THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JUNE 15TH, 1907).

VOL. X. TORONTO, JUNE 20, 1907. NO. 5

FALCONBRIDGE, C.J. JUNE 10TH, 1907.

CHAMBERS.

RE SHUPE v. YOUNG.

Division Court—Territorial Jurisdiction — Action on Contract — Provision in Contract as to Forum for Action — Waiver of Statute Making such Provisions Illegal—Effect of.

Motion by defendant for prohibition to the 4th Division Court in the county of York. The cause of action did not wholly arise in nor did defendant reside within the territory of the Division Court, but the contract sued upon contained a clause providing that any action arising upon it might be brought where plaintiff carried on business, and waiving the benefit of 6 Edw. VII. ch. 19, sec. 22.

G. H. Kilmer, for defendant.

T. J. Robertson, Newmarket, for plaintiff.

FALCONBRIDGE, C.J.:—The Act of 1906 (6 Edw. VII. ch. 19, sec. 22) was passed expressly to protect persons like defendant from the operation of contracts compelling them to come from the other end of the province to defend themselves in the Court of the division where the plaintiff resides and carries on business. The ingenious attempt is here made to evade the statute by the addition of the words "and I hereby waive my right to the benefit of the Act 6 Edw. VII. ch. 19, sec. 22." This "waiver" is a "proviso, condition, stipulation, agreement, or statement" which provides for the place of trial. To allow the purchaser when making his

contract to waive his "right to the benefit of the Act," would be to deprive him of the protection provided for him by the Act, and the Act would become absolutely a dead letter.

Order made for prohibition with costs.

BRITTON, J. JUNE 10TH, 1907.

TRIAL.

VIVIAN v. CLERGUE.

Vendor and Purchaser—Contract for Sale of Mining Property —Action to Recover Instalments of Purchase Money—Land not Conveyed to Purchaser but Possession Given—Terms of Agreement—Effect of Subsequent Agreement—Rectification — Action for Damages — Election to Treat Contract as Rescinded.

An action to recover money under an agreement for the sale of mining property in the districts of Algoma and Nipissing.

W. M. Douglas, K.C., and A. H. F. Lefroy, for plaintiffs.

W. E. Middleton, for defendant.

BRITTON, J.:—Plaintiffs by their agent on 20th June, 1903, offered to sell to defendant property consisting of 3,066½ acres for $125,000, payable as follows: $500 as a deposit upon signing the agreement; $4,500 upon completion of purchase; and $120,000 in 5 yearly instalments of $24,000 each in 1, 2, 3, 4, and 5 years from date of offer, with interest at 5 per cent. per annum, at the time of each instalment, on the whole amount that might from time to time remain unpaid. The purchase was to be completed on 15th July, 1903, at the office of Lefroy & Boulton, Toronto, and defendant was then to be given possession. It was further stipulated and made part of the offer that defendant, as soon as he had paid three-fifths of the total purchase money, together with all interest accrued on the whole, should be entitled to call for a transfer of the lands, upon a good and sufficient first charge and mortgage being executed upon the whole of said lands to the vendors to secure payment to them

of the balance of the purchase money and interest. Defendant was to have until 15th July, 1903, to examine the title, etc. The vendors were to pay proportion of taxes and insurance up to date of offer, and after that date defendant was to assume them. Then the offer contained this special proviso: "Time shall in all respects be of the essence of the agreement of sale, and unless the payments are punctually made at the time and in the manner above mentioned, and if such default shall occur before the execution of the transfer and of the charge of mortgage above mentioned, the agreement of sale shall be null and void and the sale cancelled, and in that event, you shall have no right to recover any part of the purchase money already paid."

On 23rd June defendant accepted the offer in these words: "I do hereby accept on behalf of myself or assigns the above offer and do agree to become the purchaser of the lands mentioned in it, upon the terms and conditions therein contained. T. Clergue."

A supplemental agreement was made as to ore extracted from the land before payment in full of the purchase money, but this is not material for consideration in this action.

On 15th July, 1903, plaintiffs accepted from defendant his promissory note for $4,500, at 4 months from that date, in lieu of the cash instalment, and defendant was allowed to go into possession of the lands. Defendant put a person in charge of these lands as caretaker, and the authority of this person has never been questioned or countermanded. The note was not paid at maturity, and plaintiffs recovered judgment for the amount of it and interest, and that judgment has been paid.

On 23rd June, 1904, there fell due the instalment of principal of $24,000 and interest for one year on $120,000 at 5 per cent., amounting to $6,000, making $30,000. This was not paid.

On 19th January, 1905, defendant assigned his rights under the agreement to "The Standard Mining Company of Algoma, Limited," and on 10th March, 1905, plaintiffs, the Standard Mining Co., and defendant entered into a new agreement by which plaintiffs were to sell this same property to that company for $125,000, on which the original deposit or payment of $500 by defendant was to be credited. Of the balance, $4,500 together with interest and costs, represented by the judgment against defendant, was to be paid within one month, and the yearly instalments were to be paid

on 23rd June in the years 1905, 1906, 1907, 1908, and 1909, together with interest to be computed from 23rd June, 1903. This agrement is a very elaborate and carefully prepared instrument, but it is not necessary for my present purpose to refer to any of its provisions other than the following:—

(1) The mining company were not to be given possession of the lands until the judgment for $4,500 and interest and costs and a further sum sufficient to make $10,000 had been paid.

(2) Upon the execution and delivery of that agreement the mining company were for all purposes substituted for and in the place of defendant with respect to the first agreement, . . . which was to be deemed merged in the latter agreement, subject to this, that the latter agreement and anything that might be done thereunder should not affect or prejudice the claim of plaintiffs against defendant in respect of the sum of $24,000 which fell due on 23rd June, 1904, and that maturing on 23rd June, 1905, or upon the interest on the unpaid purchase money up to the date of the assignment, viz., 19th January, 1905, or prejudice the right of defendant with reference thereto, but until the purchasers shall pay the first and second instalments of $24,000 each, with interest as aforesaid, the rights of plaintiffs and defendant shall remain as then existing in respect of these instalments and interest. That agreement recited that plaintiffs made the claim, as now sued for, and that defendant resisted that claim, asserting that there was not any personal liability on his part for anything beyond the judgment recovered upon his note for $4,500.

This action is therefore brought to recover the amount due 23rd June, 1904, on principal $24,000, the part of the instalment due 23rd June, 1905, say 7-12 of 24,000, or $14,000, and interest for 1 year and 7 months from 23rd June, 1903, to 19th January, 1905, on $120,000, say $9,500, in all approximately $47,500.

The defendant alleges that it was expressly understood and agreed that he was not to be personally liable for any amount beyond the deposit and the promissory note given by him, and he asks, in case there is liability under that agreement as it stands, that it be reformed to make it express the true intention of the parties.

No case has been made upon the evidence for reformation.

Apart from and in addition to the action brought by plaintiffs against defendant upon the note, they commenced another action by writ issued on 27th January, 1904, for damages for breach of contract. This, so far as appears, went no farther than the writ — at all events it was not brought to trial.

Defendant now contends that plaintiffs, by bringing that action for damages by reason of defendant's default, treated the contract as at an end, and defendant invokes the provision in the contract that "upon default the contract shall be null and void." If plaintiffs had proceeded with their action and had been defeated, or had recovered damages, the matter would have been different, but not having done so, defendant never having given up possession of the land, and having regard to the agreement of 10th March, 1905, I must treat the former agreement as in force as of that date.

It is contended that, as there was no conveyance of the lands to defendant, no part of the purchase price agreed upon can be recovered from him. In the absence of special agreement, the actual conveyance of the land delivered or ready for delivery is a condition precedent to the recovery of purchase money, but here by express agreement the conveyance was not to be made until payment of 3-5 of the purchase money, together with all interest, had been made.

I find that defendant is liable for the instalment which fell due on 23rd June, 1904.

The rights of the parties must now be determined as they stood on 10th March, 1905. At that time plaintiffs could not have successfully sued for the instalment falling due on 23rd June, 1905. That agreement does not provide for future instalments. After that agreement was executed, plaintiffs were not at any time able to convey to the defendant from whom they were demanding payment. They were demanding payment of something of right theirs, and as to which their right was protected and continued by the agreement, and they were demanding a further sum not recoverable by plaintiffs from defendant on 10th March, 1905, and so not recoverable now. Plaintiffs as to anything maturing after the date of the last agreement are in the same position as if they had taken possession by reason of defendant's default and sold the property to another. To entitle plaintiffs to sue now, apart from what the agreement permits, they would have to be in readiness to do their part. See

Wilks v. Smith, 10 M. & W. 355. I do not regard this case as in conflict with Laird v. Prim, 7 M. & W. 474; see Mattock v. Kingslake, 10 A. & E. 50. . . .

Judgment for plaintiffs for $33,556.70 with costs.

BOYD, C. JUNE 10TH, 1907.

TRIAL.

LAMONT v. WINGER.

Fraud and Misrepresentation—Purchase of Property—False Representations as to Business — Findings on Evidence—Dismissal of Action—Suspicious Circumstances—Costs.

Action to rescind an agreement for the purchase of a creamery, etc., upon the ground of misrepresentations.

BOYD, C.:—The decisive issue upon the record is raised by the 6th paragraph of the claim: "The plaintiffs, relying on the statements contained in said book prepared by Fred. Smith, as agent for the defendant, and upon the further asurance by the defendant to the plaintiffs that the statement so prepared and delivered was correct, agreed to purchase the said properties and plant." The evidence in support of this charge is given by one witness only, viz., the plaintiff Lawrence, in these words: "Mr. Mitchell and I went to see Mr. Winger and took that book with us and shewed it to Mr. Winger, and I asked him if that statement was correct, and he said to the best of his belief it was." He says further about this conversation: "We want your assurance that we are perfectly safe in buying the creameries on that statement, and that that statement is correct." Mr. Winger said: "You are perfectly safe in buying the creameries on that statement." . . . Mr. Mitchell was not examined—he is said to be in Scotland. Mr. Winger negatives giving any such assurance or vouching for the accuracy of the statement. He did not know personally as to the output of the business in the years covered by the statute, and could only speak from information derived from the Smiths. He kept himself, therefore, as he says, from pledging his own word as to the correctness of the statement,

though he believed that it might be depended on, as he had always found Fred. Smith to be trustworthy.

I think this particular issue presented on the record should be found in favour of defendant, and that the further evidence about safety in buying is not sufficient to satisfy the onus resting on the plaintiffs, even if the words used amount to more than an expression of opinion. It is not proved, I think, that defendant acted fraudulently in what he stated to plaintiffs.

Apart from this issue, the result of which is fatal to the success of plaintiffs, there are many circumstances of a most suspicious character in the transactions as developed in the evidence. . . . The refusal of Archibald Smith to produce the books of the creamery business for 1904 and 1905 has not been justified by any credible evidence. It is not, perhaps, very material whether defendant was owner or Archibald Smith, but I think plaintiffs understood they were dealing with Winger as the owner or an owner chiefly interested. I doubt whether the statement furnished by Fred. Smith is even approximately accurate as to the output of 1905, but, on the other hand, the evidence is halting as to the receipts from the Canadian Pacific Railway Company of butter shipped for the year 1905, being inclusive of all the output for that year. . . . The truth probably is that there was a considerable shrinkage in the operations of 1905, which was not disclosed by the Smiths, but I am not sure that it was known to defendant Winger before the close of the sale. I may suspect, but in a case of this kind the proof should be more satisfactory than I find it here.

The main issue tendered has to be decided in favour of defendant, and as to so much of the litigation he should have his costs. But as to the rest of the contention, I do not find that he or his associates, the Smiths, have so cleared themselves of suspicion or have acted so commendably as to merit an award of costs in their favour. To save the expense and delay of apportionment, I now direct that the action shall be dismissed, and that one-half the costs of litigation shal be paid by plaintiffs to defendant; otherwise no costs to or against either party.

JUNE 10TH, 1907.

DIVISIONAL COURT.

OSBORNE v. DEAN.

Carrier — Ship — Detention of Goods Carried — Replevin— Damages—Freight—Demmurrage—Costs—Set-off.

Appeal by defendant from judgment of MACMAHON, J., 9 O. W. R. 889.

F. E. Hodgins, K.C., for defendant.

W. A. Finlayson, Midland, for plaintiffs.

THE COURT (MULOCK, C.J., ANGLIN, J., RIDDELL, J.), dismissed the appeal with costs.

JUNE 10TH, 1907.

DIVISIONAL COURT.

WEBB v. HAMILTON.

Fraudulent Conveyance — Action to Set aside — Absence of Knowledge of Fraudulent Intent on Part of Grantee.

Appeal by defendant Anderson from judgment of MABEE, J., in favour of plaintiff in an action to set aside a conveyance of land by defendant Isaac Hamilton to defendant Anderson, in the circumstances stated below.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. Cowan, K.C., for appellant.

J. M. McEvoy, London, for plaintiff.

RIDDELL, J.:—The plaintiff had brought an action of slander against the defendants Isaac and Elizabeth Hamilton, and that being set for trial at Sarnia, the defendant Isaac Hamilton made a conveyance on 28th September, 1905, of certain property, a house and lot in the hamlet of Court-

right, to his sister, the defendant Anderson, for the alleged consideration of $800. The action went down to trial, and on 4th October resulted in a judgment by consent for plaintiff for $1 damages and costs. These costs were taxed at $268.29. On 26th December, 1905, this action was brought against Isaac and Elizabeth Hamilton and Mary Anderson to set aside the conveyance as a fraud upon the plaintiff. . . . My brother Mabee set aside the conveyance as fraudulent, and ordered the defendants to pay the costs. Mary Anderson now appeals.

The trial Judge has found as follows: "I have no hesitation whatever in arriving at the conclusion that this was a scheme upon the part of the defendant Isaac Hamilton to get this house and lot in such a position, along with this other property, that this plaintiff would not be able to reach it in the event of her getting an execution; that his sister Mary Anderson knew of his desire to get his property out of his hands; and that she, as his sister, desiring to assist him, lent herself to him as a means of ridding himself of this property in order that the plaintiff might not be able to reach it if she got an execution against him."

If this conclusion be supported by the evidence, it is clear that the judgment must stand—the matter is concluded by the judgment of the Court of Appeal in Cameron v. Cusack, 17 A. R. 489. I adopt the language of Osler, J.A., at p. 493: "I take the law to be that if the purchaser knows that the intent of the grantor is to defraud his creditors, the fact that he has paid a valuable consideration, and that the property was intended to pass to him, will not avail him. There must be bona fides on his part, that is to say, ignorance of the fraudulent intent on the part of the vendor. . . . The plaintiff . . was not a creditor . , , was, however, a person within the protection (the word is wrongly printed "prohibition") of the statute of Elizabeth, and entitled, in recovering judgment, to attack any transaction devised and contrived to hinder, delay, or defraud" her.

The sole question is whether the findings of the trial Judge are right. As to the defendant Isaac Hamilton there can be no question: he candidly admits that one of his objects in selling was to protect himself from the plaintiff. As to the defendant Anderson, while she knew of the litigation pending, and that this "lawing" was making her brother's residence in Courtright uncomfortable, I am unable, after reading the evidence more than once, to find that

she had any knowledge of the fraudulent intent of her brother. She had money of her own, she was accustomed to do business for herself with this money, she had lent the brother money at least once before, she had had dealings with property, the price alleged to be paid was a reasonable one. All the defendants deny that any conversation took place about the law suit at the time the alleged bargain was made; the law suit is said not to have been a topic of conversation in the family, as it was a "dirty one," and beyond question $465 of the $800 purchase money was paid by the purchaser to the vendor. Even if we were to say that the defendants are not worthy of belief, the furthest that would take us would be to disregard their evidence altogether, not to find as a fact the reverse of what they depose to. I think that it may fairly be said to be proved for the plaintiff that Isaac Hamilton was in possession of funds from which he might have handed over to his sister the money she is alleged to have paid him, and that the transaction throughout is a suspicious one. But beyond suspicion the case does not go; and in a case of this kind suspicion is not enough. There must be some evidence upon which the Court can proceed; the fact that the parties are brother and sister is not sufficient to shift the onus from the plaintiff. I am unable in this case to find anything upon which a trial Judge could base a finding that this "conveyance was in fact executed with the intent to delay and defeat creditors."

The principles governing are so clearly and authoritatively laid down in such cases as Cameron v. Cusack, 17 A. R. 489, Hickerson v. Parrington, 18 A. R. 635, and Gurofski v. Harris, 27 O. R. 201, that it would be useless to restate them.

"The case . . . is one of that class in which in order to defeat the deed there must be proof of an actual and express intent to defraud creditors, and the purchaser must be shewn (not suspected) to have been privy to such intent:" 18 A. R. at pp. 640, 641, per Osler, J.A.

I am of opinion that the appeal of Mary Anderson should be allowed with costs, and the action as against her be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., dissented, for reasons given in writing.

BRITTON, J. JUNE 11TH, 1907.

TRIAL.

McINTYRE v. McLAUGHLIN.

Vendor and Purchaser—Contract for Sale of Land—Mistake as to Quantity—Reformation of Contract—Specific Performance — Absence of Misrepresentation — Removal of Timber by Vendor—Deduction from Purchase Money.

Action for reformation of a contract for the purchase by plaintiff for $2,700 of part of lot 24 in the 14th concession of Enniskillen, and for specific performance of the contract as reformed. Counterclaim by defendant for specific performance of the contract as drawn up and executed.

A. Weir, K.C., and F. W. Wilson, Petrolia, for plaintiff.

J. Cowan, K.C., for defendant.

BRITTON, J.:—The contract is in writing and is for the south 100 acres of the lot. Plaintiff alleges that he bought the south half of the lot. The lot contains 210.3 acres.

At the close of the trial, and for reasons then given, I dismissed plaintiff's action for reformation of the agreement and for specific performance of the agreement as contended for.

Defendant counterclaims and asks to have the written agreement specifically performed.

I find that plaintiff supposed he was buying the south half of the lot, and not the south 100 acres.

This is a case where there has been a misrepresentation, and there is no ambiguity in the terms of the contract. I cannot find upon the evidence what may fairly be considered legal grounds for the mistake so as to disentitle defendant to the performance by plaintiff of the contract as asked in the counterclaim.

Tamplin v. James, 15 Ch. D. 215, 217, cited by defendant, seems very much in point on the facts under consideration.

If an injustice would be done plaintiff, performance of the contract would not be enforced, although he would be liable in damages, and upon this record I would be bound to assess the damages.

If I could say that the conversation between one Henry Sutton and defendant, in plaintiff's hearing, as to the point where the end of the line defining the northern limit of the

land defendant was offering for sale would be, was definite enough to amount to misrepresentation by defendant, even if innocent misrepresentation, specific performance would not be enforced. It was not urged at the trial that there was any intentional misrepresentation—that, of course, would be fraud.

Defendant is entitled to have the contract performed. See Powell v. Smith, L. R. 14 Eq. 1; Morley v. Clavering, 29 Beav. 84; Needler v. Campbell, 17 Gr. 592; Williams v. Felder, 7 Gr. 345; Campbell v. Edwards, 24 Gr. 152; Garrand v. Mukil, 30 Beav. 445; May v. Platt, [1900] 1 Ch. 616.

Defendant has removed some timber. He was not careful of plaintiff's rights after the agreement. Plaintiff is entitled to a deduction of $40. . . . The down timber belonged to the land. Plaintiff is entitled to the benefit of that: McNeil v. Haines, 17 O. R. 479; Honeywood v. Honeywood, L. R. 18 Eq. 306.

There is nothing in the objection that defendant was not ready to convey, or that the money was not ready on plaintiff's behalf. . . .

Upon payment within one month of $2,660 and interest at 5 per cent. from 15th December to date of payment by plaintiff to defendant, plaintiff is to be entitled to a conveyance of the south 100 acres of lot 24. . . .

As plaintiff fails upon the matters in controversy, he must pay costs. Plaintiffs action dismissed with costs. Judgment for defendant upon his . . . counterclaim for specific performance as above without costs. . . .

TEETZEL, J. JUNE 12TH, 1907.

CHAMBERS.

ILLSLEY AND HORN v. TORONTO HOTEL CO.

Parties—Assignment of Claims—Action Brought in Name of Assignors — Want of Substantial Interest — Insolvency — Motion to Dismiss Action — Security for Costs — Authority of Solicitors — Correspondence—Costs.

Appeal by defendants from order of Master in Chambers, 9 O. W. R. 935, refusing motion by defendants for an order under Rule 616 dismissing the action, on the ground that

plaintiffs had no substantial interest in it, or in the alternative under Rule 1198 for security for costs.

H. E. Rose, for defendants.

A. B. Morine, for plaintiffs.

Teetzel, J.:—There can be no doubt that the action was begun pursuant to a retainer duly given on behalf of plaintiffs to their solicitor. It is manifest that the Imperial Bank are largely interested in the fruits of the action, but it is also clear, I think, that, while the bank hold transfers of moneys payable under the contract set forth in the statement of claim, plaintiffs are necessary parties to any action on the contract. Notwithstanding the evidence of plaintiff Horn, who seems to have now thrown in his lot with defendants, I do not think it has been made to appear that the action is really the action of the Imperial Bank, or that plaintiffs Illsley and Horn are insolvent. As stated by the Chancellor in Pritchard v. Pattison, 1 O. L. R. at p. 41, "Very clear proof should be given of the status and lack of substantial interest of the plaintiff in litigation begun by him, before the Court should intercept it at the outset by an order for security for costs." . . .

[Reference to Major v. Mackenzie, 17 P. R. 18; Gordon v. Armstrong, 16 P. R. 432.]

On the ground that defendants have not, in my opinion, given clear proof either of the insolvency of all the plaintiffs or that they have no substantial interest in the litigation begun by them—and under the authorities both these conditions must be met by defendants—the appeal must be dismissed with costs to plaintiffs in any event.

Falconbridge, C.J. June 12th, 1907.

CHAMBERS.

HAMILTON v. HAMILTON, GRIMSBY, AND BEAMSVILLE ELECTRIC R. W. CO.

Costs—Taxation—Counsel Fee—Trial or Assessment of Damages—Special Circumstances.

Appeal by defendants from the certificate of Mr. Thom, senior taxing officer. The only item complained of was his

allowance of counsel fee of $125 at the trial. He applied item 153 of the tariff, "fee with brief at trial." The defendants submitted that there was only an assessment of damages, and that item 152, "fee with brief on assessment, $10," applied.

J. G. Gauld, Hamilton, for defendants.

W. A. H. Duff, Hamilton, for plaintiff.

FALCONBRIDGE, C.J.:—The action was one for damages for personal injuries. The defendants entered no appearance and filed no statement of defence. Notice of assessment was served by posting up. Both plaintiff and defendants issued commissions and took evidence thereunder in the State of New York. Defendants also obtained an order in Chambers for the examination of the plaintiff by medical practitioners. The case came on for trial (or assessment) at the Hamilton assizes. It was spoken to on one day and stood over until the next. The case was reached at 5 p.m., when the trial was begun, and continued until 7 p.m., when it was adjourned until 9.30 the next morning, and lasted from that time until 2 p.m. There was a verdict for plaintiff for $7,500, from which the defendants appealed to the Court of Appeal and were unsuccessful in the appeal.

It would be a manifest hardship that under these circumstances the allowance for counsel fee should be limited to $10, but it may be that item 152 is the only applicable.

However, I think (though with diffidence) that the following considerations may prevail to sustain the taxing officer's judgment: there was no interlocutory judgment in the case, and there was no admission upon the record of the liability of the defendants; on the opening of the case counsel for defendants admitted that they did not intend to contest liability, and the only matter tried out was the quantum of damages. Gath v. Howarth, [1884] W. N. 99, is not in point, as there interlocutory judgment had been signed.

I think, in view of all the special circumstances of this case, it may be treated as a trial and not an assessment, and plaintiff's appeal will therefore be dismissed. There will be no costs of this appeal.

TEETZEL, J. JUNE 12TH, 1907.

WEEKLY COURT.

LESLIE v. TOWNSHIP OF MALAHIDE.

Municipal Corporation—Settlement of Action against—Resolution of Council Adopting Offer of Settlement—Absence of By-law and Corporate Seal—Settlement not Binding on Corporation—Rescission of Resolution — Unexecuted Consideration.

Appeal by plaintiff from ruling of local Master at St. Thomas.

W. E. Middleton, for plaintiff.

W. K. Cameron, St. Thomas, for defendants.

TEETZEL, J.:—Plaintiff obtained a judgment against defendants for $4,000 and interest, for money advanced by plaintiff for defendants' use, which judgment was varied on appeal by direction that the amount should be reduced by any sum defendants could establish against plaintiff in respect of certain claims for damages set up by defendants, and it was referred to the Master at St. Thomas to inquire and state the amount of such damages. Further directions and the costs of the action and reference were reserved, but the costs of appeal were to be paid by defendants in any event.

After the reference had been entered upon by the Master and some evidence taken, the reference was adjourned. Pending the adjournment, and at the suggestion of plaintiff, a special meeting of defendants' council was held, on 26th January, 1907, to discuss settlement. At this meeting plaintiff submitted an offer to accept $4,750 in full settlement of his claim, defendants to pay all costs up to reference, and plaintiff to pay the costs of the reference.

A resolution was unanimously adopted accepting the offer, and another resolution passed authorizing the reeve to notify defendants' solicitors that the case was settled, and instructing them to stay all proceedings.

No by-law was passed in reference to the matter, nor was the resolution or any memorandum of the settlement authenticated by defendants' corporate seal.

On 23rd January, 1907, counsel for both parties appeared before the Master and stated that the case had been settled, and after recording the resolution evidencing the settlement, the Master adjourned the reference.

On 12th February another special meeting of defendants' council was held, at which a resolution was passed rescinding the resolutions of 23rd January.

When the matter came again before the Master, counsel for defendants stated that defendants had repudiated any settlement, and desired to proceed with the reference. This being opposed, the Master, without objection, proceeded to take evidence as to the validity of the settlement, and ruled that the settlement was not binding on defendants. While other reasons are assigned by the Master, the objection chiefly relied upon was the absence of the corporate seal.

Plaintiff now appeals from the Master's ruling.

In discussing the question how a municipal corporation can be bound by contract, the fact must be kept in mind that the council is not the corporation.

Under the Municipal Act, the "inhabitants of every county, city, town, village, township," etc., are "a body corporate," and by sec. 10 "the powers of every body corporate under this Act shall be exercisable by the council thereof;" and sec. 325 enacts that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for;" and sec. 333 enacts that "every by-law shall be under the seal of the corporation," etc.

As shewing the tendency of legislation in regard to the necessity for municipal councils exercising their powers by by-law, it may be noted that sec. 326 of the Municipal Act, R. S. O. 1897 ch. 223, provided that "every council may make regulations," etc., but by 3 Edw. VII. ch. 18, sec. 70, this was amended by inserting the words "by by-law" after the word "may" in sec. 326.

This amendment was shortly after Liverpool and Milton R. W. Co. v. Town of Liverpool, 33 S. C. R. 180, holding that the regulations there in question could only be made by by-law.

Argument of counsel for the appellant was based on the contention that the agreement of settlement in this case was founded upon an executed consideration, and therefore neither a by-law authorizing the settlement nor an agreement authenticated by the seal of the corporation need be shewn in order to bind the corporation, as was held in Mac-

artney v. County of Haldimand, 10 O. L. R. 668, 6 O. W. R. 805; Lawford v. Billericay, [1903] 1 K. B. 772; Bernardin v. Municipality of North Dufferin, 19 S. C. R. 581.

The principle adopted in those cases is that where the plaintiff has done work or supplied property to a municipal corporation for purposes for which the corporation was created, and the work done or the property supplied is accepted by the corporation, and the whole consideration is executed, there is a contract to pay implied, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect to the work done or property supplied. . . .

[Reference to the Bernardin case, per Gwynne, J., at p. 595.]

My difficulty in the present case is in holding that the whole consideration for defendants' promise or undertaking was in fact executed by plaintiff, so as to bring his case within the above authorities.

It cannot be said that the whole consideration consisted of the money for which plaintiff holds his judgment, because, in addition to this, the subject matter of the settlement involved the adjustment of defendants' claims for damages and the question of costs of the action and reference, which had not been adjudged to be payable by either party.

The terms of the settlement, besides fixing the balance of defendants' liability for the debt, embraced a promise by plaintiff to assume and pay the costs of the reference, and a promise by defendants to assume and pay all the other costs of the action. It was, therefore, an agreement comprising two express promises, apart from defendants' liability under the judgment, which promises were mutual in their nature, and, consequently, a part of the consideration was executory. See Leake on Contracts, 5th ed., pp. 5, 27, and 432.

In my opinion, therefore, the case does not come within the authorities which are based upon agreements wherein the consideration was wholly executed.

It is not necessary in this case to consider whether the action of the council comes within the limitations of the word "powers" in sec. 325, for the purpose of determining whether or not a formal by-law was required authorizing the agreement, because I am of opinion that, whether it does or not, the agreement of settlement would require to be authenticated by defendants' corporate seal.

Independently of statutory requirements, the principle of the common law applicable to a corporation is that, it being an intangible, invisible creation of the law, it must have some tangible and visible method of expressing its will in a by-law or its assent to a contract. See Biggar's Municipal Manual, p. 41.

As stated by Rolfe, B., in Mayor of Ludlow v. Charleton, 6 M. & W. 815, at p. 823: "It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience."

As affecting municipal corporations, the only exceptions to the rule that a corporation can only act by its seal, are in regard to, first, insignificant matters of every day occurrence, or matters of convenience amounting almost to necessity; second, where the consideration has been fully executed, as in the cases firstly above cited; and, thirdly, contracts in the name of the corporation made by agents or representatives who are authorized under the seal of the corporation to make such contracts.

The nature and importance of the agreement in question are such that it clearly could not come within the first exception; I have already excluded it from the second; and there is no evidence to bring it within the third.

In Mayor of Oxford v. Crow, [1893] 3 Ch. 535, where a proposal had been accepted by a committee of the council, subject to the council's approval, and the approval of the council was afterwards granted by resolution, but not under seal, it was held that the contract not having been under the seal of the corporation or signed on their behalf by any person authorized under seal to do so, or ratified under seal, or part performed or acted on, could not be enforced by the corporation.

As illustrating that the Courts of this country require that contracts of municipal corporations should be strictly in compliance with their powers, Waterous Engine Works Co. v. Town of Palmerston, 20 O. R. 411, affirmed 19 A. R. 47, and 21 S. C. R. 56, may be referred to, where it was held

that a contract for the purchase of a steam fire engine which remained executory in the sense that no acceptance of the engine had taken place, could not be enforced against a municipal corporation unless a by-law authorizing the purchase had been passed under the Municipal Act, even although the contract to purchase was under the corporate seal, and a bill of exchange for the price had been accepted by the mayor.

The appeal must be dismissed with costs.

RIDDELL, J. JUNE 13TH, 1907.

CHAMBERS.

CLISDELL v. LOVELL.

Evidence — Motion for Interim Injunction — Examination of Witnesses in Support of—Refusal to Answer Questions—Rule 491 — Relevancy of Questions — Full Disclosure — Party to Action—Duty to Prepare for Examination—Production of Documents—Duty of Examiner—Fraud—Privilege—Examination of Solicitor as Witness—Discovery—Costs.

Motion by plaintiffs to commit defendant Lovell and H. J. Wright and Massey Morris for refusal to answer certain questions upon their examination as witnesses upon a pending motion for an interim injunction.

The motion came up for disposition after refusal of defendants to give an undertaking suggested in an opinion reported in 9 O. W. R. 687.

W. N .Tilley, for plaintiffs.

W H. Blake, K.C., for defendant Lovell and others.

R. S. Cassels, for defendant Case and the George A. Case Co. Limited.

J. H. Moss, for H. J. Wright.

RIDDELL, J.:—I have set out the material facts of this case in my former memorandum, in part reported 9 O. W. R. 687.

The defendants, as was their undoubted right, have declined to give the undertaking suggested; the plaintiffs have filed their statement of claim. I now proceed to dispose of the motion.

So long as Rule 491 remains a rule of practice, I think any party to an action having in good faith served a notice of motion may insist upon the attendance for examination of any witness; and, speaking generally, insist upon such witness answering all relevant questions as though he were called at the trial. Of course, it may happen that there is some preliminary question first to be disposed of, but in general full disclosure must be made: cf. Northern Iron and Steel Co. v. Solway & Cohen, 9 O. W. R. 709.

The defendant Lovell is a clerk in the office of Messrs. Blake, Lash, & Cassels, solicitors, and is the trustee through whom the transaction was carried out. That firm used his name in "the correspondence that passed shewing the negotiations with respect to the purchase and the carrying out of the purchase, and the disputes arising and how those disputes were settled." Lovell says he has not the custody of these, and the member of that firm who attended on the examination refused to produce them. A letter was written, probably more than one, by that firm to England, and one at least was signed by Lovell. Lovell does not know the contents of these letters, the whole matter having been in the hands of Mr. Anglin.

He must make all proper investigation to enable him to produce all documents in his power, and must produce them in the examiner's office, which were written to or by the said firm as solicitors for Mackenzie, in connection with this purchase, etc. Such of these documents as shew, or tend to shew, that the purchase was in reality for Case, or Case and his associates, must be allowed to be put in evidence. Any document as to which the witness pledges his oath that it does not, in his opinion, so tend, may be ruled upon by the examiner, subject to motion in the usual way. Counsel for the plaintiffs will not be entitled to see the document in respect of which the examiner rules adversely. See Williams v. Quebrada R. L. & C. Co., [1895] 2 Ch. at pp. 757, 758.

Upon the argument of the question of admissibility, after the examiner has expressed his opinion in favour of admitting any document, counsel for all parties have a right to be heard. After argument the examiner may adhere to his ruling, in which case the document will be admitted, or change it, in which case the document will not be admitted.

Charges of fraud having been made apparently in good faith against Mackenzie, privilege does not exist: Rex v. Cox, 14 Q. B. D. 153; Williams v. Quebrada R. L. & C. Co., [1895] 2 Ch. 751.

If the defendant Lovell is unable, for any reason, to give the discovery sought, I shall under Rule 493 make an order for the examination of Mr. Anglin or such other witness as may be necessary.

(2) Mr. Wright has all the papers of his client Foster in a box. These he will produce in the examiner's office, except such as are communications between solicitor and client; these are in the case of Mr. Foster privileged. The strictly regular course to pursue is for Mr. Wright at the examination to produce and put in, if asked, all papers bearing upon the issue, pledging his oath as to the remainder, the examiner ruling upon such as are not put in, as in the case of Lovell. Mr. Wright cannot be compelled in advance to go over the papers and arrange them or divide them into such as he thinks should and should not go in. No doubt, the good sense of counsel for the plaintiff will find a way to avoid the great waste of time this course would necessitate. No doubt, Mr. Wright will, upon being paid a reasonable fee for his loss of time, go over the papers in advance and arrange them suitably. Mr. Wright, not being a party, need not produce his docket or make any inquiry to qualify himself to speak by hearsay—he may do either if he desires. He need not answer from anything but his own knowledge.

(3) Massey Morris is the banker through whom Mackenzie had the transaction carried out. He will produce all correspondence between the Toronto branch and the head office of the Canadian Bank of Commerce, and all correspondence and other papers relating to the purchase; so far as these tend to shew that the purchase was for Case or Case and his associates, they are relevant and are to be admitted in evidence; the Master will rule as in Lovell's case.

I reserve to plaintiffs leave to apply upon notice for any further or other order necessary to enable them to obtain full discovery.

The costs of this application will be to the plaintiffs in any event, as against Lovell and the Dominion Brewery Company Limited, except as to so much thereof as may have been occasioned by including in this motion the motion against Mr. Wright; as to these extra costs, there will be no order. None of the witnesses is entitled to the costs of appearing upon this motion.

The witnesses will attend at their own expense to be further examined.

TEETZEL, J. MAY 22ND, 1907.

TRIAL.

WADE v. ELLIOTT.

Bankruptcy and Insolvency — Assignment by Insolvent for Benefit of Creditors — Action by Assignee to Set aside Chattel Mortgage and Land Mortgage made by Insolvent—Previous Agreement—Absence of Knowledge of Insolvency by Mortgagee—Imputed Knowledge.

Action by Osler Wade, assignee in trust for the benefit of creditors of defendant James H. Drinkwalter, to set aside, as fraudulent and void and preferential as against the creditors of defendant Drinkwalter, a chattel mortgage executed by him to defendant Robert A. Elliott, on 25th October, 1906, for $1,000 on all his strock in trade, comprised in his general store at the village of Centreton, and a land mortgage on his farm in the township of Haldimand, for the same sum, as collateral security. Defendant Elliott, who had been carrying on a general store at Centreton, entered into an agreement (which was in writing) dated 29th January, 1906, to sell the business to Drinkwalter, at 85 cents on the dollar, of the stock and fixtures as inventoried, payable half cash, and balance in 4 equal payments, spread over one year. The agreement contained this provision: "I also agree to give Robert A. Elliott, as security, mortgage on said stock till paid for, above stock to be kept up to the standard stock now carried, insurance loss, if any, payable to Robert A. Elliott." This agreement was carried into effect in March, 1906, defendant Drinkwalter then delivering to Elliott two promissory notes, one for $400 dated 16th March, 1906, payable 6 months after date, with interest at 6 per cent., at the Dominion Bank, Cobourg, purporting to be made by himself and his brother-in-law Lewis Harnden, and the other for the same amount and same interest, of the same date, payable 9 months after date, purporting to be made by himself and his uncle Frank Waite. The chattel mortgage was not then executed. Drinkwalter paid the accrued interest on the first of the two $400 notes, about the time it matured, and agreed to pay off the principal in two payments of $200, within one month thereafter. He failed in this, and, Harnden having denied his liability as maker on the note, Elliott applied to Drinkwalter for the security by way of chattel mortgage which the agreement of sale provided for. Upon

the execution of that mortgage at Centreton, it was agreed that the land mortgage, which was a third mortgage on the farm, should be executed two days later, by which a considerable extension of time was given to Drinkwalter to pay his indebtedness to Elliott, and Drinkwalter then received back the two notes for $400, and a further note for $175, which had been accepted by Elliott as part of the cash payment of $800.

These mortgages were duly registered and filed. On 1st November Drinkwalter, on the application of the agent of the plaintiff Wade, executed the assignment.

There was no evidence to support the allegation that defendant Drinkwalter was insolvent, to the knowledge of defendant Elliott, unless knowledge ought necessarily to be imputed from the mere fact of the non-payment of the $400 note referred to.

Waite, who was called as a witness on behalf of defendant Elliott, denied that he had ever joined with Drinkwalter in the making of a $400 note. There was no question of the validity of the note for $175, which made up part of the cash payment of $800.

Defendant Elliott asserted that the transaction was entered into by him in good faith, without any fraudulent intent, and without knowing or having reason to believe that Drinkwalter was insolvent, and without the purpose or intent of injuring, defeating, or delaying Drinkwalter's creditors, and that he believed the fact to be that Drinkwalter, at the time he executed the securities and made the assignment, was not in insolvent circumstances, and that he had no knowledge to the contrary.

The action was tried before TEETZEL, J., at the Toronto non-jury sittings on 21st and 22nd May, 1907.

A. C. McMaster, for plaintiff.

F. M. Field, Cobourg, and J. H. Spence, for defendant Elliott.

TEETZEL, J.:—I think the plaintiff in this case has failed, for the reason that the defendant Elliott has satisfied the burden which the law casts upon him, by shewing that at the time he took the chattel mortgage in question he did not know and had no reason to believe that the debtor was insolvent or unable to pay his debts in full. The case is not nearly so strong upon its facts in regard to any knowledge which might be imputed to the defendant as the

Privy Council case which has been cited by Mr. McMaster. In that case there was, it appears, abundant evidence to create, upon the part of any one who knew the facts related there, the honest conviction that the debtor was insolvent, from the default that he had made in meeting his cheques and drafts.

Here, the only circumstances which seem to me to have been present to the mind of the defendant Elliott were, first, the circumstance that his own account had not been paid—his own note for $400 as collateral to the general indebtedness was not paid by the maker on its maturity. When he met the debtor the debtor told him that he had had some trouble or difficulty, and I should say—although it is not very clear—that he told him he had been called upon to pay $175, part of which he did not owe, which had taken the ready money he had promised to pay, the $200 which he had promised to pay in two weeks, and another $200 in another two weeks after that, so as to remove the whole of the $400 liability, he having paid the interest up to 1st September. The only other circumstance is that these promised payments were not made, and that in response to his request sent to the banker to hustle the other maker of the note he was informed that there was some trouble about the note, that the maker was in some way repudiating it, and on the next day made up his mind that he would secure the account or have it paid, and in pursuance of that decision prepared a chattel mortgage and took it to the debtor to be signed. Now there is no evidence that he knew that there was any claim outstanding against the debtor at that time, other than his own. It may be said that he ought to have known there must be something owing for a portion of the stock, at any rate for the goods by which the stock had been increased since the debtor purchased the business from defendant; but the stock was there to represent the indebtedness, and there was nothing brought to the mind of defendant which would apprise him of any shrinking in the value of the property which he sold to the debtor in the previous March, and nothing to indicate that the debtor was in any way embarrassed—I mean to say in the sense of being unable to realize upon the estate all he owed. The mere fact that a man does not make payments promptly on maturity is not, in itself, sufficient to cast upon any one the onus of a knowledge that the debtor is insolvent.

There is no doubt there was an understanding when he

sold the goods that he was, if necessary, to be given security upon them, and there is no doubt, upon the authorities cited by Mr. McMaster, that an unregistered chattel mortgage which is held under an agreement that it shall not be registered is a void chattel mortgage from the beginning, that nothing private can be agreed upon between the maker of the mortgage and the mortgagee; but, except in the case referred to, I find no case in which a bona fide agreement to give security vitiates a chattel mortgage honestly given without knowledge of insolvency and without any intention of giving an unjust preference over other creditors. It may be that because he had a prior agreement, which was not carried out by reason of the fact that carrying it out would have embarrassed the credit of the debtor, makes the burden all the more incumbent upon the defendant, and at the same time more difficult to satisfy, of convincing the Court that when he did take the chattel mortgage he did so with honesty of purpose and in good faith, and without knowledge or belief that he was getting an unjust preference on the estate of the insolvent debtor.

Whether such is the case or not, I think it cannot be said in this case that the defendant was aware of such facts and circumstances when he took the chattel mortgage as would make it void as against creditors. I think the case is governed by the case which has been cited of Baldocchi v. Spada, 7 O. W. R. 325, 8 O. W. R. 705, and which was affirmed by the Supreme Court, a copy of the judgment of which has been furnished to me.

It seems to me that it would be going a long way to hold that what was laid down in that case is of no avail to the defendant by reason of the fact that he took the agreement from the debtor when he sold the goods that he should have security upon them, or the fact that the security was not given in order that the credit of the debtor might not be destroyed. Even if the existence of such an agreement would in any sense destroy the validity of the chattel mortgage, even taken under circumstances in the best of good faith, I think that in this case it would not have relation, at any rate, to the real estate mortgage, which was taken as further collateral. There was no agreement for that, and it seems to me that, even if plaintiff succeeds against the chattel mortgage on that ground, it does not apply to the real estate mortgage, which I also find was taken by defendant without his knowing or having reason to believe that the debtor was insolvent.

I think the action should be dismissed with costs.

I do not base the judgment at all upon any finding that the debtor in giving the chattel mortgage was actuated by any desire to get rid of the danger of a criminal prosecution in respect of the two notes; I do not find that that was a moving cause, but I find that the moving cause was an honest desire to secure the defendant here for the debt, and I am not able to find that the debtor himself appreciated that he was insolvent and unable, eventually, to pay all his charges.

MACMAHON, J. JUNE 12TH, 1907.

TRIAL.

DAVIES CO. v. WELDON.

Money Paid—Failure of Consideration—Action to Recover—Defence of Repayment—Conflicting Evidence — Credibility —Surrounding Circumstances.

Action to recover $800 alleged to have been overpaid to defendant upon a running account between plaintiffs and defendant, and to recover interest thereon.

W. E. Middleton, for plaintiffs.

A. J. Russell Snow, for defendant.

MACMAHON, J.:—Plaintiffs, through their agent T. E. Colwell, commenced purchasing hogs from defendant in July, 1905, and deposited money from time to time to Colwell's credit in the Dominion Bank at Whitby, and Colwell made advances to defendant, as required, sometimes by sending cheques direct to the Dominion Bank at Lindsay, where defendant kept his account, to be credited to him therein, sometimes by cheques payable to defendant's order. The amounts remitted by Colwell were usually considerable, ranging from $800 to $2,100, the whole amount totalling $13,903, the receipt of which defendant did not dispute.

Of the above amount, $800 was a cheque sent by Colwell on 5th July, 1905, payable to the credit of defendant at the Lindsay bank.

Defendant said this $800 cheque was sent in consequence of a representation made by him to Colwell that he was shipping some hogs belonging to one Graham, as well as others he had purchased, and required the additional sum to pay Graham; but that Graham being then unable to ship, the matter was overlooked until the first part of August, when Colwell spoke to him over the telephone about the $800, and

said that the Graham hogs had not materialized, and therefore his account was overdrawn; that he (defendant) replied that it was, and if he (Colwell) would meet defendant in Toronto he would give him back the money; that they did meet at the Maple Leaf hotel in Toronto, some time in the early part of August, when he said he paid Colwell the $800 in bank bills. . . .

[There was some corroboration of this by two witnesses who said that in the summer of 1905 they saw defendant counting out money in the hotel mentioned and handing it over to Colwell. The latter said that a settlement did take place at the hotel on 17th August, 1905, but that no money was paid; that a balance of $1,228.40 was then ascertained in defendant's favour, for which a cheque was afterwards sent to him. It was not until more than a year after that, that plaintiffs' bookkeeper discovered that Colwell had omitted to charge the $800 to defendant in his return of moneys paid out by him to defendant, although the $800 cheque was charged by the Dominion Bank at Whitby against Colwell's account. The evidence and correspondence are set out at length in the judgment. The learned Judge proceeded:]

I accept Colwell's statement that through an oversight the entry of the $800 cheque was not transferred from his diary to the ledger, and was therefore not taken into account in the settlements of 17th August and 13th September, 1905.

The correspondence and the surrounding circumstances are all against defendant, and I prefer to credit those and the evidence of Colwell in reaching a conclusion rather than the evidence of defendant and the witnesses he called.

There will be judgment for plaintiffs for $800 with interest from 1st January, 1906, and costs of suit.

FALCONBRIDGE, C.J. JUNE 13TH, 1907.

WEEKLY COURT.

RE MORTON.

Will — Construction — Estate during Widowhood—No Devise over—Widow Taking in Fee Subject to Bequests in the Event of Re-marriage.

Motion by the widow of George Sherry Morton, deceased, for an order determining certain questions arising upon the construction of the will.

C. J. Holman, K.C., for Susannah Morton, widow.

W. H. Blake, K.C., for Phœbe Holbert and Mark Morton, brother and sister of testator.

S. Masson, Belleville, for other brothers and sisters of testator.

FALCONBRIDGE, C.J.:—The following is the will:—

"First, I hereby will that William Henry Morton, of the township of Huntingdon, be my sole executor.

"Second, I will and bequeath all the property of which I am possessed, both real and personal, to my wife Susannah Morton, for her sole use and benefit so long as she remains my widow, but in the event of her marrying again then I will that my sister Phœbe Holbert be paid from my estate the sum of $500, also I will that in case my wife marries again my brother Mark Morton be paid the sum of $500 from my estate."

The first question is whether the widow takes an estate in fee subject to the payment to Phœbe Holbert and Mark Morton of the sum of $500 each in the event of the widow re-marrying. I have no doubt that the answer to this question ought to be in the affirmative. There is no disposition made of the balance of the estate should she re-marry. This fact not only involves the application of the rule that the Court will lean against an intestacy, but I think that it also throws light upon the main question. In other words, I think it plain that what the testator intended was that the sole penalty which he imposed upon her in the event of her marrying again was to pay these two sums. If the testator had intended any further or other diminution of the provision which he made for the widow, he would, no doubt, have made a direction as to whether Phœbe Holbert and Mark Morton should take the $500 each in addition to their distributive share as on an intestacy.

The nearest authority to which I have been referred is In re Mumby, 8 O. L. R. 286, 4 O. W. R. 10. It is not exactly in point, but it is to some extent on the same lines.

The answer will, therefore, be that she is entitled to the fee simple in the land, and an absolute interest in the personalty, subject only to the before-mentioned payments in the event of her re-marrying. This judgment renders it unnecessary to answer the other questions. As I think that the point was quite arguable, I must give costs to all parties out of the estate, even though that means costs payable by the widow.