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

measure, (*Skipwith* v. *Cunningham*, 8 Leigh, 271;) but the deed ought not to conceal the fact, as was done in this case, from creditors whom it requires to release. The fact should be frankly stated. It is not the value of what is retained that affects the *bona fides* of such a deed, but the concealment. This is a sort of fact that creditors who are called upon to release ought to be candidly informed of. Clauses requiring releases are hindrances to creditors, and are not favored. *Armstrong* v. *Byrne*, 1 Edw. Ch. 79, 81.

This deed was also rendered fraudulent in the eyes of the law by the fact that the business of E. C. Jenkins went on with open doors after its execution, and that the contingency of being allowed to go on permanently by the creditors was in this way anticipated by the grantor. It was a proceeding tending to coerce creditors into terms; for they might feel apprehensive that in the interval between the execution of the deed and the day of their meeting so many of the goods had been disposed of as to leave them no alternative but to accept the terms and give a release. Deeds imposing upon creditors the severe if not arrogant condition of release, should, besides placing them in possession of all information important to their decision, bring the trust fund to them intact, untouched, and in the precise condition in which it was when surrendered. To surrender it and then to assume control of it, besides being in appearance a contemptuous trifling with the rights of creditors, was a proceeding wholly incompatible with the purposes of such a deed as that under consideration. This deed, interpreted by the grantor's conduct, is similar to that condemned in *Spence* v. *Bagwell*, 6 Grat. 444. If a deed which expressly allows the business of grantor to go on is fraudulent *per se*, (*Addington* v. *Etheridge*, 12 Grat. 437,) then the carrying it on by the grantor, and the permission of it by the grantee, rendered this deed fraudulent as to all creditors.

I will not dwell further, however, on the case as presented by the amended bills, and the evidence taken upon the pleadings, but will confine myself almost exclusively to the case as it was presented to the court on the tenth of January, 1883, by the original bill, and by the correspondence which was filed with it as exhibits.

It is strenuously contended by counsel for defendants that the order made on the tenth of January, directing the marshal to take custody of the effects of E. C. Jenkins & Co., restraining the defendants from any interference with these effects, and appointing a day for hearing a motion for a receiver and for a preliminary injunction, was ill-advised; and that the original bill upon which that order was filed did not contain such averments as warranted the severe measure taken by the court. This question is no longer of any importance in the present case; but inasmuch as it is one of considerable importance in its relation to the practice of the court, I have given it very attentive consideration.

I think the objection is founded upon a mistaken conception of the

nature of the original bill. The two amended bills which were afterwards filed are bills to set aside the deed of January 5, 1883, as intended to hinder, delay, and defraud creditors, under the statute of Elizabeth embodied in section 1 of chapter 114 of the Code of Virginia. This statute, in order to the invalidity of a deed of assignment, makes it necessary for the grantee, if he be a purchaser for valuable consideration, to have had notice of the fraudulent intent of the grantor; and counsel for defendants insist that there is no express charge in the original bill of fraud or knowledge of fraud against George Gibson, one of the defendants. The fact may or may not be true that this bill makes no such charge, and yet the bill may, nevertheless, be sufficient for the purposes for which it was originally brought. This particular bill was not predicated upon the statute of Elizabeth. It is true that in the margin of the fifth page, as if by after-thought, the deed is charged to have been made with intent to hinder, delay, and defraud creditors. But that is not the *gravamen* on which the bill was framed, and on which the order of the court was asked for and granted.

The bill charges fraud in this, namely, that E. C. Jenkins, on a promise not to give preferences, had induced complainants to withdraw from bank a note falling due, and had, nevertheless, after obtaining the withdrawal of the note by such promise, made a deed of preference. It particularly charged that, notwithstanding a deed had been made, E. C. Jenkins was continuing to carry on his business at the same place with open doors, which was a fraud of itself; and the bill added that the deed was held in secret, was not put on record, and that this secreting of the deed and withholding it from registration was, besides being fraudulent, an act which rendered the deed null and void as to complainants and other creditors. The bill referred to the statute of Virginia, (section 5, *c.* 114, p. 897, Code,) which declares that every deed of trust, such as this of E. C. Jenkins, was null and void as to creditors until and except from the time that it is duly recorded, etc.

The right of a creditor at large to sue in equity, under section 2 of chapter 175 of the Code of Virginia, p. 1126, is not confined to suits under the statute of Elizabeth. The language of the section seems to refer rather to the language of section 5 of chapter 114, declaring deeds of trust, gifts, etc., null and void as to creditors until recorded. Section 2 of chapter 175 runs thus:

"A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judgment or decree; and he may, in such suit, have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

The statute authorizes a creditor at large to bring a bill in equity for any cause of action on which he might obtain a judgment at com-

mon law or a suit in equity. The privilege of bringing suit is not confined to suits brought to set aside assignments made to hinder, delay, and defraud creditors. The original bill in this case, thus authorized, was based on the general proposition that a deed fraudulent on the part of the grantor was, as to a defrauded creditor, null and void, whether the grantee had notice of the fraudulent intent or not, so long as it was withheld from registration. The object of the complainants was, by *lis pendens* and actual custody, to establish a lien upon the effects of E. Courtney Jenkins & Co. before the deed was recorded. This was itself a legitimate object.

Upon the bill and the preliminary order of the tenth of January, which was given on the *prima facie* case it presented, two questions, therefore, arise; namely: *First*, whether the *lis pendens*, and the judicial custody of the goods established by the order, operated to prevent any valid registration of the deed on a later day, and any lien which registration, if made, might otherwise have created as to complainants; and, *second*, whether the fraud set out in the bill, supposing the bill not to have charged a knowledge of it on the part of George Gibson, was sufficient to justify the seizure by the court of the assets of E. C. Jenkins, and the closing of his place of business.

As to the first point, there can be no doubt that the *lis pendens* bound the property of E. C. Jenkins from and after the tenth of January, 1883. It has been held that a *lis pendens* in a United States court binds even real estate from the commencement of the suit, though not recorded as required by the laws of Virginia. *Rutherglen* v. *Wolf*, 1 Hughes, 78. It is also settled that a bill is a lien from the date it is filed, (*Wallace* v. *Treakle*, 27 Grat. 479;) and this lien gives priority to the complainants in the particular bill, not only as against the grantee, but as against all other creditors uniting by petition in the prayers of the bill. If, therefore, the original bill in this cause was founded upon a sufficient cause of action, and a decree be obtained upon it, it establishes a lien upon the effects of E. C. Jenkins from the date when it was filed. We have, therefore, only to inquire whether or not it did set out a cause of action entitling complainants to the decree they sought.

This deed, for all that the complainants knew of it on the tenth of January, 1883, when they exhibited their bill in court, might or might not have been embraced within the purview of section 1 of chapter 114 of the Virginia Code. It would probably have been more regular for the bill to have called for a production of the deed, and for a discovery by this means and by answer of its contents. Complainants did know, however, that it gave a preference to George Gibson; that Irwin Watkins was trustee; that E. C. Jenkins' place of business had not been closed upon execution of the deed; that this business was still going on; that such a fact itself rendered it fraudulent; that the deed was in the custody or control of George Gibson; that Gibson and Watkins knew that the business was going on fraud-

ulently in this respect; that the deed was withheld from record for the purpose, among others, of awaiting action by the creditors on the proposition whether or not the business should be continued; and they knew, finally, that the deed was, and would continue to be, null and void as to creditors until recorded. They charged these facts, and they did not expressly charge fraudulent intent, or knowledge of fraudulent intent, against George Gibson; doubtless because such a charge was not necessary to make good the case they were presenting to the court; and doubtless from a commendable reluctance to charge a respectable citizen with positive fraud, of which they could have no personal knowledge and did not know except by inference.

As before stated, bills may be brought in Virginia by creditors at large whether founded upon the statute of Elizabeth (section 1 of chapter 114 of the Virginia Code) or not. The statutory privilege of bringing them is not confined to cases embraced by that law. The section is itself but declaratory of the common law, and deeds may be assailed by creditors at large for many causes not embraced within its purview. Notably is this so in respect to assignments of choses in action in fraud or hindrance of creditors. The statute of Elizabeth declares void only gifts, assignments, or transfers of estate, real or personal, or charges upon them. It does not embrace choses in action. And yet it is well settled law that covinous assignments of choses in action are as liable to be set aside as assignments of property. See *Drake* v. *Rice*, 130 Mass. 410, and the many cases, English and American, there cited. It is equally as clear that deeds, whether *bona fide* or not, may be assailed before they are recorded. Being null and void as to creditors, if the creditors institute suit before registration, and the suit is conducted to a successful issue, the suit takes precedence of the registration, even though the deed be not fraudulent; and, so far as the deed is in conflict with the prayers of the bill, it is null and void. A deed may be free from fraud on the part of the grantor, or, if fraudulent as to him, may be free from fraud as to the grantee, and still, being void as to creditors until recorded, if assailed by a suit commenced before that event, though it may stand for all other purposes, it is null and void as to the purposes of that suit if the suit be sustained by the court in which it is brought. It was on this theory that the suit in this case was brought. It was not originally founded on the theory of setting aside a deed intended to hinder, delay, and defraud creditors. An allegation to that effect was indeed presented marginally in the bill as an afterthought; but the bill went primarily upon the theory that the deed operated as a fraud upon the complainants, and, if assailed by suit before its registration, might be set aside as null and void.

The charges set out by the bill were therefore sufficient to sustain the suit, notwithstanding the fact that it did not charge specifically against George Gibson a knowledge of the frauds of which it complained. It is true that the statute of Virginia, re-enacting that of

Elizabeth, does require such knowledge in the grantee; but the original bill under consideration charged a fraud not embraced in the statute of Elizabeth, and was founded upon another and a different statute, namely, that already cited, which declares all deeds of trust void as to creditors until recorded. Under this latter statute, I repeat, an unrecorded deed which is entirely free from fraud may be superseded and set aside as to creditors by a suit founded on sufficient cause of action, whether that be fraud or not, provided, always, that the suit be conducted to a successful conclusion.

As to whether the act of making an assignment preferring Gibson was fraudulent as between E. C. Jenkins on one side and Shufeldt & Co. and the Mill Creek Distillery on the other, I suppose there is no question. I do not think there can be. There was an appeal to Shufeldt & Co. in the letter of the twenty-ninth of December, 1882, coupled with a promise that no preferences would be given to their prejudice. There had also been a promise to the same house in the early part of December, 1882, that if notes to the amount of some $4,000, then due, were extended, no preferences would be given to their prejudice. There had been a promise to the Mill Creek Distillery Company as far back as the preceding February, in reference to a large bank indebtedness, that if an extension was given no preferences would be given to their prejudice. All these promises were made while the deed of October 6, 1881, was in existence, conveying all the property which these houses had furnished or should furnish to E. C. Jenkins, for the benefit of two other creditors. As between E. C. Jenkins and these creditors, the fraud was too palpable to need characterization. It was so flagrant as to invalidate any assignment which Jenkins might make to their prejudice, and which they might be able to intercept before the rights of other *bona fide* creditors attached. Here is the case of a fraud perpetrated upon the complainants particularly. It is a different case from those contemplated by the statute of Elizabeth, which refers only to cases of frauds perpetrated upon creditors as a class. When a particular creditor is aggrieved by a particular fraud wrought by a deed which as to him is void for want of registration, why should he not seek and obtain special redress through the instrumentality of a suit in equity assailing the fraud of which he complains, irrespectively of the question whether the beneficiary of the fraud is cognizant of it or not? Such was the case presented to the court on the tenth of January, 1883. That complainants had a good cause of action would seem undeniable. But of what avail to sue if the assets of their debtor should pass out of reach? A transfer of those effects had been made by an instrument which as to them was as yet void, and notwithstanding which the debtor was exercising the powers of ownership over them. They asked the court to lay its hands upon these goods. No violence would be thereby done to E. C. Jenkins, because he had by solemn deed assigned away the goods, and was estopped from objecting to a judicial seizure. Gib-

son, the beneficiary of the assignment, could not complain, because, as to complainants, his assignment was as yet void. *Vigilantibus non dormientibus jura subserviunt,*—it is the vigilant, not those who sleep on their rights, whom the law serves. And the court granted the order prayed for in the complainant's bill. The creditors in these two suits did succeed in bringing suit in time. They forestalled by suit the deed of January 5, 1883, before it was recorded, and while it was yet null and void. Their suit was brought for that purpose, and founded on section 5, and not on section 1, of the 114th chapter of the Code. It was brought in time. It was brought for a valid cause of action. It would stand and be sustained, and the relief sought would be given, even though the deed of January 5, 1883, were free from fraud.

I do not think, therefore, that the order of January 10, 1883, given by me at Alexandria, was improvident. The case was urgent. A trenchant order was necessary to the ends of justice, and it was given with entire confidence in its propriety. Sometimes harsh and prompt measures are the very essence of justice, and this is more especially so when they are necessary to save honest creditors from irremediable loss by the fraud and covin of others.

FARGO *v.* REDFIELD and others.

(*Circuit Court, D. Vermont.* November 29, 1884.)

RAILROAD COMPANY — EXPRESS FACILITIES — ROAD IN PART IN FOREIGN JURISDICTION—INJUNCTION.

An injunction may be granted by the circuit court to restrain a railroad corporation, one part of whose line is in a foreign country and the other in a state, from interfering with the facilities enjoyed by an express company, and from refusing to receive and transport its messengers and express matter for reasonable and just compensation over that part of the road within the state. *Southern Express Co.* v. *St. Louis, etc., Ry. Co.* 10 FED. REP. 210, followed.

In Equity.

Luke P. Poland, for orator.

W. D. Crane, for defendants.

WHEELER, J. The principles laid down by Mr. Justice MILLER in *Southern Express Co.* v. *St. Louis, etc., Ry. Co.* 10 FED. REP. 210, must be and are fully recognized as authoritative in this class of cases. No real question is made about their general correctness. The principal controversy is in respect to their application to the circumstances of this case. The principal line of the defendants' railway, over which the orator claims the right to do express business, lies about one-fifth in Vermont and four-fifths in Canada. The part in Vermont belonged to a Vermont corporation; the part in Canada