Rose, J.] [Feb. 21.

COSGRAVE BREWING CO. v. STAIRS.

Guarantee to firm—Death of partner—Notice determining guarantee.

By an agreement under seal made between C. & Co., a firm of brewers, consisting of C. and his two sons of the first part, Q. of the second part, and defendant of the third part, defendant agreed to become responsible in a continuing guarantee of $5,000 to C. & Co., or its members for the time being constituting the firm of C. & Co., for beer to be supplied to Q., so long as C. & Co. desire to sell and Q. to purchase same. On 6th September, 1881, C. died, Q.'s liability then being $5,248. By C.'s will he appointed his said two sons his executors. They continued to carry on the business, and shortly afterwards entered into partnership under the same name, C. & Co. On 2nd October, 1882, the assets of the then firm were conveyed to one D., in trust for a joint stock company to be formed, and on its incorporation on 13th December following the assets were conveyed to the company, the present plaintiffs. Q. continued to be supplied with goods, and on 1st June, 1883, when the action was commenced, the indebtedness was over $5,000, but that since C.'s death more than $5,248—the then liability—had been paid by Q. In an action against defendant under the agreement to recover the $5,000—the amount of his guarantee,

Held, by the death of C. a change in the firm was constituted, and the defendant was thereby released from any further liability under the agreement; and the evidence showed that the amount of indebtedness at C.'s death had been paid.

On 1st April, in consequence of Q. falling into irregular habits, defendant notified the then firm not to supply Q. with any more goods. The evidence showed that the firm was aware that Q.'s business was not in a satisfactory state.

Semble, that this would put an end to defendant's liability, if not before put an end to.

Osler, Q.C., and *Eddis*, for the plaintiffs.

Aylesworth, for the defendants.

CHANCERY DIVISION.

DIVISIONAL COURT.

[Feb. 21.

MCEWAN v. MILNE.

Fraud—Onus of proof.

The ordinary rule being that where there is "weakness on one side and extortion and advantage taken of that weakness on the other," the onus is upon the party likely to control the other to shew that the transaction was fair, just and reasonable, if it is impeached, and that, although the existence of confidence might be an ingredient in proving "influence" still "influence" is not to be presumed from the existence of confidence.

Held, that even if confidence had existed, which was not satisfactorily proved, it was not sufficient to throw the onus of proving that the sale and conveyance herein were not fraudulent or the effect of undue influence.

R. Meredith, for appeal.

Cassels, Q.C., contra.

SORENSON v. SMART.

Res Judicata.

A. having supplied B. with goods, and being in the habit of advancing money on cheques or orders on C., for whom B. was doing contract work, brought his action in 1880 for the amount due him, and among other items gave credit for $300 received on one of the orders. B. pleaded never indebted, *payment* and set off. At the trial B proved that in addition to the $300 order he had given a $475 order dated May 3, 1879, to A., and contended that both had been given as payment, while A. contended that he was only to give credit for what he received on the orders, and that he had received nothing on the latter. A verdict was entered and enforced in favour of A. for the amount he claimed.

B. now alleges that two days after the trial he discovered that A. had given another $300 which he had not given credit for, but he did not move to set aside or reduce A.'s verdict and brings this action to recover the $300 which he thus alleges A. has received twice, and sets up that he gave A. an order for $300