

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."

And on the succeeding day E. C. Jenkins wrote a letter, of which the following is a material part:

"OFFICE OF E. COURTNEY JENKINS & Co.,
 "113 South Fourteenth Street,
 "RICHMOND, VA., Jan. 3, 1883.

"Mess. H. H. Shufeldt & Co., Chicago, Ill.—DEAR SIRs: On twenty-sixth December we received communication, of which we inclose copy, from Mr. John Dunlop, of this city. On receipt thereof we urged upon Mr. Dunlop (who is our personal friend and at times business counsel) that the execution of such a deed, without previous consultation with our general creditors, would be very damaging to our future credit, and that we had rather make a deed not preferring Mr. Gibson, but allowing equal distribution *pro rata* for all concerned. We endeavored by delay and by personal appeal to effect this, and we meantime addressed letters to our several creditors interested, asking them to protect or to recall notes falling due in the interval between December 26th and January 10th, hoping that by the latter date we might be able to make some arrangement which would permit our active continuation of business and redemption of paper on which we had asked extension; and, as he has never realized a cent from the continued indorsement given us, but has been actuated solely by the kindest motives, we have felt *compelled* to submit to his request. We shall, by early mail, send you sworn statement of our assets and liabilities, and now write to request on behalf of the trustee, Mr. Irwin Watkins, our book-keeper for years past, that you will attend in person, if possible, or otherwise by proxy, a *general meeting* of our creditors, to be held here in our office, on *eleventh inst.*, (Thursday of next week.) We believe we can then satisfy you that this unexpected condition of affairs is the result of sheer misfortune, which will leave us penniless, unless, should consideration be shown, we may yet hold and control our established trade, which has amounted to from \$100,000 to \$125,000 per annum. Under present exhibit of our condition, however, we honestly assert that we would not presume to ask any credit whatever until *all* our creditors are convinced that our failure has been as great a loss to us as to them. * * *

"Very truly yours,

E. C. JENKINS & Co."

Letters similar to the last were written to other, and probably to all the principal, creditors of the house.

On the fifth of January, 1883, E. C. Jenkins executed a trust deed to Irwin Watkins, who was his principal clerk and his book-keeper, as trustee, in which were described, as parties of the third part, "the several persons, being *bona fide* creditors of the said E. C. Jenkins, who shall have executed and acknowledged this deed within 60 days from the date thereof;" and which required of these creditors so signing, "in consideration of the assignment [required by the deed] made for himself, and every one of them for themselves, respectively, [to covenant that he] doth hereby accept and take the property hereinbefore assigned and conveyed to said trustee for them, respectively, in full payment, satisfaction, and discharge of all their respective claims and demands against the said E. C. Jenkins, and doth by these presents relinquish, exonerate, discharge, and forever quitclaim to the said E. C. Jenkins" all claims and demands forever. The deed, after reciting that, whereas, George Gibson, Wm. F. Jenkins, of Richmond, Joseph W. Jenkins, of Baltimore, and the house of

Jenkins Brothers, of Richmond, had largely indorsed for E. C. Jenkins to enable him to carry on his business, and E. C. Jenkins has become embarrassed, and deems it necessary to make an assignment, goes on to convey to Irwin Watkins all the goods, wares, and merchandise, especially all the wines and liquors, and all office and store furniture and fixtures, now on the premises known as No. 113 South Fourteenth street, in the city of Richmond, and also all goods, wares, and merchandise of every description that may now be standing in the name of said E. C. Jenkins, or of E. C. Jenkins & Co., in the state of Virginia, or elsewhere in the United States, *in transitu*, or in any bonded or other warehouse; and also all bonds, bills, notes, securities, and vouchers, for or affecting the payment of money belonging to or held by the said E. C. Jenkins, on account of the sale of any goods, wares, or merchandise sold by him in or on account of said business; also all other rights, estate, interests, property, claims, and demands of money now due or to become due, of what nature or kind soever, in or on account of said business of distillers' agent and wholesale liquor dealer, and all rights, interests, property, claims, and demands that said E. C. Jenkins may have against Wm. F. Jenkins and the firm of Baldwin, Jenkins, etc., and that he may have by reason of any trust deed given by Wm. F. Jenkins to secure three certain negotiable notes described, and stated to have been drawn by E. C. Jenkins to accommodate Wm. F. Jenkins and indorsed by the latter, amounting in the aggregate to \$5,443. The conveyance is in trust to collect, sue for, demand, receive, and recover all debts and demands due said E. C. Jenkins, and to sell and dispose of, at public auction or otherwise, all goods, wares, merchandise, and other property conveyed by the trust deed; and after paying costs, expenses, rents, taxes, salary of book-keeper, commissions of trustee, wages of servants, and for goods *in transitu*, shall pay and distribute the residue of proceeds of sales and collections in the following order, to-wit: To the payment—(1) Of all notes indorsed by George Gibson in full, as well those due as those becoming due. (2) Of all money now due said George Gibson or others on account of any loan or advance made to said E. C. Jenkins to enable him to carry on his business. (3) Of all notes indorsed by said Wm. F. Jenkins for E. C. Jenkins now due or hereafter to become due, believed to amount to \$6,000; but this preference not to include the three notes before mentioned, aggregating \$5,443. (4) Of all notes indorsed by Joseph W. Jenkins, believed to amount to \$2,500. (5) Of all notes indorsed by Jenkins & Bros., believed to amount to \$4,000. (6) And the balance of said proceeds to be applied to the payment of all claims of other creditors who shall come in and execute this deed within 60 days from the date thereof, *pro rata*, in proportion to the amount due to each of said general creditors, which payment is to be a full discharge of said E. C. Jenkins from the claims of the said general creditors.

This deed does not purport to convey anything but the property, choses in action, etc., belonging to E. C. Jenkins, as embraced in his business, as distillers' agent and wholesale liquor dealer. It does not purport to convey and does not convey any property owned and held by himself as an individual. But the evidence shows that he owned no property disconnected with his business except a small quantity of household furniture. It shows, however, that at the time of executing the deed of January 5, 1882, he took out of his cash in business the sum of \$500; that on January 6th he loaned the business \$200; and that on the 10th this latter sum was returned to him.

The evidence shows that, notwithstanding the clause in the deed of January, 1883, preferring in the second class of debts money due George Gibson or others "on account of any loan or advance," no money was, in fact, due to Gibson on loan.

There is no evidence to show that George Gibson personally authorized E. C. Jenkins, after the execution of the deed of January 5, 1883, to go on with his business, or knew, what was a fact, that he did go on with his business as if the deed had not been made; but the evidence shows that Mr. John Dunlop, the counsel of George Gibson, who had custody of the deed, was cognizant of and did not expressly object to this conduct. The deed of October 6, 1881, was never recorded, and was in the possession of Mr. John Dunlop, under a demand from Joseph W. Jenkins that it should be recorded, when the proceedings in this suit were commenced. The deed of January 5, 1883, was not put upon record until after the commencement of these proceedings, after the seizure of the effects of E. C. Jenkins by the marshal under the order of the court, made on the tenth of January, and after the meeting of creditors called by the circular letters of the third of January had convened. It was put upon record after 1 o'clock p. m. of the eleventh of January, 1883. From and after the fifth to the eleventh of January, 1883, when the marshal took custody, the business of the house went on as if there had been no deed. George Gibson's indorsements for E. C. Jenkins were made in mere friendship, and for no consideration cognizable in law. Mr. John Dunlop, counsel for George Gibson, and custodian for him of both deeds, was the draughtsman of both deeds.

The two deeds differed in one respect. Both conveyed the goods, wares, merchandise, wines, and liquors, as well those on hand as those to be received in the course of business; but only the latter deed, that of January, 1883, conveyed also the accounts, bills, and choses in action generally.

Amid the state of facts thus set forth, most of them unknown at the time to complainants and the court, the first bill in this suit was presented to the district judge. This original bill recited the contents of the letter of E. C. Jenkins to Shufeldt & Co., of the twenty-ninth of December, 1882, in which the latter were requested to withhold from protest a note of the former for \$863.20, about to fall due on

the second of January, and in which promise was made that no preference would be given. It alleged that the note was withheld on the faith of that promise. It recited the contents of E. C. Jenkins' letter to complainants of the third of January, 1883, in which Jenkins stated that a deed of trust preferring George Gibson had been demanded by Gibson, and had been executed to Irwin Watkins as trustee, and in which the letter of John Dunlop to Jenkins, of the twenty-sixth of December, 1882, was referred to, and a copy of it was inclosed, and in which it was stated that the creditors of Jenkins were invited to meet in Richmond. The bill complained that the promise of E. C. Jenkins had been violated by the execution of this deed, after complainants had been induced by the letter of the twenty-ninth of December, and by the promise it contained, to withdraw from bank the note before mentioned, and that they had been lulled into security by the statements of the said letter, and that the execution of the deed was a fraud upon them. The bill charged that the trust deed, though executed, had not been put upon record, and that the business of the defendant Jenkins was going on as usual, at the usual place of business, with open doors. It alleged that this continuance of the business with the deed held in secret was a fraud upon the complainants and the other creditors, and that the deed, in consequence of its not having been recorded, was null and void as to complainants and other creditors. It charged that, by continuing the business after the execution of this deed, E. C. Jenkins was exercising a power incompatible with and operating to defeat the purposes of any deed designed to secure George Gibson, and that the deed was thereby void as to complainants and the other creditors. It charged that the deed was made to hinder, delay, and defraud complainants and the other creditors of E. C. Jenkins.

The bill called for an answer to all its allegations, but waived oath or affidavit. It prayed for an injunction and receiver. The court made an order directing the marshal to take the goods and effects of the house into custody, and restraining the defendants and all other persons from interfering with them. In the same order the court set the seventeenth day of January, 1883, for hearing the motion for a receiver and for an injunction. There was afterwards, to-wit, on the seventeenth of January, 1883, filed an amended bill based on the additional information disclosed by the deed when recorded. The amended bill set out that besides George Gibson, who was secured first of all, there were other creditors preferred, in different classes, and made these other persons defendants. It repeated the charges of the original bill, and charged further that the deed was fraudulent in that, without conveying, or purporting to convey, the whole of grantor's property, it required the general creditors of E. C. Jenkins, within 60 days, to sign the deed acquitting and relieving said Jenkins from all liability to them. This amended bill was filed before the hearing of the motion for a receiver, and was before the court at the hearing.

After full argument and on numerous affidavits, filed by complainants and defendants respectively, the court, on the twentieth of January, appointed a receiver, and awarded a preliminary injunction adapted to the circumstances of the case.

After this order was made, the evidence developed the existence of the deed of October 6, 1881. The complainants thereupon filed a second amended bill, reciting the facts connected with that deed, and among other things charged that, being still a subsisting deed, it was valid as between the parties to it; that the choses in action of E. C. Jenkins, which were the proceeds of the property conveyed by this, did not pass under the second deed to Irwin Watkins; that the deed was fraudulent as to complainants and other creditors, and prayed relief, etc. This last bill charges fraud by specific allegations against George Gibson and Irwin Watkins.

John A. Coke and Edw. H. Fitzhugh, for complainants.

H. H. Marshal, Legh R. Page, and John Dunlop, for defendants.

The case was heard before BOND and HUGHES, JJ.

BOND, J. It is my opinion, from a consideration of all the facts proven in this case, that the deed sought to be set aside by the bill was made purposely to hinder and defraud creditors, and that it was void as to the complainants, whether recorded or not. My brother HUGHES thinks that it was also void as to creditors because it was not recorded, and, as that is a question of construction of a Virginia statute, I propose to follow his judgment. But, in my opinion, the defendants acquired no interest in the property by virtue of the deed, whether recorded or not, as against the plaintiffs.

HUGHES, J. The decree in this suit must rest, of course, upon all three of the bills, more especially the two amended bills, and upon the evidence taken in the cause. The original bill may have been faulty; the order of court, given on the tenth of January, 1883, may have been ill-advised. Still, if the case on the amended bills be such as to entitle complainants to a decree, they would have it, despite of the defects of the original bill. I hold that the deed of January 5, 1883, is, in the eye of the law, fraudulent. It requires creditors to release the grantor within 60 days, and yet does not on its face purport to convey all the grantor's property for their benefit, or give other information tending to enlighten them in their choice. A deed imposing a release should show upon its face all that creditors ought to know, (*Gordon v. Cannon*, 18 Grat. 388;) and surely they have a right to be informed whether the grantor has assigned to them all his assets. The deed is fraudulent in law because it did not in fact convey all the grantor's property. The sum of \$500 was withheld, and no mention of the fact made in the deed. A lot of domestic furniture was also retained without announcement in the deed. The law does not forbid the retention of a few hundred dollars by an insolvent grantor for paying small debts, when circumstances warrant the