THE ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM THE 6th AUGUST, 1920, TO THE 28th FEBRUARY, 1921.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 17TH, 1920.

GARSON v. EMPIRE MANUFACTURING CO. LIMITED.

Sale of Goods—Shipment in Car-loads—Shortage in Quantities Received—Terms of Contract—Condition—Inspection—Loss on Shipment—Right to Recover—Counterclaim—Refusal to Accept Part of Goods—Damages—Costs—Set-off—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of ROSE, J., 18 O.W.N. 2.

THE appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

George Wilkie, for the appellant.

J. M. McEvoy and R. G. Ivey, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

ORDE, J., IN CHAMBERS. AUGUST 12TH, 1920.

*REX v. DE ANGELIS.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Selling Intoxicating Liquor without License—Evidence of Person who Swore he Bought Liquor from Defendant—Credibility of Witness—Question for Magistrate—Motion to Quash Conviction—Affidavit Stating that Witness has "Police

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

Court Record"—Sec. 102a. of Act (8 Geo. V. ch. 40, sec. 19)—"Improperly Admitted"—Trial—Opportunity to Produce Witnesses—Sentence—Motion to Reduce—Heavy Sentence for First Offence—Magistrate's Statement that Defendant was Guilty of Perjury—Failure to Shew that Sentence Made Heavier on that Account.

Motion to quash the defendant's conviction by a police magistrate for an offence against the Ontario Temperance Act.

J. L. Sheard, for the defendant.
F. P. Brennan, for the magistrate.

Orde, J., in a written judgment, said that the conviction was attacked upon one ground, viz., that the magistrate had improperly admitted the evidence of one Sheehan, and that under sec. 102*a*. of the Act (added by the Ontario Temperance Amendment Act, 1918, 8 Geo. V. ch. 40, sec. 19), the conviction ought to be quashed because of such admission.

Sheehan swore that he had purchased a bottle of whisky from the defendant, who went next door to get it for him. Sheehan's evidence was to some extent corroborated by that of the constable who searched Sheehan before he went into the place of the defendant, and who saw him come out afterwards with the bottle. Sheehan's story was denied by the accused.

The learned Judge said that the evidence of guilt was very meagre; and if, as was conceivable, Sheehan was lying, and not the accused, the conviction and heavy sentence were grossly unjust. But, if the evidence of Sheehan was admissible, there was no power to review the magistrate's decision. There was clear evidence, that of Sheehan, upon which to convict, and the magistrate believed Sheehan's evidence rather than that of the defendant.

It was stated in an affidavit of the wife of the defendant that Sheehan "has a previous police court record and is at the present time awaiting his trial on a charge of stealing an automobile," and therefore he was not a witness whose evidence should have been admitted without corroboration. This objection was one which might properly have been urged before the magistrate; and, had he rejected evidence to that effect, sec. 102*a*. might apply; but there is no principle which makes the evidence of a man inadmissible merely because of something which may affect his credibility. The expression "improperly admitted" in sec. 102*a*. refers to statements which, under the rules of evidence, ought not to be admitted as evidence. There was no improper admission of evidence in this sense.

There was nothing in the material filed to warrant the statement that the police court trial had proceeded without giving the defendant the opportunity of producing his witnesses.

The motion to quash should be dismissed with costs.

The learned Judge was also asked to reduce the sentence, which was a severe one, viz., a fine of $1,200, or in default 3 months' imprisonment, and an additional 3 months' imprisonment. The defendant did not, it was said, pay the fine, and was now undergoing a sentence of 6 months' imprisonment. It was urged that the sentence was unnecessarily severe, in view of the fact that the defendant had not been before convicted, and that but one bottle of liquor was sold, and no other liquor was found on the defendant's premises. But the evidence which the magistrate chose to believe indicated that the supply was kept next door. It would not be proper, on this ground, to interfere with the sentence. The magistrate saw the defendant and the witnesses and was in a better position to decide what was a proper sentence than a Judge upon a motion to quash.

The other ground urged for reducing the sentence was that the magistrate stated that he believed the defendant had perjured himself; and the solicitor for the defendant swore that he believed that it was because of that chiefly that the magistrate imposed the heavy sentence. But either Sheehan or the defendant committed perjury. If the magistrate believed Sheehan, he must have concluded that the defendant was lying. He had a right to say so if he thought fit. Had he stated expressly that because of the perjury he was adding something to the sentence, there might be ground for concluding, on the authority of Rex v. Harris (1917), 41 O.L.R. 366, that the defendant was undergoing an additional sentence for a crime of which he had not been formally adjudged guilty. But the mere belief of the defendant's solicitor that that was the reason for the heavy sentence was not a sufficient ground for interfering with the sentence.

The learned Judge therefore declined to interfere.

ORDE, J., IN CHAMBERS. AUGUST 12TH, 1920.

*REX v. THOMPSON.

Criminal Law—Keeping Disorderly House or Place for Prostitution —Motor Car—"Place"—Criminal Code, secs. 225, 228— Evidence—Inducement to Persons to Visit or Frequent Place— Element in Offence.

Motion to quash the conviction of the defendant by the Police Magistrate for the City of Sault Ste. Marie "for that he . . . at the City of Sault Ste. Marie . . . on the 10th June, 1920, unlawfully was the keeper of a disorderly house or place for prostitution, under sec. 228 of the Criminal Code." The defendant was sentenced to imprisonment for 3 months.

Murray (Blackstock & Co.), for the defendant.
Edward Bayly, K.C., for the magistrate.

Orde, J., in a written judgment, said that the defendant was the driver of a taxicab, and on the evening of the 10th June, 1920, he had with him in his vehicle two women who, from the evidence of one of them, were prostitutes to the knowledge of the defendant. The party was joined by two men, and the car was then driven to a side street and stopped. Then, while the car was standing, the two women in turn had sexual intercourse, each with one of the men, in the back of the car. The only reasonable conclusion from the evidence was that the defendant took the women and men into the car and drove them to the place where he stopped the car, for the purpose of prostitution and no other. The women were paid by the men, who also paid the defendant for the use of the car.

The substantial objection to the conviction was that the car was not a "disorderly house" or "common bawdy house," within the meaning of secs. 225 and 228 of the Criminal Code.

It was argued that a motor car cannot be regarded as a "place" within the definition contained in sec. 225.

Reference to Powell v. Kempton Park Racecourse Co., [1899] A.C. 143, 194; Rex v. Saunders (1906), 12 O.L.R. 615; Saunders v. The King (1907), 38 Can. S.C.R. 382; Brown v. Patch, [1899] 1 Q.B. 892, 899.

Applying these cases, there was little difficulty in coming to the conclusion that a motor car, if used by its owner or the person in control of it for the purposes of prostitution, is a "place" used for that purpose, and consequently a "bawdy house" within the meaning of sec. 225.

If a motor car were permanently affixed to the soil, and then used for the purposes of prostitution, it could hardly be contended that it was not a "place" within the meaning of the section. Even if the words "place of any kind" should be construed ejusdem generis with the words "house, room, or set of rooms" (as to which no opinion was expressed), a motor car so fixed would clearly be within the definition. The fact that the car is moved from spot to spot makes no difference, in the learned Judge's opinion. The prisoner was allowing his car to be used

by prostitutes for the purposes of prostitution. There was a localisation of the acts within the confines of the car; and it then became the "place" where the acts of prostitution took place. The analogy between this case and that of the movable booth (the Saunders case) was complete

It was argued that, even admitting that the motor car might otherwise come within the meaning of "place," it was one of the essential features of a bawdy house that it held out an inducement to persons to visit or frequent it—and that was absent in the case of a motor car. An American case, King v. People of State of New York (1881), 83 N.Y. 587, was cited, but nothing in that case warranted the principle contended for, and no such principle is laid down anywhere, so far as the learned Judge knows. If there were any such principle, there was no reason why a motor car, if it were known that it was available for the purposes of prostitution, might not come within it quite as fully as a house or room.

Motion dismissed with costs.

ORDE, J. AUGUST 12TH, 1920.

*RE ASTON AND WHITE.

Vendor and Purchaser—Agreement for Sale of Land—Title of Vendor—Assignment of Owner's Interest under Agreement for Sale to Another and Quit-claim Executed by that Other to Vendor—Failure to Identify Land—Attempted Identification by Affidavit—Registry Act, sec. 34—Title not to be Forced on Purchaser.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objection to the title was invalid.

The motion was heard in the Weekly Court, Toronto.
G. W. Morley, for the vendor.
W. D. M. Shorey, for the purchaser.

ORDE, J., in a written judgment, said that the vendor's father was the owner, subject to a mortgage, of the land which the vendor had agreed to sell. On the 29th June, 1918, the father entered into an agreement to sell the land to H.—the land being sufficiently described for registration purposes in the agreement. On the

1st October, 1918, the father executed under seal an assignment to the vendor of all the benefit of the agreement with H. The father died on the 24th October, 1918, having made a will whereby he gave all his property to the vendor and appointed him executor. The will had not, at the time of this application, been admitted to probate. On the 29th April, 1920, H. executed a quit-claim deed in favour of the vendor.

The purchaser raised the objection that the vendor had not such a title as a purchaser was bound to accept, and contended that the legal estate in the land was still in the estate of the vendor's father. The vendor contended that the assignment of the 1st October, 1918, constituted a conveyance of the legal estate.

The assignment nowhere mentioned the land except in a recital referring to the agreement of the 29th June, 1918, and the land therein described. For purposes of registration the vendor had made an affidavit identifying the land referred to in the assignment as the land now in question. In the operative part of the assignment the assignor purported to assign and transfer the agreement and all the interest of the assignor therein "and the property comprised therein." The vendor contended that, by virtue of the words quoted, all the assignor's legal estate in the land passed.

Strictly speaking, at the time of the agreement with H., the legal estate was in the mortgagee; but for conveyancing purposes the conveyance of the equity of redemption should be surrounded by the same safeguards as a conveyance of the legal estate.

The effort of the vendor to supply what is lacking in the assignment by attaching to it an affidavit setting forth the description does not improve his position. Reference to sec. 34 of the Registry Act. Attaching the affidavit does not solve the vendor's difficulty. It is still open to doubt whether or not the land referred to in the assignment is that now in question; and, so long as there is any doubt, the purchaser cannot be compelled to accept the vendor's title.

Reference to In re Treleven and Horner (1881), 28 Gr. 624; Armour on Real Property, 2nd ed., p. 346.

There is a very great difference between a description by reference to a conveyance already registered and one by reference to an unregistered agreement. In the latter case there is no real certainty as to what agreement is referred to.

In re Nutt's Settlement, [1915] 2 Ch. 431, distinguished.

The title of the vendor was not such as the purchaser was bound to accept; and the vendor's application should be dismissed with costs.

ORDE J. AUGUST 12TH, 1920.

*PRESTON v. HILTON.

Municipal Corporations—"Residential" By-law of City—Permit for Erection of Stables in Prohibited Area—Action to Restrain Corporation and Licensees from Erecting Building—Owner of House in Prohibited Area Suing on Behalf of himself and other Owners—Ownership of House Transferred pendente Lite—Addition or Substitution of Transferee as Party Plaintiff—Cause of Action—Injunction—Assignment of Chose in Action—Threatened Injury—Nuisance—Status of Plaintiff—Representative Capacity—Mortgagee.

The action was commenced on the 28th May, 1919, by Byron Preston against Z. Hilton and D. Hilton, the plaintiff stating that he sued on behalf of himself and all other property-owners on First avenue, in the city of Toronto, for a declaration that certain permits issued by the city architect to the defendants to build stables and a waggon-shed on the north side of that avenue were contrary to a city by-law and were illegally and improperly issued and should be set aside, and for an injunction.

Before the trial, the Corporation of the City of Toronto were added as defendants, and Elizabeth Preston was substituted for Byron Preston as plaintiff.

At the trial, the plaintiff was allowed to amend the statement of claim by alleging that the erection of the stables and shed constituted a nuisance, and claiming a declaration to that effect.

The action was tried without a jury at a Toronto sittings.

A. C. McMaster and J. M. Bullen, for the plaintiff.

W. J. McWhinney, K.C., and E. P. Brown, for the original defendants.

Irving S. Fairty, for the added defendants.

ORDE, J., in a written judgment, said that, after the conclusion of the trial on the 20th April, 1920, he was informed that Elizabeth Preston, the plaintiff, had on that day, sold the property upon the ownership and occupancy of which her action was based, being house No. 26 on the north side of First avenue, to one Ann McClelland, taking from the purchaser a mortgage for part of the purchase-money. The plaintiff thereupon vacated the house, and possession was taken by Ann McClelland.

On the 29th May, 1920, an order was issued substituting Ann McClelland for Elizabeth Preston as plaintiff; but it afterwards appeared that the intention had been merely to add the former,

leaving the latter as a co-plaintiff, and it was agreed that the case should be considered free from technicalities, as upon a motion to discharge the order substituting Ann as plaintiff and a motion for leave to add her as a co-plaintiff.

The defendants contended that the effect of Elizabeth Preston's sale of her property and her removal therefrom was to bring the action to an end, and that neither the addition nor the substitution of Ann McClelland as a plaintiff could keep the action alive.

The by-law referred to prohibited the erection of any building to be used as "a livery, a boarding, or sales stable, or a stable in which horses are kept for hire or kept for use with vehicles in conveying passengers or for express purposes, a stable for horses for delivery purposes . . . on the property on either side of First avenue between Broadview avenue and Bolton avenue," and fixed a penalty for its breach.

The learned Judge could see no distinction in principle between this by-law and that in question in Tompkins v. Brockville Rink Co. (1899), 31 O.R. 124.

On the authority of that case and also of Mullis v. Hubbard, [1903] 2 Ch. 431, and Mackenzie v. City of Toronto (1915), 7 O.W.N. 820, an action cannot be maintained by a private individual either against the Hiltons or the city corporation. Nor is the plaintiff's position strengthened by her claim to sue on behalf of the other owners of property on First avenue. Had they all been joined as plaintiffs, the position would have been the same. A by-law of this character, which prohibits the doing of a thing otherwise lawful, gives rise to no private right of action in an individual. The remedy for its breach is to be found in the four corners of the by-law itself (Tompkins case, at p. 129), or by an injunction at the suit of the municipal corporation, as in City of Toronto v. Williams (1912), 27 O.L.R. 186. Consequently, so far as the action was brought for a declaration and injunction in respect of the alleged breach of the city by-law, neither the plaintiff Elizabeth Preston nor the property-owners whom she claimed to represent had any locus standi, and Ann McClelland was in the same position.

As to the cause of action for a nuisance, the plaintiffs did not ask for damages. A personal claim for damages arising out of tort cannot be assigned; even a claim for damages for injury to property is not an assignable chose in action: McCormack v. Toronto R.W. Co. (1907), 13 O.L.R. 656, at p. 659; and it is difficult to see how a claim for an injunction designed to prevent either a threatened future injury or the continuance of an alleged existing injury can be assigned. In so far as such an injury or threatened injury is personal, it is clearly not assignable. Where the injury or threatened injury is to the property of the plaintiff, the right of action cannot be assigned.

Jones v. Simes (1890), 43 Ch. D. 607, distinguished.

The claim for an injunction to restrain an injury or threatened injury to property on the ground of nuisance is a mere personal action, to which the maxim "actio personalis moritur cum persona" applies. A fortiori, it is not assignable.

So far as Ann McClelland claims by virtue either of her purchase from Elizabeth Preston or of any express assignment of the chose in action, the cause of action could not be assigned or transmitted to her, and she could not be substituted for Elizabeth Preston, as having acquired or succeeded to the latter's right (if any) to a declaration and injunction in respect of the alleged nuisance.

It was argued that Ann McClelland, as one of the class for whose benefit Elizabeth Preston claimed to sue, could be added or substituted as a plaintiff. Assuming that Ann was one of that class at the time the action was brought, adding or substituting her would be of no avail, for an action for damages for a nuisance or to restrain a nuisance cannot be brought in a representative capacity. The injury or threatened injury must be peculiar to each person alone or to his own property.

Reference to Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021, 1035, 1039; Johnston v. Consumers' Gas Co. (1896), 23 A.R. 566, 573, 574; Parsons v. City of London (1911), 3 O.W.N. 55.

Nor can Elizabeth Preston as mortgagee maintain the action. The right of a mortgagee to an injunction to restrain a threatened nuisance, if it exists at all, must be limited to cases where it is clearly shewn that the alleged nuisance would injure his or her security as mortgagee. Elizabeth Preston had not made out a case of any threatened injury to her security which would entitle her to an injunction. The injury, if any, to a mortgagee's security may be compensated by an award of damages.

The difficulty in which the original plaintiff found herself was of her own creation, and she should not, at this late stage, be permitted to surmount it by any amendment or by a continuation of the trial.

There should be judgment, therefore, in favour of the defendants, discharging the order of the 29th May, 1920, which purported to substitute Ann McClelland for Elizabeth Preston as plaintiff, with costs against Ann McClelland, and dismissing the action with costs against Elizabeth Preston.

LENNOX, J., IN CHAMBERS. AUGUST 16TH, 1920.

RE SOLICITOR.

EAST v. HARTY.

Solicitor—Written Undertaking to Pay Money for Client—Construction—Failure to Pay—Remedy—Motion for Attachment—Money Previously Ordered to be Paid to Sheriff—Creditors Relief Act, R.S.O. 1914 ch. 81, secs. 4, 5 (1) and (2), 6, 22.

Motion by John East and John E. Corrin, primary creditors in a garnishing proceeding, for an order that a writ of attachment do issue out of the Supreme Court of Ontario, directed to the solicitor for A. E. Carter, the garnishee, "on the ground that the solicitor has not carried out an undertaking duly made by himself in writing and dated the 11th February, 1920, in the above matter."

A. A. Macdonald, for the applicants.
C. M. Garvey, for the solicitor.

LENNOX, J., in a written judgment, said that the undertaking was addressed to the solicitor for the primary creditors, in these words: "In consideration of your withdrawing the notice of motion herein returnable at Osgoode Hall tomorrow, I hereby undertake that A. E. Carter will pay to you for John East and John E. Corrin $1,000 out of the first moneys received by A. E. Carter from the Canadian National Railway or its subsidiary companies, and that in any event the said sum of $1,000 will be paid to you on or before the 1st June, 1920."

Swyny v. Harland, [1894] 1 Q.B. 707, and In re A Solicitor, Ex p. Hales, [1907] 2 K.B. 539, were cited by counsel.

The $1,000 referred to was money attached by the primary creditors as owing by Carter to the primary debtors.

Reference to secs. 4, 5 (1) and (2), 6, and 22 of the Creditors Relief Act, R.S.O. 1914 ch. 81.

Payment of the money found to be owing from Carter to the primary debtors was, by order of Sutherland, J., directed to be made to the Sheriff of the District of Rainy River.

The Courts are not to be expected to assist either of the parties to an arrangement or transaction at variance with public policy; and, a fortiori, a transaction directly in conflict with the express provisions of a statute and the order of a Judge, to say nothing of the rights of the other creditors of the primary debtors, unrepresented upon the hearing of this motion, and intended to be protected by the statute and order referred to.

The object of the motion, as revealed by the correspondence, was to force the solicitor into payment of money which he had not received, and which he had no right to receive and apply in the way contended for.

The writing was a conditional personal promise by the solicitor that his client would pay $1,000 if and when it should be obtained from a railway company, and that at all events, unconditionally, the client would pay this sum within a stated time.

It was a contract, too, on the part of both solicitors, to divert the moneys from the channel and purpose indicated by the statute and the order; and it was never intended or contemplated that the client should pay it out of his own money.

Conceding that by what he signed the solicitor became a debtor of the primary creditors, he would not thereby become liable to attachment. Imprisonment for debt has been abolished, and attachment is at the threshold of imprisonment.

Before taking the present proceeding, or at least concurrently with it, the primary creditors should have applied for an order directing payment, when the initial question would have been whether the undertaking was a personal one: see Ex p. Townley (1834), 3 Dowl. 39; Ex p. Grant (1835), ib. 320. And, if the solicitor was ordered to pay, his failure to comply with the order would not necessarily be followed by an attachment. The Court is invested with this disciplinary jurisdiction in order to control and direct the conduct of persons connected with the Court and prevent misconduct; and the power is exercised in the public interest: Seaward v. Paterson, [1897] 1 Ch. 545.

Unintentional disobedience to an order is contempt in theory only, and is not followed by imprisonment: Halsbury's Laws of England, vol. 7, p. 297; Shoppee v. Nathan, [1892] 1 Q.B. 245.

This application was covered by Re Campbell (1872), 32 U.C.R. 444, shewing that the proper proceeding against an attorney for non-payment of money is by judgment and execution, and not by attachment.

The giving and acceptance of the undertaking were improper.

The motion should be dismissed; but, as the solicitor had written a letter couched in offensive language, he should not be awarded costs.

After the argument of the motion, the learned Judge received certain memoranda outlining a proposed compromise; but this proposal he regarded as contrary to the order of Sutherland, J., and the positive provisions of the statute, and gave no heed to it.

Motion dismissed without costs.

HOLMESTED, REGISTRAR. AUGUST 16TH, 1920.

RE X.

Bankruptcy—Practice under Dominion Bankruptcy Act, 1919—Petition—Proper Officer to Receive and File—Place for Filing—Person Filing Petition—Trustee in Bankruptcy Acting on Behalf of Creditors of Alleged Bankrupt—Solicitors Act, sec. 4—Penalty—Omission of Names of Court and Matter and other Formal Requisites—Defective Document—Failure to Specify Act of Bankruptcy—Failure to Verify by Affidavit—Secs. 2 (ee), 3, 63 (1), (a), 64 (4) of Bankruptcy Act—Bankruptcy Rules 4, 7, 66, 152—Forms 1, 3.

A gentleman, claiming to be one of the duly appointed trustees under the Dominion Bankruptcy Act, 1919, 9 & 10 Geo. V. ch. 36, tendered to Mr. George S. Holmested, K.C., Senior Registrar of the High Court Division of the Supreme Court of Ontario, for filing, a petition in bankruptcy of three persons, calling themselves creditors of X.

The learned Registrar declined to receive or file the petition, giving reasons for so declining in a memorandum.

(1) The Act and Rules made thereunder being silent as to the particular officer or officers of the Court who are to act in bankruptcy, the learned Registrar was inclined to think that all the officers of the Court holding the position of Registrar were intended to act as Registrars in bankruptcy. The only officers on whom any duties are expressly imposed or powers conferred by the Act are the Registrars: see sec. 65. By sec. 2 (*ee*), "registrar" includes any other officer who performs duties like to those of a Registrar. The Supreme Court of Ontario is constituted the Bankruptcy Court for Ontario: sec. 63 (1) (*a*), but it is nowhere specifically stated that all the Registrars, or any particular Registrar, are or is to be the Registrars or Registrar in Bankruptcy. The Act seems to have committed to the Chief Justice of each Court the power "from time to time to appoint and assign such registrars, clerks, and other officers in bankruptcy as he deems necessary or expedient for the transaction or disposal of matters in respect of which power or jurisdiction is given by the Act:" sec. 64 (4). So far as the learned Registrar was aware, no such appointment or assignment had been made. It appeared to him that it was his duty to facilitate the working of the Act by holding that he had jurisdiction rather than to take the position that none of the Registrars has any jurisdiction, and more particularly so as, by Rule 66, any officer refusing to act as Registrar in bankruptcy exposes himself to a charge of contempt of Court. The learned Registrar, therefore,

held that he had jurisdiction in bankruptcy in the present state of affairs.

(2) The learned Registrar, while inclined to think that the Central Office was the best and most appropriate place for filing petitions in bankruptcy, yet thought that he ought not to refuse to receive and file in his office petitions tendered to him. In case it should be determined that they should be filed in some other office, he would be ready to transfer them on the direction of a Judge. No regulations having been made, the officers of the Court are left to adopt such course as might seem best to themselves: it is their duty to facilitate as far as they can, and not to obstruct, proceedings in Court.

(3) An officer of the Court ought not to assist any person, assuming to act as a solicitor in any proceeding in Court, whom he knows or has good reason to believe to be not duly qualified.

(4) By Rule 152, the general practice of the Court in civil actions is, in cases not otherwise provided for, to govern the procedure in bankruptcy. The filing of a petition in bankruptcy is equivalent to taking any initiatory step in a civil proceeding; and the ordinary rules governing the issue of writs of summons apply to the filing of petitions in bankruptcy. Litigants in bankruptcy may, as in civil proceedings, act in person; but they cannot act by any other person except a practising solicitor. The gentlemen tendering the petition here does not pretend to be a solicitor, and he is mistaken in supposing that his appointment as a trustee in bankruptcy entitles him to act as the agent of creditors in proceedings in Court. If he were to file the petition, he would be exposing himself to the penalties for practising as a solicitor without authority: Solicitors Act, R.S.O. 1914 ch. 159, sec. 4.

(5) The petition itself is manifestly defective: it omits the name of the Court, the words "In Bankruptcy," and the name of the matter to which it relates: Rule 7 and Form 1. It also omits to state by whom it is filed and the address of the person filing it, as required by the practice in civil cases. It should not be filed in its present form.

(6) The petition is also defective in substance, for it fails to specify any act of bankruptcy. The petition states only one thing as an act of bankruptcy, viz., that X. "is and has of late been unable to conveniently pay his liabilities as they mature." That is not one of the acts of bankruptcy mentioned in sec. 3; and the acts specified in that section are the only acts which constitute acts of bankruptcy entitling creditors to proceed against the debtor under the Act.

(7) The petition is not verified by affidavit: sec. 4 and Form 3.

ORDE, J., IN CHAMBERS. AUGUST 19TH, 1920.

*REX v. MAKER.

Ontario Temperance Act—Magistrate's Convictions for Offences against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House—Living Apartments in Second Storey of Building—Ground Floor Containing Theatre and Shops—Upper Part of Building Containing Assembly-halls—Sec. 2 (i) (i)—Proviso Added by 8 Geo. V. ch. 40, sec. 3—"Exclusively"—Internal Communication—Seizure of Liquor of three Defendants at same Time and Place—Distinct Offences—Sec. 84 (2) (7 Geo. V. ch. 50, sec. 30).

Motion to quash the separate convictions of Michael Maker, Nicholas Maker, and W. Aziz, by the Police Magistrate for the Town of Napanee, under sec. 41 of the Ontario Temperance Act, for having or keeping intoxicating liquor in a place other than a private dwelling house.

The conviction in each case was attacked on the ground that the magistrate erred in holding that the place was not a private dwelling house, and in the cases of Nicholas Maker and W. Aziz on the further ground that the liquor in respect of which each of them was convicted "was found and seized at the same time at which the seizure of the liquor of Michael Maker was made and in the same dwelling."

E. G. Porter, K.C., for the defendants.
F. P. Brennan, for the magistrate.

ORDE, J., in a written judgment, said that the three defendants occupied rooms or apartments on the first floor above the ground floor of the building known as "the Rennie block" in Napanee. The ground floor was used for a moving picture theatre operated by Michael Maker, by a dry goods shop occupied by Michael Maker, and by a tailor shop occupied by one Hogan. Between the theatre and the dry goods shop was a hallway opening from the street and in no way connected with either theatre or shop. From the hall a stairway ran to the next storey. From the hallway at the head of this stairway was a doorway into a mission-hall rented to the Plymouth Brethren. Another doorway led into Michael Maker's quarters, which were occupied by him and his wife and family and by Nicholas Maker. This hall was blocked about midway by a vault, but from Maker's rooms there was access to the rear hall and also to the rooms occupied by Aziz. From the rear hall there was a stairway allowing egress to the yard

in the rear of the building. The third storey was partly occupied by Miss Rennie, and also contained a hall occupied by the Canadian Order of Foresters. From the rear part of the hallway in the first storey above the ground floor another hallway ran at right angles, and from it two doors opened into the Mission-hall. From this hallway a stairway had at one time communicated with Michael Maker's shop.

In order to comply with the requirements of the Act, Michael Maker closed up the means of communication between the shop below and the flat in which he and the other defendants lived, by placing nails over the latch of one of the doors and by otherwise nailing up the doorways. There was, upon the evidence, some doubt as to the bona fides of the effort made to comply with the law.

But on another ground the case of the defendants failed. Section 2 (*i*) defines a "private dwelling house" as "a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence." Certain qualifications follow. Before the amending Act of 1918 (8 Geo. V. ch. 40, sec. 3), the existence under the same roof with the dwelling house of any shop or place of business, broadly speaking, took the dwelling out of the definition: Rex v. Purdy (1917), 41 O.L.R. 49. By sec. 3 of 8 Geo. V. ch. 40 a proviso was added to clause (*i*), para. (i): "Provided, however, that where the office, shop or place of business mentioned in this subdivision is on the ground floor of any building which above the ground floor is used exclusively for living apartments having no internal communication with the ground floor, such apartments . . . shall be regarded as a private dwelling house." The exclusive use refers to the whole of the building above the ground floor. Here the building contained, above the ground floor, the Mission-hall and the Foresters' hall. The upper storeys were not used exclusively for living apartments. By para. (i), the partial occupation or use of a building as a "public hall" or "hall of any society or Order" deprives the residential part of the building of its "private" character. It would be anomalous to exclude the right to have a public hall within the same building as a dwelling house when the dwelling comprises the whole of the rest of the building, and to permit it in the case of a dwelling house occupying only the upper part of the building.

Upon the further ground set up by Nicholas Maker and Aziz (see above), there was no denial that liquor of these two defendants was found. The objection was that the seizure was made at the same time and in the same place. This was not the case of two persons being convicted of the same offence under sec. 84 (2), added by 7 Geo. V. ch. 50, sec. 30. Each defendant was

shewn to have had intoxicating liquor in the forbidden place. It was a novel suggestion that, in these circumstances, only one was guilty because the place was the same or the seizure took place on the same day. They were all severally guilty of distinct offences; and, even if the liquor had belonged to them as co-owners, they would each have been equally guilty of a distinct offence. Section 84 (2) applies to cases where there is an "occupant" liable on technical grounds and an actual offender. In the present case all the defendants were "actual offenders."

Motions dismissed with costs.

ORDE, J. AUGUST 19TH, 1920.

RE FERGUSON AND ROWLEY.

Will—Devise of Land—Restraint on Alienation during Life of Devisee—Invalidity—Extinction of Charges on Land—Application under Vendors and Purchasers Act—Notice Served on Possible Claimants—Failure to Appear on Return of Application—Barring of Claims—Costs.

Motion by a vendor of land for an order, under the Vendors and Purchasers Act, declaring that an objection to the title made by the purchaser was invalid.

The motion was heard in the Weekly Court, Toronto.
Shirley Denison, K.C., and Maurice Crabtree, for the vendor.
Gordon Waldron, for the purchaser.

ORDE, J., in a written judgment, said that the purchaser objected to the title of the vendor on the ground that one Ellen McCabe, who conveyed in 1881 to a predecessor in title of the vendor, was not able to convey the fee.

Ellen McCabe derived title under the will of her father, Patrick Trainor. The exact date of his death was not shewn, but it was before the 14th May, 1878, as his will was registered on that day. He directed that his real estate should be rented, and the rents divided equally among his three daughters, Ellen, Catherine, and Jane, until Catherine should receive $800 and Jane $300, when their claim should cease, and the whole of the rent should become payable to Ellen, "to whom I hereby bequeath" the land in question, "but she my said daughter Ellen shall not sell the property

but may at her death will it to whom she may desire." On the 1st February, 1881, Ellen Trainor (then Ellen McCabe) conveyed the land in fee to William and James Cairns, from whom, by several mesne conveyances, the vendor derived his title.

It was stated that one Kelsey Godson, through whom the title had passed, was obliged, in order to satisfy a purchaser from him, to pay a sum of money to the purchaser to induce him to accept the title, and that Godson had procured from Ellen McCabe, who was still alive, a will giving the property to him, and that in the conveyance which he executed he reserved all his rights under that will.

Due notice of this application was given to Catherine Shortell, Ellen McCabe, and Michael Trainor, the surviving daughters and son of Patrick Trainor, and also to Kelsey Godson, but no one appeared for any of them on the return of the motion. Their rights, if any, might be disposed of on this motion. Jane Trainor, afterwards Jane Doherty, died leaving no issue. As Jane's claim would be for only $300 out of the rent, and Ellen disposed of the land in 1881, it was reasonable to assume that Jane had long since been paid or her charge on the land had been effectually barred.

The neat point for determination was, whether or not the restraint upon alienation attempted by the words, "but she my said daughter Ellen shall not sell the property," which followed the gift to her in fee, was valid.

A general restraint upon alienation is invalid. A conflict of authority has arisen upon the question as to the extent to which a partial restraint may be valid.

Reference to Blackburn v. McCallum (1903), 33 Can. S.C.R. 65, and Hutt v. Hutt (1911), 24 O.L.R. 574.

In the present case the restraint on alienation was general—that is, to the extent of whatever time it was limited to, it was an absolute prohibition against selling the land. There was indeed no express limitation as to time. If the prohibition against selling should be interpreted as extending to Ellen Trainor's heirs or other legal personal representatives, the restriction would be void, because it would be general in all respects. If it was to be considered as a restriction limited to the lifetime of Ellen Trainor, it was none the less a general restriction, though limited as to time. The learned Judge could see no distinction in principle between the restriction here and those in the two cases cited.

If Re Winstanley (1884), 6 O.R. 315, was applicable to the present case, it had been overruled by the Blackburn and Hutt cases.

There should be an order declaring that the attempt by the will of Patrick Trainor to restrain his daughter Ellen from selling

the land during her lifetime was invalid; that the conveyance made by her through which the vendor derived his title conveyed the fee; and that the claims, if any, of those who were served with notice were barred.

In view of the doubt which previously existed as to the law, and especially in view of the possible claim which Godson might have set up, the purchaser was to some extent justified in not accepting the title without an application to the Court; and so the order should go without costs.

ORDE, J. AUGUST 19TH, 1920.

RE HAWKINS.

Deed—Construction—Conveyance of Land to Son of Grantor for Life with Power to Appoint by Will among Children of Grantee —In Default of Appointment, Remainder to Such of the Heirs of the Grantee as "would be Entitled to same by Operation of Law"—Rule in Shelley's Case—Words of Limitation Including Whole Line of Succession Capable of Inheriting—Estate in Fee—Wife of Grantee—Claim or Interest—Dower—Effect of Executing Power of Appointment—Costs of Construction.

Motion under Rule 604, by Peter Hawkins, for an order determining the proper construction of a certain deed.

The motion was heard in the Weekly Court, Toronto.

R. J. McLaughlin, K.C., for the applicant and for Rosena Hawkins.

F. W. Harcourt, K.C., Official Guardian, representing all persons who may become the heirs of Peter Hawkins, whether in esse or not in esse, and who would not, in case of his death at the present time, be heirs.

No one appeared for Thomas Hawkins, Sarah McMahon, or Margaret Allingham, who were served with notice of the application.

ORDE, J., in a written judgment, said that Peter Hawkins had no children living at the present time, and, in the event of his death at the present time, intestate, those entitled to his property would be his wife, Rosena Hawkins, his brother, Thomas Hawkins, and his sisters, Sarah McMahon and Margaret Allingham, all of whom were over 21; and there were no other persons

now living who would be entitled to any interest in his property as heirs at law or next of kin or otherwise.

The deed in question was dated the 27th October, 1891, and was made in pursuance of the Act respecting Short Forms of Conveyances, between Joseph Hawkins as grantor, Frances Hawkins, his wife, for the purpose of barring her dower, and Peter Hawkins as grantee. After reciting in the deed that Joseph was the father of Peter, and also a collateral agreement whereby certain sums were to be charged upon the land, the grantor, in consideration of the premises and $1, conveyed to the grantee, his heirs and assigns, the land in question, to have and to hold unto the grantee "to and for his sole and only use for and during his natural life without impeachment of waste," and, after the death of the grantee (Peter), "then to have and to hold unto such of the children of" Peter as he "shall by will appoint, and in default of such appointment then to have and to hold to such of the heirs of" Peter "who would be entitled to same by operation of law."

The real question was, whether Peter took the fee simple or only a life-estate—no question of an estate tail was involved.

The intermediate power of appointment, which Peter is under no obligation to exercise, does not prevent the coalescing or merging of the estate for life and the remainder to his heirs so as to vest in him the absolute fee simple: Jesson v. Wright (1820), 2 Bligh 1.

Are the words, "such of the heirs of Peter as would be entitled by operation of law," to be construed as words of limitation and equivalent to "the heirs of Peter," and so within the rule in Shelley's Case, or as indicating a particular class of persons who, on Peter's death and in default of appointment, are to take as purchasers and not by descent?

Reference to Van Grutten v. Foxwell, [1897] A.C. 658, 677, and Evans v. Evans, [1892] 2 Ch. 173, 190.

The learned Judge said that, after giving the point much careful consideration, he had come to the conclusion that the Evans case did not apply, or must be considered as in conflict with the decision of the House of Lords in the Van Grutten case, and that the words of limitation in the Hawkins deed are intended "to include the whole line of succession capable of inheriting;" and therefore that Peter became immediately entitled to the legal estate in fee simple.

Another question was submitted: whether, in case of the death of Peter, leaving his wife surviving, she would be entitled to any interest in the land under the deed. Peter's wife could derive no interest under the deed in any circumstances. Her husband's seisin in fee will entitle her to dower if she survives him. But it

may be possible for him to defeat her claim to dower by executing the power of appointment. Whether under the limitation in the deed he can do so is doubtful. See Armour on Real Property, 2nd ed., pp. 114, 115, note (*j*).

The costs of the Official Guardian, who was appointed by the Court to represent those whose interests might have been adverse to those of Peter, ought nevertheless to be paid by Peter, there being no other source from which they can be paid.

ORDE, J. AUGUST 19TH, 1920.

CHAIT & LEON v. HARDING.

Contract—Sale of Business—Repudiation by Vendor—Grounds for Avoidance—Drunkenness—Knowledge of Purchasers—Unconscionable Bargain—Lack of Independent Advice—Conduct of Solicitor for Purchasers—Duty of Solicitor—Ratification—Want of Capacity—Findings of Trial Judge.

In this action the plaintiffs claimed specific performance of an agreement foı the sale to them of the defendant's tailoring business, fixtures, and lease, the defendant having repudiated the contract and refused to carry it out.

The action was tried without a jury at a Toronto sittings.
E. F. Singer, for the plaintiffs.
B. N. Davis, for the defendant.

ORDE, J., in a wiitten judgment, said that the grounds for the defendant's repudiation of the contract, though not given at the time, were that thc defendant entered into the contract when so drunk that he was unable to appreciate the effect of it, to the knowledge of the plaintiffs, and that it was an unconscionable agreement and ought not to be enforced.

The claim for specific performance was abandoned at the trial, so that the sole question to be determined was whether or not the contract could be avoided by the defendant.

The agreement was dated the 25th June, 1919. From the previous April up to the making of the agreement the defendant had been drinking heavily and steadily, and the plaintiff Leon admitted that he was aware of the fact. The defendant's business had been a steadily prosperous one and had produced an annual net profit of from $5,000 to $7,000. The consideration for the sale was $1,000. On the 30th June, the defendant informed the

plaintiffs that he did not intend to carry out the bargain. He said that he was still in the same condition when he repudiated the contract as he had been when he signed it. The plaintiffs were attended and assisted by their solicitor on the 25th June, 1919, when the agreement was made in the defendant's premises. The agreement was drawn by the solicitor. The defendant had no advice or assistance, professional or otherwise.

Even when no such question as that of drunkenness is involved, it always creates an unpleasant impression when two men with their solicitor call upon another man who, without any independent advice, signs an agreement which is prepared by the solicitor for the others, and when that agreement is obviously unfair and is repudiated shortly afterwards.

In every case where there is the least doubt in the mind of the solicitor for the one party as to whether the other party is capable of protecting himself, it is the duty of that solicitor, in self-protection, if for no other reason, to see, if possible, that the other party is adequately represented; and, in the absence of such independent representation, it is the duty of the Court to scrutinise the transaction in order to see whether or not there has been any overreaching or unconscionable dealing.

Our law as to the right to avoid a contract for drunkenness or insanity is, in the learned Judge's opinion, in many cases most unfair. A man, while so drunk or insane as to be absolutely unconscious of what he is doing, so far as his appreciation of the seriousness of his act is concerned, may execute a document which does him incalculable harm; but, if his drunken condition or his insanity is not known to the other party, the contract cannot be avoided: Halsbury's Laws of England, vol. 7, p. 342.

If in the present case it were clear that neither the plaintiffs nor their solicitor had been aware of Harding's condition, the contract could not be avoided. But Leon knew that Harding had been drinking for months prior to the 25th June, 1919; the plaintiffs' solicitor considered Harding a nervous wreck when he signed the agreement; on the day following he was found in bed at a time when most men of business are up and about; the terms of the bargain were extremely favourable to the plaintiffs; and Harding acted without independent advice.

Upon these facts, the finding must be that there was a deliberate attempt made by the plaintiffs to procure the defendant's business for an inadequate price; that he was so drunk, to their knowledge, when he signed the agreement as not to know or appreciate the nature of the transaction; that it was unconscionable and improper to have proceeded with the preparation and execution of the agreement, in such circumstances, until the defendant had either recovered his senses or had secured the protection of an independent

legal adviser; and that Harding's helpless condition continued during the whole of the following stages of the transaction; and that he was not capable of ratifying anything which he had done up to the time when he repudiated the agreement and declared it void.

The defendant was entitled to avoid the contract, and the action should be dismissed with costs.

ORDE, J. AUGUST 21ST, 1920.

*RE O'DONNELL AND NICHOLSON.

Deed—Conveyance of Land to Dead Person "his Heirs and Assigns" —Inoperative Instrument—Necessary Incidents of Deed—Parties —Delivery—Evidence—Estoppel—Title by Possession—Limitations Act, secs. 40, 41, 42—Possible Disability of Person Claiming under Grantor.

An application by a purchaser of land, under the Vendors and Purchasers Act, for an order determining the validity of an objection to the vendor's title.

The motion was heard in the Weekly Court, Toronto.

D. Urquhart, for the purchaser.

G. M. Willoughby, for the vendor.

ORDE, J., in a written judgment, said that one of the links in the chain of title as registered was a conveyance by way of grant from Levi Snider to Henry McCartney, dated the 24th April, 1879, and registered on the 12th May, 1904. Henry McCartney had in fact died on the 4th January, 1879, more than three months prior to the date of the conveyance. It was not suggested that the deed was really executed prior to his death and by some error dated afterwards; it appeared that McCartney had purchased or agreed to purchase, in his lifetime, and died before the conveyance was made, and that, through the stupidity of some unlicensed conveyancer, the deed was so drawn and executed as to purport to convey to Henry McCartney, his heirs and assigns.

The purchaser objected to this deed as being wholly inoperative to convey any estate in the lands to any one. The purchaser's objection must be sustained. Among the necessary incidents to a deed are that there shall be at least two parties to it and that it shall be delivered: Coke upon Littleton, 35*b*; Blackstone, vol. 2, pp. 296, 306. Among the requisites mentioned by Blackstone

is "that there be persons able to contract and be contracted with for the purposes intended by the deed." There was not, when the deed was executed by Levi Snider, any such person as the Henry McCartney with whom he purported to contract. Nor was there any such person to whom or for whose benefit the deed could be delivered. There is no principle which can make the purported conveyance operate retroactively so as to vest an estate in Henry McCartney during his lifetime.

It was argued that the grant might operate as a direct conveyance of the fee to his heirs. In 2 Preston's Conveyancing, p. 394, it is said: "With reference to indentures it seems to be a general rule that no one can be considered as a party to a deed unless he be named as a party in the clause containing the names of the persons who are formally made parties." And in 8 Blythewood and Jarman's Conveyancing, p. 413, it is said: "Where the deed is expressed to be made between the parties, the parties named are alone parties to the instrument." It may be that a deed made between A. as grantor, of the one part, and "all the heirs at law of B." as grantees, of the other part, would be operative in favour of the heirs as if expressly named (see Elphinstone on Deeds, p. 127, as to deeds in favour of a class). But this deed is expressed to be made between Levi Snider and Henry McCartney, and his heirs cannot be substituted as the parties with whom the deed is made. In any event, the heirs in this deed do not take any estate on the face of the deed. The words are merely words of limitation to describe the estate in fee which the deed purported to convey to Henry McCartney. Even if the deed could operate as a direct grant to the heirs as if named, they would in 1879 have received merely a life-estate and not the fee. I must hold, therefore, that the deed in question was wholly inoperative to convey any estate either retroactively to Henry McCartney in his lifetime or directly to his heirs. Its only value is as a piece of evidence operating perhaps in the nature of an estoppel as against Levi Snider and his heirs or legal personal representatives.

There seemed to be ample and fairly satisfactory evidence that the widow and heirs of Henry McCartney (who had gone into possession prior to his death) occupied the land exclusively from 1879 to 1905, when the present vendor acquired the lands, and the present vendor since that date. What was lacking, and what the purchaser was entitled to, was satisfactory evidence that the right of any person claiming under Levi Snider, and who might have been under some disability, had been effectually barred by lapse of time. It seemed hardly possible that after 41 years any such right could now exist, having in view the limi-

tations fixed by the Limitations Act, R.S.O. 1914 ch. 75, secs. 40, 41, and 42; but this ought not to be determined without further information.

If there are to be any costs of this application, they should be paid by the vendor.

ORDE, J., IN CHAMBERS. AUGUST 24TH, 1920.

*REX v. CHAPPUS.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House—Liquor Seized upon Truck in Course of Carriage to Defendant's House—Purchase on Terms that Property not to Pass until Delivery at House—Vendor Taking Risk of Delivery—Sale of Goods Act, 1920, secs. 19, 20—Absence of Evidence that Defendant in Possession or Control of Liquor when Seized—Finding of Magistrate—No Evidence to Support—Conviction Quashed.

Motion to quash the conviction of the defendant by the Police Magistrate for the City of Windsor for an offence against sec. 41 of the Ontario Temperance Act, viz., unlawfully having, on the 19th July, 1920, intoxicating liquor in a place other than the private dwelling house in which the defendant resided.

The conviction was as for a second offence, and the defendant was sentenced to 6 months' imprisonment at hard labour in the Ontario Reformatory.

J. W. Curry, K.C., for the defendant.
Edward Bayly, K.C., for the magistrate.

ORDE, J., in a written judgment, said that 65 or 66 cases of whisky were seized by the License Inspector, about 2.30 a.m. on the 20th July, 1920, while loaded upon a truck which was being driven upon a public highway by one V. The defendant was driving behind the truck in a touring car. Apart from that, there was nothing at that time to indicate that the defendant owned the whisky or had it in his possession or charge or control. V. was called for the prosecution and swore that the defendant had come to his place at 12.45 that night, wakened him up, and told him that one D. wanted him at his (D.'s) house with a truck, as D. had a load for V. He went to D.'s house and found the defendant there. The 66 cases were loaded on the truck by V.

and D., the defendant assisting by handing the cases from the cellar to D., who in turn passed them to V. D. was to pay V. V. left with the load, and the defendant followed in his car. About half way to the defendant's house, the whisky was seized by the Inspector.

D., called for the prosecution, denied having sold the whisky to the defendant, but said that he was to sell it to the defendant at the latter's house; that he was to deliver it at the defendant's house, and was to get no money until it was delivered there; and that it was part of the bargain that the defendant was to take no chance on delivering it, but that D. was to take that chance for him.

If the effect of the bargain between D. and the defendant was to pass the property in the whisky to the defendant as soon as it was appropriated to the contract, the defendant must be guilty; but it was contended that there was no evidence which justified the magistrate in coming to the conclusion that the whisky was owned by or was in the possession or control of the defendant.

In entering into a bargain with D., which, if completed, would result in a sale, the defendant was assisting D. to commit an offence against the Act. D. was in fact convicted under sec. 40 for selling or offering for sale this very whisky to the defendant; but that fact had no bearing upon the question to be determined here.

Upon the evidence, the property in the whisky had not passed to the defendant: Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40, secs. 19, 20 (O.); Wilson v. Shaver (1901), 3 O.L.R. 110.

The only evidence as to the terms of the contract was that of D., to the effect that no sale was to take place until the whisky was delivered at the defendant's house; and that was the only evidence that fastened upon the defendant any interest in the whisky. There was no evidence that the defendant was in charge or control of it or that V. was in any way subject to his orders or under his control.

There was no prima facie proof of possession by the defendant which would of itself, in spite of any other evidence, support the conviction upon a motion to quash. If the magistrate's conclusion was that the defendant was in possession or charge or control of the whisky while on its way from D.'s house, apart from any question of ownership, there was no evidence to support that conclusion.

The conviction must be quashed, with the usual order for the protection of the magistrate.

ORDE, J., IN CHAMBERS. AUGUST 25TH, 1920.

RE WHITE.

Bankruptcy—Assignment to Authorised Trustee under Bankruptcy Act, 1919—Previous Assignment under Ontario Assignments and Preferences Act—Proceedings Taken under—Notices to Creditors—Creditors' Meeting—Motion to Adopt under Bankruptcy Act—Absence of Provision in Bankruptcy Act Warranting Adoption—Invalidity of Previous Assignment—Bankruptcy Act, secs. 2 (q), 3 (a), 9, 11(4)—Publication in Canada Gazette.

Motion by W. R. Morris, an authorised assignee under the Bankruptcy Act, 1919, for an order confirming the steps taken by the applicant for the protection of the creditors and the winding-up of the estate of Henry G. White, debtor, and declaring that the applicant, as authorised trustee, and the inspectors named by the creditors, are at liberty to proceed with the winding-up of the affairs of the debtor as if a certain general meeting of creditors held on the 10th August, 1920, had been held under and by virtue of the Bankruptcy Act.

J. F. Strickland, for the applicant.

ORDE, J., in a written judgment, said that on the 27th July, 1920, White made an assignment for the benefit of his creditors, under the Ontario Assignments and Preferences Act, to the applicant, who had not at that time been appointed an authorised trustee under the Act. The assignment was registered as required by the Ontario Act, and the usual notice to creditors was mailed by registered letter on the 31st July, 1920, to each creditor, and was also published in a newspaper on the 31st July and 4th August, 1920. Pursuant to the notice, a meeting of creditors was held on the 10th August, 1920.

The meeting, by resolution, instructed the assignee to obtain from White an assignment under the Bankruptcy Act; and, if that was not obtained within three days, "to file an application before the Court to have White declared a bankrupt," etc.

On the same day, the applicant was appointed an authorised trustee under the Act; and on the 13th August, 1920, White made an assignment to the applicant, in the form (No. 18) authorised by the Bankruptcy Rules.

By the amending Act, 10 & 11 Geo. V. ch. 34, sec. 2, the Court may give leave to a corporation to be wound up, or to continue winding-up proceedings; but the learned Judge was not referred to and had been unable to find any provision in the Act or in the

amendments which, even by implication, empowers the Court either to authorise an insolvent person to make a voluntary assignment (other than as authorised by the Act) or to continue proceedings already begun under any voluntary assignment or to declare that proceedings already taken under any unauthorised voluntary assignment shall be deemed to have been taken under the Act.

The Bankruptcy Act makes a voluntary assignment an act of bankruptcy (sec. 3 (*a*)), and further declares (sec. 9) that any assignment, other than an authorised assignment, made by an insolvent debtor for the general benefit of his creditors, shall be null and void. So far as proceedings under the Bankruptcy Act are concerned, that means that no such unauthorised assignment can have any validity whatever.

The meeting of creditors was probably regularly held so far as the requirements of the Ontario Act are concerned; but sec. 11 (4) of the Bankruptcy Act requires the notice calling the first meeting of creditors to be published in the Canada Gazette (see definition of "gazetted," sec. 2 (*q*)). It is conceivable that some person entitled to be present at the meeting failed to hear of it because of the failure to publish the notice in the Gazette. In such circumstances, to validate the meeting would not be proper, even if there was power to do so.

All that took place prior to the authorised assignment of the 13th August, 1920, must be disregarded; and the trustee must commence anew by publishing and mailing proper notices in the manner required by the Act and Rules and holding a new meeting of creditors.

Application refused.

ORDE, J. AUGUST 26TH, 1920.

RE COOPER AND KNOWLER.

Dower—Conveyance of Land in Fee Simple—Habendum to Grantee for such Uses as he may Appoint and in Default of Appointment to Grantee his Heirs and Assigns—Rule in Shelley's Case—Legal Estate in Grantee—Wife's Right to Dower—Vendor and Purchaser—Right of Purchaser to Require Bar of Dower in Conveyance from Grantee—Attempt to Correct Conveyance—Notice to Wife—Rule 602.

Motion, under the Vendors and Purchasers Act, by a vendor of land, for an order declaring that he can make a good title by a conveyance without a bar of dower by his wife.

The motion was heard in the Weekly Court, Toronto.

J. E. Parsons, for the vendor.

W. A. Baird, for the purchaser.

Orde, J., in a written judgment, said that the vendor's title was derived by conveyance made, in pursuance of the Short Forms of Conveyances Act, on the 2nd September, 1919, whereby the land which he now proposed to convey was granted to him in fee simple, "to have and to hold unto the said grantee, his heirs and assigns, to and for such uses as the grantee may by deed or by will appoint, and in default of appointment then to hold unto the said grantee, his heirs and assigns, in fee simple."

Owing to the name of the grantor in this deed having been spelled "Stuart," a new deed was subsequently executed and registered, in which the name was spelled "Stewart." This second deed otherwise corresponded with the earlier deed, except that in the portion of the deed technically known as "the premises," instead of the words "doth grant unto the said grantee in fee simple," are the words "doth grant unto the said grantee as hereinafter stated."

The primary intention of the second deed appeared to have been to correct the misspelling, but it also appeared to have been hoped, by substituting the words "as hereinafter stated" for "in fee simple," to overcome the objection to the title raised by the purchaser.

The second deed, however, accomplished nothing. The misspelling of the grantor's name did not invalidate the earlier deed, and whatever estate Stewart possessed passed from him by execution of the earlier deed. Apart from this, the substituted words could not give the grantee any different estate in the lands.

Under the rule in Shelley's case, the grantee, by either grant, became seised of the legal estate in fee, notwithstanding the power of appointment.

Had the estate been limited to some third person to hold to such uses as Cooper might appoint, there would still be a great deal of doubt as to whether or not the vendor could convey fee from his wife's dower: see Armour on Real Property, 2nd ed., p. 114.

In these circumstances, an unwilling purchaser should not be forced to accept the title without a proper bar of dower in the conveyance; and it would not be proper, with the wife unrepresented on the motion, to come to any final decision upon the question whether or not the wife was entitled to dower.

It should be declared that the vendor, proposing to convey without his wife joining to bar her dower, had not made out a good title to the land.

If the parties desire it and think that the wife's rights can be finally determined upon this motion, leave will be given under Rule 602 to serve on her a notice returnable before the learned Judge.

ORDE, J., IN CHAMBERS. AUGUST 26TH, 1920.

*RE EMPIRE TIMBER LUMBER AND TIE CO. LIMITED.

Company—Winding-up—Petition by Creditors for Order under Dominion Act—Company Incorporated under Ontario Companies Act in Process of Voluntary Winding-up under that Act—Insolvency not Shewn—Winding-up Act, R.S.C. 1906 ch. 144, secs. 6 (a), (b), 11 (b), (e)—Powers of Dominion Parliament—Bringing Provincial Corporation within Dominion Act on Grounds other than Insolvency—Previous Decisions—Ontario Judicature Act, secs. 32 (2), 33—Voluntary Winding-up not Act of Insolvency—Constitutional Question—Notice to Attorneys-General—Petition Dismissed on other Grounds—Exercise of Discretion—"Just and Equitable."

Petition by Hall Brothers Limited for an order for the winding-up of the above company, under the Dominion Winding-up Act.

G. H. Sedgewick, for the petitioners.
H. H. Dewart, K.C., for the company.

ORDE, J., in a written judgment, said that the Empire company was incorporated under the Ontario Companies Act, and was now in process of voluntary winding-up under the provisions of that Act, in pursuance of a resolution of the shareholders passed on the 3rd July, 1920.

The company had a nominal capital of $85,000. The evidence as to the nature and extent of its assets and liabilities was a little vague, but it appeared to have certain saw-mills and equities or options in timber lands and some lumber on hand, all valued at approximately $35,000, with liabilities of about $30,000.

The petitioners were creditors upon an overdue promissory note for $591.70 and interest. No judgment had been recovered upon this note, nor had there been default for 60 days after demand made, under sec. 4 of the Dominion Winding-up Act.

There was no allegation of insolvency in the petition. The petitioners relied solely upon the fact that they were creditors and that the company had passed a resolution to wind-up vol-

untarily—they asked that it be declared that the company was a corporation to which the provisions of the Winding-up Act are applicable and that the company ought to be wound up under that Act.

Section 6 of the Dominion Act declares that the Act applies to all "incorporated companies doing business in Canada wheresoever incorporated (*a*) which are insolvent; or (*b*) which are in liquidation or in process of being wound up."

By sec. 11, the Court may make a winding-up order, "(*b*) where the company at a special meeting of the shareholders called for the purpose has passed a resolution requiring the company to be wound up;" or "(*e*) when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up."

Upon the mere construction of these sections, the Court would have power to bring a provincial corporation within the Dominion Act on grounds other than that of insolvency. But the question whether or not the Dominion Parliament can legislate so as to force a provincial corporation into a compulsory winding-up on any ground other than bankruptcy or insolvency is not yet clearly settled.

In Re Cramp Steel Co. Limited (1908), 16 O.L.R. 230, it was held that the only clauses of the Dominion Act that can be made to apply to an Ontario corporation are those dealing with insolvency. That decision has not been overruled in this Province. Re Hamilton Ideal Manufacturing Co. Limited (1915), 34 O.L.R. 66, cannot be regarded as an authority upon the question of jurisdiction in conflict with the Cramp case.

In Re Colonial Investment Co. of Winnipeg (1913), 15 D.L.R. 634, it was held that, as the Dominion Parliament has power under sec. 91 (21) of the British North America Act to declare what constitutes insolvency, if may enact that a company, if in process of voluntary liquidation pursuant to a resolution of its shareholders, may be brought under the provisions of the Dominion Winding-up Act, on the petition of a shareholder, although not actually insolvent, since such voluntary proceeding is to be regarded as a species of insolvency.

In considering whether the Cramp case was binding on him, the learned Judge felt at liberty to disregard sec. 32 (2) of the Ontario Judicature Act. It could not, he thought, be intended to apply to a case involving the exercise of powers conferred or alleged to be conferred by a Dominion Act; and especially when the Act itself provides (sec. 125) that the Courts of the various Provinces and the Judges thereof shall be auxiliary to one another for the purposes of the Act. In the judicial interpretation of the

provisions of a federal Act there should be, as far as possible, uniformity throughout Canada.

The learned Judge, however, did not feel bound by the Colonial Investment case, and did not agree with the decision of the majority of the Court of Appeal for Manitoba therein. In his judgment, the mere fact that a provincial company is in process of voluntary winding-up does not of itself make the company insolvent under the Dominion Act. The only basis for federal interference with the constitution of a provincial corporation is its bankruptcy or insolvency. The decision in the Manitoba case does not purport to justify itself upon any other ground than that the voluntary winding-up constituted a species of insolvency.

If the parties desire it, the learned Judge will direct notice to be given to the Attorneys-General for Canada and Ontario under sec. 33 of the Ontario Judicature Act. He was of opinion, however, assuming that he had power to make an order, that, in the exercise of his discretion, an order ought not to be made; and, therefore, it would serve no useful purpose to have a re-argument before him. If there should be an appeal from his order, notice under sec. 33 might be necessary.

The petitioners objected to the liquidator entering into a contract for the cutting and sale of a quantity of lumber. Creditors to the extent of over $14,000 appeared to be willing that the liquidator in the voluntary winding-up proceedings should be given an opportunity to realise the assets to the best advantage, and were opposed to a compulsory winding-up. In these circumstances, the learned Judge thought that he ought not, at the instance of a creditor for less than $600, to make a winding-up order. Default in payment of the petitioners' claim within the time fixed by the Winding-up Act may make the company technically insolvent, or the company may commit an act of bankruptcy under the Bankruptcy Act. In either of these events, the petitioners' position will be different; but at present the learned Judge did not consider it "just and equitable" that the company should be wound up under the Dominion Act.

Petition dismissed with costs.

ORDE, J., IN CHAMBERS. SEPTEMBER 2ND, 1920.

*REX v. COLLINA.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Keeping Intoxicating Liquor for Sale—Evidence to Support Conviction—Presumption—Secs. 67, 88—Improper Admission of Evidence—Relevant Evidence—Hearsay Evidence —Effect of—No Substantial Wrong—Sec. 102a. (8 Geo. V. ch. 40, sec. 19)—Reduction of Sentence.

Motion to quash the conviction of the defendant by the Police Magistrate for the City of Hamilton for the offence of unlawfully keeping intoxicating liquor for sale, without a license, contrary to the provisions of sec. 40 of the Ontario Temperance Act.

M. J. O'Reilly, K.C., for the defendant.
Edward Bayly, K.C., for the Crown.

Orde, J., in a written judgment, said that the two substantial grounds upon which it was sought to quash the conviction were: (1) that there was no evidence to support it; and (2) that the magistrate improperly admitted irrelevant evidence, which affected his judgment, to the prejudice of the accused.

There was ample evidence that the accused had strong beer upon his premises; he admitted that he had several bottles, but said that they were for his own private use. There was, therefore, evidence constituting prima facie proof of guilt upon a charge of keeping for sale: sec. 88.

It was contended that possession of liquor could not be treated as prima facie proof of guilt unless the liquor was found upon a search made under a search-warrant issued under sec. 67. If that section were the only one which created the presumption of guilt upon proof of possession, this argument might have some force. The concluding words of sec. 67 and the provisions of sec. 88 overlap; but to give effect to the argument now advanced would be to nullify the effect of sec. 88 completely.

There was sufficient prima facie evidence of possession upon which the magistrate could convict.

It was urged that, where the presumption of guilt is met by evidence (of the accused or some one else) tending to rebut the presumption, the magistrate's decision is open to review upon a motion to quash: Rex v. Covert (1916), 28 Can. Crim. Cas. 25, and Rex v. Barb (1917), 28 Can. Crim. Cas. 93, Alberta cases. Those decisions are in direct conflict with the Ontario cases, of which Rex v. Le Clair (1917), 39 O.L.R. 436, is an example. The law on this point is too well-settled in this Province to leave room for any question except in some higher Court.

In all cases of summary conviction where it is clear that the accused has not had a fair trial or the magistrate's judgment has proceeded upon grounds that are improper or unfair to the accused, the conviction is open to review.

It was said that the fact that drunken men had been seen coming from the place where the liquor was found was not relevant to the issue, and, having been admitted, might have affected the

judgment of the magistrate. But, after the decision in Rex v. Melvin (1916), 38 O.L.R. 231, sec. 102*a*. was added to the Act, by 8 Geo. V. ch. 40, sec. 19, providing that "no conviction shall be quashed . . . on the ground that some evidence was improperly admitted . . . unless, in the opinion of the Court or Judge, some substantial wrong was thereby occasioned."

There was evidence here not only of the finding of the liquor in the house, but also that, on the occasion when the police entered, a man who was not the accused was having a meal at which he was drinking beer; that there were a large number of empty gin-bottles and beer-bottles in the place; drunken men had been seen going into and coming out of the house on several occasions; and men had been seen drinking at the table with glasses and bottles on the table. There was direct and properly admissible evidence of the foregoing facts, but there was also a good deal of hearsay evidence which the magistrate ought not to have admitted.

It was contended that the evidence as to drunken men entering or coming from the house, as to the presence of empty bottles, and as to the strange man drinking at his meal, was all irrelevant and ought not to have been admitted. The learned Judge could not agree with this view. The accused was charged with keeping liquor for sale. Having liquor in his private dwelling house was quite lawful, if not kept for sale; but, under sec. 88, the magistrate may convict of keeping for sale unless the accused can displace the presumption against him. Surely the character of the house, the frequent presence of other men and their entering or leaving the house intoxicated, the number of empty bottles, and the drinking at a meal, were all factors in assisting the magistrate to come to a conclusion. Far from being irrelevant, all such evidence was most proper and desirable in determining the bona fides of the defence, for that is really the point. The accused is prima facie guilty. All such evidence, whether adduced in support of the charge or by way of reply, is directed towards meeting or answering the defendant's denial of his guilt.

There was nothing to shew that the admission of the hearsay evidence prejudiced the accused. The magistrate finds as a fact that the accused had been selling liquor. While the magistrate also stated that the accused had been selling liquor under the guise of refreshments, and had been carrying on a restaurant business without a license—statements justified only by the hearsay evidence—it could not be gathered from the magistrate's judgment that he based his finding of fact upon which he adjudged the defendant guilty, on the hearsay evidence.

As there was ample admissible evidence, coupled with the prima facie proof of guilt, to justify the conviction, the learned Judge was of opinion that no substantial wrong had been done, and that the conviction must stand.

No good ground was shewn for reducing the sentence of 3 months in gaol imposed by the magistrate.

Motion dismissed with costs.

ORDE, J., IN CHAMBERS. SEPTEMBER 2ND, 1920.

REX v. KORLUCK.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec 40—Keeping Intoxicating Liquor for Sale—Evidence to Support Conviction—Presumption—Secs. 67, 88—Improper Admission of Evidence—Relevant Evidence—Hearsay Evidence—Effect of—No Substantial Wrong—Sec. 102a. (8 Geo. V. ch. 40, sec. 19)—Reduction of Sentence.

Motion to quash the conviction of the defendant by the Police Magistrate for the City of Hamilton for the offence of unlawfully keeping intoxicating liquor for sale, without a license, contrary to the provisions of sec. 40 of the Ontario Temperance Act.

M. J. O'Reilly, K.C., for the defendant.
Edward Bayly, K.C., for the Crown.

ORDE, J., in a written judgment, said that this conviction was attacked on substantially the same grounds as that in the Collina case, ante, and the two motions to quash were virtually argued together.

Before entering the defendant's house, the police constables watched it for some time. They saw one man go in who was afterwards found in the place very drunk, and also saw seven men come out; at least two of the seven were intoxicated. Upon entering they found a man (not the accused) drinking from a bottle. There was a small quantity of alcohol in a glass on the table and five other glasses and nine empty bottles. In the kitchen was found a can containing alcohol and in a cupboard a teapot half full of alcohol and in some drawers about 15 empty "pop" bottles. As is doubtless frequently the case, there was some irrelevant, inadmissible evidence of statements made by persons in the house. There was nothing in the magistrate's

judgment to justify the contention that any improperly admitted evidence influenced his mind, or did any substantial wrong to the accused. He found the accused guilty and stated in effect that the fact of seeing drunken men there placed upon the accused the onus of shewing that there was no sale in the circumstances. This seemed to be quite sound. With the onus already upon the accused, the burden of disproving his guilt must become heavier if drunken men are found in his place, in circumstances naturally leading to the inference that they were not getting the liquor for nothing. The magistrate's statement that he did not believe the evidence of the accused and his wife was criticised. As in Rex v. De Angelis, ante, the magistrate, by accepting the evidence adduced for the Crown, necessarily disbelieved the denials of the accused. That he said so was of no consequence.

For the same reasons as in the Collina case, the learned Judge dismissed the motion with costs and declined to reduce the sentence of 3 months' imprisonment imposed by the magistrate.

ORDE, J., IN CHAMBERS. SEPTEMBER 4TH, 1920.

*REX v. JOHNSON.

Criminal Law—Magistrates' Conviction for Second Offence against sec. 41 of the Ontario Temperance Act—Insufficient Service of Summons—Criminal Code, sec. 658—Defendant not Present at Trial—Counsel Appearing for Defendant and Taking Part in Trial, though Objecting to Service—Authority—Retainer—Evidence—Waiver of Irregularity—No Substantial Wrong Occasioned.

Motion to quash a conviction of the defendant by two Justices of the Peace for an offence against sec. 41 of the Ontario Temperance Act.

C. A. Payne, for the defendant.
Edward Bayly, K.C., for the magistrates.

ORDE, J., in a written judgment, said that the only ground upon which the conviction was attacked in argument was, that, by reason of the service of the summons upon the wife of the defendant, instead of upon the defendant himself, and the defendant's non-attendance at the trial, there had not been a proper or fair trial.

On the 8th July, 1920, the defendant appeared with his counsel before the Justices at Madoc to answer a charge laid under sec. 41

of the Ontario Temperance Act, as for a first offence. Upon the application of the County Crown Attorney, the Justices permitted the charge to be withdrawn, apparently in order that a new charge might be laid as for a second offence. When the charge was withdrawn, the accused left the Court, and it was subsequently arranged between Mr. B., the defendant's counsel, and the County Crown Attorney that, if a new charge was laid, Mr. B. "would try and arrange to take the matter up on the 15th July." A new information was laid on the 10th July and a summons issued to the defendant, returnable on the 15th July at Madoc. This was given, on the 10th July, to a constable to serve, and on the 13th the constable served it by leaving it with the defendant's wife at his house in Madoc, the defendant himself being then absent.

There was no evidence to shew that the constable made any effort to find the defendant or to learn whether or not the summons served on the wife would come to the defendant's notice in time for the 15th. The County Crown Attorney communicated with Mr. B. by telephone, and they went together to Madoc on the 15th. When the case was called, the defendant did not appear, but Mr. B. did not ask for an adjournment on that ground, believing that the defendant would appear before the proceedings were concluded. The constable testified to the service of the summons upon the wife of the defendant, whereupon Mr. B. objected that the service had not been legal; but the Justices proceeded with the trial, and Mr. B. remained and cross-examined two of the Crown's witnesses, "subject to objection," meaning his objection to being obliged to proceed.

At the close of the proceedings, the Justices formally "adjourned for adjudication" until the 19th July, and on the 19th July adjourned again until the 22nd July, on which day they found the defendant guilty, and, proof of a conviction for a previous offence being given, they found him guilty of a second offence, and sentenced him to 6 months' imprisonment.

If the regularity of the conviction depended upon the proof of service of the summons, it would be difficult to support it: see sec. 658 of the Criminal Code: there was no evidence that the defendant could not "conveniently be met with;" and the defendant, by affidavit, denied, that the summons had come to his knowledge before the conviction.

But it was contended that the appearance by Mr. B. as counsel for the defendant at the hearing on the 15th July was a waiver of any irregularity in the service of the summons: Regina v. Doherty (1899), 3 Can. Crim. Cas. 505.

The learned Judge gave effect to this contention. On the evidence, Mr. B. had ample authority and instructions. The defendant did not repudiate Mr. B.'s authority to appear, and Mr. B. merely

stated that he had no specific instructions to attend on the 15th. But he had been retained on the 8th to defend the accused, and this retainer covered and was intended to cover the subsequent charge for the same offence if and when laid. Mr. B., under his retainer, appeared for the defendant on the 15th, and, although objecting to the sufficiency of the service, took part in the trial.

There was absolutely nothing to shew that the defendant was in any way prejudiced by his absence or that his defence (if any) was not as fully made out by his counsel as if he had been there in person. If there was any irregularity at the hearing, it did not appear that any substantial wrong was occasioned thereby.

Motion dismissed with costs.

ORDE, J. SEPTEMBER 7TH, 1920.

RE CUNNINGHAM AND POWLESS.

Arbitration and Award—Motion to Set aside Award—Arbitration Proceeding in Absence of Party—Denial and Explanation by Arbitrators—Acquiescence of Absent Party in Proceedings—Order for Enforcement of Award.

Motion by William and Austin Powless to set aside an award of arbitrators, and motion by J. R. Cunningham for leave to enforce the award.

The motions were heard in the Weekly Court, Toronto.
Daniel O'Connell, for the Powlesses.
H. J. Smith, for Cunningham.

ORDE, J., in a written judgment, said that the award was made by two arbitrators under a written submission, upon the dissolution of the partnership between the Powlesses and Cunningham.

The award was attacked upon the grounds: (1) that the arbitrators shewed partiality to Cunningham; (2) that they proceeded in the absence of William Powless; and (3) that the award was improperly procured by Cunningham. But, in substance, there was but one ground, viz., that the arbitrators had proceeded with the arbitration in the absence of William Powless, with the result that the award was not fair to him. Except in so far as there was any substance in the charge that the arbitrators had proceeded improperly and unfairly with the reference, there was no ground for the suggestion that they shewed any partiality to Cunningham or that Cunningham in any way improperly procured the award.

The submission was signed on the 11th December, 1919. On the 13th December, 1919, the arbitrators met, in the presence of all parties, for the purpose of proceeding with the reference. William Powless swore that he had business that day at Deseronto, and, before going there, told the arbitrators so, and that he would return the next day; that he left with them what documents and vouchers he had, and told them they might look over them in his absence, and that he would be ready to give his explanations upon his return; that Matthews, one of the arbitrators, told him that he would be in plenty of time; that he left for Deseronto, and, on his return the same evening, he met Matthews, and was handed the award; and that he then protested. These statements were denied by both arbitrators. They said that, before leaving for Deseronto, William Powless gave his evidence and handed to them what he said were all the vouchers and papers he had in regard to the partnership; that they told him not to go, and he said he had to go, and they knew as much about the matter as he did; that William Powless was present during part of the time while they were examining the accounts and hearing Cunningham's evidence. Matthews also denied that Powless protested when the award was handed to him. Cunningham's affidavit also substantially confirmed the arbitrators' statements.

On the evidence, the learned Judge felt bound to accept the statements of the arbitrators. Upon a reference to arbitration it usually lies entirely with the arbitrator to appoint the time and place of meeting for proceeding in the reference, and it is the duty of the parties to attend: Russell on Awards, 10th ed., pp. 375, 376. If, in fixing the date or in proceeding with the reference, due regard is not given to the reasonable convenience of the parties, the proceedings may be reviewed by the Courts. But what took place here would not justify the Court in setting aside the award. If the facts were as stated by the arbitrators, William Powless acquiesced in their proceeding in his absence, and had himself to blame if in the result the award was unsatisfactory to him.

In view of the foregoing, it was not necessary to come to any conclusion on the contention that the Powlesses had acquiesced in and adopted the award.

The motion to set aside the award should be dismissed with costs, and there should be an order for leave to enforce the award with costs.

ORDE, J. SEPTEMBER 8TH, 1920.

RE BRYANT.

Will—Construction—Provision for Maintenance of Grandchildren during Minority—Trust—Gift to Trustees—Gift by Implication to Grandchildren at Majority—Survivorship—Gift over.

Motion by the surviving executors of Harry Bryant, deceased, for an order determining the true construction of a clause in his will.

The motion was heard in the Weekly Court, Toronto.
T. H. Simpson, for the applicants.
M. J. O'Reilly, K.C., for Lily Emma Smith and Harry William Audrey Smith, grandchildren of the testator.

ORDE, J., in a written judgment, said that the testator died on the 18th October, 1910, leaving a will of which his widow and two sons were the executors. By the will he devised and bequeathed his whole estate to his executors upon trust to pay debts and funeral and testamentary expenses, to convert the personalty (except the furniture) and invest the proceeds, and to pay the income arising therefrom and the rents and profits of the realty, after providing for insurance, repairs, and taxes, to the widow during her life. There was then a devise of a farm to the testator's son Alfred, upon the death of the widow, in fee. Then followed the clause now in question, by which the testator directed that the westerly half of his property "with 5 acres of land and the 6 houses thereon shall go to my two sons . . . until such time as my granddaughter Lily Emma Smith and my grandson Harry William Audrey Smith shall attain the age of 21 years. Out of the rents and profits derived from the said property my sons . . . shall apply such portions thereof as in their opinion shall be reasonably sufficient when added to the earnings of my two grandchildren . . . for their proper maintenance and education until" they "attain the age of 21 years. Should either of the aforesaid grandchildren die then the portion of the deceased one shall revert to the survivor and in the event of both . . . dying prior to attaining the age of 21 years then the property willed to them shall be divided between my grandchildren the issue of James and Ada Eustice . . . their heirs and assigns for ever. It is to be distinctly understood that any amount over what is used for maintenance education and clothing of my two grandchildren hereto referred to together with all reasonable charges for collecting rents repairs etc. to the six mountain

houses, the balance shall be placed in a bank to the credit of the heirs of this said property."

The question is, whether Lily and Harry Smith take the fee simple upon attaining 21, or are entitled only to be maintained and educated out of the income during infancy with the fee vested in the two sons (executors) subject to being divested in favour of the Eustice grandchildren if Lily and Harry Smith die before attaining 21. The alternative to the two Smith grandchildren taking the fee at 21 is so absurd as to render it quite apparent that the testator could have had no such intention. The will presented a striking example of a case in which those really intended to be benefited take an estate by implication.

A gift to A. till 21, with a gift over if he dies under 21, gives A. an absolute estate in fee, defeasible upon death under 21: Theobald on Wills, 7th ed., p. 736; and, while a simple gift to trustees in trust for A. until he attains 21 will not give A. the absolute interest, very slight indications of intention will in that case also give the absolute interest: Theobald, p. 736.

There was nothing to shew any intention to benefit the two sons, but much to shew the contrary intention.

There was a gift to the two sons as trustees, in trust to collect the rents and profits, and thereout, after providing for "all reasonable charges," etc., to apply such portion of the income as in their opinion should be reasonably sufficient, when added to the earnings of the two Smith grandchildren, for their maintenance and education until they should attain 21, and as each attains 21 he or she will be entitled to an undivided half interest in fee in the land, and if either dies before attaining 21 the other upon attaining 21 will be entitled to the whole.

Order declaring accordingly; costs of all parties, as between solicitor and client, should be paid by the estate.

ORDE, J. SEPTEMBER 9TH, 1920.

RE BROWN AND BLYTH.

Settlement—Voluntary Conveyance of Land to Person in Trust for Heirs of Grantor—Reconveyance by Trustee—Application under Vendors and Purchasers Act for Declaration that Grantor can Make Title to Land—Unascertained Class of Beneficiaries—Powers of Court under Act and under Rule 602—Revocation of Settlement.

An application by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the vendor can make a good title to the land.

The motion was heard in the Weekly Court, Toronto.

J. C. McRuer, for the vendor.

E. F. Singer, for the purchaser.

E. C. Cattanach, for the Official Guardian, representing the infant children of the vendor and his heirs as a class unascertained.

Orde, J., in a written judgment, said that the vendor, on the 30th September, 1918, drew up in his own hand and executed a conveyance, in pursuance of the Short Forms of Conveyances Act, of the lands in question, in favour of one Martha H. Laurie, an unmarried woman, who was then acting as his housekeeper. In the description of the parties, she was described as the "grantee herein," and these words were followed by the words "in trust." The consideration was stated to be "natural affection and the sum of one dollar," and the grant was expressed to be "unto the said grantee in fee simple in trust for the heirs of the said grantor." There was no habendum, that is, the printed habendum in the form used was struck out. The clause which contained the general release of "all claims upon the said lands" was followed by the words "to and for the exclusive benefit of his heirs as aforesaid." The deed was registered on the 8th November, 1918. Martha H. Laurie swore that she knew nothing of the deed until some time after its registration. She understood that she held the property in trust for Brown, and she never attempted to exercise any authority over it, no rent was ever paid to her, and she never visited it, or interfered with it in any way. Subsequently, on the 10th May, 1920, she executed a reconveyance to Brown.

Brown swore that when he executed the deed he was ill and under severe mental strain; that he made the conveyance without knowing its effect; that he intended to turn over the property to Martha H. Laurie in trust for himself and with no other intention. He had no advice that the trust was irrevocable, and believed it might be revoked by his will. There was no consideration for the conveyance, and he never parted with the possession of the property.

Brown had now entered into a contract to sell the lands, and objection was made to his title by reason of the conveyance to Martha H. Laurie. Brown contended that the voluntary settlement which he had made was revocable, and numerous authorities were cited in support of the contention that, in the circumstances in which the settlement was executed, it could be revoked. But the authorities are equally clear that it is not every voluntary settlement which may be revoked; and, while there are certain principles upon which the Courts act in determining whether or not the settlor can revoke the settlement, each case must be determined upon its own facts.

Counsel for the Official Guardian, on behalf of the infant children of the settlor and of his unascertained heirs, took the objection that no such power of revocation as that claimed by the vendor could be given effect to upon an application under the Vendors and Purchasers Act. This objection must prevail. Whether, under the provisions of Rule 602, the Court could make an order binding upon an unascertained class, was open to serious doubt. But in this matter the Court was asked to pronounce what in effect would be a declaratory judgment—a judgment declaring that the vendor could effectively revoke an instrument which appeared as a cloud upon his title, and in which no power of revocation was reserved, and, by doing so, cut out certain unascertained persons who might otherwise be entitled. No such power was intended to be conferred upon the Court by the Vendors and Purchasers Act, or by Rule 602; and, in the absence of any authority that any such power is conferred, no such order can be made here, but the vendor must resort to some other remedy, probably an action commenced by writ, for the relief which he requires in order to make title. That he will meet with difficulties in bringing that action against an unascertained class, is obvious, but the difficulties are of his own creation.

For these reasons, it should be declared that the vendor has failed to remove the objection raised by the purchaser, and is unable at present to convey to the purchaser a good title to the lands in question.

The vendor must pay the costs of the purchaser and also of the Official Guardian.

MIDDLETON, J. SEPTEMBER 9TH, 1920.

RE BUTTERFIELD AND WAUGH.

Mortgage—Discharge—Effect of—Registry Act, R.S.O. 1914 ch. 124, sec. 67—Conveyance of Legal Estate to Person Entitled in Equity —Second Mortgage Paid off but not Discharged.

An application by a vendor of land, under the Vendors and Purchasers Act, for an order declaring the purchaser's objection to the title invalid and that the vendor had shewn a good title.

The motion was heard in the Weekly Court, Toronto.

G. H. Sedgewick, for the vendor.

G. P. McHugh, for the purchaser.

MIDDLETON, J., in a written judgment, said that the vendor bought the land on the 1st November, 1911, and gave a mortgage, payable on the 1st January, 1912, for $200, part of the purchase-money. This mortgage was paid off on the 25th January, 1912; and the mortgagee's receipt was produced. No discharge was registered, as the mortgagor was ignorant of the law; and the mortgagee could not now be found. This was a second mortgage. The first mortgage was paid off and discharged in July, 1920.

The effect of this discharge, under sec. 67 of the Registry Act, R.S.O. 1914 ch. 124, was to convey the legal estate to the mortgagor, who was the person entitled in equity.

The objection was in this way fully answered.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 10TH, 1920.

*REX v. FOXTON.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Liquor in Place other than Private Dwelling House—Search-warrant—Finding of Keg on Premises—Evidence as to Contents—Sufficiency—"Liquor"—Sec. 2 (f) of Act.

Motion to quash a conviction of the defendant, by a magistrate, for the offence of having intoxicating liquor in a place other than a private dwelling house, contrary to the provisions of sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

J. J. Maclennan, for the defendant.
F. P. Brennan, for the magistrate.

MIDDLETON, J., in a written judgment, said that the sole question argued was, whether the proof of the nature of what was found upon the defendant's premises was sufficient.

The defendant received from a railway company, on the 2nd June, a 5-gallon keg marked as containing liquor, and signed a receipt therefor. This was dealt with under the provisions of the Act relating to the possession of intoxicating liquor, and it was sufficiently shewn to be intoxicating liquor.

On the 25th June, a search was made, under a search-warrant, of the defendant's premises, and two kegs were found, one containing, it was said, two gallons of liquor. There was nothing to identify it with the keg received from the railway company. The License Inspector who made the search, said, according to the magistrate's note: "The warrant was to search for liquor. We

found one keg with about two gallons of liquor. It was a 5-gallon keg. The two kegs were labelled." There was no cross-examination upon this testimony. Another constable, who was present, spoke of the finding of the keg, and said that he supposed the fluid in it to be liquor, but he did not know. He "could not say whether it was water or not."

The argument was, that it was not shewn that the liquor was intoxicating liquor.

Reference to sec. 41, making it an offence to "have or keep or give liquor in any place wheresoever other than in the private dwelling house" in which the accused resides; and to sec. 2 (*f*), defining "liquor" as including "all fermented, spirituous and malt liquors," etc.

The prohibited thing was well-described by the term "liquor." In the context in which the word was used by the Inspector in giving evidence, it could not have been used with any other signification than that of intoxicating liquor—the kind of liquor forbidden by the statute. If there could be any doubt as to the meaning of the witness, it was the duty of counsel acting for the accused to clear up the situation by cross-examination.

Reference to Browne v. Dunn (1894), 6 R. 67.

The magistrate's notes of the evidence, in a case of this kind, may well be incomplete. It would not be safe to assume that the responsibility for the use of the particular word, "liquor," did not rest with the magistrate. At the trial it appeared to have been taken for granted by all concerned that what was found was "liquor" within the meaning of the Act. The defence before the magistrate was based upon the ground that the house where the liquor was found was really the accused's private dwelling house, notwithstanding that there were boarders in it.

Where a statutory meaning is given to a word by the interpretation clause, and where the section under which the prosecution takes place uses the word in this special sense, it is to be assumed that, in giving evidence describing the situation, the word is used by the witnesses in the same sense, unless upon cross-examination this inference is displaced.

Motion dismissed with costs.

ORDE, J. SEPTEMBER 10TH, 1920.

HYDRO-ELECTRIC POWER COMMISSION OF WELLAND v. HILL.

Nuisance—Flats in Building Leased to Several Tenants—Public Billiard-room above Store and Office—Noise from Billiard-room Disturbing and Annoying Tenants of Store and Office—Interference with Reasonable Enjoyment of Premises—Ceiling so Constructed as to Accentuate Sound—Upper Floor not Constructed so as to Deaden Sound—Duty of Tenant to Minimise Annoyance—Injunction—Stay to Enable Application of Remedy.

An appeal by the defendant from the report of the Judge of the County Court of the County of Welland, upon a reference to him for trial of the action, which was brought to recover damages for an alleged nuisance and for an injunction. The learned County Court Judge reported in favour of the plaintiffs' claim. The plaintiffs moved for judgment upon the report.

The appeal and motion were heard in the Weekly Court, Toronto.

L. B. Spencer, for the defendant.

H. S. White, for the plaintiffs.

ORDE, J., in a written judgment, said that the plaintiffs were tenants of the ground floor and basement of a building in the city of Welland. The premises were used by the plaintiffs as a store and office. The defendant was the tenant of the first floor of the building, the floor above the ground floor, which he used as a public billiard-room, with 6 tables.

The plaintiffs complained that the noises from the billiard-room constituted a nuisance, and interfered with the work and efficiency of their office staff. Three specific things were complained of: (1) the noise made by billiard-balls dropping from the tables upon the floor; (2) the noise made by the pounding on the floor of the butt-ends of the billiard-cues; and (3) the noise caused by the walking about the floor of the frequenters of the billiard-room and the creaking of the boards in a portion of the floor.

The learned Judge, after stating the facts, referred to Halsbury's Laws of England, vol. 21, p. 531, for the principles applicable to cases of alleged injury to health and comfort; also to Kerr on Injunctions, 5th ed., p. 203; Ball v. Ray (1873), L.R. 8 Ch. 467, 469; Christie v. Davey, [1893] 1 Ch. 316; Sanders-Clark v. Grosvenor Mansions Co., [1900] 2 Ch. 373; Pope v. Peate (1904), 7 O.L.R. 207.

So far as the business of the defendant was concerned, on the principle of these authorities, the plaintiffs could not succeed. Assuming that the premises used as a billiard-room were fully adapted for the purpose, with floors reasonably constructed to deaden the sound, then, no matter to what extent the plaintiffs might be annoyed or rendered uncomfortable by such noises as are incident to a properly conducted billiard-room, they would not be entitled to an injunction nor to damages. The use of an upper storey in a building in a business district as a billiard-room is quite usual and reasonable; and the defendant is entitled, so far as the plaintiffs are concerned, to carry on this or any other business, not in itself objectionable, in the premises demised to him.

The question which presents the real difficulty is, whether or not, in adapting the premises for use as a billiard-room, the defendant took reasonable and proper steps to minimise the noise which apparently is necessarily incident to the business which he proposed to carry on.

For the accentuation of the noises by the metal ceiling over the plaintiffs' premises and under the floor of the defendant's premises, the plaintiffs must themselves find the remedy, the defendant being in no way responsible for that; but to the extent that the annoyance may be due to the defendant's floor, he is in the wrong. In refitting the room for use as a billiard-room, he failed to take proper and reasonable care to minimise the annoyance to his neighbours by providing a proper floor for a billiard-room.

To the extent, therefore, that the present inadequate floor (apart from the metal ceiling) aggravates the noises complained of by the plaintiffs, the defendant is guilty of creating a nuisance which the plaintiffs are entitled to have restrained by injunction; and to that extent the report of the learned County Court Judge should be affirmed; but the injunction order should be stayed for two months, in order that the defendant may make such alterations in the floor as are necessary to decrease and minimise the noise.

The defendant should pay to the plaintiffs their costs of the action and reference and of these motions.

ORDE, J. SEPTEMBER 10TH, 1920.

RE PARDON.

Will—Construction—Soldier's Will—Printed Form—Blanks not Filled up—Ambiguity—Evidence—"Personal Estate"—Intention of Testator—Subjects of Gifts.

Motion by Nelly Robinson, wife of W. F. Robinson, and John Pardon, for an order declaring the true meaning and effect of the will of Albert Pardon, deceased.

The motion was heard in the Weekly Court, Toronto.

G. R. Munnoch, for the applicants.

L. M. Keachie, for the administrator with the will annexed.

W. J. Hanley, for Jennie Dodds.

ORDE, J., in a written judgment, said that the testator died while serving in the Canadian Expeditionary Forces in France. The will was made upon a printed form provided by the military authorities. It commenced with a clause revoking all former wills and declaring this to be his last will. Then followed, in printed words, "I bequeath all my real estate unto," followed by a blank, and then, in print, "absolutely, and my personal estate I bequeath to," followed by another blank. Opposite the two blanks were the printed directions, "Name and address of person or persons to whom it is to go" and "Name and address of person or persons to receive personal estate (see note)." The operative part of the will, including all the printed as well as the written portions, read:—

"6000 shares Moose Horn mining stock

"*I bequeath all my real estate unto*

"$1000 to Miss Jennie Dodds, Calgary, Alberta.

"Remainder to

"Mrs. W. F. Robinson (sister), 52 Emerson Ave., Toronto.

"John Pardon (brother) now serving with 228th Bn. C.E.F.

"*absolutely, and my personal estate I bequeath to*

"Pte. John Pardon, now serving with 228th Bn. C.E.F."

The portions in italics are the printed portions.

Any difficulty which might have arisen by the contradictory gifts of the remainder to the testator's brother and sister and of all his personalty to his brother was removed by an agreement between them and the administrator that, after the payment of debts and funeral and testamentary expenses and the satisfaction of whatever bequest was made to Jennie Dodds, the estate should be equally divided between the brother and sister.

Jennie Dodds contended that by the will there was bequeathed to her 6,000 shares of the Moose Horn mining stock and an additional $1,000. The brother and sister contended that the testator intended to give only the 6,000 shares and that the "$1,000" must be read as merely indicating the value of the shares.

The printed words "I bequeath all my real estate unto" were meaningless and might be disregarded.

There were no words of gift, but that was of no consequence —the testator was making a will disposing of his property, and the words "I give" or "I bequeath" might be understood.

The testator had 12,000 shares in Moose Horn Mines Limited, but it was not suggested that the par value was $1,000. Evidence that the testator paid 10 cents per share for the stock, and that he frequently referred to the shares as having a value of $2,000, was tendered. In addition to these shares, he had some other mining stock, some of it of no value, a small parcel of real estate, some money in the bank, his army pay, and $1,433 owing to him for wages.

While evidence of surrounding circumstances is admissible in some cases to explain the meaning of words and for other purposes, no such evidence could be admitted here to explain whatever ambiguity arose from the language of this gift.

The difficulty was caused by the failure of the testator to use the word "and" before "$1,000."

Keeping in mind the principle that, where there is an evident intention to benefit some person and there is any ambiguity as to the extent of the gift, the Court will lean to that construction most favourable to the object of the testator's bounty (Halsbury's Laws of England, vol. 28, p. 763), the doubt ought to be resolved in favour of Jennie Dodds—it should be declared that she took both the 6,000 shares and the $1,000.

What the testator intended was to give the 6,000 shares and $1,000 to Jennie Dodds, his personal belongings, i.e., clothing and such like things, to his brother, a soldier like himself, and the remainder of his estate equally to his brother and sister.

Order declaring accordingly; costs of all parties to be paid out of the estate, those of the administrator as between solicitor and client.

GOSSELIN V. GAGNIER—KELLY, J.—AUG. 9.

Contract—Sale of Factory—Misrepresentations—Damages—Rectification—Claim and Counterclaim—Judgment—Costs—Set-off.] —This action arose out of a sale by the defendant to the plaintiff of a munitions factory in Peterborough in December, 1916. The plaintiff alleged misrepresentations and claimed damages and a rectification of the agreement for sale and other relief. The defendant counterclaimed for payment or allowance of several items. The action and counterclaim were tried without a jury at a Toronto sittings. KELLY, J., in a written judgment, made a full statement of the facts and made findings thereon. He directed that

judgment should be entered for the plaintiff for $2,367.68 and interest from the 20th December, 1916, and judgment for the defendant on his counterclaim for $1,458.93 and interest from the same date and also for the interest, if any allowed by the bank, on the sum of $166,900 from the date upon which the plaintiff took possession till the 29th December, 1916; these respective amounts to be set off and the plaintiff to have judgment for the difference; the plaintiff to have the costs of the action and the defendant the costs of the counterclaim, the two sets of costs to be set off pro tanto. Daniel O'Connell, for the plaintiff. A. C. McMaster, for the defendant.

RE ODDFELLOWS' RELIEF ASSOCIATION AND BLAMEY—LENNOX, J., IN CHAMBERS—AUG. 16.

Insurance (Life)—Presumption of Death of Insured—Insurance Act, R.S.O. 1914 ch. 183, sec. 165 (4), (5)—Evidence—Disposition of Insurance Money—Administration Dispensed with.]—Motion by the association, under the Insurance Act, R.S.O. 1914 ch. 183, sec. 165 (4) and (5), for a declaration as to the presumption of death of George F. Blamey, a person whose life was insured by the association, and for a direction as to the payment of the insurance money. LENNOX, J., in a written judgment, said that there was ample evidence to support a presumption of the death, under the terms of the statute, and the money or benefit secured by certificate No. 18909 was immediately payable. There was also good ground for believing that Blamey died intestate, unmarried, and without lawful issue. The parties should not be put to the expense of administration, and payment into Court was unnecessary. There should be an order declaring that the presumption of death had arisen, directing the payment of the money, less the association's costs of the motion, to the next of kin of Blamey mentioned in the affidavits, and exonerating the association from further liability. W. Lawr, for the association. G. D. Conant, for the beneficiaries.

RIZA V. DOWLER—LENNOX, J.—AUG. 16.

Injunction—Interim Order—Motion to Continue—Remedy in Damages—Ability of Defendants to Pay—Delay of Building Operations—Public Interest.]—Motion by the plaintiffs to continue an interim injunction restraining the defendants from pulling down the wall of a building. The motion was heard in the Weekly

Court, Toronto. LENNOX, J., in a written judgment, said that the proper construction of the writings between the parties could be determined with reasonable certainty only after all the local conditions and surrounding circumstances had been put in evidence at the trial. For the infringement of any right the plaintiffs might have they could be adequately compensated in damages, and there was no doubt that they would be able to recover any damages which might be awarded to them. On the other hand, loss by delay during the building season, for which there could be no adequate recovery, might be occasioned by continuing the injunction; and it was in the public interest, too, that building operations should not be unnecessarily arrested. The injunction should be dissolved, and the motion to continue it dismissed; costs reserved to be disposed of by the Judge at the trial. A. St. G. Ellis, for the plaintiffs. G. A. Urquhart, for the defendants.

RE W.—ORDE, J., IN CHAMBERS—SEPT. 7.

Infant — Custody — Right of Father — Misconduct — Welfare of Infant—Custody of Maternal Grandfather.]—Motion by Walter W. for an order awarding him the custody of his infant son, aged 7, at present living with his maternal grandfather. The boy's mother died in October, 1918; the applicant had married again. ORDE, J., in a written judgment, said that in ordinary circumstances the father's right to the custody of his own son would be paramount; but the circumstances here were not ordinary. The grandfather resisted the application on the ground that the father and his second wife were not fit persons to have the custody of the boy, and that it would be in the interest of the boy to leave him with his grandparents. After reviewing the evidence, the learned Judge said that he was satisfied that neither the father nor his present wife ought to be entrusted with the care of the boy. There was abundant evidence that the boy was happy with his maternal grandparents and would be well-cared for upon their farm. He had been with them now nearly two years. To take him from these surroundings and restore him to his father would, in all the circumstances, be taking a great risk, and would be an act of heartless cruelty to the boy. The father had, by his misconduct, forfeited the right to the custody and care of his son. The application should be dismissed with costs. The order should contain a provision enabling the father, under proper safeguards, to see the boy at intervals, if the father so desired. J. R. Roaf, for the father. C. A. Thomson, for the grandfather.