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ARTHUR C. WILKS *et al.*, ÈS QUALITÉ (PLAINTIFFS) ..... APPELLANTS; *Nov. 19. *Dec. 23.

AND

STEPHEN C. MATTHEWS (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

*Payment by insolvent—Preference—Recovery back by curator—Gaming transaction—Illegal contract—Right of action—Arts.* 1031, 1032, 1036, 1927 C.C.—*Arts.* 853 *et seq., C.P.Q.*

An action by the curator of an abandoned estate to recover back moneys paid by an insolvent to one creditor to the prejudice of the others, on the eve of insolvency, is not barred by the provisions of article 1927 of the Civil Code of Lower Canada denying a right of action in respect of gaming contracts. Judgment appealed from (Q.R. 22 K.B. 97) reversed.

Owing to suspicions aroused by the exposure of the insolvent's methods of business, a creditor who had deposited money with him for investment in anticipation of obtaining large profits through his operations on the stock market by urgent demands secured re-payment of the sums so deposited together with a large amount of alleged profits on the day preceding that on which the insolvent absconded.

*Held*, that, as the creditor must be deemed to have had knowledge of the insolvent circumstances of the debtor at the time of the payment, the curator to the abandoned estate of the insolvent was entitled to recover back the amount so paid, under the provisions of article 1036 of the Civil Code of Lower Canada.

The judgment appealed from (Q.R. 22 K.B. 97) in its result affirming the judgment at the trial (Q.R. 41 S.C. 155) was reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) Q.R. 22 K.B. 97.

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Greenshields J., in the Superior Court, District of Montreal(1), by which the plaintiff's action was dismissed with costs.

The plaintiffs, who are the curators appointed to the abandoned estate of one Charles D. Sheldon, an insolvent, brought the action to recover back, as part of the insolvent's estate, the sum of $13,743, which had been paid by the insolvent to the defendant on the day previous to that on which he absconded. Sheldon had carried on business, in Montreal, as an investment broker, the defendant being one of his customers who, as such, had, previous to the 10th of September, 1910, deposited for investment by him certain sums of money aggregating $7,102 for the purpose of sharing in profits made or supposed to be made in stock transactions by Sheldon. On 30th September, 1910, Sheldon's books of account shewed the amount of $13,743 to the credit of the defendant, being the amount of the deposits which had been made by the defendant within some months previously together with profits accrued upon investments alleged to have been made in the purchase and sale of fluctuating stocks. In the circumstances mentioned in the headnote the defendant obtained from Sheldon the payment of the amount so shewn as standing at his credit, after banking hours, on the 10th of October, 1910, the eve of the day of Sheldon's departure from Montreal for an unknown destination. By their action the plaintiffs claimed the amount thus paid to the defendant on the ground that it was a preferential and illegal payment to the prejudice of all the other creditors of the insolvent and had been made at a time

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when Sheldon's insolvency was notorious and known of the defendant. The defendant pleaded good faith and that, at the time of the payment, he believed that the profits he received had been earned through the investment of his money and that Sheldon was solvent at the time he made the payment. In the Superior Court Mr. Justice Greenshields dismissed the action on the ground that the evidence did not shew that the defendant was aware of Sheldon's insolvency at the time he received payment. By the judgment appealed from, the Court of King's Bench held that this view was erroneous, but refused to reverse the order dismissing the action because recovery of the amount so paid was denied by article 1927 of the Civil Code on account of the transactions between the defendant and Sheldon being in their nature gaming contracts.

The questions in issue on the present appeal are stated in the judgments now reported.

*Atwater K.C.* and *Chauvin K.C.* for the appellants.

*C. H. Stephens K.C.* and *A. Maillot* for the respondent.

THE CHIEF JUSTICE.—I do not think we are called upon in this case to inquire into the nature of the agreement made between the defendant and Sheldon with respect to the investment by the latter of the funds entrusted to him. That it was either illicit or immoral is not absolutely free from doubt, and I am not at all sure that the defendant could not have enforced her claim against Sheldon for money had and received. Vide S.V. 1913,1,285 (cas d'un mandataire chargé d'employer une somme d'argent en jouant aux

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courses) S.V. 1912,2, sup. 422 (cas d'un gérant de cercle refusant de rendre ses comptes). It must also be observed that if this were a suit arising out of that agreement, the position of the plaintiff would be different from that of either of the parties to it. I quote the following "considérant" from a judgment of the Court of Appeal at Paris:—

> Vainement on allèguerait, pour écarter la demande en restitution, la règle "nemo auditur propriam turpitudinem allegans," alors que la demande en restitution est formée *non par la parties qui a pris part à la convention, mais par son liquidateur judiciaire, agissant au nom de la masse des créanciers*, qui n'ont pas participé à la convention illicite. (S.V. 1905,2,206.)

But those interesting questions do not arise here. This action is brought by the plaintiff as curator to the insolvent estate of Sheldon under the instructions of the court, not to enforce the contract which the defendant made with Sheldon, but to recover a sum of money alleged to have been paid to the defendant by Sheldon in fraud of the general creditors of the latter now represented by the plaintiff.

This is an action *sui generis* entirely distinct and independent of any claim which Sheldon might have had against the defendant. It arises not out of the agreement or arrangements which they may have entered into or out of any claim accruing to Sheldon by reason of the payment hereinafter referred to. It takes its rise in the fraud which it is alleged Sheldon practised on his creditors when he parted with the money. Planiol describes the origin and nature of the action so clearly that I will be pardoned this quotation from his "Droit Civil" (vol. 2, No. 319 (5 ed.)):—

> S'il (le débiteur) commet une fraude, s'il cherche à faire disparaître son actif pour éviter de payer ses dettes, sa conduite fait

naître, au profit du créancier, une action nouvelle, distincte de la première (under art. 1031, C.C.), car la fraude est un *délit civil*, et comme telle elle a la force de produire une obligation qui a pour objet la réparation du préjudice causé. Le créancier *armé dès lors d'une action spéciale*, cesse de subir l'effet de l'acte frauduleux. Aussi dit-on que le débiteur qui agit par fraude *cesse de représenter ses créanciers*, langage un peu énigmatique, qui désigne simplement la possibilité pour les créanciers de se soustraire aux effects d'un acte déterminé.

The sole question here is: Can an action be maintained on the facts proved in this record. Those which are relevant to the issue are few and undisputed. On the 10th of October, 1910, when it is admitted he was hopelessly insolvent, Sheldon paid the respondent, after office hours, the sum of $13,738. This sum represented $7,102, capital invested with Sheldon by the defendant at different times during the preceding months, and $7,836, profits alleged to have been earned on that investment. The night of that same day Sheldon fled the country, leaving behind him creditors whose claims, in the aggregate, amounted to over $2,000,000. They included not only the business customers, but also trade creditors from whom he had bought his household supplies, carriages, horses, etc. Sheldon's assets at that time were estimated at about $19,951.29; there is, therefore, no doubt as to the fact of his insolvency.

The circumstances surrounding the payment, the subsequent flight, the fact that defendant's son and a former employee of her husband were in Sheldon's service, the press campaign in which Sheldon's financial methods were vigorously attacked, all combine to convince me that the defendant had good reason to know, when she received the money, that Sheldon was insolvent. I entirely agree with Mr. Justice Cross when he says,

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that there is reason to say that the respondent should be held to have known that Sheldon was insolvent when he paid the money,

and with Mr. Justice Gervais, who, referring to the finding of the trial judge that the defendant was ignorant of Sheldon's financial condition, said:—

L'on peut avoir des doutes sur l'exactitude du motif de la cour de première instance.

Assuming, therefore, that we have those facts proved: 1. The insolvency of Sheldon; 2. The knowledge of that insolvency by the defendant when the money was paid to her; 3. The appointment of the plaintiff as curator to the estate of the insolvent; 4. The authority of the court to bring this action in the interest of the mass of the creditors — what is the law applicable? If the question was not unnecessarily complicated by the issue as to the nature of the agreement between Sheldon and Mrs. Mathews, could there be any doubt about the right of the plaintiff to succeed in this action? I submit that the point would not be arguable (art. 1032 *et seq.* C.C.), and I am at a loss to understand how the issue between the parties can be, when properly understood, affected by the fact that the original transaction between Sheldon and Mrs. Mathews may have been either illicit or illegal as alleged. Let us apply this test: assuming that there had been no abandonment of property, then any one of Sheldon's creditors might have brought this action under article 1032 C.C., and if taken by one of those who had furnished Sheldon supplies for his household, could the defence of "nemo auditur propriam turpitudinem allegans" be set up against that creditor? How could that maxim be made to apply in such a case? What would be the "turpitudo" chargeable against that creditor or how could article 1927 C.C.,

relied on in appeal, be held to be a defence to an action to impeach the payment made to Mrs. Mathews by Sheldon in fraud of the rights of that creditor ? As I said before, that would be an "actio pauliana oblique," *i.e.,* an action which is given to creditors to obtain the revocation of the acts done by their debtor in fraud of their rights (Planiol, vol. 2, No. 296 *in fine*), and not an action for the recovery of money under a gaming contract or a bet, as the judges in appeal have assumed this action to be. If the objection relied on below could be set up against a creditor of Sheldon, how can it avail against the curator, an officer of the court

*who exercises all the rights of action of the debtor and all the actions possessed by the mass of the creditors*

(877, C.P.Q.), including, of course, the trade creditors ? It is said by one of the judges below

that the curator to an abandonment in insolvency is an officer of the Superior Court and should not be required to act as "croupier" to the patrons of a gaming house.

That is undoubtedly a very pretty sentiment. The question at issue is not, however, one of ethics or propriety to be solved in a court of honour. It is a question of law which courts of justice must decide in accordance with what I submit with all deference are settled legal principles. The money sued for, when collected, will be distributed under the eye of the court among the general body of creditors as their interests may appear. The question of the right to share in the fund as well as all priorities will then be settled. For the moment we are called upon purely and simply to say whether by the payment to Mrs. Mathews, or as a result of it, the general creditors of

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Sheldon, who are represented by the plaintiff, have been prejudiced; or in other words: Was the payment complained of made by the insolvent debtor to a creditor knowing his insolvency? If, as argued here, the contract between Mrs. Mathews and Sheldon was so tainted with illegality that no action could be brought upon it, then the payment by Sheldon must be deemed to have been gratuitous and, in that case, it is presumed to have been made with intent to defraud and the amount is recoverable at the suit of any creditor at least to the extent of his interest (1034 C.C.). If in the other alternative Mrs. Mathews' claim was legal and enforceable at law, then the payment complained of was made by an insolvent to a creditor who, as found by the Court of Appeal, must have known of the insolvency; in which case it is deemed to have been made with intent to defraud and is voidable under article 1036 C.C. So that if the position of the curator is that of a creditor of the insolvent who was not a party to the illegal agreement, his right to recover in either alternative is undoubted.

It is important, therefore, to clearly state again the nature of this proceeding. The action is taken by the curator. By the fact of his appointment he entered into possession of the whole estate of the insolvent (870 C.P.Q.), and is subject to the summary jurisdiction of the court (875 C.P.Q.). He exercises all the rights of action of the debtor and all the actions possessed by the mass of the creditors (877 C.P.Q.) and the sums realized are distributed under the eye of the court (880 and 881 C.P.Q.). It is specially important to observe in a case like this that the curator represents not only the debtor, but also the mass of the creditors, for this very obvious reason. If the curator

represented only the insolvent debtor, then he would be obliged to rely on article 1031 C.C., in which case all the pleas available in an action taken by the debtor himself might be raised, such as *"in pari causâ turpitudinis cessat repetitio"* or *"in pari delicto potior est conditio defendentis"* or, again, the defence under article 1927 C.C. But when the action is brought as in this case under both articles 1031 and 1032 the issues are different and the legal principles applicable are well settled. If the payment complained of prejudiced the other creditors in that it decreased the estate of their insolvent debtor diminishing *pro tanto* their security and it is proved that the payee knew, when she received the money, that the payer was insolvent, that payment is deemed to have been made with intent to defraud, in which case the recipient of the money may be compelled to restore the amount received for the benefit of the creditors of the insolvent according to their respective rights (1036 C.C.).

That the curator as representing the creditors may invoke both articles 1031 and 1032 C.C. in support of their claim can no longer be doubted.

Un créancier peut exercer cumulativement l'action de l'article 1166 et celle de l'article 1167. En vertu de la première action, il peut exercer les droits de son débiteur, mais il se voit opposer les désistements, renonciations de celui-ci. Aussi peut-il à ce moment les attaquer par l'action Paulienne s'il prétend qu'ils sont frauduleux. C'est ce qu'a jugé la Cour de Lyon, le 8 déc., 1908; Gaz. Pal., 17-18 janv., 1909; v. de même Trib. de Nantes, 12 juill., 1906, Gaz. Pal., 1906.2.366.

This appeal should be allowed and the action maintained with costs.

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IDINGTON J.—I agree with the learned judges in appeal upon the monstrous absurdity of any sane person of intelligence believing that a man could go on for years or even for months, making as an investment broker twenty-five to forty per cent. monthly profits on money given him for investment.

I, however, do not see my way to found upon such facts as before us the inevitable conclusion that all the creditors of such a man were gamblers, or that all their claims are founded upon that or some other consideration tainted with illegality.

No such defence is set up in the pleading. Nor was any such case made by the evidence.

It is no violent presumption to suppose that the curator may in fact represent honest creditors regarding whose claims no such imputation can be made.

And such as I take it must be the legal presumption on behalf of the curator herein till the contrary is shewn.

If there are claims made upon the estate by creditors who cannot, by reason of their contracts being founded on some illegality, recover in law, future inquiries must determine any questions so raised.

It seems to me that the only questions herein respecting which there can be any doubt are whether or not respondent's receipt of $13,743, from Sheldon, can be said to have fallen within the meaning of either articles 1034, 1035 or 1036 of the Code.

The incredible suggestion that Sheldon was making for respondent and his wife and others trusting him such enormous profits as alleged renders it easier to impute knowledge of his insolvency to respondent or his wife than might be possible in the case of an ordinary business.

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It only needed very ordinary business intelligence to comprehend that such distribution of alleged profits must end in insolvency, and that within a very limited time.

People possessed of such intelligence must inevitably have been on the lookout for the bursting of such a financial bubble.

And when such a course of dealing, having gone on for months, was publicly assailed and had become the subject of discussion in leading newspapers, the collapse was at hand.

The condition of mind of the respondent's wife on the 9th and 10th of October—the eve of Sheldon's flight — indicating such a desperate determination to obtain the money in question is betrayed in too many ways to permit of our attributing it to anything else than a deep conviction that disaster awaited her venture, and that the only hope of rescue was to get the money on that evening, the 10th of October. The cashing of his cheque could not await the next morning. And when nearly eight thousand dollars of this money was supposed to be the result of a few months of fabulous profits to make up which somebody else must certainly be robbed, I need not multiply harsh words to describe such a transaction. As to the part of it covering such mythical profits it might, if it had stood alone, have fallen within art. 1034. Therefore, I must hold that when joined to the rest of the transaction such connection of the obviously illegal with the otherwise possibly legal has, if nothing else has done so, stamped the entire transaction as illegal and void within art. 1036.

The kind of knowledge meant therein is not literally a stock-taking of a man's assets as means of pay-

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ment, but the conviction that if that were done it would demonstrate insolvency, and sooner than face that issue the person possessed of such conviction has decided to take all chances and get ahead of fellow creditors.

It is not necessary to follow in detail the many circumstances which, added to the inherent nature of the transactions in this peculiar case, demonstrate such belief as irresistibly the equivalent of actual knowledge directly proven.

The insolvency seems abundantly proven. And the suggestion that the estate of the insolvent had not been deprived in fact of the sum in question was not part of the defence in pleading or otherwise.

Whatever merits in law might be found in such a contention if it had been so gone into and the securities given proved worthless, is something I need form no opinion upon.

The *primâ facie* case is entirely the other way. I think the appeal must be allowed with costs throughout, and judgment given the appellant as prayed with costs.

DUFF J.—Article 1036 of the Civil Code is as follows:—

> 1036. 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 or thing received or the value thereof, for the benefit of the creditors according to their respective rights.

The principal question presented by this appeal as I view it is the question whether or not the payment made by Sheldon to the respondent through his wife was "a payment by an insolvent debtor to a creditor

knowing his insolvency," within the meaning of this article. As to the insolvency of Sheldon whatever plausible suggestions might be made as to possible defences by Sheldon in answer to the claims of his clients, so-called, there was undeniably a strong *primâ facie* case of insolvency to which no solid or even substantial answer has been made.

The real controversy concerns the allegation which the appellant must make good that the payment was made to a creditor "knowing of" Sheldon's "insolvency." Did the respondent or his wife "know of" Sheldon's insolvency within the meaning to be attributed to those words in this article? The question is not, as it appears to me, whether the respondent ought to have known in the sense that persons of reasonable judgment in his situation, or in the situation of his wife would have known of Sheldon's position, but whether in fact that was or was not the state of mind of one or other of them at the time the payment was made. The tribunal passing upon the question must be able to reach the conclusion upon the evidence before it that the state of mind denoted by "knowledge" in this connection, did in fact exist. The first point to consider is, what is meant by "knowledge" here? One may perhaps be permitted to observe at the outset that there is, of course, no sort of warrant for introducing here ideas drawn from the English doctrine of "notice" according to which knowledge of a state of facts may in certain circumstances be imputed to one, although everybody admits that in point of fact one was quite ignorant of it. It may be observed, however, that the terms "know" and "knowledge" are very elastic terms, capable of a broad range of signification varying with the context and the sub-

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ject-matter in connection with which they are employed. And one, of course, must not, if it can be avoided, give to such phrases a meaning which, in practice, would frustrate the purpose of the enactment in which they occur. Without further analysis and without attempting to lay down or even suggest a rule of anything like of universal application I think that where you have a belief on the part of the creditor that insolvency exists and that belief is founded on facts which to a person ordinarily conversant with affairs would point to insolvency there you have a state of facts which constitutes knowledge within the meaning of this article. *Ex hypothesi* in every case in which the question arises, of course, there is insolvency in fact. I am not prepared to say that given insolvency in fact the additional fact that the creditor entertained a suspicion or strong conviction that such was the state of affairs without any objective of grounds for that conviction would in itself be sufficient to bring the case within the article. But I think that where you have such a belief based upon solid objective grounds then the case is made out.

In the present case there is ample evidence to shew that none of these elements was wanting. I will not go into the evidence in detail, but I think the natural inference from what was done by the respondent's wife is that she was actuated by a very pressing sense of the fact that the least delay would be fraught with signal risk of the loss of her husband's money; and in view of all the facts in evidence I think that is the proper inference. As in my conclusion upon this question of fact I am differing from the opinion of the learned trial judge, I think it is right to point out first, neither the respondent nor the respondent's wife, although

called as witnesses, made any direct statement as to the state of their knowledge or suspicions touching Sheldon's affairs. Secondly, this question, though a question of fact, turns upon the proper inference to be drawn upon the facts proved and the answer to be given to it would not, in my view of those inferences, in any material degree, be affected by any opinion that one might have formed as to the credibility of the witnesses who gave evidence at the trial. Thirdly, the judgment of the learned trial judge which I have considered with care, and of which I desire to speak with the greatest respect, seems to me to be open to the observation that the learned judge has not given sufficient weight to the circumstance that the respondent was a man of affairs and that the character and circumstances of Sheldon's operations may be taken in absence of some explanation by him to have marked them, for a man of his experience (I think I am putting it very moderately) as both irregular and extremely hazardous. I think, with respect, that the learned trial judge has fallen into some error in failing to give sufficient weight to this circumstance in interpreting the subsequent conduct of the parties.

On this question of fact the Court of Appeal appears also to have been unable to accept the conclusion of the learned trial judge, but held the appellant to be barred from recovery by the provisions of article 1927 C.C. As I understand the view of the Court of Appeal touching the application of that article it is this: the persons who entrusted their money to Sheldon were partners with him in a series of gambling transactions, and all parties must be presumed, in view of the facts, to have contemplated transactions forbidden by the law. Then it is said

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that according to article 1927 C.C. (the moneys in question having been paid to the respondent as moneys to which he was entitled as the profits arising from operations including such transactions) the recovery of these moneys is barred by the express language of the article in question. With great respect I have been unable to convince myself that the reasoning upon which the Court of King's Bench proceeded is sufficient to support their conclusion. The nullity with which a payment to which article 1036 C.C. applies is affected by the rule embodied in that article rests upon the fraud upon the rights of creditors which the payment made in such circumstances is presumed to involve; and the right of recovery given by the article is shewn by the express words of it to be primarily, at all events, a right conferred in the interests and for the benefit of the creditors who have thereby been wronged. It would appear, therefore (assuming Sheldon himself to have been disabled from recovering the moneys paid by reason of the provision of article 1927 C.C.) that this circumstance would not necessarily be conclusive against the claims of creditors under article 1036 C.C. Indeed, if I am right in my construction of the view taken by the Court of Appeal (assuming the hypothesis upon which that view is founded to be correct, viz., that the moneys in question were paid to the respondent as profits arising out of illegal transactions in which he was a partner) it would appear to be susceptible of plausible argument that the claim of the curator could be sustained under article 1034 C.C. If, indeed, it had been shewn that the nature of Sheldon's transactions and of his relations with those who entrusted their money to him was such as to disentitle any of them to sustain

any claim against him in a court of law in respect of their transactions with him, then a totally different question might have arisen, viz., the question whether in truth Sheldon was insolvent, within the meaning of article 1036 C.C., at the time the payment under consideration was made. But to support such a conclusion it would be necessary to go far beyond anything justified by the record before us, and I do not understand the Court of Appeal to have put their judgment on any such ground.

For these reasons, I think the curator was entitled to succeed in his action and that the appeal ought to be allowed.

ANGLIN J.—I agree with the view apparently taken by the learned judges of the Court of King's Bench that enough was established in evidence to raise a presumption that the defendant's wife believed that Sheldon was insolvent when she obtained the money in question from him. As he was in fact insolvent, that belief, in my opinion, constituted knowledge of his insolvency within the meaning of article 1036 C.C. But, with respect, I cannot accept the conclusion reached by the learned appellate judges that the plaintiff's action is barred by article 1927 C.C.

His right as curator is to recover all the property of the insolvent debtor, including what he has alienated in fraud of his creditors. Money paid gratuitously by an insolvent is deemed to have been paid in fraud of creditors (art. 1034 C.C.). This applies to the sum of $7,841, fictitious profits paid to the defendant's wife, which would, therefore, be recoverable without proof of the knowledge required by article 1036 C.C., under which the balance of $5,942, paid to re-

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coup moneys deposited with Sheldon by the defendant, is claimed.

The curator represents the creditors as well as the insolvent debtor. But I cannot think that his right to get in the assets of the insolvent estate depends upon the enforceability of the claims of any or of all of the insolvent's creditors. At all events, in the absence of conclusive proof that no creditor of the insolvent estate has an enforceable claim, the curator's right to recover in this action cannot be questioned. Assuming that the claims of all the business creditors of Sheldon should fall within the bar of article 1927 C.C. (something which may not be assumed, but must be proved as against each creditor when he seeks to enforce his claim) the claims of his other creditors would have to be met and the expenses of the curatorship provided for. There is no evidence that Sheldon had not creditors other than the customers of his business; and that again may not be assumed. It may be that on the distribution of the estate many or all of the claims of the "clients" of the insolvent will turn out to be so tainted with the vice of gaming that article 1927 C.C. will preclude their recovery. But the time for considering such questions is when the period arrives for determining who are entitled to share in the distribution of the estate — not before it is realized.

It should also be noted that the defence of gaming is not even hinted at in the defendant's plea.

No other defence to the curator's claim has been suggested.

I would, therefore, allow the plaintiff's appeal with costs in this court and the Court of King's Bench and

would direct judgment for the amount of his claim also with costs.

BRODEUR J.—Il s'agit d'une action Paulienne instituée par le curateur aux biens de l'insolvable Sheldon par laquelle il demande l'annulation d'un paiement fait par ce dernier à l'intimé la veille du jour où Sheldon a laissé le pays.

Sheldon a eu pendant un temps beaucoup de notoriété à Montréal. Il avait réussi à convaincre un certain public que, par des spéculations dont il avait seul le secret, il pourrait réaliser des profits fabuleux sur les sommes qu'on voudrait lui confier. Ses opérations durèrent pendant quelques mois, lorsqu'un jour des journaux s'avisèrent de le dénoncer et de publier que tout cela devait nécessairement se terminer par un désastre. Cette campagne de presse naturellement affecta sa position financière et plusieurs de ses déposants se sont présentés pour retirer leur argent. Il parut faire face pendant quelques jours assez facilement à l'orage.

L'intimé était l'un de ces déposants. Dans le cours de la semaine qui a précédé le 10 octobre, 1910, il fut appelé par ses affaires en dehors de Montréal. Sa femme, qui était au courant de ses relations avec Sheldon, alarmée de cette campagne de presse qui se poursuivait avec plus de vigueur que jamais contre Sheldon, se présenta à son bureau le 10 octobre, 1910, pour retirer l'argent de son mari. Elle avait un fils employé chez Sheldon et il y avait aussi là parmi les employés un ancien commis de son mari, un nommé Hunton.

Elle s'adressa au commis Hunton qui prépara un chèque pour la faire signer par Sheldon mais comme

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elle était énervée ou indisposée et que Sheldon était alors absent, elle est allée pendant quelque temps se reposer au bureau de son mari, qui se trouvait dans les environs. Elle revint plus tard et Sheldon lui aurait alors promis, suivant elle, d'envoyer son chèque par son fils.

Peu satisfaite de cette promesse, elle s'est adressée à un ami, M. Cooper, et revint avec ce dernier un peu après deux heures dans l'après-midi. Là Sheldon lui donna un chèque daté du lendemain sur Garand & Terroux, banquiers privés de Montréal.

Le chèque fut pris par Mde. Mathews; mais après avoir conféré à la porte du bureau avec M. Cooper elle est rentrée de nouveau.

Alors Sheldon partit avec Mde. Mathews et M. Cooper pour aller voir ses banquiers, Garand & Terroux. Il fit un arrangement avec eux et Garand & Terroux donnèrent alors un chèque qui fut accepté par Mde. Mathews. Quelques heures après, Sheldon remettait entre les mains de Garand & Terroux des valeurs au montant de cent trente et quelques mille piastres.

Le lendemain Sheldon avait pris la fuite et laissé un déficit énorme. Ses dettes se seraient montées à au-delà de deux millions, tandis que son actif représentait à peu près vingt et quelques mille piastres.

Il s'agit de savoir si ce paiement fait par Sheldon à Mde. Mathews, dans les circonstances que je viens de relater, constitue un paiement frauduleux.

La Cour Supérieure, présidée par l'Honorable Juge Greenshields, a décidé qu'il n'y avait pas lieu d'annuler ce paiement parce qu'il n'est pas établi que Mathews connaissait alors l'insolvabilité de Sheldon.

La Cour d'Appel a été d'opinion que la connais-

sance de l'insolvabilité était prouvée; l'honorable juge Cross dit ceci:—

There is reason to say that the respondent should be held to have known that Sheldon was insolvent when he paid the money, and that the defence is, consequently, unfounded.

mais que le curateur ne pouvait pas exercer d'action pour recouvrer le montant qui avait été payé parce qu'il s'agissait d'une dette de jeu; et qu'en vertu de l'article 1927 du code civil,

Il n'y a pas d'action pour le recouvrement de deniers ou autres choses en vertu d'un contrat de jeu ou d'un pari; mais si les deniers ou les choses ont été payés par la parties qui a perdu, ils ne peuvent être répétés, à moins qu'il n'y ait preuve de fraude.

Après avoir lu la preuve, je suis d'opinion que Sheldon était insolvable lorsqu'il a fait le paiement en question et que Mathews et sa femme qui agissait en son nom connaissaient son insolvabilité.

Cette connaissance de l'insolvabilité de Sheldon résulte de plusieurs circonstances. Il est assez étrange cependant qu'on n'ait pas demandé directement à Mde. Mathews, lorsqu'elle a été examinée comme témoin, si elle connaissait ou non cette insolvabilité. Mais je suppose qu'elle aurait déclaré, comme cela se fait d'ailleurs souvent dans des circonstances semblables, qu'elle n'en connaissait rien.

D'un autre côté, quels sont les faits ? Voici un homme dont les opérations étaient dénoncées dans la presse depuis plusieurs jours. Il avait, il est vrai, répondu à ces attaques; mais la nature de ses réponses avait ébranlé la confiance du public. On représentait dans les journaux que ses opérations devaient nécessairement conduire au désastre, qu'il était impossible qu'il pût payer les profits considérables qu'il prétendait et qu'un de ces jours les déposants seraient exposés à perdre l'argent qu'ils auraient placé là.

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Cette femme a été profondément affectée par ces dénonciations; elle déclarait le samedi, le 8 octobre, que si elle vivait jusqu'au lundi (sachant qu'aucune opération ne pouvait se faire le dimanche) elle irait certainement chercher son argent.

Nous la trouvons le lundi suivant au bureau de Sheldon; nous la voyons insister pour être payée; on veut la faire temporiser mais elle revient à la charge à deux ou trois reprises. On lui donne en définitive un chèque payable le lendemain. Elle n'est pas satisfaite de cela; il lui faut son argent de suite. On la mène chez les banquiers privés sur qui le chèque est tiré; et, chose singulière, elle accepte de préférence le chèque de ces banquiers privés à celui de Sheldon.

Maintenant il ne faut pas oublier qu'elle avait là dans le bureau un ami dans la personne de Hunton, un ancien employé de son mari. Elle avait aussi son fils qui devait nécessairement connaître quelque peu la situation financière de Sheldon et les difficultés auxquelles il était en butte.

Mais laissons de côté la connaissance qu'elle pouvait avoir acquise par ces deux personnes. Il est évident qu'elle avait perdu confiance dans la solvabilité de Sheldon et la présomption raisonnable à tirer de toutes les circonstances c'est qu'elle connaissait son insolvabilité.

Maintenant la Cour d'Appel a décidé que c'était une dette de jeu pour laquelle il n'y avait pas d'action en répétition. Examinons ce point.

Je ne crois pas qu'on puisse traiter de contrat de jeu les relations de Mathews et de Sheldon; mais en supposant même que ce serait une dette de jeu que le failli a payé, est-ce que l'action Paulienne ne compète pas aux créanciers, ou à leur représentant, le curateur,

dans ce cas-là ? Je suppose pour un instant le cas d'un débiteur insolvable qui a une dette de jeu et une dette légitime et qui paie ces deux dettes-là à des créanciers qui connaissent son insolvabilité. Il n'y a pas de doute que sous les dispositions de l'article 1036 C.C. le paiement de la dette légitime doit être annulé et le créancier peut être forcé de remettre la chose reçu. Serait-ce à dire que le paiement de la dette de jeu ne serait pas susceptible d'être soumis à l'action révocatoire de la part des autres créanciers ? Il me semble que poser la question c'est la résoudre.

Si le créancier légitime est exposé à voir annuler son paiement, il doit en être de même du créancier dont la dette repose sur une illégalité; autrement ce serait le créancier illégitime qui serait plus favorisé que le créancier légitime.

L'article du code civil qui prohibe l'action en répétition dans le cas d'une dette de jeu ne dit pas que l'action Paulienne par les créanciers du débiteur ne peut pas être exercée. Je vois que la Cour d'Appel a confondu ces deux actions qui sont régies par des principes différents.

Le débiteur qui a fait un paiement ne peut pas lui-même réclamer l'argent qu'il a payé, même si en faisant ce paiement il a fraudé ses créanciers. Il ne peut pas non plus répéter l'argent qu'il a donné pour une dette de jeu. Mais si en payant sa dette de jeu ou en acquittant ses créances légitimes il était insolvable à la connaissance de ceux qui ont reçu ces paiements, alors ses autres créanciers et le curateur à la faillite peuvent, sous les dispositions de l'article 1036, non pas exercer l'action en répétition, mais prendre une action Paulienne pour faire annuler ses paiements et en faire

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rentrer le montant dans la masse pour le bénéfice de tous les créanciers.

Je suis donc d'opinion que l'appel est bien fondé et qu'il doit être maintenu avec dépens.

*Appeal allowed with costs.*

Solicitors for the appellants: *Chauvin, Baker & Walker.*

Solicitors for the respondent: *Elliott & David.*