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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*VANZANT v. COATES.

Gift—Parent and Child—Voluntary Conveyance of Land by Mother to Daughter—Undue Influence—Fiduciary Relation—Onus—Evidence—Public Policy—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of MULOCK, C.J. Ex., 39 O.L.R. 557, 12 O.W.N. 239.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., LENNOX, J., and FERGUSON, J.A.

George Wilkie, for the appellant.

Frank Arnoldi, K.C., for the defendant, respondent.

FERGUSON, J.A., read the judgment of the Court. After a full discussion of the evidence and a review of the leading cases, he said that the learned trial Judge had found against the appellant, and the Court could not say either that his findings of fact were not supported by the evidence, or that, in arriving at his conclusions of law, he erred in the law or its application to the facts as they appeared in evidence.

Appeal dismissed with costs.

* This case and all others so marked to be reported in the Ontario Law Reports.

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*RE ORR.

Will—Validity of Bequests—Charitable Bequests—Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, sec. 2(2)—Advancement of Religion—Christian Science Church—Public Policy—Perpetuities—Benefit to Community—"Uplift of Needy"—Uncertain Bequest — Invalidity — "Deserving People" — Residuary Bequest—Trust—Validity—"For God only"—Invalid Bequest Falling into Residue—Administration of Fund by Court—Reference to Propound Scheme—Costs.

Appeal by the Church of Christ, Scientist, and the persons claiming under those provisions of the will of the testatrix which had been declared to be invalid, against that part of the judgment of SUTHERLAND, J., which so declared; and appeal by Mary Cameron, claiming as next of kin of Mary Helen Orr, deceased, against the judgment in so far as it declared to be valid a bequest of $10,000 to the Mother Church, Boston, "to be used for spreading the truth," a bequest of $10,000 towards the encouragement of building Christian Science churches, and a bequest for the benefit of those who are endeavouring to "uplift the needy in Chicago." The judgment of SUTHERLAND, J., is noted in 12 O.W.N. 220.

The appeals were heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., LENNOX, J., and FERGUSON, J.A.

I. F. Hellmuth, K.C., and E. C. Cattanach, for the appellants in the main appeal.

R. J. McLaughlin, K.C., and T. H. Stinson, for Mary Cameron and the Corporation of the Town of Bobcaygeon.

J. A. Paterson, K.C., for the next of kin of the father of the testatrix.

Daniel O'Connell, for the next of kin of the mother of the testatrix.

E. D. Armour, K.C., for the Official Guardian.

T. Stewart, for the executors and trustees.

MEREDITH, C.J.O., read a judgment in which he set forth the provisions of the will and stated the contentions which were made upon the appeal. The bequests were the following:—

(1) The Mother Church, Boston, $10,000 to be used in spreading the truth.

(2) $10,000 towards encouraging those building C. S. churches, to be distributed in smaller or larger sums as may be wise, from $100 to $300 to each church.

(3) $10,000 to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually.

(4) $10,000 for the benefit of those who are endeavouring to uplift the needy in Chicago such as Miss Jane Addams, United Charities, and whatever may seem to require assistance.

(5) $5,000 to be used for any necessary or uplifting purpose among father's kin.

(6) $5,000 to be similarly used among mother's kin.

(7) $50,000 will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near, and universal for all who will receive. These institutions may take the place of what at present are called hospitals, poor-houses, gaols, and penitentiaries, or any place that is maintained for the uplifting of humanity.

(8) $10,000 as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilised in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in "Science and Health with Key to the Scriptures" by Mary Baker Eddy.

(9) The whole of my estate must be used "for God only."

The validity of all the bequests, except 3, 5, and 6, was attacked by the appellant Mary Cameron: (1) and (2) as being contrary to public policy; (4) as not being a charitable bequest and being void for uncertainty; (7) as not being a charitable bequest and being void for uncertainty and offending the rule against perpetuities; (8) as not being a charitable bequest and being void for uncertainty; (9) as not being a dispositive provision or a declaration of trust, or, if one or other, as being incapable of execution on account of its indefiniteness and so void.

The objections to bequests (1) and (2) were not well-founded.

Bequest (4) was clearly a charitable one and valid.

Bequest (7) was valid.

As to bequest (8), the learned Chief Justice, with some hesitation, concluded that it was void for indefiniteness.

Bequest (9) was a valid declaration of trust as to the estate of the testatrix not effectually disposed of by her will, and the trust was a good charitable bequest for religious purposes.

If any of the previous bequests were invalid, the money bequeathed by them fell into the residue and was impressed with the trust for religious purposes; and the Court would execute the trust and administer the fund by means of a scheme.

The learned Chief Justice, in dealing with each bequest, gave reasons for his views, and cited many authorities.

The appeal of the appellant Mary Cameron, he said, should be dismissed, and the appeal of the other appellants allowed, with a declaration that bequests (4), (7), and (9) are valid and effectual, that bequest (8) falls into the residue; and there should be a reference to the Master to propound a scheme for the application of the residuary estate.

The costs of all parties should be paid out of the residuary estate—those of the executors and trustees between solicitor and client.

MACLAREN and MAGEE, JJ.A., and LENNOX, J., concurred with the Chief Justice.

FERGUSON, J.A., reached the same result, for reasons given in writing.

Judgment as stated by the Chief Justice.

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*ONTARIO HUGHES-OWENS LIMITED v. OTTAWA ELECTRIC R.W. CO.

Negligence—Street Railway—Collision of Street-car with Automobile—Negligence of Driver of Street-car—Finding of Jury not Supported by Evidence — Judicature Act, sec. 27—Ultimate Negligence—New Trial.

Appeal by the defendant company from the judgment of SUTHERLAND, J., at the trial, upon the findings of a jury, in favour of the plaintiff company for the recovery of $754.23 damages and costs, in an action for injury to the plaintiff company's automobile in a collision with a street-car of the defendants in a highway, by reason of the negligence of the defendant company's motorman, as the plaintiff company alleged.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Taylor McVeity, for the appellant company.

A. E. Fripp, K.C., for the plaintiff company, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the plaintiff company's chauffeur convicted himself of negligence by his own testimony. He arrived on the scene, operating the car, and when coming into Dalhousie street, which runs north and south, he found his view to the south obstructed by a building. He blew his horn and slowed up, moved ahead to go across the street, and when he got out so that he could see up the street, he sighted the street-car. He was then "going so slow" that he "could not get up speed to go across the street to get to the other side in time."

The trial Judge, in charging the jury, put it as if the chauffeur was in a position of danger at the moment and had to act suddenly, and that the very best judgment was not to be expected of him in such circumstances; but in the evidence there was no trace of such a crisis. The chauffeur thought he could run northward while the street-car slowed down, he crossing ahead of it— he had it in full view when he made this decision. Before he got across, he was struck by the car—he called the speed of the car terrific. If his evidence as to speed was correct, he was extremely foolish to try to cross. He was, on his own shewing, perfectly safe, and his car was under control, and he chose to take a step either utterly foolish or quite unwise and unjustifiable, having regard to the approaching street-car, whether it was going at high speed or not. The finding of the jury acquitting him of negligence could not be supported. It was a case in which the powers given by sec. 27 of the Judicature Act should be exercised and the finding set aside.

There remained the question whether the principle underlying the decision in Loach v. British Columbia Electric R.W. Co., [1916] 1 A.C. 719, was applicable—the principle that ultimate negligence may be established either by an act occurring after the effects of the contributing negligence has been spent and the crisis has supervened, or by a condition created negligently prior to the emergency, but still operating so as to prevent any immediate act from being effective. The jury in this case found that the defendant company's negligence consisted in excessive speed and neglect in not perceiving the motor-car sooner and then not exercising precaution to avert a possible accident. Consideration of the respective negligent acts and apportionment of the proper

consequences of each in turn was something to which the jury should have had their attention directed.

Since the Loach case at least, the practice of leaving to the jury the question (as put in that case), "If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident?" should be followed in every instance where contributory negligence is alleged, unless the facts clearly exclude any inference of ultimate negligence. The point of time at which ultimate or second negligence may be said to arise is when the person at fault became aware, or should have become aware, of the danger of the other person.

The judgment below should be set aside and there should be a new trial; costs of the appeal should be paid by the plaintiff company, and costs of the former trial should be to the successful party in the cause.

New trial ordered.

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Insurance—Fire Insurance—Notice by Insurer Terminating Insurance—Service by Registered Letter—Tender of Unearned Portion of Premium by Enclosing Money in Letter—Letter not actually Received by Assured—Insurance Act, R.S.O. 1914 ch. 183, sec. 194, conditions 11, 15.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 12 O.W.N. 399.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. C. Kingstone, for the appellant.

R. S. Robertson, for the defendants, respondents.

HODGINS, J.A., read a judgment in which he said that among the defences was one setting up that the action was premature under sec. 89 of the Insurance Act, R.S.O. 1914 ch. 183, and sec. 194, condition 22. The respondents (defendants) had, since the argument, abandoned this defence, on terms.

There remained, therefore, only the point decided by the trial Judge, upon the defence that the respondents had validly cancelled the policy under statutory conditions 11 and 15. This was effected, as they contended, by mailing to the appellant, in a registered letter addressed to her, "F. Veltre, Esq., 82-4-6 Claremont St., Thorold, Ont.," a notice cancelling the policy, and by enclosing in this letter the respondents' cheque for $11.34, "being the unearned premium for balance of the current term of policy," giving its number. The letter containing the notice and money was never delivered to or received by the appellant until after the fire.

The sole question raised was, whether the method thus adopted was an effective compliance with the conditions which require a tender of the unearned premium as well as the giving of notice.

It was held by the trial Judge that, "if the notice putting an end to the policy, the distinct end aimed at, could be given in writing by registered letter, the tender of the unearned portion of the premium may be made in the same way."

With this conclusion, said HODGINS, J.A., he was unable to agree. While it was true that the end aimed at was cancellation, that object was not achieved by a mere notice, but required also a tender of the unearned premium. The giving of notice by letter did not complete the cancellation: it was only one step or element, the other being in effect the payment of the money. The reason for the return of the unearned premium was twofold: it would be inequitable, on cancellation, to retain it; and the assured is entitled to have in hand the money wherewith to insure elsewhere. The result of the trial judgment was to enable the respondents to cancel the policy without the assured being aware of it, and therefore being unable to protect herself by insuring elsewhere. A tender of the money, if personal, left the assured in no doubt of the position and free to safeguard herself by seeking another company. It seemed unjust to deprive her of all the protection against loss by fire, while leaving her in fact under the belief that she was still insured—unless required to do so by very clear words in the conditions endorsed upon the policy.

Under condition 11, there are two things to be done and done at the same time. One is to give a 7 days' notice, not necessarily in writing, and the other is to tender therewith a ratable proportion of the premium paid. The essentials of a valid tender (unless waived) are, actual money, precise amount, and personal offering. Where the insurer is required to calculate the amount, which is not known to the assured nor its return expected, it is reasonable that the assured should have the right to insist on all these essen-

tials, unless they are waived. The notice is entirely the act of the insurer, but the tender must have the assent of the assured if it is to be made otherwise than as by law required. The word "therewith" does not wipe out any safeguard thrown around a tender for the protection of the person who is, till that moment, entitled to enforce the contract.

Upon the point that, as to the notice itself, posting alone is sufficient, Skillings v. Royal Insurance Co. (1902-3), 4 O.L.R. 123, 6 O.L.R. 401, expresses the proper view to be taken where the act in question is cancellation by post-letter, and does not wholly turn on the improper address. Where what is to be accomplished by a notice is cancellation of an existing contract, and that notice is unexpected by the other party, and till received is still subject to recall, it can be effective, in terminating the obligation, only if and when it reaches that other party.

Pursuant to the terms agreed upon between the parties in consideration of the abandonment of the other defence, the judgment will be set aside and judgment will be entered for the appellant for the money secured by the policy, without costs of action or appeal.

MAGEE, J.A., for reasons stated in writing, agreed in the result.

MACLAREN and FERGUSON, JJ.A., also agreed in the result.

MEREDITH, C.J.O., read a dissenting judgment.

Appeal allowed; MEREDITH, C.J.O., *dissenting.*

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*WILLARD v. BLOOM.

Practice—Interpleader Order—Unauthorised Service of Notice upon Person Residing abroad Made Plaintiff in Issue—Person Served not Appearing upon Motion—Application to Set aside Order—Order Going beyond Notice—Ex Parte Order—Rules 3 (b), (j), 25, 217, 629, 630.

Appeal by Adolf Blitz from the order of LATCHFORD, J., 12 O.W.N. 305.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. J. Boland, for the appellant.

H. S. White, for the plaintiff, respondent.

The judgment of the Court was read by HODGINS, J.A., who said that LATCHFORD, J., had refused to set aside, as being made ex parte, an order of SUTHERLAND, J., dated the 10th September, 1916, permitting the plaintiff to pay into Court the amount of two promissory notes made by him, and held by Blitz, the appellant, in Chicago, where he resided. The notes were given in Ontario in payment for 500 shares of the stock of an incorporated company, and the order purported to rectify the share-register of that company by substituting the name of the plaintiff for that of the defendant Bloom as the owner of these 500 shares. The notes themselves were in Chicago, and were transferred in the United States to the defendant Blitz during their currency. The order of SUTHERLAND, J., also directed the trial of an interpleader issue to determine the right to the money to be paid into Court—the appellant to be plaintiff in the issue, and one Gauld, who asserted a claim in right of the defendant Bloom, to be defendant. The order was made after a notice of motion had been served on the 3rd September, 1916, in Chicago, upon the appellant, for an order authorising the plaintiff to pay into Court the amount owing upon the two notes, and directing the Registrar of the Court to execute a transfer to the plaintiff of the company-shares, "and for such further or other order as to the said Court may seem just." There was no mention of an interpleader order being sought nor of rectification of the share-register. Upon the return of the notice, the appellant did not appear, and the order was made as above. Reference to Rules 3 (*b*), (*j*), 25, 217, 629, 630; Re Confederation Life Association and Cordingly (1900), 19 P.R. 89; In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer, [1891] 3 Ch. 451; In re King & Co.'s Trade Mark, [1892] 2 Ch. 462; Spence v. Parkes, [1900] 2 I.R. 619.

No permission was obtained from the Court to issue or serve the notice which reached the appellant; and, as process, it was "an absolute nullity:" Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670, 684. See also Pennington v. Morley (1902), 3 O.L.R. 514.

What was ordered went quite beyond what was notified—treating the notice of motion as information.

Both upon the ground that the service of the notice was unauthorised and therefore null and void as process, and upon

the ground that, if treated as informal notice only, it gave no correct information as to what the Court was to be asked to do, and was therefore, as to the matters complained of, no notice at all, the order of SUTHERLAND, J., was an ex parte order within Rule 217, and should have been set aside by LATCHFORD, J.

His order should be reversed and an order made setting aside the order of SUTHERLAND, J., as having been made *ex parte*, and directing payment out of the money in Court to the plaintiff, who should pay the costs of the appellant of his motion for leave to move to set aside the order and of his motion to set it aside; no costs of the appeal.

Appeal allowed.

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Highway—Village Street—Assumption by By-law of County Corporation—Highway Improvement Act, R.S.O. 1914 ch. 40, secs. 4 (1), 5 (1)—Power not Confined to Highways in Townships—Exemption of Townships from Burden of Maintenance of Road—Special Act, 26 Vict. ch. 13—Sec. 15 of new Act—Good Roads Expenditure—Action to Set aside By-law—Locus Standi of Village Corporation to Maintain—Absence of Injurious Affection—Municipal Act, sec. 285—Policy of Act as to Quashing By-laws—Discretion of Court.

Appeal by the defendant county corporation and cross-appeal by the plaintiff village corporation from the judgment of SUTHERLAND, J., 12 O.W.N. 370.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. W. Marquis, for the defendant corporation.

A. C. Kingstone, for the plaintiff corporation.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the action was brought by the respondent village corporation for the purpose of obtaining a declaration that by-law 600 of the council of the appellant county corporation, bearing date the 3rd February, 1917, was illegal and invalid and

ultra vires of the appellant corporation, and that the respondent corporation and the other local municipalities forming the county corporation were not bound by the by-law, and that the respondent corporation was not liable to assessment or taxation under it or to meet or pay any liability or expenditure in pursuance of it, and for the purpose of having the by-law set aside or quashed or amended, and for an injunction restraining the appellant corporation from acting or proceeding in any manner under the by-law and from assessing or taxing the respondent corporation for any part of the cost or expenditure incurred under or by reason of the by-law.

The by-law purported to be passed under the authority of the Highway Improvement Act, R.S.O. 1914 ch. 40.

The principal objection was, that the appellant corporation had no jurisdiction or authority to assume, as county roads, certain roads designated by the numbers 1, 14, 16, and 18, parts of which were situated within the limits of incorporated villages and towns, without the consent of their councils. To this objection effect had been given by the trial Judge, who adjudged the by-law to be illegal and invalid in so far as it assumed the part of the Hartzel road which runs through the village of Merritton by including it in a scheme for the improvement of highways in the county—his opinion being that, having regard to the whole of the provisions of the Act, and particularly sec. 5 (1), the right of a county council to assume highways for the purposes of the Act was confined to highways in townships.

The learned Chief Justice said that he was unable to agree with this view, and could find nothing in the Act which warranted the cutting down of the comprehensive language of the principal enabling section, 4 (1): "The council of any county may by by-law adopt a plan for the improvement of highways throughout the county by assuming highways in any municipality in the county . . . ."

Reference to secs. 2 (8), 436 (1), 446 (4), 460 (1), 482 (5), of the Municipal Act, R.S.O. 1914 ch. 192; to sec. 12 (2) of the Highway Improvement Act; and to sec. 31 of the Interpretation Act, R.S.O. 1914 ch. 1; Gundry v. Pinniger (1852), 1 De G.M. & G. 502, 505; Caldwell v. McLaren (1884), 9 App. Cas. 392.

The cross-appeal was on the ground that the trial Judge should have held the by-law invalid in so far as it included in the scheme the Queenston and Grimsby road; and it was argued, in support of the cross-appeal, that this road was vested in the county corporation, not as a county road within the meaning of the Municipal Act, but vested in the county corporation as assignee

of a joint stock road company; and that certain townships in the county were, by special legislation, exempt from contributing to the maintenance of the road, but were (under the by-law) now made liable to contribute to the improvement of it, and for that reason the by-law was ultra vires and invalid: see 26 Vict. ch. 13; Regina v. Corporation of Louth (1863), 13 U.C.C.P. 615; County of Lincoln v. City of St. Catharines (1894), 21 A.R. 370.

The learned Chief Justice said that it might be assumed for the purposes of this case that the special Act (26 Vict. ch. 13) relieved the exempted municipalities not only from the cost of acquiring the road, but also from the expenditure for its upkeep; but it did not follow that they were to be relieved from the expenditure to be made upon it because it was made part of the good roads system of the county; and they were not relieved from it. Section 15 of the Highway Improvement Act authorises a county council to pass by-laws to raise by debentures the sums necessary to meet the expenditures on highways under the Act, not exceeding 2 per cent. of the equalised assessment of the county, or to provide the money out of county funds or by an annual county rate in the manner authorised by the Municipal Act. This is not in conflict with the special Act, for these expenditures are not connected with the assumption of the road by the county corporation, but are entirely different expenditures, incurred for the purposes of the Highway Improvement Act.

Moreover, the village corporation had no locus standi to bring or maintain an action to set aside the by-law on this ground: if the by-law improperly imposed a rate on the municipalities exempted by the special Act, it did not *injuriously affect* (Municipal Act, sec. 285) the village corporation, but was in ease of it.

The policy of the Municipal Act, as indicated by sec. 285, ought to be applied to an action by which it is sought to obtain a judgment quashing a by-law; or the Court, in its discretion, ought, in view of that policy, to refuse to quash the by-law.

The appeal should be allowed with costs, the action dismissed with costs, and the cross-appeal dismissed with costs.

Order accordingly.

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*GRAHAM v. CROUCHMAN.

Promissory Note—Non-negotiable Instrument—Note Given for Balance of Purchase-money of Land to Wife of Vendor—Vendor's Lien Passing with Note to Wife—Transfer of Note for Value—Equitable Assignment of Chose in Action—Right of Assignee to Sue without Making Assignor Party—Rule 85—Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 49.

Appeal by the plaintiff from the judgment of the County Court of the County of Essex in an action on a promissory note; the action was dismissed unless the plaintiff should, within 30 days, give security sufficiently indemnifying the defendant against all liability upon the note to one Ehrhardt, his wife, or any other person; if security should be given, judgment was to be entered for the plaintiff for the balance remaining due upon the note after certain deductions.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

D. L. McCarthy, K.C., for the appellant.

A. J. Gordon, for the defendant, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought to recover the amount of a promissory note for $400, made by the defendant, payable to the order of Charlotte E. Ehrhardt, dated the 1st May, 1910, and payable 12 months after date. The note was in the usual form, with the words "not negotiable" written at the end of it. It was given for the balance of the purchase-money of land sold by the husband of the payee to the wife of the defendant, to whom the land was conveyed by the vendor on the 21st April, 1910. The words "not negotiable" were added in order to prevent the note from being negotiated to the prejudice of the grantee in the event of her being unable to get possession of the land. She did not get possession until about the 23rd May following, and the defendant claimed to set off against the note the rent he or his wife had to pay during that period—$30; and this set-off the plaintiff was willing to allow. Between the date of the conveyance and its registration, executions against the goods and lands of the grantor

were placed in the sheriff's hands, and under them goods were seized which were claimed by the wife of the grantor, and an interpleader order was made, by the terms of which the wife was required to pay into Court $450 as security for the goods in the event of her failing to establish her right to them. In order to assist in raising this money, the wife sold the note to the plaintiff for $300, received the money, and endorsed and delivered the note to the plaintiff. The $450 was paid to the sheriff, and eventually a compromise was effected, by which the execution creditors were to receive $250; this sum was paid to them out of the $450; the claim of the execution creditors to the goods was abandoned; and the remainder of the $450 was returned to Ehrhardt's wife. After this payment had been made, there remained due on the executions $131.55, and this still remained due and unpaid. The execution creditors, under the erroneous impression that the executions had priority over the conveyance to the defendant's wife, gave notice to the defendant of their claim and warned him not to pay the plaintiff the amount owing on the note.

The judgment of the County Court was based on two grounds: (1) that the effect of the transaction between the plaintiff and Ehrhardt's wife was that the plaintiff became the equitable assignee of her claim upon the note, but, as the assignor was not made a party to the action, the plaintiff could not recover in this action; (2) that Ehrhardt, the vendor, was entitled to a vendor's lien for the unpaid purchase-money for which the note was given; that this lien was bound by the executions; and that the execution creditors were entitled to look to the land to the extent of the lien for payment of what remained due on their judgment; and that the defendant was entitled to set off against the amount due on the note the amount required to release the land from the lien. The effect of the judgment as entered was, that the plaintiff was required to pay the vendor's lien found to exist in favour of Ehrhardt to the extent of the amount remaining due on the executions and to indemnify the defendant against claims in respect of the lien by Ehrhardt or his wife.

The learned Chief Justice said that he was unable to comprehend the principle upon which, assuming that Ehrhardt was entitled to a vendor's lien, the relief granted against the plaintiff was warranted. The note was given by the defendant for the unpaid purchase-money, not to Ehrhardt, but to his wife; and, assuming that the note was the property of the wife—and there was nothing to shew that it was not—the vendor's lien passed with the note to the wife. Reference to O'Donoghue v. Hembroff (1872), 19 Gr. 95.

The plaintiff (appellant) was, therefore, entitled to recover the amount of the note and interest unless the judgment could be supported on the other ground.

"An assignee of a chose in action may sue in respect of it without making the assignor a party:" Rule 85. Reference to Lee v. Friedman (1909), 20 O.L.R. 49; Sovereign Bank v. International Portland Cement Co. (1907), 14 O.L.R. 511, 518; McMillan v. Orillia Export Lumber Co. (1903), 6 O.L.R. 126; Bank of British North America v. Gibson (1892), 21 O.R. 613; Hall v. Prittie (1890), 17 A.R. 306; Wood v. McAlpine (1877), 1 A.R. 234, 241.

It is settled law that sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, does not affect equitable assignments that were before the Act effectual in equity to transfer a chose in action.

The Rules, including Rule 85, having been confirmed by statute, have the force of a legislative enactment. Nothing in Rule 85 conflicts with sec. 49 of R.S.O. 1914 ch. 109—both might stand together; and, now that fusion has taken place, Rule 85, though the original of it was applicable only to suits in equity, applies to an action in the Supreme Court of Ontario, and enables an equitable assignee to sue in his own name, where, as in this case, the assignment is of the whole fund, leaving no beneficial interest in the assignor.

In England, where the assignor's interest in the subject-matter has ceased, his presence before the Court may be dispensed with: Halsbury's Laws of England, vol. 4, para. 829, p. 391; William Brandt's Sons & Co. v. Dunlop Rubber Co., [1905] A.C. 454, 462, 21 Times L.R. 710; but see Durham Brothers v. Robertson, [1898] 1 Q.B. 765, 768, 774.

In this case, the objection as to parties was not raised until the trial or after the trial, by the Judge of the County Court. Such an objection should be raised promptly: Sheehan v. Great Eastern R.W. Co. (1880), 16 Ch.D. 59, 63, 64.

Effect should not be given to the objection.

The appeal should be allowed with costs, and judgment should be entered for the plaintiff for the amount of the note, less $30, with interest at 5 per cent. per annum from its due date, with costs.

FIRST DIVISIONAL COURT. NOVEMBER 12TH, 1917.

*TAYLOR v. CITY OF GUELPH.

Assessment and Taxes—Remission of Taxes—Business Tax—Assessment Act, 1904, 4 Edw. VII. ch. 23, sec. 12, Amended by 10 Edw. VII. ch. 88, sec. 20—Powers of Court of Revision and County Court Judge on Appeal—Remission of Taxes actually Paid—Counterclaim—Abandonment.

Appeal by the defendant city corporation from the judgment of the Judge of the County Court of the County of Wellington, in favour of the plaintiff, in an action in that Court, tried without a jury.

The plaintiff was the liquidator of the Standard Fitting and Valve Company Limited; he sought to recover the amount he had paid for business tax upon the company for 1912 ($345), less the amount said to be due for the taxes of 1913 ($240), and this claim, with interest, was allowed by the Judge of the County Court.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Hugh Guthrie, K.C., S.-G. Can., for the appellant corporation.

G. L. Goetz, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the company was assessed in 1911 for $25,000 on its real property and for $15,000 for "business," and the taxes on that assessment were paid in 1912. The company was similarly assessed in 1912 and 1913. These assessments were for the purpose of imposing the taxes for the years following those in which the assessments were made; and the taxes based on the assessment of 1912 had not been paid; those based on the assessment of 1913 were not in question.

Before the 3rd June, 1913, the respondent (the liquidator) presented a petition addressed to the Court of Revision, in which it was stated that the company had been in liquidation since the 3rd July, 1911; that, since that date, the premises in which the business of the company was carried on had been vacant, except for a short period, and that the company had not carried on business "since the said date;" and the prayer of the petition was, that the Court should remit the taxes paid or to be paid by the petitioner "since the said date." The decision of the Court of Revision (3rd June, 1913) was, that the taxes for

the present year on the property of the company "be reduced to those on an assessment of $10,000, as the factory was not operated during the whole of 1912 and part of 1911, and as the said company paid full taxes in 1912, but it is understood that this reduction is not to be considered a precedent."

From this decision the respondent appealed to the Judge of the County Court, who, on the 6th August, 1913, ordered "that for the year 1912 the taxes for business assessment of the . . . company . . . amounting to $345, and one-half of the amount of taxes for business assessment for the year 1913 of the said company . . . (being for the first half of 1913) be and the same are hereby remitted from the amount of taxes due from the said company in the year 1913, and that, should there be any balance due by the city to the liquidator, the said balance be paid by the city to the liquidator."

These proceedings were taken under the provisions of sec. 112 of the Assessment Act, 4 Edw. VII. ch. 23, as amended by 10 Edw. VII. ch. 88, sec. 20.

The learned Chief Justice said that, in his opinion, neither the Court of Revision nor the County Court Judge on appeal had jurisdiction to remit or reduce taxes which had been paid. The authority to remit or reduce taxes is confined to "taxes due," and the taxes for 1912 had been paid, and were not "due" by the respondent. The word "remit" is used in the sense of abstaining from exacting payment of the taxes or allowing them to remain unpaid: Murray's Dictionary.

The respondent was not entitled to recover anything, but the appellant corporation was entitled to recover on its counterclaim —which was to recover the whole of the taxes of 1913, less so much of them as was in respect of business—but, on the argument, counsel for the appellant corporation expressed his willingness to abandon his counterclaim and to consent to its being dismissed.

The judgment of the County Court should be varied by substituting for the judgment for the respondent, a judgment dismissing the action with costs, and leaving the judgment dismissing the counterclaim to stand; and the respondent should pay the costs of the appeal.

The effect of the abandonment of the counterclaim was, that the appellant corporation gave up the whole of the taxes for 1913, and therefore more in respect of those taxes than the Court of Revision and the County Court Judge together directed to be remitted. The question of the jurisdiction of the Judge to direct the remission of the business tax for 1912, which had been paid, was thus the only question to be dealt with by this Court—and that was determined as above.

Appeal allowed.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. NOVEMBER 13TH, 1917.

GROSS v. SMITH.

Will—Action to Set aisde Will and Deed—Mental Capacity of Testatrix—Evidence—Undue Influence.

Action to set aside a testamentary writing propounded by the defendant as the will of Mary Gross, deceased, for a declaration that she died intestate, to set aside a deed, and for other relief.

The action was tried without a jury at Welland.

A. C. Kingstone and F. E. Hetherington, for the plaintiff.

W. M. German, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said, as to the alleged want of mental capacity, that the evidence strongly preponderated in the plaintiff's favour. Besides the negligible testimony of Benjamin Kelcey, who had a conversation with the testatrix at her house, which he had visited on business not connected with her, and who never knew her in her normal state, before she had a stroke in 1908, there was on the defendant's side only the evidence of the defendant and her husband.

If it were merely a case of oath against oath, the evidence of the plaintiff, as against that of the defendant and her husband, should be unhesitatingly accepted. But the plaintiff was strongly corroborated by independent witnesses. Particular importance should be attached to the evidence of Dr. Bell and of Mr. Vintes, a British Methodist Episcopal minister. This evidence was of the highest value in such an inquiry as the present: Murphy v. Lamphier (1914), 31 O.L.R. 287, at p. 296. Furthermore, "The grand criterion by which to judge whether the mind is injured or destroyed, is to ascertain the state of the memory:" per Boyd, C., in Murphy v. Lamphier, ubi supra, at p. 296, quoting the pertinent language of a Scottish Judge (Lord Cringletie).

Judged by this standard, Elizabeth Gross had not mental capacity to make either will or deed.

If necessary, there should be no hesitation in pronouncing in the plaintiff's favour on the question of undue influence, also. Joseph Kelcey and Mr. Vintes give illuminating testimony on this branch of the case.

Judgment for the plaintiff in terms of the prayer of the statement of claim, with costs.

KELLY, J. NOVEMBER 14TH, 1917.

RE DOUGLAS.

Will—Construction—Gift to Surviving Children—Relation to Period of Distribution.

Application by the trustees under the will of John R. Douglas, deceased, for a summary determination of questions arising upon the terms of the will.

The application was heard in the Weekly Court at Toronto.

J. Harley, K.C., for the trustees.

A. H. Boddy, for two sons of the testator.

W. M. McClemont, for the heirs of George Douglas, who survived the testator, but predeceased the life-tenant.

KELLY, J., in a written judgment, said that the testator, after giving directions for the payment of his debts, funeral expenses, and probate of his will, and for sale of his estate and investment of the proceeds of the sale, directed that the whole of the interest from the whole of his property that he might die possessed of, after payment of his liabilities, should be paid to his daughter, Georgiana Douglas, half-yearly, during the whole of her natural life, or during the time she should remain unmarried; in the event of her marriage, he instructed his executors to pay to her $500 and to divide the balance of his estate between "all my surviving children share and share alike; if my said daughter Georgiana Douglas remains unmarried then upon her decease I direct my said executors their heirs and assigns to divide the residue of my estate between my surviving children share and share alike."

The testator died in July, 1894, and there were then six children of his surviving, four sons and two daughters. The daughter Georgiana Douglas died in March, 1917, and at the time of her death three sons of the testator were living, namely, Thomas V. R. Douglas, Charles P. Douglas, and Harry Douglas; the testator's daughter Carrie Nesbitt and his son George Douglas having died after the testator and before the death of Georgiana Douglas, both leaving children, all of whom were over the age of 21 years.

The question submitted was: Do the next of kin of George Douglas and Carrie Nesbitt share in the residuary estate of the testator, John R. Douglas, with his children who survived Georgiana Douglas?

In bequests of personal estate words of survivorship are primâ facie to be referred to the period of payment or distribution and not to the death of the testator: Cripps v. Wolcott (1819), 4 Madd. 11; Neathway v. Reed (1853), 3 DeG.M. & G. 18; Hearn v. Baker (1856), 2 K. & J. 383. The rule applies also to real estate: Re Gregson's Trust Estate (1864), 2 DeG.J. & S. 428; but this general rule will not apply if there is an indication of a contrary intention.

In Jarman on Wills, 6th ed., p. 2131, the author says: "The rule in Cripps v. Wolcott is not only settled, but is one which the Court never seeks to evade by slight distinctions."

A more recent pronouncement is found in In re Poultney, [1912] 2 Ch. 541. See also Wiley v. Chanteperdrix, [1894] 1 I.R. 209; Smith v. Coleman (1875), 22 Gr. 507; Re Miller (1911), 2 O.W.N. 782; Re Elliott (1911), 2 O.W.N. 936.

There is nothing in the will to indicate a different intention, and the rule already stated must be taken to apply.

Costs out of the estate, those of the trustees as between solicitor and client.

KELLY, J., IN CHAMBERS. NOVEMBER 15TH, 1917.

GORDON v. GORDON.

Venue—Motion to Change—Convenience—Rule 245 (d).

Appeal by the defendant in a County Court action from an order of the Master in Chambers dismissing the defendant's motion to change the place of trial from Belleville to Toronto.

George Wilkie, for the defendant.
W. Lawr, for the plaintiff.

KELLY, J., in a written judgment, said that the defendant sets forth in his affidavit of the 5th October, 1917, which formed part of the material on this appeal, that an appearance was entered and an affidavit of merits filed and served on the plaintiff on the 3rd October, and that "the issues can now be determined." The motion to change the venue was not made until after that date. After pleading to the claim, the defendant cannot move to set it aside as irregular: Hill v. Toronto R. W. Co. (1915), 7 O.W.N. 831; but this would not preclude an application being made under

Rule 245 (*d*) to change the place of trial upon the ground of the balance of convenience (*ib.*)

The present case arose out of the same agreement which was in issue in Gordon v. Gordon (1916), 38 O.L.R. 167; and, having regard to the effect of the decision in that case, as well as to the circumstances of the present case, which were before, and no doubt considered by, the Master, there was no good reason for disturbing the order he made. Mr. Wilkie placed much reliance upon Shaw v. Gould (1868), L.R. 3 H.L. 55, which, he said, was not brought to the Court's attention in the previous action; however, upon no ground therein stated was the learned Judge, he thought, bound to a different conclusion as to the right to a change of venue.

Appeal dismissed with costs.

MASTEN, J., IN CHAMBERS. NOVEMBER 15TH, 1917.

*REX v. THORBURN.

Constitutional Law—Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 41 (1)—"Having and Giving" Intoxicating Liquor—Conviction for—Canada Temperance Act in Force in District where Offence Committed—Inoperative Prohibition of Provincial Statute.

Motion to quash a conviction of the defendant by the Judge of the District Court of the District of Manitoulin, for that the defendant "on or about the 26th day of April, 1917, at the township of Billings, in the district of Manitoulin, did have and give liquor at the Havelock hotel, being a place other than the private dwelling-house in which he resided, contrary to the provisions of the Ontario Temperance Act."

The defendant had a bottle of whisky in his room, and gave R. a drink from it. The room formed part of a building which was formerly a licensed hotel, and which was (it should be assumed) not the private dwelling-house of the defendant.

It was admitted that at the time the act was committed the Canada Temperance Act, Part II., was in force in the district of Manitoulin.

J. A. Mulligan, for the defendant, contended that, the Canada Temperance Act being in force, the provisions of the Ontario

Temperance Act under which the defendant was convicted were not in force.

J. R. Cartwright, K.C., for the Crown, contra.

MASTEN, J., in a written judgment, said that the constitutional question raised was important, but the cases which had been decided by the Privy Council narrowed the point which now fell to be determined.

Reference to Russell v. The Queen (1882), 7 App. Cas. 829; Hodge v. The Queen (1883), 9 App. Cas. 117; Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348; Attorney-General for Manitoba v. Manitoba License Holders' Association, [1902] A.C. 73; St. Francois Compagnie Hydraulique v. Continental Heat and Light Co., [1909] A.C. 194; John Deere Plow Co. Limited v. Wharton, [1915] A.C. 330.

After quoting sec. 140 of the Ontario Temperance Act, 6 Geo. V. ch. 50, and the Dominion Act respecting Intoxicating Liquors, 1917, 7 & 8 Geo. V. ch. 30, sec. 4 *C.*, the learned Judge said that these enactments made it plain that the legislators both of Ontario and Canada considered that the two Acts covered the same field—and that plainly appeared also from a consideration of the scope and purpose of the two Acts.

The Ontario Temperance Act must be in force as a whole or not in force at all. It is not conceivable that the provisions of that Act prohibiting the traffic in intoxicating liquors are ineffective where the Canada Temperance Act is in force, and that the provisions respecting "having and giving" are in force.

Re Rex v. Scott (1916), 37 O.L.R. 453, does not govern the present case nor assist in its determination.

The Canada Temperance Act purports to limit the use of intoxicating liquor and to regulate the traffic therein, yet it does not prohibit "having and giving," and so impliedly authorises it, while the Ontario Act, sec. 41 (1), directly prohibits it. The two Acts are therefore inconsistent, and the present case is brought within the principle stated in Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348, that Provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district.

Order quashing the conviction without costs, and with the usual protection to the Judge.

CLUTE, J. NOVEMBER 17TH, 1917.

RODGERS v. GENERAL ACCIDENT FIRE AND LIFE INSURANCE CORPORATION.

RODGERS v. MERCANTILE FIRE INSURANCE CO.

Insurance—Fire Insurance—Proofs of Loss—Fraud—Findings of Fact of Trial Judge—"Second Insurance"—Effect of Removal of Goods from two Separate Buildings into one—Knowledge and Assent of Insurers—Salvage—Overvaluation—Suspicion as to Cause of Fire—Insurance Act, R.S.O. 1914 ch. 183, sec. 194, condition 5—Waiver of Objections—Knowledge of Agent—Bona Fides of Assured.

Action by A. J. Rodgers upon two policies of fire insurance covering goods and merchandise in his premises in the town of Sudbury, by a fire which occurred on the 17th January, 1917.

The actions were tried together, without a jury, at Toronto.
A. J. Russell Snow, K.C., and McFadden, for the plaintiff.
A. C. McMaster and J. H. Fraser, for the defendants.

CLUTE, J., in a written judgment, said that the main defence was based on the insufficiency of the proofs of loss and on fraud; the defendants alleging that the proofs were false and fraudulent under the Insurance Act; that there was overvaluation in claiming for a total loss, when in fact there was considerable salvage; and that there was not such account of the loss as the nature of the case permitted.

The learned Judge said that he was satisfied of the truthfulness of the plaintiff, and that he was not intentionally guilty of any fraud or misdealing in respect of the fire or the loss or proofs of loss or furnishing an account as required by the statute.

It was also urged that the removal of the goods insured, which were in two separate buildings in different streets at the time of the insurance, and were afterwards removed to one building, had the effect of creating what was called a "second insurance" of goods in the same building, without notice.

This point was not, the learned Judge said, in his opinion, open to argument—the insurance having been properly placed upon the goods in separate buildings, and their removal to one building having afterwards been authorised, there was nothing to make void a policy valid when the insurance was effected—there was in fact no further insurance.

The learned Judge was satisfied that the salvage was grossly overvalued in the adjustment of the loss. The sum of $200, mentioned in the proofs as salvage of the fixtures, was more nearly right than the amount allowed by the adjuster.

Some evidence was given with the view of raising a suspicion as to the cause of the fire; but the case in that regard was not pressed. The plaintiff's presence in the building late on the night of the fire was satisfactorily explained.

Statutory condition 5 (sec. 194 of the Insurance Act, R.S.O. 1914 ch. 183) had no application to this case. The removal of the goods was by the authority of the defendants; and there clearly was no fraud.

What was done in regard to the adjustment, and the fact that no further proofs of loss were called for, amounted to a waiver of all objections to the proofs of loss: Mutchmor v. Waterloo Mutual Fire Insurance Co. (1902), 4 O.L.R. 606; Adams v. Glen Falls Insurance Co. (1916), 37 O.L.R. 1.

In the present case the position of the defendants' agent was unique. He had knowledge of the whole position of matters before the fire, and what insurance there was on the property; and, according to his evidence, was well satisfied with the bona fides of the plaintiff in effecting all the insurances upon the property.

Judgment for the plaintiff against the defendants in both actions for the amounts claimed, with costs.

RE FITZPATRICK—BRITTON, J., IN CHAMBERS—NOV. 12.

Infants—Custody—Application by Mother on Return of Habeas Corpus—Peculiar Circumstances—Husband and Wife Living apart—Children Placed in Boarding-school—Order for Payment by Husband of Expenses of Wife Visiting Children—Terms.]—Motion by Alice E. Fitzpatrick, upon the return of a habeas corpus, for an order awarding her the custody of her two infant daughters, as against Thomas Fitzpatrick, her husband, the father of the infants. BRITTON, J., in a written judgment, said that the husband and father should provide a home for his wife and daughters, and all should live together as a united family; and this home should be in readiness before the end of the term at the school where the daughters have been placed by him. The husband and wife are living apart, the husband having broken up the home, and the wife is not being maintained by her husband.

The children are well cared for in a school in the Province of Quebec; and the mother does not object to them being there. The husband has no objection to the wife visiting the children so long as she does not attempt to get possession of them. The mother has no means to enable her to visit the children. Whether she is entitled to be maintained by her husband cannot be decided on this application. The case is full of difficulty; it is one that ought to be settled between the parties. Because of the peculiar circumstances, the learned Judge feels at liberty not to act upon the return of the habeas corpus by attempting to remove the children from the school and from the custody of the father and giving them over to the custody of the mother, she having no home and no present means for maintaining the children. There should be an order that the husband pay to the wife $50 for her expenses in visiting the children at least once before the expiration of the present term at school. This order will be without prejudice to the rights of either party if the matter of the custody of the children shall come up on a subsequent application or if the right of the wife to maintenance shall be considered in an action for alimony. Upon the $50 being paid and the visit by the wife to the children made, the motion will be dismissed. The solicitors for the wife must undertake that there shall be no attempt on the part of the mother to influence the children against the father or against remaining where they are during the present term. No costs. W. S. Montgomery, for the applicant. A. J. Anderson, for the respondent.

BARBER v. JAMES RICHARDSON & SONS LIMITED—FALCONBRIDGE, C.J.K.B.—NOV. 12.

Principal and Agent—Acts of Supposed Agents—Damping Auction Sale — Authority of Agents — Holding-out — Actionable Wrong—Damages—Costs.]—Action by Henry Barber, assignee for the benefit of creditors of H. E. and M. E. Maddock, to recover damages for the damping by the defendants of an auction sale of the stock in trade of the assignors which passed to the plaintiff under the assignment. The action was tried without a jury at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the facts as to the alleged agency of Stephens, Plover, and Grattan, were not in dispute, and, on the law, he was of opinion that they were not agents nor was any one of them agent of the defendants, an incorporated company, in this behalf, and they

did not act within the scope of their authority or employment, nor for the general benefit of the defendants. The doctrine of holding-out did not apply to this class of case. If the learned Chief Justice had been in favour of the plaintiffs on this point, he would have had to consider the further question (not raised in argument) whether the mere assertion of a supposed right without any actual malice is actionable. The proof of damage was rather shadowy and hypothetical. It was not a case in which costs should be awarded to the defendants. Action dismissed without costs. Hamilton Cassels, K.C., for the plaintiff. J. M. Farrell and A. E. Day, for the defendants.

KUPNICKI v. NODEN HALLITT & JOHNSON LIMITED—BRITTON, J.—NOV. 12.

Negligence—Death of Man Caused by Falling into Elevator-shaft in Store—Action under Fatal Accidents Act—Negligence of Deceased—Findings of Trial Judge.]—Action, under the Fatal Accidents Act, to recover damages for the death of a man who was injured in the defendants' store and died from his injuries. The deceased intended to step into an elevator or hoist for the purpose of being carried up to the second storey, where he wished to select and buy a mattress. A salesman of the defendants was in the act of pulling the hoist down from an upper storey, when the deceased, mistakenly supposing that the hoist had come to a level with the floor upon which he was, stepped into the elevator-shaft, below the hoist, fell to the bottom, and was so injured that he died. The negligence charged was, that the defendants' agent and salesman negligently and wrongfully invited the deceased into the elevator-shaft; that the defendants had not sufficient light in or near the elevator and shaft; that there were insufficient guards at the shaft; that the system whereby the gate was raised was defective; and that the defendants neglected and failed to comply with the Factory Shop and Office Building Act, R.S.O. 1914 ch. 229, sec. 58. The action was tried without a jury at Toronto. BRITTON, J., in a written judgment, examined with care the various grounds of negligence alleged, in the light of the evidence, and concluded that the death was caused by the rashness and want of reasonable care of the deceased himself, and that the defendants were not to blame. Action dismissed without costs. F. J. Hughes, for the plaintiff. H. H. Dewart, K.C., and A. J. Anderson, for the defendants.

FOUND v. GERTZBEIN—RIDDELL, J., IN CHAMBERS—NOV. 14.

Mortgage—Action for Foreclosure—Appearance Set aside—Practice—Final Order of Foreclosure.]—Appeal by the plaintiff from an order of one of the Registrars, sitting for the Master in Chambers, refusing an application for a final order of foreclosure. RIDDELL, J., in a short memorandum, said that the appeal should be allowed and the defendant's appearance set aside; costs here and below to be added to the mortgage-claim. The defendant may apply substantively for relief under the Rules—or to stay or set aside proceedings as not authorised. W. J. Tremear, for the plaintiff. A. Cohen, for the defendant.

RE RENDLE—RIDDELL, J., IN CHAMBERS—NOV. 14.

Infant—Custody—Application of Father—Children's Aid Society.]—Application by Walter Rendle for an order directing the Children's Aid Society of Toronto to give up the custody of his infant child to the applicant. RIDDELL, J., in a short memorandum, said that the application should be refused without costs. He had difficulty in determining whether to pursue this course or retain the motion for 6 months—but thought it better, in all the circumstances, to refuse the application. F. Kerr, for the applicant. William Proudfoot, K.C., for the society.

REDMOND v. STACEY—KELLY, J., IN CHAMBERS—NOV. 15.

Pleading—Statement of Defence—Rule 141—"Material Facts."]—Appeal by the plaintiff from the order of the Master in Chambers, ante 79, in so far as it dismissed a motion to strike out as embarrassing certain paragraphs of the statement of defence. KELLY, J., dismissed the appeal with costs. R. T. Harding, for the plaintiff. F. S. Mearns, for the defendant.

RE GARFUNKEL AND HUTNER—KELLY, J.—NOV. 15.

Arbitration and Award—Innocent Misconduct of Arbitrator—Evidence Improperly Admitted—Compromise Award Set aside.]—Motion by Herman Hutner and Frank S. Hutner to set aside the award of a sole arbitrator. The motion was heard in the Weekly

Court at Toronto. KELLY, J., in a written judgment, said that papers and documents were placed before the arbitrator without the knowledge of the applicant, whose attention was not drawn to them; and the arbitrator innocently misconceived the duties of an arbitrator and treated the matter before him as one for a compromise. Upon these grounds, without considering others, the learned Judge concluded that the award should be set aside with costs. Grayson Smith, for the applicants. Gordon Waldron, for Garfunkel, the respondent.

STEVENSON v. BROWN—CLUTE, J.—NOV. 17.

Fraud and Misrepresentation—Earnings of Mechanic Entrusted to Person Controlling Employer-companies—Promissory Note—Agreement—Tender of Shares in New Company.]—The plaintiff, an expert jeweller-mechanic, sued the defendant, who owned or controlled the greater part of the stock of companies by which the plaintiff was employed for a period of 10 years, for $3,891.50 and interest. The plaintiff alleged that he had left portions of his earnings, amounting to the sum claimed, in the hands of the defendant, who had promised him shares in the various companies formed by him, and that he (the plaintiff) had received nothing but a promissory note for $2,500, signed by the defendant, dated the 10th August, 1914, which was subject to an agreement rendering it practically valueless. The action was tried without a jury at Toronto. CLUTE, J., in a written judgment, set forth the facts, and said that the defendant had tendered to the plaintiff 66 shares in a new company formed after the note was given. The learned Judge found all the facts in favour of the plaintiff. In regard to the new company, the learned Judge said that there were no qualified shareholders and no proper allotment of stock either to the defendant or the plaintiff; that the so-called paid-up stock was never in fact paid-up; that the assets which were said to be conveyed to the company formed but a small portion of the face-value of the capital stock issued or supposed to be issued. The company was a fraud upon the plaintiff and upon the public. The agreement which the plaintiff was induced to sign should be set aside. It was probable that $2,500 did not represent in full the plaintiff's earnings of which the defendant possessed himself; but an accounting might be expensive. There should be judgment for the plaintiff for $2,500 with costs; the plaintiff to be at liberty, if he so desires, to have a reference to the Master of all the dealings between the parties. T. P. Galt, K.C., for the plaintiff. C. W. Livingstone, for the defendant.