that the facts therein stated are true. The principal fact upon which the validity of the proceeding depends, to-wit, his belief that prejudice and local influence will hinder his obtaining justice *in the state court*, he does not state in his petition, and hence does not even by implication swear to in his affidavit. He need not state the grounds of his belief, nor in what the prejudice or local influence consists; but the law requires him to swear, and he ought to swear, that he fears the court will not give him justice.

3. The bond, also, is defective—not for the reason assigned in the argument, that it contained no witnesses to the signatures. These are required, not to give the bond validity, but to facilitate the proof of its proper execution. But the condition of the bond is what is required by the act of 1875, and not what is required by the act of 1867. A cursory examination of the two statutes will show that they are quite different, and that the one cannot be substituted for the other. We think that the motion to remand must prevail. But for these defects, the case of *Insurance Co.* v. *Dunn*, 19 Wall. 214, would be sufficient authority for the petitioner to remove the suit after a trial and verdict, which has been set aside by an appellate court, and a *venire de novo* awarded.

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## SHUFELDT and others *v.* JENKINS and others.

## MILL CREEK DISTILLERY CO. *v.* SAME.

(*Circuit Court, E. D. Virginia.* October, 1884.)

FRAUDULENT CONVEYANCE — PREFERENCES — INJUNCTION — LIS PENDENS — VIRGINIA STATUTE.

An insolvent merchant of Richmond, Virginia, in consideration of extensions by a creditor, promises that he will give no preferences against the creditor. The promise is made while a secret deed of preference is already executed. Finally, the insolvent writes to the creditor, who is afterwards complainant, asking the withdrawal from bank of a note about to fall due, and repeats the promise that no preference will be given against him, and the note is withdrawn; yet, in a few days, the insolvent makes a deed giving a large preference against complainant. This deed is not recorded, and the insolvent merchant continues his business with open doors. The complainant, hearing by some means of this deed, filed his bill, charging fraud as to himself on the facts, alleging that the deed is not recorded, and is null and void under the laws of Virginia, as against creditors, until recorded; asking an injunction against all interference with the goods of the insolvent, and that the marshal may take immediate possession of the goods. This order was granted, and at a subsequent date a receiver was appointed. The marshal took possession of the goods, and afterwards, on the same day, the deed was recorded. *Held*, that the deed was fraudulent as to complainant, and as to all creditors, and must be set aside as to the preferred creditor, whether he had a knowledge of the fraud or not. *Held* that, under the statutes of Virginia, the order of injunction and seizure was proper, and that the *lis pendens* of the complainant creditor took precedence of and invalidated the recording of the deed as to defendants.

In Chancery.

These two cases are practically one, and in what follows particular mention will be made only of the first case named. Besides these two bills, creditors' petitions have been filed by Walsh & Kellogg; Gottschalk & Co.; Charles H. Ross & Co.; J. Hayes & Co.; Griffiths, Curtis & Co.; Charles Ewan & Co.; W. W. Johnson & Co.; and Maddux, Hobart & Co.,—all wholesale liquor dealers.

On the tenth of January, 1883, this court, then sitting in Alexandria, on the bill first exhibited in this cause, made an order assuming custody of the goods, chattels, effects, and property of E. Courtney Jenkins & Co., of Richmond, including the books of account, and all bonds, bills, notes, and other evidences of debt due the house, and restraining the defendants and all other persons from interfering with the property, books, and claims thus taken into custody. The marshal executed this order early on the morning of the eleventh of January. The evidence subsequently taken discloses that the firm of E. Courtney Jenkins & Co. consisted alone of E. Courtney Jenkins, individually. In all that follows the firm name will be disregarded; the defendant will be designated as E. C. Jenkins simply. The evidence also discloses the following facts:

The defendant had been insolvent for several years, and was then insolvent. His books showed liabilities to the amount of $73,000, and assets estimated at less than $50,000. These assets have been subsequently sold and collected with care and diligence, and have produced only about $25,000. When these proceedings commenced, the defendant had made two deeds of assignment, neither of which had been put on record, and both of which were still in the hands of their grantees as subsisting deeds. One of these deeds had been executed on the sixth day of October, 1881. In it, E. C. Jenkins—after reciting that George Gibson, of Richmond, and Joseph W. Jenkins, of Baltimore, had, for the purpose of enabling him to conduct his business, indorsed numerous negotiable notes of his, and had promised and agreed to renew these indorsements, and to indorse other notes, for the purpose of enabling him to go on with his business, if he would fully secure them from risk, liability, and loss on account thereof—conveyed to John G. Spotts, as trustee, all the goods, wares, and merchandise then in the store-house in Richmond occupied by E. C. Jenkins, and all goods, wares, and merchandise that should thereafter be brought upon said premises by the said E. C. Jenkins, or upon any other premises in Richmond occupied by said Jenkins in his business; also all goods, wares, and merchandise, especially wines and liquors, of every description, that were then or should be thereafter standing in the name of said Jenkins in any warehouse, or be *in transitu* therefrom in the state of Virginia or any state of the United States,—upon trust that the trustees should permit the said Jenkins to remain in possession of the property conveyed, and to use and dispose of it in carrying on his business until default, etc., and

upon default then to sell, etc., and out of the proceeds of sale to pay all notes then under indorsement or that should be indorsed by George Gibson, and also all notes indorsed or that should be indorsed by Joseph W. Jenkins; and also three certain notes of said E. C. Jenkins held by Joseph W. Jenkins, aggregating in amount the sum of $5,443; and, after paying all said notes in full, then to pay all general creditors of said E. C. Jenkins *pro rata;* and if anything should remain, then to pay the same to said E. C. Jenkins. This deed was executed in duplicate, and one copy of it given to the counsel of George Gibson, Mr. John Dunlop, who was also, as to the drawing of the deed, counsel of E. C. Jenkins. The other copy was given to Joseph W. Jenkins, a citizen and resident of Baltimore. At the time of the execution of this deed George Gibson was indorser for E. C. Jenkins to the amount of about $12,000; and Joseph W. Jenkins was indorser to the amount of about $5,000, and was holder besides of the three notes for the aggregate of $5,443 before mentioned.

E. C. Jenkins remained in possession of all the goods and stock in trade which he had on hand at the date of this deed, and continued to do so, and to buy and sell and carry on business in his firm name as if no deed had been executed.

John G. Spotts, the trustee named in this deed, was the business partner of George Gibson, and the places of business of Spotts & Gibson and of E. C. Jenkins & Co. were adjoining tenements in Richmond. John G. Spotts was not informed of the existence of the deed either by E. C. Jenkins, or by George Gibson, or by John Dunlop, counsel of Gibson and of E. C. Jenkins, the custodian of Gibson's copy of the deed. John G. Spotts did not know of the existence of the deed until the tenth of January, 1883, after the proceedings in this suit had been commenced. He then was made aware of its existence by receiving from Joseph W. Jenkins, in Baltimore, a letter inclosing his copy of the deed, and requesting him to record it at once. When he received this letter Spotts went to Mr. John Dunlop and showed him the letter of Joseph W. Jenkins, and left the deed with him. This deed was never recorded.

In the winter following the execution of the said deed of October 6, 1881,—that is to say, in February, 1882,—E. C. Jenkins, being under embarrassment, solicited and obtained an extension of notes falling due to the Mill Creek Distillery Company, complainants, and to the house of Maddux, Hobart & Co., petitioners in this cause. These notes amounted in the aggregate to about $7,000. The extension was granted on a promise by E. C. Jenkins, that, if anything should happen to him, he would secure these houses in the first class of preferred creditors. In the early part of December, 1882, E. C. Jenkins solicited and obtained from Shufeldt & Co., complainants, to whom he owed about $4,000, an extension of notes on a like promise. The evidence shows that George Gibson advised or was aware of the obtainment of these extensions, but does not show positively that he

advised or was aware of the promise which was made by E. C. Jenkins in connection with them.

Mr. Boudar, an expert in book-keeping, who, under an order of this court, has made examination of the business of E. C. Jenkins & Co., as shown by his books, reports that the house was behind on December 31, 1880, in liabilities over assets, to the amount of $11,196; that the excess on December 31, 1881, was $16,249; and that at the close of 1882 it was $18,252. In the period between October, 1881, and January, 1883, the indorsements of George Gibson for the house had increased from about $12,000 to $21,700. Those of Joseph W. Jenkins had diminished from about $5,000 to about $2,000.

On the twenty-sixth of December, 1882, Mr. John Dunlop, the counsel of Gibson, who had drafted the deed of October 6, 1881, and who held George Gibson's copy of it, after oral conference with E. C. Jenkins, wrote and delivered him the following letter:

"No. 1003 BANK STREET, RICHMOND, VA., December 26, 1882.

"MY DEAR SIR: You will have heard of the recent death of Mr. Bennett Dashiell, who was for so many years the confidential friend and clerk of Mr. George Gibson. Owing to Mr. Dashiell's death I am obliged to ask you to execute a trust deed to secure Mr. Gibson as your accommodation indorser on notes indorsed now by him for you. It is with great regret that Mr. Gibson now makes, through me, his counsel, this request of you; especially as your business promises so well at present, and Mr. Gibson would be the last person to affect, in any way injuriously, your credit. But Mr. Gibson's own health has not been very good of late, and the death of Mr. Dashiell makes him feel the necessity of closing up all matters outside of the firm of Spotts & Gibson. I unite with him in his great regrets, and remain, very sincerely, yours,

[Signed] "JOHN DUNLOP.

"*E. Courtney Jenkins & Co., Richmond, Va.*"

Three days afterwards, E. C. Jenkins wrote to the complainants the following letter:

"OFFICE OF E. COURTNEY JENKINS & Co.,
"113 South Fourteenth street,
"RICHMOND, VA., Dec. 29, 1882.

"*Mess. H. H. Shufeldt & Co., Chicago, Ill.*—DEAR SIRS: Will you be kind enough to telegraph bank here to hold, or return to you without protest, our note falling due on January 1st, (payable according to state law here on the 2d,) for $863? A *most unexpected demand*, occasioned by the misfortune of a relative, compels us temporarily to ask this indulgence of *all* our creditors; but we can show a statement which we hope will be satisfactory to all concerned, and you will hear from us, either in person or by letter, *at earliest possible moment*. Meantime, we only ask your confidence, and assure you that our intentions are honest to *all* parties, without preferences, and we believe we can establish this fact to your entire satisfaction. Regretting the necessity that occasions this request, and trusting that you will give us kindest consideration, we are,

"Very respectfully, yours, E. COURTNEY JENKINS & Co."