to that of insanity. Third, *Holmes* lays down and *Foy* does not disagree, that it is for the court, not counsel, to say whether there is evidence of insanity.

The present position may be summarized by saying that in Queensland the tendency seems to be to cope with automatism by taking a broad view of the insanity rules, whereas in Western Australia automatism is seen as a category of involuntary action distinct from insanity.[9]

COLIN HOWARD.

LAND LAW

Restraints on Alienation.

In *Hall v. Busst* (34 A.L.J. 332) the High Court made a decision on the law concerning restraints on alienation that could be the beginning of a general restatement of the law on this subject. Hitherto the voidness of such restraints has been based on the concept of repugnancy to the grant; and there has been doubt and difference of opinion as to whether the repugnancy rule is an expression of a general principle of public policy in favour of free alienation. The High Court decision was based on this principle; and the result may be that the narrower repugnancy rule is thereby superseded.

Briefly the facts of the case were as follows. In 1949 the proprietor of an island off the coast of North Queensland sold the land together with fixed improvements and certain chattels on it for £3,157 4s. On the same day the vendor and the purchaser entered into an indenture by which the purchaser unterdook not to assign the land without the consent in writing of the purchaser and which also provided, in case the purchaser should desire to sell for a first option of purchase by the vendor at the original sale price plus the value of additions and improvements and minus the value of deficiencies of chattels and a reasonable sum to cover depreciation. In 1957 the original purchaser resold the property to other persons for £8,500, without obtaining the consent of the original vendor, who thereupon sued the original purchaser for damages for breach of contract.

The imperfect drafting of the indenture made it difficult to determine whether the prohibition of alienation without consent was absolute, or whether it ceased to operate if the original vendor

9. Since this note was written the report of the decision by the Full Court of Queensland in *Cooper v. McKenna* [1960] Qd.R. 406 has come to hand. A majority of the Court decided (1) that the effects of concussion from a blow on the head did not necessarily amount to insanity and (2) that no burden of proof falls on D in automatism. This decision may show that the approach which will be taken to insanity in relation to automatism in Queensland will not, after all, be significantly wider than elsewhere.

failed to take advantage of the first option to purchase. Two members of the Court construed the restraint as being absolute, and another considered that, although qualified, it was still sufficient to attract a rule against restraint on alienation. The question for them to decide was whether a covenant against alienation was to be treated in the same way as a condition against alienation. Thus if A conveys to X on condition that X does not alienate without A's consent, it is well settled that the condition is void. What has not hitherto been settled is whether if A conveys to X, and independently of the conveyance X covenants not to alienate without A's consent, the covenant is void. The principle on which conditions against alienation have been declared void is that of repugnance to the essential incidents of the interest granted. If the rule of law rests entirely on this principle (whether or not the principle is an expression of a public policy in favour of freedom against alienation), contracts not to alienate are outside the rule and are not void. However, the majority of the High Court (one member expressing no opinion) appear to have accepted the view that "it is a principle of the law that private property should be freely alienable" (p. 335), and a contract fettering alienation, as well as a condition, is void.

The acceptance of this principle would appear to displace the repugnancy rule as the statement of the law on this point. The rule perhaps still stands, and will continue to apply to conditions involving repugnancy other than conditions against alienation, *e.g.* in a case where it is not freedom to alienate that is restricted, but freedom not to alienate: see *Shaw v. Ford* (7 Ch.D. 669) and Jarman on Wills (8th ed. p. 1480). But the rule of law that gives concrete expression to the public policy of freedom of alienation now goes beyond the repugnancy rule and in effect supersedes it.

This development of the law raises the question whether further developments or modifications should not follow. Under the repugnancy rule a condition against alienation was void even though it operated for only a short period, because a repugnant condition, if objectionable merely because of repugnancy, must be void however short may be the period of its operation. But the general policy in favour of freedom of alienation is not in most cases pushed to extremes, and restrictions are allowed for a limited period, that laid down by the rule against perpetuities. This is so when freedom of alienation is restricted by executory limitations over, *e.g.* where there is a gift to A in fee simple, but if he should die leaving no child surviving him, then to B in fee simple; and similarly where property is given on the terms that it shall be held and applied to a particular purpose (with of course an exception in the case of charitable gifts). This gives rise to an anomalous situation. The decision in *Hall v. Busst* rests on the view that if a condition against

alienation is void, because it infringes a principle of free alienation, so also should a covenant that has the same practical effect be void. It is practical effect that is looked to, for a covenant not to alienate does not in fact prevent alienation, even to a person with notice of the covenant (unless this sort of covenant is somehow to be brought within the *Tulk v. Moxhay* rule). But if a covenant having this practical effect is void in all cases, why should not an executory limitation over having the same practical effect be void in all cases? It would seem to be more reasonable to treat all restrictions in the same way. There can be no question of making executory limitations over void, so that equal treatment must involve allowing restrictions on alienation to operate for the perpetuity period. This of course would involve allowing conditions against alienation for a limited period to be valid which hitherto have been invalid under the repugnancy rule. But if that rule has gone by the board —and it seems to be unnecessary in view of the new wide formulation of the governing rule—absolute invalidity goes with it. It is perhaps not likely that the further developments suggested will in fact occur, but if they do not, this decision adds to the anomalies in the law that governs the tying up of land, and creates theoretical as well as practical inconsistencies that did not previously exist: for the repugnancy rule, having a ground of its own to stand on, was not theoretically inconsistent with the perpetuities rule in its various applications.

It was adverted to above that the repugnancy rule may continue to stand and apply to conditions other than conditions against alienation. If it does continue to stand, this must be on the basis suggested by Sweet (Restraints on Alienation, 33 L.Q.R. 236, 241) that "attempts to deprive ownership of its essential incidents are contrary to public policy". But the history of the repugnancy rule indicates that the incident of ownership mainly in view was the power of alienation; and *Hall v. Busst* now rests the maintenance of this power directly on a principle of public policy in favour of freedom of alienation, and so takes away most of *raison d'etre* of the repugnancy rule. Furthermore, the repugnancy rule has not been fully applied to incidents other than the power of alienation. For example, a covenant restricting the free use of land by an owner, as in *Tulk v. Moxhay,* is just as repugnant to the essential incidents of ownership as a covenant not to alienate; but such covenants seem never to have been considered invalid on the ground of repugnancy. Their enforceability in leases has never been questioned, and when attached to estates in fee simple they are enforceable under the law concerning restrictive covenants. Thus, being displaced by another rule in its main field of application, and never having been applied in the field next in importance, the repugnancy rule, it would seem, should go into discard.

Lease or Licence

In the last issue of this Journal it was pointed out (III, 417) that the High Court decision in *Raidich v. Smith* (101 C.L.R. 209) made some of the English Court of Appeal decisions on the lease-licence question no longer authoritative in Australia. However, the authority of these decisions was soon restored by the Privy Council decision in *Isaac v. Hotel de Paris Ltd.* (1960 1 W.L.R. 239), on appeal from the Federal Supreme Court of Trinidad.

The respondent Company owned the Hotel de Paris, and held a lease of two upper floors of a building on the other side of the street, which were used as an extension of the Hotel de Paris and were called the Parisian Hotel. One Joseph who had bought all the shares of the Company agreed to sell some of these to Isaac, the price being payable by instalments, and Isaac was put in charge of a night bar in the Parisian Hotel on the first floor. Following differences between these two persons, a settlement was agreed to under which Isaac, who had been running the Parisian Hotel as agent for the Company, agreed to pay the balance due on the shares, was to remain in occupation of the first floor where the night bar was being operated, was to pay all expenses in connection with the Parisian Hotel, including the rent payable to the landlord, and retain all profits in lieu of dividends on his shares if he acquired them. No binding contract was concluded on these terms; but nevertheless the parties acted as if one had been made. Isaac occupied the premises, paid monthly to the Company "as rent" the amount due from the Company to the landlord (but without getting any receipt or acknowledgment), and took all the profits. Isaac failed to pay the balance due to Joseph for shares in the Company, and eventually the Company took proceedings to recover possession. Apparently there was no previous notice to quit except a seven day notice from Joseph.

It was argued on behalf of the appellant Isaac that he was in occupation as a monthly tenant. The Privy Council held, however, endorsing the statement of one of the judges of the Federal Court, that Joseph never intended to accept Isaac as a tenant and that Isaac was fully aware of this; and that the relationship between the parties was that of licensor and licensee.

It may well be that even on the High Court view of the law, as set forth in *Raidich v. Smith*, this could be treated as a case of licence and not lease (just as in *Raidich v. Smith* the case could have been treated as a lease without dissent from the Court of Appeal licence decisions). But the Privy Council expressly stated that "there are many cases in the books where exclusive possession has been given of premises outside the Rent Restriction Acts and yet there has been held to be no tenancy", and they cited *Errington v.*

Errington ([1952] 1 K.B. 290) and *Cobb v. Lane* ([1952] 1 All E.R. 1199) as instances. The High Court, on the other hand, had treated exclusive possession as much more decisive. See especially the judgment of Windeyer J. It is probably true that *Isaac v. Hotel de Paris Ltd.* could have been decided without approval of the broad principles laid down in the Court of Appeal decisions, just as *Raidich v. Smith* could have been decided without dissenting from them. But it seems clear that the Privy Council has in fact endorsed them, and actually decided on the basis of these principles and not on any narrower principle. This being so it is difficult to see how the older view favoured by most of the members of the High Court can be regarded as holding the field in Australia.

W. N. HARRISON

TORTS

Demise of Re Polemis

Some 44 years ago an Arab stevedore, engaged in the work of discharging cargo from a ship in Casablanca harbour, carelessly allowed a plank to fall into the hold of the vessel. From the unprepossessing character of this act there followed consequences of alarming magnitude. For the plank that fell caused a spark which ignited the vessel's cargo of petrol and in the ensuing fire the entire ship was destroyed.

In the claim which followed these events, the legal problem, in the form in which it finally reached the Court of Appeal, was this: Were the charterers liable to the owners for loss of their ship when all that could reasonably be foreseen as the result of dropping the plank was that *some* damage would be caused to the vessel, but not the damage (destruction by fire) which in fact occurred? The Court of Appeal were unanimous in holding the charterers liable: the fire, it was said, was the "direct" consequence of negligence for which the defendants were responsible. The fact that such a consequence was unforeseeable was irrelevant, for a consideration of this kind "goes to culpability, not to compensation".[1] Or as Holmes later put it, "the tort once established the tortfeasor takes the risk of the consequences".[2]

The principle thus established and known as the rule in *Re Polemis*[1] has troubled lawyers ever since. Its antecedents were few and doubtful;[3] its progeny in the years that followed were

1. [1921] 3 K.B. 560 at p. 571 per Bankes L.J., citing Lord Sumner's dictum in *Weld-Blundell v. Stephens* [1920] A.C. 956, 984.
2. Holmes-Pollock Letters, vol. II, 88.
3. Chiefly *Smith v. London & S.W. Ry. Co.* (1870) L.R. 6 C.P. 14, which can be explained on other grounds.