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Judges, counsel, and suitors have been experiencing for some time considerable vexation in the prosecution of their business in the Montreal Court House. Every effort that could reasonably be expected seems to have been made to diminish the inconvenience; nevertheless it goes without saying that extensive works and alterations cannot be carried on in a building without excessive discomfort to those who are obliged to use the premises as court rooms. The works are likely to extend over so many months that we fear a moderate intermission of business would not be of much service. Nevertheless, the necessary pulling down and rebuilding of walls could no doubt be pushed on more rapidly if the contractors had full possession of the central portion of the edifice; and if it is possible to get through with the worst part of the job by having a recess of a few weeks, we trust that the bar will consent to an arrangement of that nature. A vacation might be taken before and after Easter, or at such other time as would best favour the rapid progress of the work; and the recess, while permitting the contractors to put the building in something like order, would not involve serious delay in the business of the Courts.

Novel claims of damages are constantly being presented in the Courts, arising from new contrivances and inventions. In *Woodward* v. *The Imperial Strength-Testing Company*, before the Lord Mayor's Court, London, Dec. 6, the plaintiff, a compositor, sued for damages under peculiar circumstances. The defendant company are the proprietors of a patent machine which will test the strength of persons who, after placing a penny in the slot, punch a pad provided for the purpose. The plaintiff, on the 10th of July last, was at Southend, where, at the entrance to the pier, was one of the defendants' machines. He read the directions upon it, which were, "Place a penny in the slot and punch." He placed a penny in the slot and punched, but the spring behind the pad would not move, and the effect of the blow was that his wrist was broken. He was unable to continue his occupation, and had lost his situation. He claimed compensation on the ground of defendants' negligence in not keeping the machine in proper order, and also on the ground of warranty and of a promise of performance of a contract on the payment of a penny. The judge, in directing the jury, said if the defendants provided a machine which in itself was a source of danger, or contained a latent danger, so that anyone using it, at the invitation of the defendants, would be injured, then the defendants would be liable. The jury found for the plaintiff for 50*l*.

SUPERIOR COURT.

SWEETSBURGH, Nov. 5, 1890.

Before LYNCH, J.

LETOURNEUX et al. v. DUFRESNE.

Contract in fraud of creditors—Avoidance of—Insolvency—Knowledge of—Art. 1035, *C.C.*

HELD:—*Where a debtor enters into a contract (twenty-three days before he makes a judicial abandonment), by which he transfers to one of his creditors practically the whole of his available movable property, being at the time indebted to other creditors in a large sum which he has no means of paying, it may be presumed that the debtor knew he was insolvent.*

2. *Knowledge of his insolvency by the person with whom he contracted may be presumed from the fact that this person had been doing business with him for several years and had an intimate knowledge of his affairs; that he knew that the insolvent was indebted to him in a large amount, that he held overdue paper of the insolvent, and that the insolvent was indebted to other parties.*

PER CURIAM:—

This is an action instituted on the 2nd day of February, 1889, by nine of the creditors of the defendant Dufresne, to annul and set aside the deed of sale made before Boyce, notary, the 25th August, 1888, by which the

defendant Dufresne sold to the other defendant Gilmour "the whole of his stock of paints, oils, varnishes, tins, tin-cans, barrels and machinery for manufacturing paints and mixing the same, and all tools used for the same, and the business owned and carried on by the said Dufresne in the township of Stanbridge as well as in the city of Montreal, and all the fixtures, counters, shelvings, tables, office furniture, horses, buggies, express waggons, sleighs, and everything including furniture generally, belonging to and used by said Dufresne in the prosecution of the said business, and also the book debts and accounts of said business."

The declaration alleges that the goods so sold comprised all the movable property which Dufresne possessed; that Dufresne was not indebted to Gilmour at the time in the sum of $15,000, the alleged purchase price of said property; that such sale was made for the purpose of defrauding plaintiffs and that it had the effect of injuring them; that Dufresne continued afterwards in possession; that none of the property was delivered to Gilmour; that the same day, 25 August, 1888, Dufresne gave Gilmour a hypothec on certain real property for $3,000; that on the 17th September following, Dufresne made an abandonment of his estate for the benefit of his creditors, Gilmour appearing in the statement of liabilities as a creditor for $10,000; that by means of said sale and hypothec Gilmour became the owner of all the movables of Dufresne, and hypothecary creditor for at least the value of his immovables; that notwithstanding said sale, the statement made under oath by Dufresne of his assets contains an enumeration of the very property claimed to be sold to Gilmour; that Dufresne had no other movable property than that mentioned in the deed of sale, and that his immovables were hypothecated for more than their value; that the sale was fraudulently made and with the intention of defrauding; that it had the effect of injuring plaintiffs, creditors of Dufresne, and was made by Dufresne for the purpose of paying Gilmour in preference to his other creditors, and that thereby plaintiffs are prevented from exercising their recourse against said movable property and from sharing the proceeds thereof with the other creditors of Dufresne.

Gilmour, severing in his defence from Dufresne, who has not appeared, pleads a general denial, and specially that he bought the property mentioned in the deed of sale for good and valid consideration as therein set forth; that at the time Dufresne was solvent, and that he, Gilmour, believed him to be so, and that throughout he acted in good faith relying upon the representations of Dufresne.

The plaintiffs have examined twelve witnesses apart from the two defendants. Dufresne having gone to the States shortly after making his abandonment, was examined there under a commission, and Gilmour has called two of those who had already been examined by the plaintiffs.

There is not much controversy between the parties regarding the principal facts which result from the evidence; but they entirely disagree as to the conclusions deducible from them. It would appear that some time prior to the summer of 1888, Dufresne had established at Bedford a paint manufactory, and had opened in Montreal a store to which the manufactured paints were sent for sale, and that Gilmour had been in the habit of making advances to Dufresne to enable him to carry on his business, as well directly as by discounting the notes and drafts of customers. On the 25th August, 1888, Dufresne was indebted to Gilmour (as appears by the latter's statement marked "A") in the total sum of $38,342.29 composed as follows:

Obligations	$ 5,743.25
Notes	26,479.63
Drafts	6,119.41

And to the plaintiffs and others he was at the same time indebted to about the sum of of $39,000, making in all a total indebtedness of about $77,000. A portion of this was indirect, arising from drafts and endorsements of paper of customers and others, and a portion was not then due. It is unnecessary now to enter into a consideration of the relative proportion of direct and indirect liabilities then due and exigible. According to Gilmour's said statement, Dufresne was then directly liable for debts due to various persons in the sum of $3,140.41; and table 4 of said statement shows that he then had

overdue notes endorsed by Dufresne for $1,607.54, and in table 5 overdue drafts drawn by Dufresne for $2,219.40.

For some reason, not clearly made apparent by the evidence, Gilmour did not succeed in securing from Dufresne recognition as being, after the sale, entitled to run the establishment at Bedford, and only partially so the store in Montreal; and on the 12th September following the sale, Gilmour makes an affidavit before the prothonotary of this Court for the issuance of a writ of *saisie-revendication* to attach all the property mentioned in the deed of sale, alleging his ownership; that the property was worth the sum paid; that Dufresne refused to deliver over the property; and that he had reason to believe that Dufresne had fraudulently removed a portion. The writ issued and under it the property at Bedford and Montreal was seized. This seizure was apparently the means of making known to the other creditors the sale to Gilmour, for on the 17th September, Dufresne makes an abandonment, and as he says in his evidence, under pressure from his creditors; and in the statement of his assets he includes the greater part of the property sold to Gilmour, under the following general headings: "Stock at Bedford, stock in Montreal, fixtures, book debts," and which he adds are claimed by one of his creditors, Gilmour.

Claims to the amount of $48,722.41 were filed with the curator, including one of $10,726.34 from Gilmour, composed of the amounts of the three hypothecs already mentioned; of a note dated 26th August, 1888, for $1,100; of a draft drawn by Dufresne on the 23rd April, 1888, and of the hypothec dated 25th August, 1888, for $3,000; but as to the latter he declares in the claim that he does not intend to avail himself of it as the insolvency occurred within thirty days of its registration. The curator also reported claims as known but not filed to the extent of $16,126.65. Dufresne must have left the country shortly after his cession, although the date of his departure does not appear from the record.

The household furniture was not claimed by Gilmour, and being sold by the curator, netted $227.85. By an agreement between Gilmour and the curator, on the 8th November, 1888, the other movable property was sold by the latter on the 15th and 20th of November, and netted $6,903.23, which with $700 collected from the books, has been deposited in La Banque Nationale in the joint name of Gilmour and the curator, to abide the result of the present litigation. The immovables were sold by the sheriff on the 2nd April, 1889, for $3,534.33, which was paid and distributed as follows: For costs and taxes $138.50, and the balance $3,395.83 to Gilmour on account of his hypothecs.

The practical aspect of this contestation then is, that if the sale to Gilmour be maintained there will be $227.85 to divide among the creditors; and if it be annulled there will be $7,603.23 to apportion among them.

To succeed the plaintiffs must establish: First—That as creditors exercising rights then existing, the deed of sale of the 25th August, 1888, from Dufresne to Gilmour was made in fraud of their rights, C.C. 1032, 1039. Second—That the deed was given by Dufresne with intent to defraud them, and that it has had the effect of injuring them, C.C. 1033. Third—That Dufresne was insolvent at the time, C.C. 1035. Fourth—That Gilmour was not in good faith at the time, and that he knew Dufresne to be insolvent, C.C. 1035.

The quality of the plaintiffs as creditors of Dufresne is shown by the evidence and by the admissions made by Gilmour. Since the institution of the action one of them, Letourneux, has become insolvent, and the curator to the estate petitions to be permitted to continue the proceedings, to which of course there is no objection.

Stripped of all qualifying words, that which vitiates the contract as between the debtor and his creditors is fraud; and that which taints it as between the creditors and the contracting third party is fraud. If fraud be not found to exist, in any form, then the contract is perfect between all the parties; and it is useless to pursue the enquiry further concerning it, or to dilate upon the wrongs which have resulted from its execution. The best evidence which can be given of the fraudulent intention is the knowledge on the part of the third party and

of the debtor himself of the insolvency of the latter. Marcadé says (Vol. 4, p. 426, No. 497): "C'est-à-dire qu'il ait accompli l'acte sachant le tort qu'il causerait à ses créanciers, connaissant son insolvabilité." Toullier (Vol. 6, No. 349): "Il y a dessein de frauder lorsque le débiteur connait son insolvabilité." Aubry & Rau (Vol. 4, p. 137): "Le dessein de frauder de la part du débiteur se présume lorsqu'il fait un acte préjudiciable à ses créanciers en connaissance de son insolvabilité." Bédarride (Vol. 4, No. 1438): "Ainsi la fraude est légalement présumée contre le débiteur lorsqu'il dispose de ses biens au détriment de ses créanciers dans un moment où il a lui-même la conviction de son insolvabilité."

In the first place it becomes necessary to determine whether plaintiffs have proved that Dufresne was really insolvent on the 25th August, 1888, and whether being so he himself was aware of it. When does a man become insolvent? Under Arts. 763-4 of the C. C. P. he may make an abandonment (which is a declaration of his insolvency) if he has been capiased or if he has ceased his payments, and "bankruptcy," "la faillite" is defined in Par. 23 of Art. 17 of the C. C. as meaning "the condition of a trader who has discontinued his payments." In Art. 1092, C. C., the terms used are "bankrupt," "en faillite" or "insolvent," and the same occur in Art. 1953 C. C., thus showing that the two expressions in our civil law—"bankrupt" and "insolvent"—have the same meaning.

In *Mantha et al.* v. *Simard et al.*, (6 Leg. News, p. 195,) it was held that insolvency as applied in Art. 1092, C. C., was the same thing as *déconfiture*, which means that the assets of a man are less than his liabilities; and in *Sirois* v. *Beaulieu*, 13 Q. L. R., p. 293, that "la cessation du paiement qui constitue la faillite n'est pas l'inhabilité du débiteur à payer une dette en particulier; mais celle générale de ne pouvoir pas rencontrer ses engagements."

Judged by these standards, let us see how Dufresne could stand the test on the 25th August, 1888. Had he then ceased or discontinued to make his payments? There is no proof that any particular creditor had at the time asked directly for payment and been refused; but there was at the time a comparatively large sum due on overdue paper, and two notes had shortly before been protested for non-payment, and they were at the time unpaid. He owed indirectly and directly about $77,000, and his assets, according to his own valuation, were only $24,875, or less than one-third of his liabilities, and these same assets subsequently sold only for the sum of $11,365. There can be no manner of doubt that on the 25th August, 1888, Dufresne was hopelessly insolvent, that he could not meet his engagements, and that he had ceased to make his payments from sheer inability to do so.

It seems almost useless to enquire if Dufresne knew that he was insolvent. He swears that he was not; and I am almost disposed to take a merciful view of his then situation and believe that he did not know whether he was really solvent or not; he had been flying kites so long that he had become decidedly airy in his ideas as to his financial position. But if he had the conviction before passing the deed that he was solvent, a moment's reflection after its execution would have convinced him that he was no longer so; for by his answer to the 21st interrogatory he says that by the deed and mortgage he transferred all his property movable and immovable to Gilmour, while still owing him over $10,000, and his other creditors about $39,000. Demolombe, Vol. 25, Nos. 1883-4; Aubry & Rau, Vol. 4, p. 137; Toullier, Vol. 6, Nos. 349-50, and foot note; Bédarride, Vol. 4, No. 1447.

I have now to decide the most important and by far the most difficult element of the case. Did Gilmour know Dufresne to be insolvent on the 25th August, 1888? The principles upon which my decision must rest are thus admirably stated by Bédarride, Vol. 4, Nos. 1432, 1438, 1439, 1446, 1458:

"La seconde condition pour le bien fondé de l'action révocatoire, est la preuve de la fraude de celui qui a traité avec le débiteur. Mais cette condition n'est exigée que lorsque le tiers a traité à titre onéreux, car, nous venons de voir, le donataire est tenu de restituer, quelle qu'ait été d'ailleurs son ignorance ou sa bonne foi. L'acquéreur à titre onéreux mérite les mêmes égards que les créanciers eux-mêmes; comme eux, en effet,

il a un intérêt sérieux à la contestation, et s'il la soutient, c'est qu'il cherche à garantir d'une perte, *de damno vitando*. La position étant égale, on devait revenir au droit commun, suivant lequel nul ne peut répondre que de son propre fait, suivant lequel, encore, la fraude ne se présume pas, et c'est à celui qui l'allègue à la prouver.

"Vainement donc, la fraude du débiteur serait-elle prouvée et acquise, l'acte à titre onéreux n'en serait pas moins maintenu si l'autre partie a été de bonne foi. Celle-ci est présumée jusqu'à preuve contraire, mais cette preuve peut être faite par témoins et par présomptions. Elle résulterait suffisamment de tout ce qui tendrait à établir que le tiers a connu la fraude de celui avec qui il a traité. Connaître une fraude et accepter une participation dans l'acte destiné à la consommer c'est en accepter la complicité. Ainsi, l'action révocatoire n'est recevable que par la double preuve de la qualité de créancier et de l'insolvabilité du débiteur. Elle n'est fondée que par celle de la fraude de celui-ci et des tiers qui ont traité avec lui. Cette dernière preuve n'est exigée que dans le cas d'un traité à titre onéreux. La libéralité cède à la seule mauvaise foi de son auteur.

"La preuve n'est même pas toujours nécessaire, car fidèle au système de se montrer d'autant plus sévère que la fraude est plus facile et plus probable, la loi en a présumé l'existence dans divers cas.

"Ainsi la fraude est légalement présumée contre le débiteur lorsqu'il dispose de ses biens au détriment de ses créanciers, dans un moment où il a lui-même la conviction de son insolvabilité.

"Toutefois cette présomption ne concerne que le débiteur. Celui qui a traité avec lui peut avoir ignoré l'état réel de ses affaires. N'ayant, d'ailleurs, aucun devoir à remplir envers les créanciers, la connaissance qu'il aurait eu qu'il en existait un ou plusieurs, ne ferait pas admettre sa complicité dans la fraude de celui avec qui il a traité.

"Mais si l'insolvabilité était notoire, si des actes significatifs, si des poursuites judiciaires l'avaient signalé, la fraude du tiers, quoique non présumée de droit, serait facilement admissible. Pour peu que cet indice fût accompagné d'autres circonstances suspectes, on ne devrait pas hésiter à la consacrer.

"Ainsi, l'insolvabilité fait légalement présumer la fraude contre le débiteur. Quant aux tiers qui ont traité avec lui, la connaissance de cette insolvabilité ne suffit pas pour les constituer en mauvaise foi. Mais elle crée une telle prévention que l'admission de cette mauvaise foi serait la conséquence de quelques circonstances suspectes venant l'étayer et l'aggraver.

"Les auteurs anciens ont beaucoup écrit sur la nature, la qualité, le nombre des présomptions qu'on devait exiger. Les plus judicieux arrivent cependant à cette conclusion, qu'en pareille circonstance, il ne saurait exister de règles certaines ou absolues. Que chaque espèce avait ses caractères particuliers, ses exigences spéciales, et qu'ainsi, telle ou telle présomption, jugées suffisantes dans un cas, pourraient ne pas le paraître dans un autre; que c'était donc à la conscience du juge à se prononcer selon les inspirations qu'elle puiserait dans un mûr examen de chaque cause. Ces principes sont encore aujourd'hui les seules vrais, les seuls admissibles.

"Mais, et sans empiéter sur les fonctions de la magistrature, on peut reconnaître qu'il est certains faits qui auront nécessairement une importante influence sur le sort du litige. Dans cette catégorie se placent l'aliénation de tous les biens, la qualité des parties, la rétention de la possession des choses prétendues aliénées, le mystère et la clandestinité de l'opération.

"Ce que nous devons ajouter, sans revenir autrement sur ce que nous avons déjà dit, c'est que la pertinence des présomptions est souverainement appréciée par le juge. Appelé à prononcer comme juré, le magistrat ne doit compter qu'à sa conscience de la conviction qu'il puise dans l'ensemble des faits et circonstances du procès."

Plaintiffs' counsel at the argument frankly admitted that he had failed to establish the alleged notorious insolvency of Dufresne, so that no presumption against Gilmour exists from that source; but plaintiffs contend that they have disclosed such a combination of unfavorable acts and circumstances as lead inevitably to the conclusion that Gilmour must have known of the insolvency. Let us

examine these so-called suspicious facts in the order in which they are stated by Bédarride. Did Dufresne in effect, by the deed alienate all his property? We have already seen that Gilmour had at the time three hypothecs upon the immovables amounting to $5,743.25, and that on that day a fourth one was executed for $3,000 to cover advances theretofore made, and which are shown by the statement "A" produced by Gilmour, to have been for two cheques and five notes made by others and endorsed by Dufresne and presumably then due. Dufresne says that he does not remember the mortgage; that there was some talk of giving a mortgage at first. He says that the factory alone cost him $17,000. We have also seen that the sale of all the immovables produced only the sum of $3,534.33. As to the movables Dufresne says they were all included in the deed, (see his answers to interrogatories 12 and 21) but in answer to cross-interrogatory 7 his answer varies. Gilmour said there was besides what was sold him the household furniture, some lumber, and $4,500 of stock which Dufresne claimed to have in La Banque de St. Jean. As to the lumber I have not been able to find any trace of it. As to the bank stock, which Dufresne says he sold shortly after the sale to Gilmour, using the money to pay off his creditors, it turns out that some few months before Mr. Girard, of Marieville, had sold Dufresne some shares at the rate of $15 per share, and that about the 15th September, 1888, Girard bought the same shares back at the same price from Mrs. Chatèle (Dufresne's sister-in-law), who was then the owner, and paid for them in her two notes of $1,500 which he held on account of the original sale. From the evidence I am unable to say whether on the 25th of August, 1888, Dufresne was the owner of this bank stock or not. Had Gilmour thought so and had he regarded it as of any value, it was his duty as one of the inspectors of the estate to have done something about it, and yet nothing appears to have been done. Gilmour does not claim the household furniture, but Dufresne does not except it as coming within the property sold to Gilmour by the deed. Looking at the deed itself its terms are very general, and would seem fairly to convey the impression that it was intended at the time of its execution to include the furniture. Gilmour says the furniture was worth $2,000, but Douglass, the bailiff who sold it, and who had been in the house several times while occupied by Dufresne, puts the value of the whole furniture at from $300 to $400. The portion seized, which must have included the greater part of the whole lot, sold for $227.85. The sale if not intended to be of the whole of Dufresne's available property was really and practically such, for there was nothing but the shadow left. Bédarride (Vol. 4, No. 1447), thus characterizes such a sale: "Cette circonstance avait pris, dans le Digeste, le caractère d'une présomption légale, à tel point qu'elle dispensait de rechercher quelle avait été l'intention du débiteur; comment, en effet interpréter autrement une pareil conduite? Qu'un homme puisse, par convenance, par calcul et quelquefois même par besoin se défaire de quelques-uns de ses immeubles, on le comprend. Mais aliéner tout ce qu'on possède, pour se trouver ensuite en présence d'une masse de créanciers non payés, c'est évidemment n'avoir agi que pour se soustraire à des exécutions en dénaturant et en la faisant disparaitre."

The next question is the qualities of the parties. There is no family relationship between Dufresne and Gilmour, but the same inference which exists between relatives may be deducible from the business relations of others. Was Gilmour in a position to know the financial condition of Dufresne? He says himself that he had been doing business with Dufresne for several years, and his statement showing a total indebtedness of over $38,000 is pretty convincing evidence of the extent of that business. He says he knew that Dufresne had other creditors, but that he did not suppose they were so for large amounts. Dufresne says Gilmour did not know that he was insolvent, as he was not in fact; that Gilmour had no reason to think him insolvent; and that he had always represented himself to Gilmour as solvent. It may be that both Gilmour and Dufresne did not fully realize the extent of the latter's embarrassment; but there are some things which could not have escaped the business

attention of Gilmour, because he was interested in them, and which led him to desire to assume the control of the whole business in order to protect himself. He had in his hands at the time, as having discounted the same, a large amount of overdue notes and drafts either made or endorsed by Dufresne, two of which at least had been allowed to go to protest with his knowledge only a few days before; and Dufresne says that one of the conditions of the sale was that Gilmour was to advance him $8,000 with which to pay off his creditors. By his own showing Dufresne owed him $14,721.29, wholly unsecured after deducting the four hypothecs and the consideration price of the sale, $15,000. How did he expect that Dufresne after divesting himself of all his property and handing over all his business as he did by the sale, was going to pay this large sum of over $14,000, and the $38,000 which he owed other people? Gilmour was in a position to know, and from all the circumstances it is reasonable to presume that he did know, that Dufresne was utterly unable to meet his engagements.

The retention of the property by Dufresne after the sale, no matter from what motive, is to say the least peculiar. By the terms of the deed Gilmour was to have possession forthwith, and Dufresne says that he did give him possession. As a matter of fact no effective possession was ever given. The day following the sale Gilmour asked one Jackson to stay in the paint shop at Bedford while he and Dufresne went to Montreal; and the next day Dufresne told Jackson that he did not want him there, and the latter went away. Dufresne was in undisputed possession of the factory until Gilmour took out the *saisie-revendication* on the 13th September. As to the store in Montreal the business there was managed by Frappier. On the 24th August, the day before the sale, and evidently in anticipation of it, Dufresne had arranged with Frappier to give him possession of the stock, undertaking to retire all the notes and drafts which Frappier had given. The day following the sale Dufresne and Gilmour go to Montreal together, and Gilmour gives Frappier a guarantee that he will provide for the payment of these notes and drafts himself. No mention is made of the sale, but Frappier says that he understood that he was after that time to account to Gilmour for the cash received and for customers' notes; that Gilmour was to have control of the finances to secure him for the money which he might advance to pay off Dufresne's debts; that there was no taking possession of the store or business by Gilmour, and no change in the name under which the business had been carried on. The evident intention was that the business was to continue in appearance as before. Dufresne was to remain in charge of the factory, but the finances were to be wholly managed by Gilmour, and in this way the other creditors would have no apparent occasion for alarm. Dufresne, however, having refused afterwards to carry out his part of the understanding, because, as he says, Gilmour failed to advance him the balance of the $8,000, having only given him $1,417 at Montreal on the 26th August, it became necessary for Gilmour to take legal proceedings, and in his affidavit he swears that Dufresne refused to give up possession. This clearly establishes that Gilmour did not consider that he had been put in possession of the property sold him by Dufresne.

I am unable from the evidence to say whether the parties intended to make the sale public or not; the delay between the sale and the seizure—twenty days—was too short a time for any manifestation of such intention, and particularly as the parties had at a very early period disagreed with reference to their unwritten undertakings. By the deed Dufresne had one year in which to redeem the property, and I am very much disposed to think that had no trouble arisen rendering litigation necessary nothing would have been said about the deed.

The evidence discloses one or two circumstances in connection with the consideration mentioned in the deed, which are deserving of notice. It is therein expressed as being $15,000 cash already advanced. Gilmour says it was for three notes which he then held against Dufresne, and he produces at the *enquête* one of them, and says the other two were delivered up to Dufresne at the time of the sale; they are described in table

1 of Gilmour's statement. Dufresne says that the consideration was the obligation on the part of Gilmour to pay the notes and drafts signed and accepted by Frappier, and to pay him, Dufresne, $8,000. (See Dufresne's answers to interrogatories 13 and 14 and to cross-interrogatories 2, 6, 8, 12, 13 and 14). The contradiction is strikingly apparent between these two versions as to what the consideration was; but there is much in all that occurred as related by those directly concerned to bear out the version given by Dufresne. It is somewhat strange that one of the notes spoken of by Gilmour as forming part of the consideration should remain in his possession until he is examined as a witness on the 17th December, 1889, or more than one year after the sale, and that the other two notes or their whereabouts are not considered as of sufficient importance to be accounted for by any one. As to the Frappier notes and drafts Gilmour, on the 27th August, 1888, gave the following letter to Frappier, as Dufresne had promised would be done at his interview with the latter the day before the sale: "Montreal, 27th August, 1888. To A. Frappier,—I hereby agree to return all notes signed by A. Frappier; those past due and falling due without costs or protest, A. H. Gilmour." And table 3 of Gilmour's statement gives a list of these notes amounting to $4,388.77. As to the $8,000 spoken of by Dufresne there is nothing in the evidence regarding it apart from his own statement; but it is somewhat confirmed by the following note given by Dufresne the day following the sale: "Montreal, August 6th, 1888,—Four months after date I promise to pay to the order of A. H. Gilmour, Esquire, $1,417 at La Banque Ville-Marie for value received." To the uninitiated this transaction, just at that time, seems most singular; but Gilmour accounts for it as being an indication of his continued confidence in Dufresne's solvency. As to the mortgage Gilmour says it was to cover advances already made, and it is so stated in the document itself. In table 2 of Gilmour's statement he gives a list of the cheques and notes which make up the amount covered by the mortgage, $3,000. Dufresne is very hazy in his recollections about the mortgage; in fact he is not by any means sure that there was a mortgage at all. (See his answers to interrogatories 19 and 20 and to cross-interrogatory 3). Again, as to the amount of Dufresne's indebtedness to Gilmour there is a marked difference between them as to its amount. At the time of the abandonment he gave it as $10,726.34, and in his examination he is a good deal mystified as to what it was. (See his answers to interrogatories 3, 4, 15 and 23 and cross-interrogatory 1). Gilmour at the commencement of his examination fixed it at over $25,000 and less than $27,000, but later, upon examining more fully into it, he gave the amount definitely as being $38,000.

These are the facts and circumstances concerning this whole matter as shown by the evidence and by the exhibits produced by the plaintiffs and the defendant Gilmour. The following authorities may be referred to as having more or less bearing on this case:—Delorimier, Vol. 18, p. 59-61; Sirey, Vol. 1, p. 759, Nos. 8, 10, 59-60; 10 L. C. R., p. 125; 2 L. C. L. J., p. 39; 12 L. C. J., p. 315; 8 R. L., p. 627; 10 R. L., p. 390; 4 L. C. J., p. 220; 3 Leg. News, p. 398; 4 Leg. News. p. 215; 4 Q. L. R,, p. 298; 7 Leg. News, p. 276; 15 R. L., p. 91; M. L. R., 3 S. C., p. 201; 2 S. C. R., p. 571; M. L. R., 6 S. C., p. 277.

Applying these authorities, as amplifying the general principles laid down in the Code, and especially the comprehensive remarks of Mr. JusticeTaschereau in the Supreme Court, to the facts as I have given them in this case, I am, as the authors say, compelled as a jury would be to declare whether I believe that on the 25th August, 1888, Dufresne was insolvent and whether Gilmour knew him to be so. I have little hesitation in answering both questions in the affirmative; and it is needless to say that having come to that conclusion plaintiffs' action must be maintained, and the deed of sale in question be annulled and set aside as having been made in fraud of plaintiffs' rights.

Fortin for plaintiffs.

Amyrault for defendant Gilmour.