

second, as to whether defendants had acquired a title as against the plaintiff. Subsequently the plaintiff having acquired title to the same property through the original grantee of the Crown, applied under section 140 of the Act for leave to file a second caveat setting up such title without removal or dismissal of his caveat already filed.

Held, that such application could not be granted, for the Court has no jurisdiction to order the filing of a new caveat until after the discharge, lapse or withdrawal of an existing caveat.

Mathers, for plaintiff. *Heap*, for defendants.

Richards, J.]

NEWTON v. SILLY.

[April 26.]

*Fraudulent preference—Assignments Act, R.S.M., 1902, c. 8, ss. 38-42—
Novation—Rescission of contract partly performed.*

A. M. Monat & Co., general merchants, being indebted to the defendants, the Gault Bros. Co., Limited, amongst other creditors, and not making payments satisfactory to the Gaults, the latter pressed them for payment though not in a peremptory manner. The defendant, Silly, then offered to buy out Monat & Co.'s stock in trade if the Gaults would accept him as their debtor in the place of Monat & Co. The Gaults having agreed to do so, Silly bought the stock at 82½ cents on the dollar and bound himself to Monat & Co. to pay their debt to Gaults and to procure a release from Gaults to them. He then paid to Monat & Co. in cash the difference between the purchase money and the amount of their debt to Gaults and bound himself to Gaults to pay Monat & Co.'s debt to them and procured from Gaults and delivered to Monat & Co. a release to them in full. This release involved the release also of Gault's claim against one Brown, a guarantor of Monat & Co.'s debt to them to the extent of \$1,200. Silly paid Gaults a part of the debt before this action. Within sixty days after the novation Monat & Co. made an assignment to the plaintiff as official assignee for the benefit of their creditors, and plaintiff then brought this action to set aside the transaction between the defendants, Silly and the Gaults as being fraudulent and void as against the plaintiffs and the creditors of Monat & Co. According to the finding of the trial judge, Gaults did not know Monat & Co. to be insolvent or have reasonable ground for suspecting that they were at the time when the arrangement was entered into, but entered into it partly because they thought Silly likely to be prompter in making payment than Monat & Co. and partly because they wished to secure him as a customer and expected to get him as such as a result of the arrangement.

Held, that as the contract had been partly performed and the parties could not be placed in substantially the same position as they occupied before it was made, it should not be rescinded. Giving the Gaults a right to rank on the estate, for dividends would not restore to them their rights