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THE UNITED STATES AND ALIEN LABOUR LEGISLATION.

As a result of proceedings taken by order of the Canadian Government to execute the decrees of a law, Draconian in conception and futile in execution, popular interest is now being manifested by communities on both sides of the line in this legislation—barbaric legislation (initiated in the United States and followed here) that is well fitted to impress the blunt acerbity of Shylock properly amended: "These be the Christian nations." The result above referred to appears in the judgment of Hon. Mr. Justice Anglin, post p. 573.

We may premise by criticising the inadequate treatment this subject has received at the hands of some of the leading journals in this country; something more dignified and instructive might have been expected. It may be noted in this connection that some of the best journals in the United States seem to have a much better grasp of the subject and its bearings than do ours. The fact of our "penny-a-liners" being so much in evidence would seem to indicate that there is no logical answer to the carefully considered judgment which has been made the occasion of some feeble jokes.

Without discussing this judgment and the large field of enquiry which it opens up we shall at present content ourselves with a glance at the main breaches of international comity that would ensue from any attempt to carry out the law as found in the United States statute. Examples without number might be adduced where its enforcement would abrogate the privileges of other countries or entail repudiation of the most solemn engagement in treaties. The United States statutes at large of 1903 comprehend the existing legislation there on this head.

The law of that country will be found of universal application, or perhaps, to be more accurate, it would seem that the civil-

ized and uncivilized world alike are intended to be comprehended thereunder. But how, it may reasonably be urged, can the authorities burdened with the duty of its enforcement act in various contingencies that may arise to perplex them? A Swiss, for example, who may have formed a contract or agreement previous to his leaving home to perform labour or service in the United States, and who, proceeding north, may have embarked at some Atlantic harbour, or going south, sailed from a Mediterranean port—what is to be done with him, should he plant himself on the free soil of the Republic, and it should be desired to deport him? The master of the vessel, who has (probably quite innocently) brought the delinquent over is obliged under a heavy penalty to receive him on board again, and transport him on the return voyage to the very port from which he may have sailed. This, it will be apparent, does not place him in Switzerland, that being, as no one needs to be reminded, inland territory. Would there not be as plain a disregard of the rights afforded each of them by international law in setting him free without license in France, Italy or Germany as were some American officer of justice to spur his lagging steps in conducting him to the frontier? A like situation would be presented if the return of an emigrant unlawfully finding his way into the Republic from the South American dominions of Bolivia or Paraguay were sought.

Distinct altogether from the peculiar state of things exemplified, where, some one might inquire, does the United States obtain its power to command the person in charge of a sea-going vessel bound for some European or other shore, to carry a passenger in custody (for his control of the alien in view of the rigorous conditions by which he is governed, amounts to imprisonment) a single foot within the limit of three miles from the coast which forms the admirality jurisdiction of the power behind it. The correct thing for the master to do, supposing him to desire immunity for himself (apart from any humane consideration) would be, before reaching the ticklish point, to launch one of the ship's boats, place the rejected party in it and allow him to shift for himself. But, may we say, in reference to such like suggestions that any results involving absurd or un-

solvable situations and complications flow from crude and class legislation, and not from a judicial decision which has exposed its fruitlessness.

Further the law passed by Congress provides that where a foreigner shall have come from a trans-Atlantic port he must be taken back to the identical place of embarkation, and that where he shall have landed from a trans-Pacific port he must be returned to the identical port in that ocean from which he shipped. What then is to be the fate of the traveller who starts from Asia, doubles the Horn and enters the Republic somewhere on the Atlantic sea-board, or, vice versa, of one who sailing from one of the Kingdoms of Europe, lengthens his journey and passes through the Golden Gate? It occurs to the writer that as with the Swiss either individual could resist expulsion with good prospect of success.

The possible complication growing out of our neighbour's legislation which strikes one as the most serious of any is furnished by a clause in the section which enumerates the different classes that are excluded from her bounds, and who, having effected an entrance will be summarily expelled. It reads: "Any person who has been convicted of any offence involving moral turpitude" shall not be received, or, coming in, shall be deported. Now passing by the difficulty of determining the question thus presented, notice how airily the extradition treaty with ourselves is driven through by this provision. The expression "accused person" in the statute based upon the treaty includes a person condemned. But under this gratuitous law, a person condemned, so long as the offence for which he is to undergo punishment involves moral turpitude, may, should he have taken refuge in the United States, be forced back to the country whose law he has broken, at the will and pleasure of one signatory to a compact, who, jointly with another, pledged itself that no criminal should be transferred, unless an extraditable offence had been committed, and extradition be demanded.

The writer feels unable to close this discussion without referring to the singular position occupied by the Commonwealth of Australia with regard to their Alien Labour Acts, if the judgment of the Supreme Court of New Zealand in *Gleech's case*,

1 O.F & B. 79, be considered good law. By that decision the view was expressed that one colony could not remove a person to the borders of another because the high seas, over which no jurisdiction was possessed by a non-sovereign power, had to be crossed. Australia, it cannot be forgotton, is separated by water on every side from the rest of the world.

JUDGMENTS AGAINST MARRIED WOMEN.

The recent decision of the House of Lords in *Bolitho* v. *Gidley* (1905) A.C. 98, appears to conflict with its prior decision in *Hood-Barrs* v. *Heriot* (1896) A.C. 174. In that case their Lordships in effect declared that a restraint on anticipation was at an end as regards income of a married woman's property as soon as it becomes due and payable. Numerous cases are cited by Lord Herschell, L.C., with approval in support of that view. The contention in that case was that the restraint was operative until the income had actually reached the hands of the married woman and that contention was distinctly rejected by their Lordships. But in *Bolitho* v. *Gidley* their Lordships seem to have departed from that view. The case it may be observed is not well reported in that it omits to give any dates either of the contract sued on or of the recovery of judgment. Both in England and Ontario a married woman's contract was formerly held to bind only the property she had at the date of the contract and still had when judgment was recovered against her, but that was changed in England in 1893 by 56 & 57 Vict. c. 63, s. 1, and in Ontario on April 13, 1897 (R.S.O. c. 163, s. 4) and since those Acts came into force judgments against married women (in respect of contracts subsequently made) are enforceable not only against the property they had at the time of the contract sued on and still have at the time of judgment, but also against all separate property they may at the time of the contract or thereafter possess or be entitled to. The English Act contains the proviso similar to that in R.S.O. c. 163, s. 4 (21): "Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property

which [at that time or thereafter] she is restrained from anticipating." It may be remarked in passing that the words in brackets are not in the Ontario Act and they were held to be very material, and virtually to exclude all property at any time liable to a restraint against anticipation, even after the restraint had ceased: *Bennett* v. *Howard* (1900) 2 Q.B. 784; 83 L.T. 301; whether the Ontario Act is not susceptible of the construction that the proviso protects property subject to a restraint against anticipation only so long as such restraint is operative, remains to be determined. But even if it were held to have that meaning, there is s. 21 also to be reckoned with, which provides that "nothing in this Act contained shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, etc."

But to return to *Bolitho* v. *Gidley* we are left in the dark whether the contract for which the judgment in that case was recovered was governed by the English Act of 1893 or not. All that appears is that the plaintiffs having recovered judgment against a married woman, obtained a garnishee order attaching moneys in the hands of the garnishees; these moneys were the income of the judgment debtor's separate estate which she was restrained from anticipating, and which the garnishees were in the habit of paying into the plaintiff's bank to the credit of the judgment debtor. This money was received by the garnishees between the date of the judgment and the garnishee order. According to *Hood-Barrs* v. *Heriot* the restraint ceased on the income becoming payable, but their Lordships in *Bolitho* v. *Gidley* have held that it was nevertheless not attachable. If the restraint on anticipation is an absolute protection of the income from liability, even after it becomes due and payable, then *Hood-Barrs* v. *Heriot* seems to have been wrongly decided; the fact that the income there sought to be attached was due at the date of the judgment could make no difference. If the restraint is an absolute protection the income is protected no matter when it becomes due. And that this is the effect of the Act as regards restraints on anticipation seems to be clearly the view of their Lordships, who took part in the decision of *Bolitho* v. *Gidley*. The Lord Chancellor says: "In my view the Acts of Parliament

have prohibited in effect the execution insisted on here." Lord Macnaghten is more explicit. "If effect were given to the contention it would defeat the Act of 1882, and render the restraint on anticipation absolutely inoperative. No doubt a married woman restrained from anticipation would still be unable to give a security for advances; but those who had ministered to her extravagance would find a security in a judgment against her of an anticipatory character, swooping down upon her property from time to time as and when received; and so the restraint on anticipation would be of no avail." This reasoning applies to the income, no matter when it becomes due, and would equally protect income overdue at the date of judgment, as well as income falling due after its date, and therefore the case appears to be inconsistent with *Hood-Barrs* v. *Heriot*.

DISCOVERY AND INSPECTION.

In a previous volume (ante, vol. 39, p. 762) we referred to some contrasts between the law of discovery and production in England and Ontario. It will be helpful to our readers to reproduce from the English *Law Times* an article discussing the practice on this subject as it obtains in England under Order XXXI. The article reads as follows:—

Numerous decisions have been given under the order providing for discovery and inspection, and amongst the labyrinth of cases those most important to the general practitioner will be noticed. Thus it has been held that a petitioner is a plaintiff and may interrogate (*Haden's Patent*, 51 L. T. Rep. 190), and that in patent and trade mark applications a party can interrogate, notwithstanding the statutory declaration as to particulars: *Crossely* v. *Tomey*, 34 L. T. Rep. 476. But it is in libel and slander actions that interrogatories are very useful, and a great deal of fighting has taken place in these actions as to whether certain interrogatories should be allowed and as to the mode and manner of answering when answered. The general principle upon which the Court proceeds is that it wil not allow interrogatories of a fishing nature. Thus, where actions are brought against newspaper proprietors and they do not deny their re-

sponsibility, they will not be compelled to disclose the name of the alleged writer or of his informant (*Hennessey* v. *Wright*, 59 L. T. Rep. 323), or what they have done to test the information received (*Parnell* v. *Walter*, 62 L. T. Rep. 75); but it should not be forgotten that though the discovery may be of a fishing nature, yet in some instances it may be allowed, and expressly where it might be very material to shew express malice, and so defeat a plea of justification. Thus in *Elliott* v. *Garrett*, 86 L. T. Rep. 441, it was allowed the plaintiff to ask the defendant what information he had and what steps he took to verify the same, and generally, in libel actions against newspaper proprietors, interrogatories will be allowed for the purpose of shewing negligence or malice, and thus destroy the plea of privilege. On the other hand, discovery will not be granted a defendant so as to enable him to give particulars of justification: *Zierenberg* v. *Labouchere*, 69 L.T. Rep. 172. A foreign Sovereign, should he bring an action here, will not be exempt from giving discovery (*South African Republic* v. *La Coup Franco-Belge*, 77 L. T. Rep. 241), and such discovery must be given on the oath of himself, and not on that of an agent: *Priolean* v. *U.S.A.*, 14 L. T. Rep. 700. In common law actions the time for discovery is generally not allowed until after statement of defence (*Mercier* v. *Cotton*, 35 L. T. Rep. 79; *Union Bank of London* v. *Manby*, 42 L. T. Rep. 393; *Mellor* v. *Thompson*, 49 L. T. Rep. 422), but interrogatories have been allowed before statement of defence (*Beal* v. *Pilling*, 38 L. T. Rep. 486), the reason being that until after defence it is not possible to say what is material. In the Chancery Division a different practice prevails, and it is the every-day practice to allow discovery before statement of defence: *Union Bank* v. *Manby*, supra; *Harbord* v. *Monk*, 38 L. T. Rep. 411.

But, though the terms of Order XXXI. are very wide as to discovery and inspection, it must not be forgotten that there is a limit imposed, and that the order will not be made should the Court or judge be of opinion that it is not necessary for disposing fairly of the cause or matter or for saving costs: see Rules 2, 6, 7, 12, and 18.

But, apart from the statutory rules, discovery may, as a matter of course, be resisted in four cases—(1) on the ground of

professional privilege, (2) as disclosing the party's evidence, (3) as being criminatory or penal, and (4) as being injurious to public interests. As to the first ground, which is of vital importance to the legal practitioner, this privilege does not extend to any person except a legal professional agent or any persons who may act for such agent or under his directions. Others have claimed the privilege, but have failed. Thus a patent agent cannot have the privilege (*Moseley* v. *Victoria Rubber Company*, 55 L.T. Rep. 482), neither a medical man nor a clergyman (*Russell* v. *Jackson*, 9 Hare 387), nor a pursuivant of the Herald's College: *Slade* v. *Tucker*, 43 L. T. Rep. 49. The reasons upon which the privilege is founded are given in *Greenough* v. *Gaskell*, M. & K. 103, where Lord Brougham states: "It is founded on a regard to the interests of justice which cannot be upholden and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case"; and Lord Justice Turner in *Russell* v. *Jackson*, 9 Hare, at p. 391, approves of the rule as laid down by Lord Brougham, and states: "This, then, being the foundation of the rule, the Court, when called on to apply it, must, of course, have regard to the foundation on which it rests, and not extend it to cases which do not fall within the mischief it was designed to prevent." For further cases as to professional privilege the practitioner may refer to *Reece* v. *Trye*, 9 Beav. 319; *Kennedy* v. *Lyell*, 48 L. T. Rep. 455; *Re Strachan*, 72 L. T. Rep. 175, and *Reg.* v. *Bullivant*, 82 L. T. Rep. 493.

Proceeding to the question of what evidence a party need not disclose, it may be stated, as a general proposition, he need not disclose the evidence of his case, or the facts of or the way he intends to make out the same; but, as distinguished therefrom, he may be compelled to discover the nature of his case or such facts upon which he may rely to support the same: *Eade* v. *Jacobs*, 37 L.T. Rep. 631; *Bolckow* v. *Fisher*, 47 L.T. Rep. 724;

Benbow v. *Low*, 44 L. T. Rep. 119; *Attorney-General* v. *Gaskill*, 46 L. T. Rep. 180. So also a party may endeavour to impeach or destroy his adversary's case by interrogation (*Grumbrecht* v. *Parry*, 49 L. T. Rep. 570; *Bidder* v. *Bridges*, 50 L. T. Rep. 287); but a party is not bound to disclose the names of his witnesses, unless the name sought to be disclosed is a material fact of the case: *Marriott* v. *Chamberlain*, 54 L. T. Rep. 714. As to discovery being resisted as being criminatory or penal, it has been held that, where the discovery will expose a person to the risk of any kind of punishment by way of pains, penalties, and forfeiture, he is not bound to give discovery. The swearing by a party that he believes the document will criminate him is sufficient (*Lamb* v. *Munster*, 47 L. T. Rep. 442), but the defendant cannot refuse discovery because he thinks that discovery would make him liable to a penalty, where such discovery is required by a plaintiff in a proceeding for the purpose of obtaining a judgment or order: *Derbyshire County Council* v. *Mayor of Derby*, 74 L. T. Rep. 747. There are, however, statutory exceptions to the general rule which provide that it shall be no ground for resisting discovery because discovery may tend to criminate the party giving the same, but in such cases the discovery is not to be used against the defendant in any other proceeding; thus for the publication of libels in newspapers the law makes special exceptions for discovery: 6 & 7 Wm. IV. c. 76; 32 & 33 Vict. c. 24; 33 & 34 Vict. c. 99; *Ramsden* v. *Brearley*, 33 L. T. Rep. 322; *Lefroy* v. *Burnside*, 41 L. T. Rep. 199. The protection of the rule extends to penal proceedings abroad: *United States of America* v. *Macrae*, 17 L. T. Rep. 428.

Proceeding to consider the matter where privilege is claimed on the ground of public interest, we find that this privilege is founded upon public policy, and to prevent matters which concern the State, and the publication of which might be injurious to the State, from being made known. The privilege is generally confined to public officials' documents, provided the publication thereof would be injurious to the public interest.

When the objection to produce a document is taken at the trial, the head of the department must himself state on oath that, in his opinion, the production of such document would be

injurious to the public interest (*Beatson* v. *Skene*, 2 L. T. Rep. 378), and where the Secretary of and representing the Board of Trade was sued as defendant, and he refused to produce all documents in his official custody on the ground of public policy, and declined to state anything further in the affidavit which he made in the matter, it was held that this was not sufficient; that he must go through the documents and consider them, and bring his mind to bear upon them: *Kain* v. *Farrer*, 37 L. T. Rep. 469.

Adverting to the question of inspection, we observe that every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any party in whose pleadings or affidavits reference is made to any document to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof, and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient for not complying with such notice, in which case the Court or judge may allow the same to be put in evidence on such terms as to costs or otherwise as the Court or judge shall think fit: Order XXXI., r. 15.

The difference between an application for general discovery and for inspection is that, where the documents are referred to in the pleadings, the object is to give the other party the same advantage as if the documents were fully set out therein (*Quilter* v. *Heatley*, 48 L. T. Rep. 373), and to grant him an immediate inspection, unless he can shew good cause to the contrary, and the onus lies on him. The judge has an express power to give inspection; thus in *Webster* v. *Whewall*, 42 L. T. Rep. 868, a certain deed was mentioned in the statement of claim. The defendant gave the plaintiff notice to inspect it. The latter, however, declined to do so until after defence. The plaintiff subsequently at the trial produced it in evidence, and the defendant objected. Mr. Justice Denman overruled the defendant's objection, as he had no right to production till after defence, and

could h e applied for inspection under Rule 18 of Order XXXI., instead ' .. aiting until the trial and objecting to its production. A party, however, is not bound to produce for inspection every document referred to in his statement of claim, and where the plaintiff refused to produce deeds referred to in his statement of claim, as they related to his own title, the Court upheld his objection (*Roberts* v. *Oppenheim*, 50 L. T. Rep. 729), and it has been decided that the defendant need not produce a deed of conveyance to himself, but in this case he was ordered to give particulars of the consi ration and the date of the deed: *Milbank* v. *Milbank*, 82 L. T. Rep. 63. As to the manner in which reference to documents should be made in cases where entries in a books are referred to, it may be observed that the particulars will be limited to these entries (*Quilter* v. *Heatley*, supra); and in cases of letters, production cannot be ordered of copies not referred to. As to documents, it is sufficient if they are referred to generally; they need not be particularly described: *Smith* v. *Harris*, 48 L. T. Rep. 869. Any person entitled to see an affidavit may see the exhibit, as the latter is considered to be a part of the affidavit: *Re Hinchliffe*, 71 L. T. Rep. 532. This, apart from law, is in consonance with common sense and justice, as an exhibit is often the most important part of an affidavit, and in many instances, sometimes alone, sometimes coupled with other facts, is the means of proving the plaintiff's claim.

The party to whom a notice is given shall within two days from receipt of such notice, if all the documents therein referred to have been set forth by him in the affidavit as mentioned in Rule 13 of Order XXXI., or if any of the documents referred to in such notice have not been set forth by him in any such affidavit then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or, in case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on which ground: Order XXXI., r. 17. Thus in *Re Fenner and Lord's Arbitration*, 76 L. T. Rep. 376, it was held that the

latter rule was not confined to cases where there has been an affidavit of documents, but is applicable to all documents mentioned in Rule 15, supra.

Should the party served with notice under Rule 17 omit to give such notice of a time for inspection, or object to give inspection, or offer inspection elsewhere than at the office of his solicitor, the Court or judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit, provided that the order shall not be made when and so far as the Court or a judge shall be of opinion that it is not necessary for disposing fairly of the cause or matter or for saving costs. Any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court or judge shall not make such order for inspection of such documents when and so far as the Court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs: Order XXXI., r. 18.

The penalty for non-compliance with an order to answer interrogatories or for discovery or inspection is attachment. The party in default, if a plaintiff, is liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or judge for an order to that effect, and an order may be made accordingly: Order XXXI., r. 21. The Court will not exercise its powers in an arbitrary manner, but the defendant must purge his contempt. Thus it has been held that after the fourth insufficient affidavit of documents an application for attachment was justifiable; and, on getting notice of motion for attachment against him, the party must, if he wishes to prevent the motion being brought on, not only give discovery, but file his affidavit and tender a fixed sum for costs (*Thomas* v. *Palin*, 47 L. T. Rep. 207), and in *Hampden* v. *Wallis*, 50 L. T. Rep. 515, an order was made not to be drawn up for fourteen

days. In *Gay* v. *Hancock*, 56 L. T. Rep. 726, a writ of attachment was issued; the affidavit of documents was then filed and notice of filing given to the other side. The party, however, was subsequently arrested, but the Court ordered his discharge and held the arrest irregular, making no order as to costs.

As to dismissal for want of prosecution, the rule is not so imperative: *Hartley* v. *Owen*, 34 L. T. Rep. 752. Where an order is made that in default of answer judgment may be signed, a certificate of such default is sufficient authority to enter judgment. Service of an order for interrogatories or discovery or inspection made against a party or his solicitor shall be sufficient to found an application for an attachment for disobedience to the order. But the party against whom the application for attachment is made may shew in answer to the application that he has had no notice or knowledge of the order: Order XXXI., r. 22. A solicitor does not escape attachment if, when any order against any party for interrogatories or discovery of documents is served under the last preceding rule, he neglects, without reasonable cause, to give notice to his client: Order XXX., r. 23.

Amongst other rules of this most important Order XXXI. may be noticed Rule 2, providing that on the application for leave to deliver interrogatories the particular interrogatories proposed to be delivered must be submitted to the Court or judge; Rule 5, where a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any other officer or other person, an order may be made for the administration of interrogatories to any member of such corporation, company, or body; Rule 7, interrogatories may be set aside if exhibited unreasonably or vexatiously, or struck out on the ground that they are oppressive, unnecessary, prolix, or scandalous, and any application for this purpose may be made within seven days after service of the interrogatories; Rule 8, interrogatories must be answered by affidavit to be filed within ten days, or such time as a judge may allow; Rule 14, enabling a Court or a judge at any time during the pendency of any cause or matter to order the production of documents; Rule 26, enacting that security for costs shall be given, and the mode thereof; Rule 29, which makes the provisions of Order XXXI. applicable

to infant plaintiffs and defendants and to their next friends and guardians ad litem.

It will be seen from the foregoing provisions of Order XXXI. and the cases decided thereunder that it is scarcely necessary at the present time to resort to an action for discovery. Under the Judicature Act 1873, s. 24 (7), the Court before whom any cause or matter is pending has jurisdiction to order all discovery in aid of the claim or defence which could before the Act have been obtained by reason of a bill of discovery (*Ramsden* v. *Brearley*, supra); and, should the practitioner be desirous of bringing an action of discovery, he may still do so, and is referred to *Orr* v. *Diaper*, 35 L.T. Rep. 468. But no action for discovery will lie in aid of proceedings in a foreign Court: *Dreyfus* v. *Peruvian Guano Company*, 60 L. T. Rep. 216.

The *Law Times* (Eng.) in a recent number in two editorial items refers to the automobile difficulty in England. We have already appeared to *Punch's* view on the subject (ante, p. 544). The *Law Times* calls attention to the necessity for legislation as to those "road-hogs" (as *Punch* calls them) who "offend against the ordinary canons of gentleman-like driving as distinguished from mere technical infractions of the law, and there are one or two leading motorists who are given to brag openly of their doings and are still personæ gratæ in automobile circles." The writer also calls attention to the discredit falling on "gentleman-like driving" owing to the recklessness of those who have "no special inducement to consider anything beyond the lust for speed." We are not surprised that the Ontario Legislature at its recent sittings was bombarded with applications to restrain this "lust for speed." One result of this was the requirement that motors should be numbered with letters five inches in length; but this clearly is not sufficient for some of these "road-hogs," for they go so fast that letters of even a larger size would be undistinguishable in the cloud of dust they raise; so that as yet there seems to be no better suggestion than that of the Marquis of Queensberry, namely, to deal with such characters with rifle and revolver.

REVIEW OF CURRENT ENGLISH CASES.

REDEMPTION ACTION.

Ainsworth v. *Wilding*, 1 Ch. 435. A correspondent suggests that our note of this case (ante, p. 483) is not full enough. Adopting his suggestion we would ask our readers to correct the last line so as to read "liable to account with rests at the time of each sale in respect of the rents and profits."

LETTERS OF ADMINISTRATION—SUPPRESSION OF WILL—ACTS BY WRONGFUL ADMINISTRATOR—REVOCATION OF ADMINISTRATION.

In *Ellis* v. *Ellis* (1905) 1 Ch. 613 a testator died in August, 1892, leaving a leasehold house then subject to an equitable mortgage in favour of one William Ellis for £100. George Ellis, the testator's son, suppressed the will and obtained letters of administration, and William Ellis threatening foreclosure, he borrowed of James Ellis £100 and paid off William Ellis, and as security for the loan from James Ellis he gave him a promissory note and deposited the lease by way of equitable mortgage. In Nov., 1892, the beneficiary named in the will brought an action against George Ellis for, and obtained, a revocation of the grant of the letters of administration. In July, 1902, the beneficiary sold to the defendant the leasehold house, it was at the time of the sale stated that the lease was lost, and the vendor gave the purchaser an indemnity against any claim in respect of it. James Ellis having died his representatives brought the present action to recover the £100, lent by him to George Ellis under the circumstances aforesaid against the defendant as purchaser of the house. It was conceded that the claim of William Ellis, the original equitable mortgagee, was long since barred under the Statute of Limitations, but the plaintiffs claimed that they were entitled to stand in the place of George Ellis as de facto administrator, paying a debt of the testator, but Warrington, J., came to the conclusion that all the acts of and disposition of assets by an administrator who has obtained a grant by suppressing a will are void, except only such as are done in due course of administration, and that though the payment of the debt might be deemed proper and the administrator entitled to credit for it, yet the giving of the mortgage to James Ellis stood on a different footing. "This was essentially a voluntary act, no title was in fact conferred by it," and it was simply void. The plaintiffs therefore failed.

TRUST—LEASEHOLDS FORMING PART OF TRUST ESTATE—REVERSION PURCHASED BY TRUSTEE.

In *Bevan* v. *Webb* (1905) 1 Ch. 620 the point in question was whether a trustee of certain leasehold estates could validly buy the reversion for his own benefit. Warrington, J., held that he could where, as in the present case, the trust estate has no right of renewal.

FRIENDLY SOCIETY—DISPUTE BETWEEN MEMBER AND SOCIETY—ARBITRATION—FINALITY OF DECISION OF DOMESTIC TRIBUNAL.

Andrews v. *Mitchell* (1905) A.C. 78 although a decision under an English statute governing friendly societies, yet in effect lays down a rule applicable to all domestic tribunals. By the Act in question disputes between members and the society are required to be decided in manner directed by the rules of the society, and the decision so given is to be final and conclusive. In the present case a member of a friendly society was summoned before the arbitration committee for a breach of the rules, and was in his absence expelled from the society by the committee on a different charge, namely, of fraud and disgraceful conduct, of which no written notice had been given to him as required by the rules, and the House of Lords (Lord Halsbury, L.C., and Lords Davey, James and Robertson) affirming the Courts below held that under the circumstances the decision was null and void.

WILL—CONSTRUCTION—PRECATORY WORDS—ABSOLUTE GIFT "IN CONFIDENCE" THAT DONEE WILL MAKE A CERTAIN DISPOSITION—EXECUTORY GIFT OVER IN DEFAULT OF TESTAMENTARY DISPOSITION BY ABSOLUTE DONEE.

Comiskey v. *Bowring-Hanbury* (1905) A.C. 84 is a case which in the Courts below was known as *Re Hanbury, Hanbury* v. *Fisher* (1904) 1 Ch. 415 (noted ante, vol. 40, p. 378). It may be remembered that the case turns upon the proper construction of a will whereby a testator gave all his property to his wife "absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof, by her will or testament, I hereby direct that all my estate and property acquired by her by this my will, shall at her death be equally divided among the surviving said nieces." The Courts below had come to the conclusion that the wife took absolutely free from any claim on the part of the nieces; but the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Davey, James,

and Robertson) agreed that though the widow took an absolute estate in fee with power to devise the property in favour of one or more of the testator's nieces, yet that as to any of the property as to which she made no such disposition there was a good executory devise over in favour of the nieces; from this decision Lord Lindley dissented, he being in favour of affirming the judgment appealed from.

SHIP—BILL OF LADING—WARRANTY OF SEAWORTHINESS.

In *Elderslie* v. *Borthwick* (1905) A.C. 93 which was known in the Court below as *Borthwick* v. *Elderslie* (1904) 1 K.B. 319 (noted ante, vol. 40, p. 260) the House of Lords have affirmed the decision of the Court of Appeal.

HUSBAND AND WIFE—MARRIED WOMAN—JUDGMENT AGAINST MARRIED WOMAN—SEPARATE ESTATE—RESTRAINT AGAINST ANTICIPATION—INCOME DUE AFTER JUDGMENT—MARRIED WOMEN'S PROPERTY ACT, 1882 (c. 75), ss. 1, 19; (R.S.O. c. 163, ss. 3, 4, 21).

In *Bolitho* v. *Gidley* (1905) A.C. 98 the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) have approved of *Whitley* v. *Edwards* (1896) 2 Q.B. 48, and hold that under a judgment against a married woman leviable out of her separate property not subject to restraint against anticipation, the judgment creditor cannot attach future accruing income of her estate which is subject to a restraint against anticipation, even after it has become due and payable.

HIRE AND PURCHASE AGREEMENT—CONVEYANCE OF CHATTELS BY ABSOLUTE DEED INTENDED AS A SECURITY—NON-REGISTRATION UNDER BILLS OF SALES ACT.

Maas v. *Pepper* (1905) A.C. 102, which was known below as *Mellor* v. *Maas* (1903) 1 K.B. 226 (noted ante, vol. 39, p. 345) has been affirmed by the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley). The facts were that Mellor made a contract to buy a hotel and furniture for £30,000, and being unable to find all the purchase money applied to Maas to advance £2,000, which he did, taking a receipt from the vendor, as the purchase money of the furniture, and obtained from him an absolute conveyance thereof; the same day he made a hire-purchase agreement with Mellor under which Mellor went into possession. The conveyance to Maas was not registered under the Bills of Sales Act, and Mellor having become bankrupt his trustee claimed the chattels on the ground that the conveyance to Maas was void for want of registration as against

Mellor's creditors. The Court below gave effect to this contention and their decision is now affirmed on the ground that the sale to Maas was merely colourable and the transaction was in fact one of loan.

WILL—CONSTRUCTION—FORFEITURE CLAUSE—WORDS OF FUTURITY —LIMITATION TO EVENTS AFTER TESTATOR'S DEATH.

Chapman v. *Perkins* (1905) A.C. 106, known below as *In re Chapman, Perkins* v. *Chapman* (1904), 1 Ch. 431 (noted ante, vol. 40, p. 378) was a case upon the construction of a forfeiture clause in the will, in which the question was whether the clause applied to acts committed in the lifetime of the testator, and the Court below held that it did not, and the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James, and Lindley) have affirmed the decision.

CONTRACT—CONSTRUCTION—IMPLIED CONDITION.

Ogdens v. *Nelson* (1905) A.C. 109 is the case called below *Ogdens* v. *Telford* (1904) 2 K.B. 410 (noted ante, vol. 40, p. 732) in which the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley) have also affirmed the judgment of the Court of Appeal. The question arose on a counterclaim in an action for the price of goods. The counterclaim set up that in consideration of the defendants becoming a customer and buying goods of the plaintiffs for a period of four years, the plaintiffs agreed to distribute as an annual bonus among their customers including the defendant, in proportion to their purchases, a certain fixed sum, and also the expected profits on certain goods which should be sold by the plaintiffs during the period. Before the four years were up the plaintiffs sold their business to a rival concern, and the defendant claimed damages for breach of the agreement. The Court below held that there was an implied agreement on the part of the plaintiffs that they would continue in business for the four years and that the defendant was entitled to damages with which conclusion their Lordships agree.

PRACTICE—EXCESSIVE DAMAGES—NEW TRIAL.

Watt v. *Watt* (1905) A.C. 115 has already been referred to ante, p. 433.

EXTRADITION—ARREST AND REMAND OF THE ACCUSED—HABEAS CORPUS—JURISDICTION—PROCEDURE.

United States v. *Gaynor* (1905) A.C. 128 is a somewhat notorious case in which the United States Government were driven t appeal from an order of Caron, J., of the Province of

Quebec releasing the defendants who had been arrested for extradition to the United States. The whole course of procedure seems to have been curious. The defendants were first arrested by order of the Extradition Commissioner and detained in Montreal and while under remand there, a habeas corpus was granted by Mr. Justice Andrews in Quebec to which place the prisoners were taken, but that learned judge came to the conclusion that he had made a mistake in granting the writ, which he accordingly quashed, and remanded the prisoners to the custody of the sheriff of Montreal; whereupon Mr. Justice Caron, another judge in Quebec, issued another habeas corpus returnable before himself and without any motion to discharge the prisoners and before hearing evidence and argument to the effect that the charges made were extradition crimes, disposed of the case on its merits and dismissed the prisoners. In doing so the Judicial Committee of the Privy Council (the Lord Chancellor and Lords Macnaghten, Robertson and Lindley and Sir F. North and Sir A. Wilson) held he usurped the jurisdiction of the Extradition Commissioner and exceeded his own; and on the merits was in error, as the offences disclosed were extradition crimes. Altogether the case cannot be regarded as a very creditable episode in Canadian administration of justice.

MALICIOUS PROSECUTION—VERDICT SET ASIDE—NEW TRIAL.—REASONABLE AND PROBABLE CAUSE.

In *Cox* v. *English, Scottish & Australian Bank* (1905) A.C. 168 the Judicial Committee of the Privy Council (Lords Davey and Robertson, and Sir F. North and Sir A. Wilson) have given their approval to *Metropolitan Ry Co.* v. *Wright* (1886) App. Cas. 152 a case which has been often followed in our own Courts—in which it was laid down that in order to justify the setting aside of a verdict of a jury the Court must be satisfied that there is such a preponderance of evidence against it as to make it unreasonable and almost perverse that the jury, when instructed and properly assisted by the judge, should have returned it. Applying that rule to the case in hand which was one for maliciously procuring the plaintiff to be adjudged insolvent, the jury had found that the plaintiff did not depart from his dwelling house with intent to delay his creditors and that the defendants did not honestly believe that he had so departed, whereas it appeared that, assuming the plaintiff was not keeping out of the way of his creditors with a view to delay them, there was evidence which might lead a reasonable man to believe that he was: their Lordships therefore held that the verdict had been properly set aside, and their Lordships point out that the ques-

tion of "reasonable and probable cause" is one to be determined by the judge on facts found by the jury and it is improper to leave that question to a jury.

COMPANY—PROXY—SHAREHOLDER ONLY TO BE PROXY.

In *Bombay—Burmah Trading Corp.* v. *Shorff* (1905) A.C. 213, an Indian appeal, the Judicial Committee of the Privy Council (Lords Macnaghten and Lindley and Sir A. Scobie and Sir A. Wilson) held that were a company's articles of association provide that no person shall be appointed to act as proxy who is not a shareholder of the company; an objection will not lie against a person who is not a shareholder when appointed, but who becomes and is one at the time the proxy is lodged and continues to be so when he claims to act as proxy, and further, that as the articles did not require the proxy to be literally named therein, a proxy could not be objected to who was sufficiently described for all business purposes, *e.g.*, a member for the time being of a specified firm.

LIQUOR LICENSE—RENEWAL OF LICENSE—RIGHT TO REQUIRE REASONABLE UNDERTAKING FROM LICENSEE—REFUSAL TO DELIVER LICENSE WITHOUT UNDERTAKING — MANDAMUS — LICENSING ACT (4 EDW. VII., c. 23) ss. 1, 9—(R.S.O. c. 245, s. 12).

King v. *Dodds* (1905) 2 K.B. 40 was an application for a mandamus to justices to compel them to issue a renewal liquor license to the prosecutor. The justices as a condition of renewal had required the prosecutor to enter into an undertaking as regards sales and as to the mode of keeping his premises, which were reasonable, but not required by any statute, nor was the refusal to comply with such conditions covered by any of the statutory grounds for refusing a license, or a renewal; under these circumstances the majority of the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.JJ.,) held that the justices had no power to insist on the undertaking and allowed the appeal from the Divisional Court (Alverstone, C.J., and Wills and Kennedy, JJ.,) which had refused the mandamus. Mathew, L.J., dissented.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

From Gov.-Gen'l.-in-Council.] [May 15.

IN RE FERRIES.

Constitutional law—Interprovincial and international ferries—Establishment or creation—License—Franchise—Exclusive right—Powers of Parliament.

Chapter 97, R.S.C. "An Act respecting Ferries" as amended by 51 Vict. c. 23, is intra vires of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General-in-Council to, establish or create ferries between a Province and any British or foreign country, or between two Provinces.

The Governor-General-in-Council, if authorized by Parliament may confer by license or otherwise, an exclusive right to any such ferry.

Newcombe, K.C., for Dominion of Canada. *Blackstock*, K.C., for Ontario.

From Gov.-Gen'l.-in-Council.] [May 15.

IN RE 4 EDW. VII. CHAPTER 31.

Constitutional law—Railway company—Negligence—Agreements for exemption from liability—Power of Parliament to prohibit.

An Act of the Parliament of Canada providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition or declaration issued by the company, or by any insurance or provident association of railway employees, or of rules or by-laws of the company or association,

or of privity of interest or relation between the company and association or contribution by the company to funds of the association; or of any benefit, compensation or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association; or of any express or implied acknowledgement, acquittance or release obtained from the association prior to such injury purporting to relieve the company from liability, is intra vires of said Parliament.

Newcombe, K.C., for Dominion of Canada. *Ritchie*, K.C., and *Lennox*, for railway employees. *W. Cassels*, K.C., for Grand Trunk Ry. Co.

Ont.] [May 2.

KNY-SCHEERER CO. *v.* CHANDLER & MASSEY CO.

Contract — Sale of goods — Lowest wholesale price — Special discount.

By contract in writing whereby the C. & M. Co. agreed for three years from the date thereof to purchase for their business surgical instruments manufactured by the K.-S. Co. only, the latter contracted to supply their products at "lowest wholesale prices" and for all goods furnished from New York to allow a special discount of 5 per cent. from the prices marked in a catalogue handed over with the contract.

Held, that under this agreement the K.-S. Co. could allow to purchasers of their goods in large quantities a greater discount from the wholesale prices than 5 per cent, without being obliged to give the same reduction to the C. & M. Co. Appeal dismissed with costs.

Blackstock, K.C., *R. F. Smith*, K.C., *Riddell*, K.C., and *Rose*, for appellants. *Shepley*, K.C., and *Middleton*, for respondents.

Ont.] BLAIN *v.* CANADIAN PACIFIC RY. CO. [May 2.

New trial—Decree of appellate Court—Reasons for judgment.

B., a passenger on a railway train, was thrice assaulted by a fellow-passenger during the passage. The conductor was informed of the first assault immediately after it occurred, and also of the second, but took no steps to protect B. In an action against the railway company B. recovered damages assessed generally for the injuries complained of. The verdict was main-

tained by the Court of Appeal, but the Supreme Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 Can. S.C.R. 74). In the reasons given for the last mentioned judgment, written by MR. JUSTICE SEDGEWICK for the Court, it was held that damages could be recovered for the third assault only, but the judgment as entered by the Registrar stated that the Court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused a new trial was had on which B. again obtained a verdict, the damages being apportioned between the second and third assault. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict,

Held, TASCHEREAU, C.J., and DAVIES, J., dissenting, that as the decree was in accordance with the judgment pronounced by the Court when the decision was given, and as it left the whole case open on the second trial the jury were free to give damages for the second assault and their verdict should not be disturbed. Appeal dismissed with costs.

Johnston, K.C., and *Denison,* for appellants. *Riddell,* K.C., and *D. O. Cameron,* for respondent.

BOARD OF RAILWAY COMMISSIONERS.

Killam, C.C.] [May 2.

IN RE GRAND TRUNK RY. CO. AND CITIES OF ST. HENRI AND STE. CUNEGONDE.

Can. Ry. Act 1903, s. 139—Expropriation for yards—Land owned and used by municipal corporations.

The Grand Trunk Ry Co. applied to the Board for authority to expropriate, for the purpose of yard room, lands owned by the Cities of St. Henri and Ste. Cunegonde, in the Province of Quebec.

The following authorities were cited: Wood on Railroads, vol. 2, s. 235, p. 822 and s. 237, p. 840; *In re Bronson and the City of Ottawa,* 1 O.R. (1882), page 415, and authorities therein cited.

KILLAM, Chief Commissioner:—It appears to me that, under the Railway Act, it is competent for railway companies to take, without the consent of the owner, the lands owned by municipal corporations and used by them for municipal purposes.

The Act provides for the taking of lands of the Crown with the consent of the Crown, and for the acquisition of a right of

way over the lands of another railway company by authority of the Board. Sub-section (*c*) of s. 118 gives authority to a railway company to "purchase, take, and hold of and from any person any lands or other property necessary for the construction, maintenance, and operation of the railways;" and sub-s. (*d*) to "make, carry, or place the railway across or upon the lands of any person upon the located line of the railway."

By the Interpretation Act, R.S.C. c. 1, s. 7, sub-s. 22, "the expression 'person' includes any body corporate and politic;" and unless the provisions are applied to municipal corporations, there is no authority for the railway company to acquire the lands of such bodies. The provisions relating to compulsory acquisition seem to me to apply to these as much as any other provisions of the Act. The language cited from Wood on Railways may be quite accurate as applied to the United States, but the constitutional limitations in that country give rise to methods of construction of statutes of this kind which frequently have no application in this country. Even if there be any doubt as to the power to acquire these lands, it appears to me better that the Board should give the necessary authority, leaving it to the parties to fully settle their rights in the Provincial Courts. Subject to proof that the applicant company has the consent of the Governor-General-in-Council to use and occupy the lands of the Dominion adjoining the lands for which authority to expropriate is now sought, the order authorizing the expropriation of the lands of the Cities of St. Henri and Ste. Cunegonde, and J. Beaudoin should go as asked.

Cowan, K.C., for the company. *Gouin*, K.C., for Mr. Beaudoin (a private land owner). *Coderre*, for the City of St. Henri. *Dupuis*, K.C., for the City of Ste. Cunegonde.

NOTE.—Leave was granted to the cities under s. 44, sub-s. 3 of the Railway Act to appeal from the above decision.

Killam, C.C.] [June 9.

IN RE REID AND CANADA ATLANTIC RY. CO.

Canada Railway Act 1903, s. 186—Right of private individuals to make application under—Municipal by-laws—Formalities—Agreement between parties—Specific performance—Railway constructing highways.

This was an application by a private individual to compel a railway company to make and maintain crossings over its line of railway at points adjoining the applicant's land.

It was alleged that there was an agreement between the applicant and the company made by Mr. Booth on behalf of the company. There were disputes as to this. The railway was constructed through the lands of the applicant who subsequently laid it out into town lots, with intersecting streets adjoining the railway. The municipality passed a by-law purporting to establish as public highways the streets thus laid out, but the by-law was passed without complying with the formalities of s. 32 of the Municipal Act, R.S O. 1897, c. 223.

The application was made under the Railway Act 1903, s. 186, which provides that "upon any application for leave to construct the railway upon, along or across the existing highways the applicant shall submit plans, etc., to the Board."

Held, 1. The above section should be construed so as to include an application either by a railway company or by other parties for leave to the company or other parties to construct the desired highway crossings.

2. The by-law of the municipality was inoperative to establish a highway across the railway against the will of the company.

3. The Surveys Act, R.S.O. 1897, c. 181, s. 39, cannot create highways across the land of a railway company or give any right to the applicant to have his streets extended across the railway line.

4. It would be competent for a railway company with the leave of the Board to lay out and dedicate portions of the right of way for use as highways. And the municipality could accept these without passing a by-law for that purpose.

5. The utmost that the applicant can have from the Board would be an order giving to the railway company leave to lay out and construct such highways, and the by-law of the municipal council might be looked at as shewing an acceptance of such highways.

6. The Board does not sit as a Court for the purpose of decreeing specific performance of such an agreement as that set up by the applicant, nor does the Railway Act empower the Board to compel the railway company to construct the highway at the instance of the applicant. The application should proceed for the purpose of enabling the Board to determine whether it will give this permission.

Latchford, K.C., for applicant. *Chrysler*, K.C., for Canada Atlantic Railway Company. *Christie*, K.C., for Mr. Booth.

Province of Ontario.

HIGH COURT OF JUSTICE.

MacMahon, J.] IN RE IMPERIAL STARCH CO. [April 11.

Company—Transfer of shares—Refusal to enter on books of the company—Ultra vires.

The transfer agent and registrar of the above company which was incorporated under the Ontario Companies Act, R.S.O 1897, c. 191, acting under instructions of the president of the company, refused to enter the transfers of two shares of stock upon the books of the company though the said shares were fully paid up, and the transfers in order. A by-law of the company provided that no transfer of any stock of the company should be valid until approved by the directors and registered in the books of the company, and that all transfers of stock should be at the discretion of the directors; and this by-law had been ratified unanimously by the shareholders of the company.

Held, following *In re Panton and Cramp Steel Co.* (1904) 9 O.L.R. 3, that any attempt to authorize the directors to refuse to transfer fully paid up stock was ultra vires; and mandatory order made for the transfer of the two shares.

W. H. Blake, K.C., for transferees of the stock. *Boland*, for the company.

Divisional Court.] [May 22.

THOMAS *v.* NORTH NORWICH.

Municipal corporations—Highway—Negligence—Repairs—Want of warning—Proximate cause of accident—Horse beyond control.

Where two causes combine to produce an injury, both of which are in their nature proximate, the one being a defect in the highway and the other some occurrence for which neither party is responsible, the municipal corporation is liable in damages if the injury would not have been sustained but for the defect in the highway.

The defendants were held liable in damages, because while they were repairing a bridge on a highway they failed to give warning or put up a barrier and an accident happened in consc-

quence of a driver's attempt to turn suddenly off the highway when he came to the bridge, his horse at the time being almost beyond his control in consequence of a break in the harness.

Judgment of IDINGTON, J., reversed.

Douglas, K.C., for appellant. *Makins*, for respondents.

Divisional Court.] [June 10.

LOUNT *v.* LONDON MUTUAL FIRE INS. CO.

Fire insurance—Variations from statutory conditions—Notice to agent.

A variation from the statutory conditions striking out from the third statutory condition the words "or its local agent" in the clause requiring notice of a change material to the risk to be given to "the company or its local agent," and providing that wherever the words "agent" or "authorized agent" occur in the statutory conditions such agent or authorized agent should be held to mean the company's secretary only, was in the case of a company having more than four hundred local agents in the Province of Ontario held, as to the third statutory condition, to be just and reasonable, and notice to a local agent insufficient.

Judgment of STREET, J., affirmed.

Creswicke, for appellant. *Judd*, for respondents.

Falconbridge, C.J.K.B., Britton, J., Anglin, J.] [June 12.

AMES *v.* CONMEE.

Stock brokers—Purchase of shares on margin—Hypothecation by brokers—Conversion—Action against principal for balance due.

Action by plaintiffs against defendant for money paid by plaintiffs for the purchase at defendant's request of certain shares of the Lake Superior Consolidated Company and for interest in carrying that stock and for brokerage or commission.

Appeal from judgment of BOYD, C., at the trial in favour of the plaintiffs.

Held, per FALCONBRIDGE, C.J.K.B., and BRITTON, J., that the appeal must be dismissed, and the plaintiffs were entitled to recover, inasmuch as the evidence shewed that, though they hypothecated to their bankers, to secure their general indebtedness, a quantity of Lake Superior Consolidated stock, together with other stock, yet they had at all times after the purchase on

behalf of the defendants, a quantity of such stock equal to the amount purchased for the defendant, to deliver to him had he asked for it and paid the balance.

Held, per ANGLIN, J., the evidence made it reasonably clear that the defendants' stock though not ear-marked, was, while the plaintiffs were supposed to be carrying it for him, pledged with other stock held by them to lenders for advances not restricted in amount to the balance due from the defendant upon his stock, and made without reference to the rights of the defendant. There was no evidence of any arrangement made by the plaintiffs entitling them to demand a release of the defendant's stock on payment to their lenders of a sum equal to the balance due from the defendant to them. Between such an hypothecation and an absolute transfer, there is no difference in principle. Both involve a conversion of the client's stock. The plaintiffs' assertion that they were able and ready at any time to make delivery to the defendant upon payment, amounted to nothing more than an assertion of ability and readiness to procure stock to meet the defendant's demand either by obtaining the release of hypothecated stock or by purchasing other shares on the market. The pledge of the defendant's stock for the general indebtedness of the plaintiffs, was a conversion whether the plaintiffs were or were not at all times in a position by paying that indebtedness to redeem such stock; and the fact that the bought note (even if it actually reached the defendant, which he denied, and which had not been proved) contained upon it a memorandum that when carrying stocks for clients the plaintiffs reserved the right of pledging the same or raising money upon them in any way convenient to them, did not when properly construed assert the right to do more than pledge the customer's stock to the amount which he owed upon it: and, therefore, no estoppel could be raised upon it against the defendant to prevent him objecting to what the plaintiffs had done in this case. When the plaintiffs pledged the defendant's stock for their general indebtedness, they wrongfully converted it to their own use, and the defendant in taking the account was entitled to credit for the market value of the stock at the day of its conversion.

Thomson, K.C., and *Tilley*, for plaintiffs. *Millar*, for defendant.

MacMahon, J.] HARKNESS *v.* HARKNESS. [June 16.

Will—Construction—Vesting—Life estate—Remainder—Family.

A testator provided that his son A. and his daughter M. should have, after the death of his wife if she should survive him-

the life use of all his real and personal property to hold to them jointly during their natural lives if they should survive him and to the longest liver of them; and that after the death of his wife and his son A. and his daughter M. all real property belonging to him should be divided into three equal portions and distributed as follows: one portion to his son J.'s family, one portion to his son G.'s family and one portion to his daughter N.'s family.

Held, that the word "family" meant and included only the children of the two sons and the daughter and that these children took among themselves per capita and that the estates of the children became on the death of the testator vested estates in remainder subject to the respective life estates of the wife and of the son A. and the daughter M.

R. T. Harding, for plaintiff. *Mabee*, K.C., for executor. *G. G. McPherson*, K.C., for other defendants.

IN RE GILHULA

IN RE CAIN.

Habeas corpus—Constitutional law—Acts to restrict importation of aliens—Incapability of Parliament—Meaning of words "return to country whence he came"—Force exerted beyond limits of Canada.

Held, that the expression "returned to the country whence he came" in 60 & 61 Vict. c. 11, s. 6, as amended by 1 Edw. VII. c. 13, intends the actual depositing on foreign soil of the alien who is in custody for deportation, and the extra territorial constraint assumed thereby is beyond the power of the Dominion Parliament to authorize. The language necessitates, not simply the prisoner's conveyance to the boundary, but his arrival on foreign soil. The interim custody of the prisoners was consequently declared invalid and their discharge was ordered.

[TORONTO, June 16—Anglin, J.

This was an application for the discharge from custody of James R. Gilhula, chief despatcher, and Everett E. Cain, of the Père Marquette Railway lines operating in Canada, who were held by the Commissioner of Dominion police under warrants from the Attorney-General for Canada which required the officer "to take into custody the said (prisoner) and return him to the United States of America, etc."

J. A. Robinson, for Gilhula. *J. B. McKenzie*, for Cain. *Shepley*, K.C., for the Attorney-General for Canada.

ANGLIN, J.:—Numerous grounds were urged in support of the motion, but, in the view which I take of the matter, it be-

comes unnecessary to deal with any ground other than that upon which I am about to dispose of it.

As amended by 1 Edw. VII. c. 13, s. 3, the 6th section of 60 & 61 Vict. c. 11 (*d.*) reads as follows:—

"The Attorney-General for Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, or company violating section 1 of this Act."

This statutory provision contains the sole authority for the issue and enforcement of the warrants above set out. Its validity is impugned by the applicants upon the ground, inter alia, that, inasmuch as it purports to authorize the Attorney-General, or his delegate, to deprive persons against whom it is to be enforced of their liberty without the territorial limits of Canada, it transcends the powers of the Dominion Parliament.

By the 91st section of the B. N. A. Act the Parliament of Canada is empowered to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the Provinces, and it is by sub-s. 25 given "exclusive legislative authority" in regard to "aliens and naturalization." In many judgments the Privy Council has declared that our Parliament "has and was intended to have powers of legislation as large and of the same nature as the Imperial Parliament itself," the language of the B. N. A. Act being "apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to": *Riel* v. *The Queen*, 10 App. Cas. 675: *The Queen* v. *Burah*, 3 App. Cas. 889, 904; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 588. But that the area within which the powers so conferred may be exercised is restricted to the territorial limits of the colony to whose legislature they are granted, is equally well established. However general the language in which its jurisdiction is conferred, without an explicit bestowal of extra-territorial powers by the sovereign Parliament, no colonial legislature may enact legislation to be actively enforced beyond the boundaries of the colony: *Powell* v. *Apollo Candle Co.*, 10 App. Cas., at p. 290; *Routledge* v. *Low*, L.R. 1 Ch., at p. 47 per Turner, L.J.; L.R. 3 H.L., at p. 116, per Lord Chelmsford; Forsyth's Constitutional Law, pp. 24, 465; Todd's Parliamentary Government in British Colonies, 2nd ed., pp. 159, 177-8; Dicey on The Constitution, 6th ed., p. 99n.

This is but one of the several restrictions necessarily flowing from the inherent condition of a dependency: *Reg.* v. *Taylor*, 36 U.C.R. at p. 191; *Craw* v. *Ramsay*, Vaughan 274, at pp. 292-3. Counsel for the Attorney-General was, therefore, well advised in conceding at bar that if the return of the immigrant to the country whence he came, prescribed by the 6th section of the statute, would necessarily involve his detention or subject him to constraint, by the agent of the Attorney-General, without the territorial limits of Canada, that provision is ultra vires of the Dominion Parliament.

Giving full effect to the argument of the learned counsel that, if at all possible, the statute should receive a construction consistent with jurisdiction, not desiring "to attribute to the colonial legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony": (*McLeod* v. *Attorney-General for New South Wales*, [1891] A.C. 455, 457), I have striven to discover some means for the performance of that which the warrants to the Commissioner requife him to do, viz., to take into custody the applicants and return them to the United States of America, whence they came,—that would not involve an assumption of extra-territorial jurisdiction. In this I have failed.

Mr. Shepley argued that the requirements of the statute must be deemed satisfied if the "immigrant" to be deported is "put in course of return" to the country from which he came. I cannot so read the words "return to." If the constraining force of the officer acting under the Attorney-General's warrant ceases before the subject of it is within the territorial limits of the foreign country, I cannot understand how he can be said to be returned to that country by virtue of the warrant. If such force continues until the subject is upon foreign territory, its extra-territorial exercise cannot be denied.

In effecting the return of an "immigrant" to the United States it is suggested that the officer charged with that duty may take his subject in custody to the imaginary line forming the boundary, and then, remaining himself on Canadian territory, may push his prisoner across the line and into the United States. But, were it possible for the officer to eject a resisting alien without risk of projecting any part of his own person upon United States soil, in my opinion the application of the propelling force operating upon the person of the alien, while wholly or partly within the foreign territory, is an extra-territorial constraint of such alien by the Canadian officer and as such cannot be authorized by the Dominion Parliament. Again counsel suggests that the officier may select such a point as Windsor for the

deportation, and may discharge his duty by placing his alien prisoner upon a ferry-boat crossing the river to Detroit. Here the alien is upon Canadian territory until the middle of the stream is reached. If the custody ceases when the alien is placed on the ferry-boat, it cannot be said that he is returned to the United States by the officer charged with the execution of the warrant. If the custody continues until the ferry-boat reaches mid-stream—apart from the difficulty of determining the precise moment at which the boat crosses the imaginary line beyond which any constraint by Canadian authority is admittedly unwarranted, and the danger of an involuntary violation of United States territory—it is impossible to say that the deported subject is not under actual constraint imposed by Canadian authority until the boat reaches the Detroit docks. He is upon the ferry-boat not of his own volition, but because Canadian power has placed and kept him there. In theory his imprisonment may cease at the instant his body is carried over the border: in fact he is carried not to the border, but to the City of Detroit in United States territory, by compulsion of Canadian law.

The difficulties of returning "immigrants" to countries separated from Canada by the high seas without exercising extra-territorial constraint are even greater. The statute extends to all foreign countries which have enacted and retain in force laws or ordinances applying to Canada of a similar character: s. 9.

"In so far as they possess legislative jurisdiction, the discretion committed to the Parliaments, whether of the Dominion or of the Provinces, is unfettered. It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed to them": *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, 585. Discharging that function, I have reached the conclusion that the provision of the Dominion statute 60 & 61 Vict. c. 11, for the return of certain "immigrants" to the country whence they came, is ultra vires.

Neither may that statute be invoked to justify the custody in which the applicants are held within Canada. This custody is merely a means to an end, that end being deportation. The applicants are not in custody for any other purpose. Their apprehension is authorized by the legislature only as something subsidiary to their return to the United States. It follows that, if the return itself cannot be legally effected, the detention for that illegal purpose is unwarranted.

The appellants are, therefore, in my judgment, entitled to an order for their immediate discharge—and that order I accordingly pronounce.

In addition to the authorities cited in the course of the foregoing opinion, I make the following references: *Ray* v. *McMac-*

kin, 1 Vict. L.R. 274; *In re Gleich,* 1 New Zealand Sup. Court. 39; *In re Victoria Steam Navigation Board,* 7 Vict. L.R. 248; Lefroy on Legislative Power in Canada, pp. 322, et seq.; In re Bigamy Sections of Criminal Code, 27 S.C.R. 461; *Reg.* v. *Brierly,* 14 O.R. 525; *Reg.* v. *Plowman,* 25 O.R. 656.

[NOTE.—Reference might also be made to *Badische Anilin* v. *Johnson* (1897) L.R. 2 Ch. Div. 322, 337, 341, 344, 349.—ED. C.L.J.]

Province of Manitoba.

KING'S BENCH.

Full Court.] WATSON *v.* MOGGY. [June 9.

Landlord and tenant—Surrender of lease—Cancellation of lease —Eviction—Forfeiture.

In March, 1903, defendant by deed leased his farm to the plaintiff for three years. In December following the parties met and discussed terms on which plaintiff should abandon the lease and give up possession to the defendant. The plaintiff was in financial difficulty and stated that, unless the defendant would agree to guarantee the wages of the hired men for the ensuing year and the store bills to be paid, he would be unable to go on with the working of the farm under the lease. Defendant being anxious to assist the plaintiff in this respect offered to guarantee the store bills to the extent of $125, but he refused to guarantee the men's wages. Negotiations having failed defendant told the plaintiff that he would cancel the lease for non-fulfilment of some of the covenants in it, when plaintiff said he wanted that in writing. Next morning defendant served on plaintiff the following notice: "Take notice that I have this day cancelled lease of my farm to you on the ground of non-fulfilment of terms of said lease."

Plaintiff left the farm the same day after selling to defendant some oats, barley and feed that were on the premises. A few days afterwards he came back and sold defendant his poultry. Defendant retained possession of the farm from the day the notice was served.

This action was for the recovery of damages for eviction from the farm and for refusal to restore possession of it.

Held, that there had not been a surrender of the lease either by operation of law or by the acts of the parties. Defendant also relied on an alleged forfeiture of the lease for breach of plaintiff's covenant in the lease to buy three horses from the

defendant and to pay for these by breaking and clearing of stones on the farm at so much an acre, and in default to pay in cash at the time of threshing. Plaintiff did some breaking and clearing, and defendant received some of the crop at threshing time, but it did not clearly appear how the accounts between them stood, although there might have been a balance of about $38 due on the horses.

Held, that there was not shewn such a clear breach of the covenant as to entitle defendant to declare the lease forfeited.

Judgment of PERDUE, J., allowing $700 damages affirmed with costs.

Daly, K.C., and *Elliott*, for plaintiff. *Howell*, K.C., and *Mathers*, for defendant.

Full Court.] McGREGOR *v.* WITHERS. [June 9.

Sale of land under registered judgment—Right of purchaser under agreement of sale, how far bound by registered judgment—Cancellation of agreement before action brought by judgment creditor—Forfeiture.

Appeal from judgment of RICHARDS, J., dismissing the action as against defendant Houghton.

This was an action to enforce payment of a registered judgment of a County Court against the defendant Withers by the sale of his interest in the land in question. The defendant Houghton was the owner of the land and had agreed in July, 1901, to sell it to Withers for the sum of $1,800 to be paid with interest at eight per cent. per annum as follows: Withers was to crop at least 100 acres in wheat each year and to deliver one-half of such crop to Houghton who was to credit the net proceeds first on the accrued interest and then on the principal.

There was no provision allowing Withers to pay in cash or in any other way than by the delivery of half the grain raised each year. The vendor was to be at liberty, on default by the purchaser in performance of any of his covenants, with or without notice to cancel the contract and forfeit all payments and improvements and take immediate possession. There were also clauses providing that Withers should cut all noxious weeds and farm the land in a husbandlike manner, that he should break at least 20 acres in each year, insure the wheat against hail, etc. It was further provided that, until the completion of the purchase the legal relationship of landlord and tenant should subsist between the parties. The judgment was in force and a certificate of it was registered in the proper office at the time Withers entered into the agreement. In December, 1903, plaintiff took proceedings under Rule 743 of the King's Bench Act before the

local judge at Brandon to sell the land. While these proceedings were pending, Houghton served notice on Withers that the agreement was cancelled for default in performance of covenants.

This action was then brought to have it declared that the alleged cancellation by Houghton was void and that the plaintiff was entitled to redeem Houghton and for an order for sale.

By section 213 of R.S.M. 1902, c. 38, it is declared that the registration of a certificate of judgment shall bind all interest or estate of the defendant or defendants in lands and hereditaments situate within the registration district . . . the same as though the defendant or defendants had in writing under his or their hand or hands and seal or seals charged the said lands and hereditaments with the amount of the said judgment.

Held, that, under this enactment, the binding effect of the registered County Court judgment was not nearly so extensive as that of a registered judgment of the Court of King's Bench under the Judgments Act, R.S.M. 1902, c. 91, or that of a fi. fa. lands under the former practice; that it could be equivalent to no more than a bare charge on the then present interest of Withers under his agreement, which would not be equivalent to an assignment of the benefit of his contract, or operate by way of estoppel so as to convey the estate that might be afterwards acquired in case he should carry out the terms of the agreement; that, as there seemed to have been some default on the part of Withers in carrying out the terms of the agreement, Houghton was entitled to cancel it as he did and without notice to the judgment creditor, who could not be regarded as an assignee of the agreement; and that there was no interest or estate left in Withers which could be sold under the judgment. Leith's Real Prop. Statutes, p. 314, and *Bank of Montreal* v. *Condon*, 11 M.R. 366, followed.

Held, also, that, as the plaintiff was not in the position of an assignee of the agreement or entitled to perform it, he could not claim any relief in equity against the forfeiture by Houghton, even if such relief would have been granted on the application of Withers.

Appeal dismissed with costs.

Wilson and *Kilgour*, for plaintiff. *Howell*, K.C., and *Coldwell*, K.C., for defendant Houghton.

Full Court.] ALLOWAY v. ST. ANDREWS. [June 9.

Real Property Act—Caveat—Filing second caveat after acquisition of additional right or title.

The plaintiff was the grantee of the land in question under a tax sale deed issued by the defendant municipality. At a subse-

quent sale of the same land for further arrears of taxes the municipality itself became the purchaser, and a vesting certificate was issued to it. The municipality then applied for a certificate of title under the Real Property Act, R.S.M. 1902, c. 148. Notice having been served on the plaintiff, he filed a caveat claiming the land under his tax deed. Issues were then directed to be tried to determine the questions involved. While these issues were pending the plaintiff obtained, as he claimed, title to the land under a deed from the original grantee from the Crown and applied for an order for leave to file a new cavat based on such additional title, and postponing the trial of the issues already pending so that proceedings might be taken upon such new caveat and the new issue, if any directed, consolidated with the pending issues.

Held, 1. The plaintiff had the right under s. 127 of the Real Property Act, to file such new caveat without a judge's order giving leave to do so. *Frost* v. *Driver*, 10 M.R. 209, distinguished on the ground that the second caveat in that case was based on the same estate or interest as the first.

2. As the Interpretation Act, R.S.M. 1902, c. 89, declares, in sub-s. (*m*) of s. 8, that a word importing the singular number includes more than one thing of the same kind, it is impossible to construe the words "a caveat" in s. 127 of the Real Property Act as meaning "only one caveat."

Appeal from RICHARDS, J., allowed with costs and order made as asked for by plaintiff.

Mathers, for plaintiff. *Heap*, for defendants.

Full Court.] BARRIE v. WRIGHT. [June 9.

Hotel keeper—Loss of property of guest—Negligence—Contributory negligence.

Appeal from decision of a County Court judge in favour of plaintiff claiming for loss of part of his luggage left at defendant's hotel at which he was a guest. The plaintiff, on his arrival in Winnipeg, by train, delivered part of his luggage to the driver of a baggage transfer company with instructions to take it to defendant's hotel. Plaintiff then went to the hotel, registered as a guest and was shewn to a bedroom to which he took his valise which he had himself carried from the train. Later in the same day the luggage which he had intrusted to the transfer company was taken to the hotel by that company's driver and placed in the hall where he saw some other luggage lying. That part of the hall is not visible from the office of the hotel. Persons going to and from the hotel bar pass the place where the luggage was

left. The hotel was crowded at the time, and the hall was not a safe place for unwatched luggage to be left in. The driver who delivered the luggage in question said that he went at once to the hotel clerk and told him that he had left it in the hall for the plaintiff. The clerk denied this, but the finding by the trial judge in plaintiff's favour necessarily implied that he believed the driver's story.

Neither the defendants nor their servants paid any attention to the luggage, and it was left where the driver had put it. Plaintiff saw it there about eleven o'clock on the night of his arrival, but did not remove it or draw the attention of the hotel servants to it. The next day he noticed that it was not in the hall. He did nothing on so noticing, or until the third day thereafter. On such third day he asked for it, but it could not be found. The presumption was that it had been stolen.

Per RICHARDS, J., dismissing the appeal. The plaintiff was justified in assuming, when he saw his goods in the hall, that they were being cared for by the defendants, and, when he missed them the next day, it was reasonable for him to suppose that they had been put into defendant's baggage room.

There was no negligence on plaintiff's part in his merely acquiescing in the defendant's acts with regard to the goods.

Per PERDUE, J., dissenting. It was gross negligence on the plaintiff's part, under the circumstances, not to call the attention of the hotel keeper to his parcels when he saw them lying in the hall, and to take no steps to have them removed to a safer place. Had he done so the loss would not have occurred.

The Court being equally divided the appeal was dismissed without costs.

Wilson, for plaintiff. *Phillipps*, for defendant.

Full Court.] BELL *v.* ROKEBY. [June 9.

Principal and agent—Commission on sale of land—Liability of agent on contract made for principal.

Defendant, resident in New York, at an interview there with plaintiff, a resident of Winnipeg, employed the plaintiff as an agent on commission to find a purchaser for the property in question at $15 per acre. Some months afterwards the plaintiff wrote to defendant that he had received an offer of $12 per acre in cash, to which defendant replied that he would consult his father—who lived in England—about it. Four days afterwards defendant wrote plaintiff as follows: "I have heard from my

father that he will accept $12 per acre for the Headingly farm. As you know, James Scott has this farm in hand for sale and I have written to him to take the matter up with you. Will you therefore please call on him and arrange regarding commission, as, of course, I cannot afford to pay more than one commission. No doubt he will agree to divide with you."

Plaintiff did not call on Scott nor did Scott call on plaintiff in relation to the matter, but the plaintiff took his purchaser to the office of the defendant's solicitors in Winnipeg to whom the purchaser paid $500 on account and stated his readiness to pay the balance as soon as title could be transferred to him.

A few days before this, however, the other agent, Scott, found a purchaser for the property at the same price and telegraphed defendant, who afterwards carried out the sale to Scott's purchaser through the same solicitors and paid Scott the usual commission. Defendant did not notify plaintiff of the offer received through Scott or his acceptance of it, but afterwards returned the $500 to the purchaser introduced by plaintiff.

Held, that defendant had accepted the sale negotiated by plaintiff and, as the purchaser produced by him was ready and willing to complete the purchase, plaintiff had earned his commission, and that there was nothing in the letter above quoted to make it a condition precedent that the plaintiff should get the consent of, or consult with, the other agent.

The title to the land was in defendant's father, and defendant had told plaintiff that the land was his father's; but defendant had a power of attorney to sell and convey the land, and the Court found that, in the dealings between plaintiff and defendant, the latter was contracting on his own behalf with the plaintiff and knew that the plaintiff looked to him to pay the commission if earned, and

Held, that defendant had made himself personally liable for the plaintiff's commission. Story on Agency, at pp. 206 and 509; *Jones* v. *Littledale*, 6 A. & E. 490; Evans on Principal and Agent (Am. Ed.), p. 370; and *Ex parte Hartop*, 12 Ves. 352, applied.

Daly, K.C., for plaintiff. *Howell*, K.C., and *Mathers*, for defendant.

Full Court.] GILMOUR *v.* SIMON. [June 9.

Specific performance—Principal and agent—Evidence to prove authority of agent to sell land—Implied powers of real estate agent—Appeal from trial judge's findings.

Appeal from judgment of PERDUE, J., ordering specific performance of an agreement of sale of land signed on behalf of

defendant by his agent, Egan. Egan's authority from defendant was altogether verbal, and, in the opinion of the Full Court, was only that ordinarily conferred upon a real estate agent employed to find a purchaser for the property at a named price and to introduce him to his principal.

Held, following *Hamer* v. *Sharp*, L.R. 19 Eq. 108; *Wilde* v *Watson*, 1 L.R. Ir. Chy. 402; *Prior* v. *Moore*, 3 T.L.R. 624, and *Chadburn* v. *Moore*, 61 L.J. Ch. 674, that such authority does not warrant the agent in signing a contract of sale so as to bind his principal. Authority to make a binding sale may be conferred verbally, but it must be clearly so expressed and proved by evidence of the clearest and most convincing kind, when the principal disputes it. The only evidence to prove that Egan had been authorized to make a binding sale in this case was his own, but the trial judge gave evidence to it, and said that he placed no reliance upon defendant's testimony in contradiction. Egan's account of his interview with defendant may be summarized as follows: "I called on Mr. Simon and asked him what he wanted for the property. He said about $45 an acre. I said, 'Would you sell for $40 per acre?' He said, 'Yes, if I get $1,000 cash.' I asked for the exclusive right until Saturday night. He said, 'I will until Monday give it to no one else.' I said. 'All right, you will give me until Monday?' and he said, 'Yes, you can sell it for $40 per acre and $1,000 cash, and the purchaser to assume Bain's claim.'"

Egan received $50 cash deposit from plaintiff and gave him a receipt for it, signed by himself as agent for defendant, and being the agreement of which specific performance was sought The receipt stated that the remainder of the $1,000 referred to by defendant was to be paid "on acceptance of title."

Egan went the same day to defendant, told him of the sale and shewed him the $50 cheque and a copy of the receipt, when defendant at once objected to what Egan had done.

Held, distinguishing *Rosenbaum* v. *Belson* (1900) 2 Ch. 267, that the evidence was not sufficient to establish an authority in Egan to make a binding contract of sale of defendant's land.

Held, also, that the stipulation for payment of the $950 only on acceptance of title was, in any case, clearly unauthorized and contrary to the express instructions given to Egan according to his own testimony, and that, on this ground also, specific performance should be refused.

Although accepting the findings of the trial judge as to the credibility of the witnesses, the Court in appeal may review the evidence, and in a proper case, reverse the decision arrived at as to the legal conclusions to be drawn from the admitted facts.

Howell, K.C., and *Minty*, for plaintiff. *Bradshaw*, for defendant.

Full Court.] MASSEY-HARRIS CO. *v.* MOLLOND. [June 9.

Sheriff—Negligence of bailiff—Liability for loss of stolen money—Satisfaction of judgment—Sale under fi. fa. without notice or advertisement.

Judgment of RICHARDS, J., noted vol. 40, p. 789, affirmed with costs.

Held, also, 1. The provision of section 21 of the Executions Act, R.S.M. 1902, c. 58, requiring at least eight days' public notice in writing of the time and place of sale under a fi. fa. goods, is only directory and that a sale should not be held invalid for want of such notice, if there was otherwise a sufficient notice to insure a successful public sale. As a matter of fact the chance of good prices being obtained was increased on account of the buyers not knowing that the sale was a forced one under execution. That provision is for the benefit of the debtor, and neither the plaintiffs nor the sheriff can take advantage of an omission of the bailiff to get the sale declared void when no damage of any kind resulted from the omission.

2. Only the mortgagees could object to the auctioneer selling the goods themselves or claim that only the defendant's equity of redemption therein could be sold under the fi. fa.

3. If the sheriff sells otherwise than for ready money he is responsible for the collection of the cash, but that does not render the sale invalid.

4. There being no other executions in the sheriff's hands against the defendant, neither the plaintiffs nor the sheriff could take advantage of the sheriff's neglect to observe the requirements of section 25 of the Executions Act as to this rateable distribution of the money realized by the bailiff.

5. There having been a seizure by the bailiff under the fi. fa. before the sale, and no abandonment afterwards, the sale must be considered to have been made under the writ and not under order of the executors.

Aikins, K.C., for plaintiffs and sheriff. *Wilson*, for the executors.