

the payments set aside, and the money brought into court for the benefit of the creditors generally. The appellants also pleaded to the merits that they had no opportunity of knowing, and did not in fact know that Chaput & Massé were insolvent before the date of their assignment; that at the very time referred to (February, May and June, 1882), the appellants Boisseau & Frère themselves made considerable advances to Chaput & Massé in the belief that they would be able to meet their engagements.

The court below (Mathieu, J., in the Superior Court, Montreal), maintained the action in part. The facts, as they appeared to the court, were that in the beginning of 1881, the defendants Boisseau & Frère, wishing to encourage Chaput and their relative Massé, advised them to form a partnership and commence business in Montreal. The partnership was formed, and by clause 7 of the deed it was stipulated that the books of Chaput & Massé should be regularly kept, and that Boisseau & Frère should have access to all the accounts and transactions. The book-keeper of Chaput & Massé, one Noel, was also book-keeper to Boisseau & Frère. From April, 1881, up to 26th December, 1881, Chaput & Massé bought goods from Boisseau & Frère to a considerable amount. They also bought goods from J. G. Mackenzie & Co., from March, 1881, to November, 1881, Boisseau & Frère becoming responsible to the extent of about \$1,200. In January, 1882, Chaput & Massé made an inventory of their affairs by which they showed assets \$15,386.90 and liabilities \$16,489.68, leaving a deficiency of \$1,102.78, or rather of \$1,600, as certain items of assets had been counted twice over. The court was of opinion from the relations between the parties that Boisseau & Frère must have known of the insolvency of Chaput & Massé in May, June and July, 1882. By article 1036 of the code, every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount received, for the benefit of the creditors according to their respective rights. As it was proved that Chaput & Massé were insolvent when the payments were made, and as Bois-

seau & Frère were aware of the insolvency, the article applied, and the action was maintained to the extent of \$1,490. The payments made to J. G. Mackenzie & Co., to pay liabilities for which Boisseau & Frère were endorsers were not shown to have been requested by Boisseau & Frère, and the action was dismissed as to this part. The appeal was by the defendants from this judgment.

It was contended on the part of the appellant that Article 1036 above cited applies only where the insolvency is open and notorious. The article says the creditor may be compelled to restore the amount. This indicated that the legislature did not intend to make an absolute rule, but on the contrary wished to give the court the power of appreciating the circumstances and ordering the money to be restored only where fraud is apparent or at least strongly presumed. On the evidence, which is voluminous, it was submitted that fraud was not established. The stipulation that Boisseau & Frère should have access to the books of Chaput & Massé had in view the case of difficulties arising between the partners, and as a fact Boisseau & Frère were not aware of the transactions of the other firm.

It was argued by the respondents that the insolvency of Chaput & Massé and the knowledge of that fact by the appellants were clearly established; that article 1036 applied, and that the judgment was, therefore, correct.

RAMSAY, J. This is an action brought against the members of the insolvent firm of Chaput & Massé and the members of the firm of Boisseau & Frère, creditors of Chaput & Massé, to set aside certain payments of the firm of Chaput & Massé to Boisseau & Frère as being made in fraud of the creditors of Chaput & Massé, and to compel Boisseau & Frère to pay into court the sums so received by them, and for other purposes. The judgment ordered Boisseau & Frère to pay back \$1,490 to be distributed according to the rights of the creditors of the insolvent firm. Boisseau & Frère appealed, and contend that there is no such action known to the law, and that the respondents can only set up the extent of their interest and have the payments set aside in so far as it affects them.