraud.

3. Such a failure to pay on the part of a banker, merchant or trader ought to be so far deemed evidence of fraud as to cast on him the necessity of explaining his conduct, because of the great difficulty in such a case of proving actual fraud. It is generally true, indeed, that, when the question is fraud or no fraud, he who alleges fraud must prove it. But in cases like the present it is almost impossible by direct evidence to prove actual fraud. However great the fraud might be, all that we could reasonably expect the petitioner to be able to prove, would be the failure of the debtor to pay the commercial paper. The intent which led to the failure, it would generally be impossible to prove by anything like direct evidence. But on proof of the failure, I think, the fraudulent intent may be fairly inferred till the contrary is proved. On the other hand, if facts exist which may fairly rebut the inference of fraud, they would in most cases be easily proved. For example, the facts we may suppose to be, as above stated, severe and protracted sickness or unavoidable and unexpected absence from home, and the like. In such cases, the debtor could generally prove the facts, and thus rebut the prima facie case made by proof of the mere omission to pay. This rule making the mere failure to pay prima facie evidence

only of a fraud, therefore, commends itself to us on account of its fairness, its plainness, and its easy and general application to cases of this kind. Moreover, it appears to me to be quite consistent with the general scope of the bankrupt act, and to do no violence to the 39th section, on which this question arises. Avoiding extremes, therefore, and following the maxim in medio tutissimus ibis, I conclude that the failure on the part of a banker, merchant or 1208 trader to pay his commercial paper for fourteen days after it falls due, unless payment is resumed before proceedings in bankruptcy are commenced against him, is prima facie evidence, and only prima facie evidence, that he has committed an act of bankruptcy.

NOTE. To the same effect are the following: In re Jersey City Window Glass Co. [Case No. 7,292]; In re Ballard [Id. 816]; In re Lowenstein [Id. 8,574]; Doan v. Compton [Id. 3,940]; Davis v. Armstrong [Id. 3,624]; In re Hollis [Id. 6,621]. That fraud must be proved. In re Leeds [Id. 8,205]; In re Cone [Id. 3,095]; In re Davis [Id. 3,615]. Since the amendment making the clause read "fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," it is held that the "fourteen days" applies to the suspension only, and that the word "fraudulently" only relates to the first portion of the clause. In re Wells [Id. 17,387]; In re Cowles [Id. 3,297]: In re Sohoo [Id. 13,162]; In re Thompson [Id. 13,936]; In re Hall [Id. 5,920]; In re Burt [Id. 2,210]; Baldwin v. Wilder [Id. 806].

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 Leg. Gaz. 46, contains only a partial report.]

[2] [From 3 N. B. R. 187.]