TOOF ET AL. *v.* MARTIN, ASSIGNEE, ETC.

1. By insolvency, as used in the bankrupt act when applied to traders and merchants, is meant inability of a party to pay his debts, as they become due, in the ordinary course of business.
2. The transfer, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such a case, and not upon the assignee or contestant in bankruptcy.
3. A creditor has reasonable cause to believe a debtor, who is a trader, to be insolvent when such a state of facts is brought to the creditor's notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business.
4. A transfer by an insolvent debtor with a view to secure his property, or any part of it, to one creditor, and thus prevent an equal distribution among all his creditors, is a transfer in fraud of the bankrupt act.

ERROR to the Circuit Court for the District of Arkansas; the case being thus:

The 35th section of the bankrupt act of 1867, thus enacts:

"That if any person, being insolvent, or in contemplation of insolvency, with a view to give a preference to any creditor or person having a claim against him . . . . makes any assignment, transfer, or conveyance of any part of his property . . . . (the person receiving such assignment, transfer, or conveyance, having reasonable cause to believe such person is insolvent, and that such assignment or conveyance is made in fraud of the provisions of this act), the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it or so to be benefited."

With this enactment in force, Martin, assignee in bankruptcy of Haines and Chetlain, filed a bill in the District Court for the Eastern District of Arkansas, against J. S. Toof, C. J. Phillips, and F. M. Mahan, trading as Toof, Phillips & Co. (Haines and Chetlain being also made parties), to

set aside and cancel certain conveyances alleged to have been made by these last in fraud of the above-quoted act.

Haines and Chetlain were, in February, 1868, and had been for some years before, merchants, doing business under the firm name of W. P. Haines & Co., at Augusta, Arkansas. On the 29th of that month they filed a petition for the benefit of the bankrupt act, and on the 28th of May following were adjudged bankrupts, and the complainant was appointed assignee of their estates. On the 18th of the previous January, which was about six weeks before the filing of their petition, they conveyed an undivided half-interest in certain parcels of land owned by them at Augusta, to Toof, Phillips & Co., who were doing business at Memphis, in Tennessee, for the consideration of $1876, which sum was to be credited on a debt due from them to that firm. At the same time they assigned to one Mahan, a member of that firm, a title-bond which they held for certain other real property at Augusta, upon which they had made valuable improvements. The consideration of this assignment was two drafts of Mahan on Toof, Phillips & Co., each for $3034, one drawn to the order of Haines, and the other to the order of Chetlain. The amount of both drafts was credited on the debt of Haines & Co. to Toof, Phillips & Co., pursuant to an understanding to that effect made at the time. There was then due of the purchase-money of the property, for which the title-bond was given, about $700. This sum Mahan paid, and took a conveyance to himself from the obligor who held the fee.

The bill charged specifically that at the time these conveyances were made the bankrupts were insolvent or in contemplation of insolvency; that the conveyances were made with a view to give a preference to Toof, Phillips & Co., who were the creditors of the bankrupts; that Toof, Phillips & Co. knew, or had reasonable cause to believe, that the bankrupts were then insolvent, and that the conveyances were made in fraud of the provisions of the bankrupt act.

It also charged that the assignment of the title-bond to Mahan was in fact for the use and benefit of Toof, Phillips

& Co., for the purpose of securing the property or its value to them in fraud of the rights of the creditors, and that this purpose was known and participated in by Mahan.

The answer, admitting a large amount of debts at the time of the conveyances in question, denied that the bankrupts were then "insolvent," asserting, on the contrary, "that at the time aforesaid said Haines & Co. had available assets in excess of their indebtedness to the extent of $16,000." It also denied that there was a purpose to give a preference; asserting that the conveyances of the land were made because Haines & Co., not having cash to pay the debt due Toof, Phillips & Co., were willing to settle in property; and it denied that the title-bond was assigned to Mahan for the benefit of Toof, Phillips & Co., or that they paid for the same; but on the contrary averred that Mahan bought the property and paid for it himself, and for his own use and benefit, out of his own funds.

Appended to the bill were several interrogatories, the first of which inquired whether at the time of making the transfers to Toof, Phillips & Co. the indebtedness of W. P. Haines & Co. was not known to be greater than their immediate ability to pay; and to this Toof, Phillips & Co. answered that at the time of making these transfers they did not believe Haines & Co. were able to pay their debts *in money*, but that they were able to do so on a fair market valuation of the property they owned, and of their assets generally.

Chetlain, one of the bankrupts, testified that on the 18th of January, 1868, Haines & Co. could not pay their notes as they came due; that previous to this time they had contemplated bankruptcy, and that he had had several conversations with Mr. F. M. Mahan, relative to their finances, and had told him the amount, or near the amount, of their debts. His advice was to get extensions, and he would help them get through; that after his promises to advance them more goods, they concluded not to go into bankruptcy, but to go on in business; that he told Mahan that Haines & Co. could not pay out; and in a conversation with him previous to the transfer of the real estate, he, Chetlain, told Mahan that

such was the state of the finances of Haines & Co. that if he would assume their liabilities, and give them a receipt, Haines & Co. would turn over all their assets to him. He did not accept.

He also testified that about the 1st of January, 1868, the sheriff levied on the goods belonging to Haines & Co., in their storehouse in Augusta, on an execution in favor of one Weghe, which caused them to suspend business for a few days, until the levy was dissolved by order of the sheriff, at or about the 15th day of January, 1868. Mahan was in Augusta at the time of this levy, and Haines & Co. had an interview with him in regard to it.

During the entire autumn and winter preceding these transfers, Haines & Co. did not pay, except to Toof, Phillips & Co., more than $500 on all their debts; and in the latter part of December, 1867, and the first part of January, 1868, some of the creditors sent agents to collect money from them, but got none, because Haines & Co. had no funds to pay them.

A witness, Frisbee, testified that he had assisted Mr. Haines in making up his balance-sheet "about the 1st of January, 1868, and that the result was that their available assets were not sufficient to pay their debts."

Another witness, an agent for an express company, testified that he received, about the last of December, 1867, or January, 1868, notes from Toof, Phillips & Co. and another firm against Haines & Co. for collection; that he presented them for payment to Haines & Co., and that they said they could not pay them at that time. They did not pay them to him. He knew something of the financial condition of Haines & Co., and of their debt to Toof, Phillips & Co., and of complaints of other parties, and something of their business through the country, and from all these facts he thought it doubtful about their being able to pay their debts. This was during the months of December, 1867, and January, 1868; and he wrote to Toof, Phillips & Co. that he thought they had better look to their interests, as his conviction was that it was doubtful about their being able to collect their

debt from Haines & Co. Shortly after writing this letter Mahan came round to look after the matter.

The property described in the title-bond assigned to Mahan, which he stated that he purchased as an investment on private account for $7000, was shown by the testimony of Chetlain to have been worth only $4000, and by the testimony of a witness, Hamblet, to have been worth only $3500, and it was valued by the bankrupts in their schedules at $4000. Both of the bankrupts testified that it was understood at the time the title-bond was assigned to Mahan, that the amount of the two drafts given by him on Toof, Phillips & Co. for it, should be credited to Haines & Co. on their indebtedness to that firm.

The schedules of the bankrupts annexed to their petition showed that their debts at the time of their transfers to Toof, Phillips & Co. exceeded $59,000, while their assets were less than $32,000.

On the other hand there was some testimony to show that some persons thought that they could get through, &c., &c.

The District Court decreed the conveyances void, and that the title of the property be vested in the assignee, the latter to refund the amount of the purchase-money advanced by Mahan to obtain the deed of the land described in the title-bond, less any rents and profits received by him or Toof, Phillips & Co. from the property. This decree the Circuit Court affirmed.

In commenting upon the answer of Toof, Phillips & Co., already mentioned, which, in reply to the interrogatory, "whether at the time of the transfer to them the indebtedness of Haines & Co. was not greater than their ability," admitted that they did not believe Haines & Co. "able to pay their debts *in money*," the Circuit Court said:

"Here is a direct confession of a fact that in law constitutes insolvency, and it is idle for the defendants to profess ignorance of the insolvency of the bankrupts in face of such a confession. If the bankrupts could not pay their debts in the ordinary course of business, that is, *in money*, as they fell due, they were insolvent, and if the defendants did not know that this constituted

insolvency within the meaning of the bankrupt act, it was because they were ignorant of the law."

But that court examined all the testimony, and in affirming the decree of the District Court rested the case upon it, as well as upon this answer. From the decree of the Circuit Court, Toof, Phillips & Co. brought the case here.

Mr. A. H. Garland, for the plaintiffs in error:

1. Did the inability of Haines & Co. to pay their debts *in money*, as they fell due, constitute "insolvency" within the meaning of the bankrupt act, on their part? Now "insolvency" does not mean inability to pay *in money*. An insolvent is one who cannot pay, or who does not pay, his debts, or whose debts cannot be collected out of his means by legal process.* By the universal acceptation of the word in this country and in England, if a party's available means, which he can use in paying his debts, exceed those debts, he has never been deemed insolvent.† If even there are debts due which the party is unable to meet, yet if by arrangements made with his creditors, their promises to aid him, his assets overbalancing his debts, his credit good, and his prospects in business for the future encouraging, he still goes on in his business, he is not insolvent.‡

2. How does the case in this view stand on the evidence? When the witness, Frisbee, says that in December, 1867, he aided in making up a balance-sheet, and he found Haines & Co. were not able to pay, he states a fact, which, if limited to paying in money, we do not deny; but if he states that their debts exceeded their property in value, he is not sustained by the other witnesses. Other persons had confidence that with extension the firm would get through. The answer of defendants states, in response to an inquiry on this

* 2 Burrill's Law Dictionary, title (Insolvent).

† James on Bankruptcy (notes to § 35), p. 153–183; Avery & Hobbs, Bankruptcy, 261, 289, 290; Burrill on Assignments, 38–41; Buckingham *v.* McLean, 13 Howard, 151–167; Jones *v.* Howland, 8 Metcalf, 377.

‡ Potter *v.* Coggeshall, 4 Bankrupt Register, 19.

point, that the assets of Haines & Co. were in excess of their liabilities by $16,000.

3. Were these conveyances made with a view to give a preference to appellants over the other creditors of Haines & Co.? To constitute a preference here, not only must Haines & Co. have been insolvent, but Toof, Phillips & Co. must have known them to be so, and must have intended to have received, and actually have received a preference. Toof, Phillips & Co. swear that Haines & Co. were not insolvent, but on the contrary had a surplus. As for Haines & Co., it is impossible to suppose that they supposed themselves insolvent.

Messrs. Watkins and Rose, contra.

Mr. Justice FIELD delivered the opinion of the court.

The bill presents a case within the provisions of the first clause of the thirty-fifth section of the bankrupt act. That clause was intended to defeat preferences to a creditor, made by a debtor when insolvent or in contemplation of insolvency. It declares that any payment or transfer of his property made by him whilst in that condition, within four months previous to the filing of his petition, with a view to give a preference to a creditor, shall be void if the creditor has at the time reasonable cause to believe him to be insolvent, and that the payment or transfer was made in fraud of the provisions of the bankrupt act. And it authorizes in such case the assignee to recover the property or its value from the party who receives it.

Under this act it is incumbent on the complainant, in order to maintain the decree in his favor, to show four things:

1st. That at the time the conveyances to Toof, Phillips & Co. and Mahan were made the bankrupts were insolvent or contemplated insolvency;

2d. That the conveyances were made with a view to give a preference to these creditors;

3d. That the creditors had reasonable cause to believe the bankrupts were insolvent at the time; and,

4th. That the conveyances were made in fraud of the provisions of the bankrupt act.

1st. The counsel of the appellants have presented an elaborate argument to show that inability to pay one's debts at the time they fall due, *in money*, does not constitute insolvency, within the provisions of the bankrupt act. The argument is especially addressed to language used by the district judge when speaking of the statement of the appellants in answer to one of the interrogatories of the bill, to the effect that at the time the transfers were made they did not believe the bankrupts were able to pay their debts *in money*, but were able to do so on a fair market valuation of their property and assets. The district judge held that this was a direct confession of a fact which in law constitutes insolvency, and observed that "if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent."

The rule thus laid down may not be strictly correct as applied to all bankrupts. The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts, as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel.

With reference to other persons not engaged in trade or commerce the term may perhaps have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency, in every case.

In the present case the bankrupts were insolvent in both senses of the term at the time the conveyances in controversy were made. They did not then possess sufficient prop-

erty, even upon their own estimation of its value as given in their schedules, to pay their debts. These exceeded the estimated value of the property by over twenty thousand dollars. And for months previous the bankrupts had failed to meet their obligations as they matured. Creditors had pressed for payment without success; their stock of goods had been levied on, and their store closed by the sheriff under an execution on a judgment against one of them. It would serve no useful purpose to state in detail the evidence contained in the record which relates to their condition. It is enough to say that it abundantly establishes their hopeless insolvency.

2d. That the conveyances to Toof, Phillips & Co. were made with a view to give them a preference over other creditors hardly admits of a doubt. The bankrupts knew at the time their insolvent condition. A month previous they had made up a balance sheet of their affairs which showed that their assets were insufficient to pay their debts. They had contemplated going into bankruptcy in December previous, and were then pressed by numerous creditors for payment. Their indebtedness at the time exceeded $50,000, and except to Toof, Phillips & Co. they did not pay upon the whole of it over $500 during the previous fall and winter. Making a transfer of property to these creditors, under these circumstances, was in fact giving them a preference, and it must be presumed that the bankrupts intended this result at the time. It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy.

No such proof was made or attempted in this case. But, on the contrary, the evidence shows that the conveyances were executed upon the expectation of the bankrupts, and upon the assurance of Toof, Phillips & Co., that in consequence of them they would continue to sell the bankrupts goods on credit, as they had previously done; and that no arrangement was made by the bankrupts with any other of their creditors, either for payment or security, or for an extension of credit.

The fact that the title-bond was assigned, and the property for which it was given was conveyed to Mahan alone, and not to Toof, Phillips & Co., does not change the character of the transaction. Mahan was a member of that firm, and the conveyance was made to him with the understanding that the sum mentioned as its consideration should be credited on the indebtedness of the bankrupts to them. Both of the bankrupts testified that such was the understanding at the time. The pretence that Mahan bought the lots as an investment on private account will not bear the slightest examination. It is in proof that the lots at the time were only worth $4000 at the outside, yet the consideration given was nearly $7000. Toof, Phillips & Co. might well have been willing to credit this amount on their claim against insolvent traders in consideration of obtaining from them the possession of property of much less value, but it is incredible that an individual, seeking an investment of his money, would be careless as to the difference between the actual value of the property and the amount paid as a consideration for its transfer to him.

3d. From what has already been said it is manifest not only that the bankrupts were insolvent when they made the conveyances in controversy, but that the creditors, Toof, Phillips & Co., had reasonable cause to believe that they were insolvent. The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was

the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business. That such a state of facts was brought to the notice of the creditors is plainly shown. Chetlain, one of the bankrupts, testifies that previous to the execution of the conveyances he had several conversations with Mahan respecting their finances, and told him the amount or near the amount of their indebtedness, and that they could not pay it. Mahan advised them to get extensions, and said that he would help them to get through. Chetlain also testifies that such was the state of the finances of the bankrupts that on one occasion, in conversation with Mahan, they offered to turn over to him their entire assets if he would assume their liabilities and give them a receipt, and that he declined the offer.

It also appears in evidence that the levy by the sheriff upon the stock of goods of the bankrupts, already mentioned, which was made in January, 1868, caused a temporary suspension of their business, and that Mahan was in Augusta at the time and had an interview with the bankrupts on the subject of the levy.

It also appears that about the last of December, 1867, or the first of January, 1868, Toof, Phillips & Co. sent notes of the bankrupts which they held to an agent in Augusta for collection. The agent presented the notes for payment to the bankrupts and was told by them that they could not pay the notes at that time. The agent then wrote to Toof, Phillips & Co. that they had better look to their interests, as his conviction was that it was doubtful whether they would be able to collect their debts. Shortly after this Mahan went to Augusta to look after the matter, and whilst there the conveyances in controversy were made.

It is impossible to doubt that Mahan ascertained, while thus in Augusta, the actual condition of the affairs of the bankrupts. The facts recited were sufficient to justify the

conclusion that they were insolvent, or at least furnished reasonable cause for a belief that such was the fact.

4th. It only remains to add that the creditors, Toof, Phillips & Co., had also reasonable ground to believe that the conveyances were made in fraud of the provisions of the bankrupt act. This, indeed, follows necessarily from the facts already stated. The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act. That such was the effect of the conveyances in this case, and that this effect was intended by both creditors and bankrupts, does not admit, upon the evidence, of any rational doubt. A clearer case of intended fraud upon the act is not often presented.

DECREE AFFIRMED.

Mr. Justice BRADLEY was absent from the court when this case was submitted, and consequently took no part in its decision.

WHEELER *v.* HARRIS.

1. On appeal to the Circuit Court from a decree in the District Court for the payment of money, the Circuit Court affirmed the judgment of the District Court with costs to be taxed, from which affirmance the respondent took an appeal here. After the appeal here, another decree was rendered by the Circuit Court, in which, after reciting the former decree and taxation of costs, it was decreed in form that the appellee have judgment against the appellant for the amount decreed, together with costs, amounting to the sum of $5444.
2. On motion to dismiss this last appeal, on the ground of a former one pending in the same case: *Held*, that under the circumstances, the first decree was not a final decree; and that it was the first appeal and not the second which should be dismissed.
3. The court approves the practice of entering decrees in form before taking appeals to this court.

THIS was a motion by *Mr. Donohue* to dismiss an appeal from the Circuit Court for the Southern District of New