PUBLIC POLICY

AS A GROUND FOR LEGAL DECISION.

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CHAPTER 1.

INTRODUCTORY

1. DIFFICULTY OF DEFINITION.

"Public Policy" is a common law doctrine which has found a place in many branches of the law. It has been applied by Courts of Common Law from a very early period in our legal history and is probably as old as the Common Law itself. It has been described by an eminent Judge as the "foundation of law." (Lord Chief Baron Pollock in Egerton v. Brownlow, 4 H.L.C.1., 144). Courts of Equity, too, have applied the doctrine not only in those classes of case to which it has been applied by Common Law Courts, but also in others in which the Common Law Judges have refused to apply it.

The application of this doctrine has in some cases led to settled rules of law, while in others the result has been instability in the law, owing to the judicial reflection, to some extent at all events, of the changes in public opinion from time to time, or, as one learned Judges expressed it in a recent case, the reflection in jurisprudence of the evolution of economic thought. (Lord Shaw in Herbert Morris Limited v. Saxelby (1916) A.C.688).

To new and unprecedented cases the doctrine is, owing to its indefinite and uncertain character, somewhat difficult of application, and on this account it has been, in modern times, the subject of much judicial discussion and comment, frequently of an unfavourable character.

Judicial opinions vary considerably as to the scope and application of the doctrine, and an examination of the cases in which it has been discussed reveals a great diversity of opinion, even amongst the

most learned Judges, both as to the true significance of the term "public policy," and as to the application of the doctrine it is used to denote.

Judges have frequently described the doctrine as "uncertain" and even "dangerous" in its application as a ground for legal decision, and when any attempt is made to define or fix its limitations, it must be confessed that the subject is not free from difficulty.

Confusion arises in the first place from the fact that "public policy" is used in different senses.

With public policy in the political sense all are familiar, and it is clear that public policy in the legal sense does not cover so wide a ground.

The term has, however, been used in at least three different senses -

1. Public policy in its widest or political sense, which is a matter for the consideration of politicians.
2. Public policy in a narrower sense, and which is, in effect, the judicial conception of what is, or is not, for the public good.
3. Public policy as the name of the doctrine or principle of law which holds that no transaction shall be treated as valid by the Courts, which tends to be injurious to the public, or is contrary to the public good.

Public policy in the first sense is concerned with political questions, such as, for example, whether free-trade or protection is the better fiscal policy; or whether the State should or should not control monopolies and regulate industry; and other similar questions which fell within the province of the Legislature. These are questions of political expedience which do not concern the judiciary or law until settled by legislative enactment.

The judiciary is, however, concerned with such questions, as, for example, whether a covenant in restraint of trade or a condition in a will has a tendency to be injurious to the public. These are questions of public policy in relation to the administration of the law.

The answers to such questions depend not upon purely political considerations, but rather upon the judicial conception of the public interest or the public good - that is on public policy in the second sense abovementioned. With public policy in this sense the judiciary is concerned, for it is upon it that the legal doctrine known as public policy is based.

The difficulty arises when any attempt is made to draw a dividing line between public policy in the political, and public policy in the legal sense.

Some Judges have regarded every application of the doctrine to a new case as an encroachment by the judiciary on the function of law making which belongs to the Legislature.

Others again, like Lord Hardwicke, have held that full effect should be given by the Court to what he called "political arguments."

That learned Judge said in Chesterfield v. Janssen (1 Atk. 301, 352), "Political arguments in the fullest sense of the word as they concern the government of a nation must and have always been of great weight in the consideration of the Court, and though there may be no dolus malus in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may be properly said that it regards the public utility."

This is probably the widest view of the scope of

public policy in the legal sense ever expressed by any Judge.

It was quoted with approval by Lord Lyndhurst, in his judgment in Egerton v. Brownlow (1853) (4 H.L.C. 1, 160), and at p. 163 he added, "Each case must, as I have already stated, be decided on its own circumstances as applied to the established rule of law regarding the public interest and welfare, or to use the words already quoted of Lord Hardwicke, 'upon political arguments in the fullest sense of the word as they concern the government of a nation'."

Many modern Judges, however, take a narrower and more cautious view than that of Lord Hardwicke and Lord Lyndhurst, and are much inclined to leave public policy to the legislature, except as to certain definite subjects or heads of public policy, which are taken to have been already well established by previous decisions.

There appears to have been no successful judicial attempt to draw a definite line between public policy in the political sense, and that "public policy" "public good" "public utility" or "public interest" which Judges have regard to, when they apply the doctrine known in law as public policy.

Whether a transaction is, or is not, contrary to public policy, is a question of law, upon which no evidence can be called, and no matter how a Judge arrives at his conception of the public good, whether from his own personal opinions, or from what he thinks are the "prevailing and just opinions of the public good," or partly from one and partly from the other, it is obvious that there must still be a vagueness about public policy in the legal sense, which makes adequate definition difficult if not quite impossible.

It is not surprising, therefore, to find numerous

expressions of judicial opinion as to the indefiniteness and uncertainty of the term, and more than one definite opinion that it is altogether incapable of definition.

Thus, Sir George Jessel M.R. said in Besant v. Wood (1879) (12 Ch. D. 605,620), "This is a breach of the law which depends upon what is commonly called public policy. Now you cannot lay down any definition of the term public policy, or say it comprises such and such a proposition and does not comprise such and such another; that much be to a great extent a matter of individual opinion, because what one man or one Judge, and perhaps I ought to say one woman also, in this case, might think against public policy, another might think altogether excellent public policy. Consequently, it is impossible to say what the opinion of a man or a Judge might be, as to what public policy is."

Kekewich, J. too, in Davies v. Davies (36 Ch. D. 359, 364) said, "Public policy does not admit of definition and is not easily explained. If that statement requires authority, turn to Egerton v. Brownlow, and consult the arguments of counsel, and the opinions of the Judges."

An examination of the opinions of the Judges in Egerton v. Brownlow (4 H.C.L.I) shows that there is much justification for the statement of Kekewich J., and reveals the uncertainty that existed in the minds of the learned Judges whose opinions were sought in that case, with respect to the meaning of the term "public policy".

The short quotations from the opinions of the Judges, given below, indicate the difficulty they felt with respect to the matter.

Creswell, J. (at p. 85) said, "I presume that

your Lordships did not intend to ask the opinion of the Judges upon any general question of public policy, or, in other words, whether they think that the interests of the public would be better advanced by tolerating or refusing to tolerate such provisoes, but whether they are in contravention of any established law, or in contravention of the spirit although not against the letter of any law, in which case they may be said to be against the policy of the law."

Talfourd, J. (at p. 96), "The contravention of public policy is a term of dangerous, because uncertain, use in the ascertainment of legal rights, but it is true that if the object proposed by the testator were in its nature capable only of attainment by the violation of any law of God or man, or if he had prescribed or suggested such violation of morals or law, his condition or proviso would be void."

Baron Alderson, (at p.106). "If by public policy, is meant the object and policy of a particular law, then I readily accept it as a rule ..... But here it seems to be contended that an act possible and legal, but in the opinion of sensible men not expedient to be done, is for that reason void as contrary to public policy. Now I think that this, which is really what is here meant, would altogether destroy the sound and true distinction between judicial and legislature functions and I pray your Lordships to pause before you establish such a precedent as that. By this "public policy" will be meant the prevailing opinion, from time to time, of wise men (and in saying "of wise men" I give a favourable view of the principle), as to what is for the public good - an excellent principle, no doubt, for legislators to adopt, but a most dangerous one for judges."

Parke, B. (at p. 122), "The main ground on which it is argued that the provisoes are illegal, is that they are against "public policy." This is a vague and unsatisfactory term, and calculated to lead to uncertainty and error when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and in its ordinary sense does mean, "political expedience" or that which is best for the common good of the community ..... The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law."

Pollock C.B., (at p. 144) "The doctrine of the "public good" or the "public safety," or what is sometimes called "public policy," being the foundation of law, is supported by decisions in every branch of the law: and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good, and that alone."

Lord Truro, in the same case, during the course of his judgment said (at p. 196), "Public policy in relation to this question, is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law."

This is an attempted definition of the doctrine or principle of public policy, that is, of public policy in the third sense above mentioned. It is, however, of little practical value as a definition.

The expressions "injurious to the public" and "against the public good" used by the noble and learned Lord, are themselves vague and uncertain. Clearly enough, that which tends to be injurious to the public or against the public good may be contrary to public policy. But in the broadest sense the "public good" and "that which is injurious to the public" are the concern of the legislature, and the difficulty remains of determining how far, apart from giving effect to legislative enactments, Judges are the guardians of the interests of the public.

It appears, however, to be impossible to advance any further in the direction of defining this doctrine, "and when so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptibl of being settled on certain principles. They have attempted to define and fix that which cannot in the nature of things be defined and fixed," (quoted Story, Conflict of Laws, S. 28).

It seems impossible to arrive at any satisfactory definition owing to the difficulty of fixing definitely the limits of the "public good" to which Judges refer cases of this class. They have regard to the "public good," and they pay some attention to "political arguments" but not "in the fullest sense of the word." Public policy, in the legal sense, is something narrower and more limited than public policy in the political sense but how much narrower cannot be stated with accuracy.

Notwithstanding this difficulty, however, Judges have, from a very early period, refused, and still refuse to enforce transactions which, though they do not involve the doing of any act that is malum prohibitum or malum in se, yet if carried out might be injurious to the

public, and are therefore considered to be contrary to public policy.

2. THE POLICY OF THE LAW.

As indicated by Lord Truro's definition, public policy in relation to the administration of the law is sometimes called "the policy of the law," and it is as well that this should be clearly understood, as in the cases quoted in the following pages, sometimes one expression is used, and sometimes the other.

Some of the early Judges like Lord Hardwicke and Lord Eldon, used both expressions in the same sense.

Thus the former, in Debenham v. Ox (1749) (1 Ves. Sen. 276) said, "As to the bond itself, it is admitted to be given without consideration, and that which is insisted on would be going further than 'the policy of the law'would admit;" and later, in the same case, he said, "the plaintiff himself being particeps criminis, so that if it had not been for the ingredient of 'public policy' he could hardly have come here for relief."

In Westmeath v. Westmeath (1830) (1 Dow & Clark 519, 544) the term "public policy" and "policy of the law" are used as interchangeable expressions. The case was one concerning the validity of a Deed of Separation.

Lord Eldon there said, "This certainly is a question both of law and equity, for the question of public policy both at law and in equity rests on the same grounds;" and a little farther on he added, "But here the question is not as to cruelty, but as to the circumstances under which the parties lived together after the execution of the Deed, and whether the policy of the

law having regard to the rights of third parties, does not destroy an agreement for separation under such circumstances."

Parke, B., in his judgment in Wells v. Foster (1841) (8 M. & W. 149, 151), also uses both expressions.

"I concur in the opinion," he said, "that this action is not maintainable upon the ground that, on principles of public policy, the allowance granted to the defendant was not assignable by him," and a little later on the same page, "But where the pension is granted not exclusivel for past service, but as a consideration for some continuin duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."

In an earlier case, Hanington v. Du Chatel, (1781) (1 Bro. C. C. 124), Lord Chancellor Thurlow used a combination of both expressions and referred to "the public policy of the law."

Lord Justice Knight Bruce, in Cartwright v. Cartwright (1853) (3 DeG. M. & G. 982) also made use of both expressions in his judgment, while Lord Justice Turner in the same case preferred "the policy of the law".

In a modern case, in re Hope Johnstone (1904) (1 Ch. 470, 474), Kekewick, J., expressed his preference for the term "policy of the law", as follows:- The phrase most frequently used in argument was "public policy" but following the example of many eminent Judges, I prefer the "policy of the law"

And Isaacs J. in the recent Australian case of Wilkinson v. Osborne (1915) (21 C.L.R. 89 p. 97), said "Every bargain contrary to such a social governing principle, is regarded as prejudicial to the State, or in other words, contrary to 'public policy' or, as it is sometimes called, 'policy of the law.'"

3. EARLY TEXT WRITERS

The doctrine of public policy is found enunciated under some form or other by the early text writers Bracton and Coke, and also in Sheppard's Touchstone.

In Bracton, Book III, p. 100, the following passage occurs: "Item loca deducuntur in stipulationem, ut si dicas, existens Oxon hodie London dare spodes; talis stipulatio erit inutilis, nisi tempus adjiciatur, quo fieri possit id quod deducitur in stipulationem, quia omnino est impossible. Ac si quis promitteret quae in rerum natura non esset, vel esse non posset, vel si rem sacram vel publicam, quae non est in alicuius bonis."

And in Coke, at 66 b: "Non solum quod licet sed quid est conveniens est considerandum;" and "Nihil quod est inconveniens est licitum."

And again at 206 b: "But herein distinguish between a condition against the law for the doing of any act that is malum in se and a condition against the law (that concerneth not anything that is malum in se), but therefore is against the law because it is either repugnant to the State or against some maxim or rule of law.

Coke here clearly draws a distinction between a condition that is "against some rule or maxim of law" and a condition that is "repugnant to the State."

In Sheppard's Touchstone, (Ch. 6, 132) is found the following passage, referring to conditions annexed to estates: "But if the matter of the condition tend to provoke or further the doing of some unlawful act or to restrain a man from doing his duty, the condition is for the most part void;" and at p. 133, "And hereupon it is that conditions annexed that the profits thereof shall be employed to superstitious uses, are void, and hence also

it is that such conditions as are against the liberty of the law, as that a man shall not marry or the like, and hence also such as are against the public good."

4. AT COMMON LAW.

Public policy is the foundation of law, said Chief Baron Pollock in Egerton v. Brownlow, (4 H.L.C.1, 144), and there appears to be good ground for this statement if we regard public policy as synonymous with the "public good" as the learned Chief Baron did in that case.

It is commonly said that it is the function of the legislature to make laws for the "public good," and the duty of the Judge to administer and expound the laws so made. English Judges usually disclaim any pretensions to being law makers, and claim that, when they seem to be laying down new law, they are merely applying the existing principles of the law to new facts. "The Common Law," said Lord Esher, "does not consist of particular facts; it consists of a number of principles which are recognised as having existed during the whole time and course of the Common Law."

Nevertheless, in early times, when the law was very indefinite, the duty frequently fell upon the Judges of "declaring" the law for the case in hand and of applying old principles to new sets of facts.

Lord Chancellor Westbury once said in an address to the House of Lords, on the revision of the law, that "the sources of our Common Law were in ancient

times of the most indefinite character and the power or liberty of judicial decision was equally unlimited. In the old times, it was impossible to know what the law was until it was declared. The Judges were not only legislators, but the worst of legislators, ex post facto legislators."

It should be remembered, however, that this ex post facto legislation was frequently necessary in early times when the legislature did not pass laws with the same facility as modern parliaments. Cases then came before the Courts with greater frequency, for which the law had not been determined or declared. And in determining the law in doubtful cases, the early Judges frequently applied the maxim 'salus populi suprema lex' which Lord Chief Justice Wilmot called "the favourite dominant principle of the common law." (Lowe v. Peers Wilm. 364, 373.) It was on this maxim that the Judges acted when applying the doctrine of public policy. They frequently took it upon themselves to protect the interests of the public by refusing to give effect to transactions between private persons which they conceived to be contrary to the good of the public. They deemed the welfare of the State to be of paramount importance, and acted accordingly.

"It is the duty of all Courts of Justice," said Lord Chief Justice Wilmot, in Lowe v. Peers, (1770) Wilm. at p. 378, "to keep their eye steadily upon the interest of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance in 'foro civili.' Upon this principle, turning prosecutions for felony into civil actions for things stolen, bonds and agreements not to prosecute

felonies, and many other cases might be cited, which are all governed by that super-eminent and noble principle, the care and protection of the whole community."

Thus it was apparent to the old common law Judges, that it was for the benefit of the State that each member of it should be at liberty to earn his livelihood, and so support himself and his family, and they therefore would not enforce any agreement which prohibited a man from doing so.

We read of the anger of a certain Judge Hull in the well-known Dyer's case (2 H.V. pl. 27) at the effrontery of the plaintiff in attempting to enforce a bond by which the defendant was prohibited from working at his trade in the same town with the plaintiff for half a year, and the Judge's threat that if the plaintiff had been present, he would have sent him to prison until he had paid a fine to the King. His words in French then used in English Courts, were, "A ma intent vous purres aver demurre sur luy que le l'obligation est voide et que le condition est encounter comman luy, et per dieu si le plaintiff fuit icy il ira al prison tanque il ust fait fine au Roy."

In a later case, about the year 1600, Colgate v. Bachelor (Cro. Eliz. 872), (also reported sub. nom. Claygate v. Batcheler Ow. 143), an action was brought on a bond conditioned that, "if R. Bacheler son of the defendant at any time on this side, or before the feast of St. John Baptist, which shall be in the year 1604, either as apprentice, or servant, or for himself as Master, or otherwise, use the trade of an haberdasher within the County of Kent, the Cities of Canterbury or Richite: if then the within bound R. Bacheler do upon request pay unto the plaintiff £20, that then the obligation shall be void."

The Court resolved "that the condition is against law to prohibit or restrain any to use a lawful trade at any time or at any place; for as well as he may restrain him for one time or one place, he may restrain him for longer times at more places which is against the benefit of the Commonwealth, for being freemen, it is free for them to exercise their trade in any place."

It was likewise clear to the early Judges that trade was very essential to the welfare of the country, "especially of an island" as it was put in one case, and consequently they held that it was against the public welfare that trade should be restricted by allowing any person, or group of persons, to have a monopoly of any branch of trade.

In the case of Darcy v. Allen (44 Eliz.) (1602) (mentioned in 8 Co. 125 a) the plaintiff's case was that Queen Elizabeth granted to him that he should have the sole traffic in playing cards, and that he only should import them from beyond the sea into this Kingdom, also that he should have the sole making of playing cards in this realm in such ample manner as Ralph Bowes had it before him. And it was adjudged that the grant to make playing cards and to restrain traffic was void because trade and traffic is the life of every Commonwealth and especially of an island.

And so also in the case of the Tailors of Ipswich (1615) (11 Co. Rep. 53a). The Tailors of Ipswich were a corporation under Letters Patent, and made rules by virtue of their supposed power under the Letters Patent, for the purpose of prohibiting any one from exercising his trade in Ipswich until he had presented himself before them and proved that he had served seven years at least as an apprentice, and to fine any one making a breach of the rules.

They proceeded against one William Sheninge, a

tailor, for a breach of the above rules. It was resolved by the Court, "that at Common Law no man could be prohibited from working in any lawful trade for the law abhors idleness, the mother of evil, otium omnium vitiorum mater, and especially in young men, who ought in their youth to learn lawful sciences and trades which are profitable to the Commonwealth and whereof they might reap the fruit in old age, for idle in youth poor in age: and therefore the Common Law abhors all monopolies which prohibit any from working in any lawful trade.

Then again the Common Law Courts recognised that it was obviously for the benefit of the community to encourage production, and that produce should be brought to market, and so it was held that it was against the best interests of the public that produce should be distrained while temporarily on a tenant's premises, and especially when on the way to or at the market.

In a case in the reign of Queen Elizabeth, Read v. Burley (1597), (Cro. Eliz. 596), a Clothier had sent some yarn to a spinners to be spun and afterwards took a horse to fetch it. He and the spinner took the horse and yarn to a neighbour's house for the purpose of weighing the yarn, and both horse and yarn were taken in distress for rent.

The Court held, "that they are not distrainable, for the trade of a Clothier is pro bono publico, who ought to be allowed all necessary means."

It was also said in the same case, "A horse which carrieth corn to market and is set up for a time in a private house is not distrainable, because his purpose of bringing the horse was pro bono publico."

Again, in Trassell v. Morris (1617) Noy 19, where S. brought an Ox hide to Leadenhall in London to sell it, and W. distrained it damage feasant, it was adjudged

that the distress was not lawful for "it was brought there to be sold pro bono publico, for goods brought to a market and exposed for sale shall not be distreyned."

It was also held that a private wrong might be justifie if committed for the public good.

In the report in 1 Dyer 37a. in the case of Malverer v. Spinke decided in the year 1538, the following passage occurs:

"Yet, we will well agree that in some cases a man may justify the commission of a tort, and that is in cases where it sounds for the public good, as in war time a man may justify making fortifications on another's land without a licence; also a man may justify pulling down an house on fire for the safety of the neighbouring houses; for these are cases of the Common weal; so also is it, if the sheriff pursue a felon to an house and in order to take him, break open the doors, this is justifiable, because it is for the public good that such felons should be taken."

And again in 1 Dyer 60b, "And also every privilege is by prescription and every prescription which founds for the Common weal is good, although it be to the prejudice of the individual. As in the times of E. 4 (8 E. 4, 23a), it was holden a good prescription to dig in the soil of another adjoining the sea, to make bulwarks against the King's enemies."

In their zeal for the public welfare some early common law Judges even claimed that Acts of Parliament could be controlled by the common law for the public good.

Lord Coke said, in Bonham's case (1609) (8 Co. rep. 118a), "And it appears in our books, that in many cases the Common Law will control Acts of Parliament, and sometimes adjudge them to be utterly void, for when an act of Parliament is against common right and reason or

repugnant or impossible to be performed the common law will control it and adjudge such act to be void."

Lord Chancellor Ellesmere in the Earl of Oxford's case (1615) (1 Ch. Rep. 1, 12), referred to this dictum of Lord Coke as follows:-

"It seemeth by the Lord Coke's Report Folio 118, in Dr. Bonham's case, that Statutes are not so sacred as that the Equity of them may not be examined. For he saith that in many cases the Common Law hath such a prerogative as that it can control acts of Parliament, and adjudge them void; as if they are against Common right or Reason or repugnant or impossible to be performed ..... And the Judges themselves do play the Chancellor's parts upon Statutes, making construction of them according to Equity, varying from the rules and grounds of Law, and enlarging them pro bono publico, against the letter and intent of the makers, whereof our books have many hundreds of cases."

These dicta indicate to what an extent the question of public welfare entered into the considerations of the early common law Judges and how far they were prepared to go 'pro bono publico.' Even as late as the year 1702 the following comment on Lord Coke's dictum was made by Holt C.J. in the case of City of London v. Wood, (12 Mod. 669, 687), "What my Lord Coke says in Bonham's case in his 8 Co., is far from any extravagancy, for it is a very reasonable and true saying that if an Act of Parliament should ordain that the same person should be party and Judge, or which is the same thing, Judge in his own causes, it would be a void act of Parliament."

5. IN EQUITY.

When the Common Law Judges began to take a narrower

view of their duties, to hold themselves governed by old cases and maxims, and to regard the common law as jus strictum, it was found necessary for the good of the public to establish Courts of Equity. On these Courts was cast the duty, as Lord Bacon said, "of relieving against the rigour, and of supplying the defects of the common law."

Lord Chief Justice Wilmot remarked in the case of Collins v. Blantern (1767) (2 Wils. 341, 350)° "Whenever such cases as this come before a Court of law, it is for the public good that the common law should reach them and give relief. I have always thought that formerly, there was too confined a way of thinking in the Judges of the Common law Courts, and that Courts of Equity have risen by the Judges not properly applying the principles of the Common Law, being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the Common Law."

The doctrine of public policy forms the basis of some purely equitable doctrines, notably the rule against perpetuities, (Egerton v. Brownlow 4 H.L.C.1 per Lord St. Leonards, at 244).

In other cases, equity applied the doctrine for the purpose of giving relief against the rigid rules of the Common Law. Thus bonds given pursuant to marriage brocage contracts were enforced by the Common Law Courts but relief was given in Equity, not for the benefit of the obliger but for the interests of the public. So, also in the case of Contracts in restraint of Marriage, Equity relieved against bonds which Common Law Courts enforced.

It sometimes happened that the Common Law Courts adopted the principle thus applied in Equity.

In the case of Cocks v. Richards (1805) 10 Ves. 429, 440, Lord Chancellor Eldon remarked, "Courts of Law have not until lately taken upon themselves to canvassmarriage brocage and such contracts, which have been constantly cut down in equity."

And in Jackman v. Mitchell, (1807) 13 Ves. 581, 586, one of a class of case in which relief was given on grounds of public policy, the same learned Judge said that a bond given to secure a creditor the balance of his debt over and above a composition was bad both in Equity and also at Law. He added, "But I remember when such a bond was not considered bad at law by any person attending this Hall. It must, however, now be taken to be bad at law.....But it is well settled that the jurisdiction of Courts of Equity is not gone by the resolution of Courts of Law to adopt the principle of Equity."

6. EXTENSION OF DOCTRINE

The general result was that the application of the doctrine of public policy was considerably extended by Courts of Equity, and there was a corresponding tendency in the Common Law Courts. At all events, the doctrine appears to have grown in favour during the latter part of the Seventeenth Century, and to have flourished and been applied in a great variety of cases during the eighteenth century, at about the end of which or the early part of the nineteenth century it appears to have reached its zenith.

It was then that the extreme application of the doctrine by the Common Law Courts in the group of cases known as the "Wagering Cases," resulted in a certain amount of judicial ridicule, and led to a growing opposition which reached its culminating

point when the case of Egerton v. Brownlow came before the House of Lords in 1853.

This opposition was voiced by Best, C.J., in the earlier case of Richardson v. Mellish (1824) (2 Bing. 229, 242), where he said, "We have heard much of this being a contravention of public policy and that on that ground it cannot be supported. I am not much disposed to yield to arguments of public policy. I think the Courts of Westminster Hall have gone much further than they were warranted in going in questions of public policy, and they are always in danger of so doing, because Courts of law look only at the particular case and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of public policy.

And let that doubtful question of policy be settled by that high tribunal, namely the legislature, which has the means of bringing before it all the considerations that bear on the question and can settle it on its true and broad principle."

And in the same case Burrough, J., at p. 252, delivered his much quoted dictum, "I for one, protest as my Lord has done, against arguing too strongly on public policy, it is a very unruly horse, and when once you get astride it, you never know where it will carry you."

Two years later, however, we find Best, C.J., supporting the doctrine in an opinion delivered to the House of Lords in Fletcher v. Lord Sondes 3 Bing 501, 590. On that occasion, he expressed himself as follows:- "I am aware that these are rather considerations of public policy than law: But my Lords, if there be any doubt what is the law, Judges solve such doubts by considering what will be the good or bad effects of their decision. I say nearly in the words of one of the Bishops in The Bishop of London v. Fytche, that doctrine cannot be law

which injures the rights of individuals and will be productive of evil to the Church and the community."

And again in a later case Gifford v. Lord Yarborough 5 Bing. 163, 169, "the judges are therefore warranted by justice, by public policy, by the opinions of learned writers and the authority of decided cases, in giving to your Lordships the answer which they have directed me to give."

Best, C.J. was, therefore, notwithstanding his dictum in the earlier case of Mellish v. Richardson, clearly of opinion that public policy was a valid ground for legal decision.

In Egerton v. Brownlow (4 H.L.C.1), however, public policy as a ground for legal decision was vigorously assailed by the majority of the Judges whose opinions were sought by the House of Lords, and serious objections were raised against its application, objections which, however, failed to convince the noble and learned Lords who decided that case.

Egerton v. Brownlow is generally regarded as the leading authority on the doctrine of public policy; and for a proper appreciation of the opinions expressed by the Judges who were called to the assistance of the House of Lords, and of the judgments delivered by the learned Lords in that case, it is necessary that the more important cases in which the doctrine had previously been applied, should be shortly alluded to.

The subject will, therefore, be dealt with in the following pages as follows:-

1. Application of the doctrine prior to Egerton v. Brownlow.
2. The case of Egerton v. Brownlow.
3. Consideration of objections to the doctrine.
4. Application of the doctrine since Egerton v. Brownlow.

CHAPTER II

APPLICATION OF THE DOCTRINE OF PUBLIC POLICY PRIOR TO EGERTON v. BROWNLOW

1. RESTRAINT OF TRADE

The doctrine of Public Policy is perhaps, of the most practical importance in its application to contracts in restraint of trade, and some of the earliest decisions recorded are in cases arising out of contracts of this kind.

There appears to have been a period in the early history of our law when all contracts in restraint of trade were treated by the Courts as invalid, whether the restraint was general or only partial, for the reasons that no man should be prevented from carrying on his trade and earning his livelihood, and that the community ought not to be deprived of such a person's services.

The Dyers case, Year Book 2 Hen. V pl. 27, and the case of Colegate v. Bachelor, Cro. Eliz. 872, decided about the year 1600, and already referred to, were cases of partial restraint only.

In the latter case there was a limit both as to time and place, and the restraint was one which in later times no exception would have been taken, but which was then held to be against the benefit of the Commonwealth.

Gradually however, this very strict rule was relaxed as it began to be perceived that all restrictions on trade were not necessarily injurious either to the individual or to the public.

If it was profitable to the public that young men should learn trades and professions, it was necessary that those who carried on such trades and professions

should be encouraged to teach them: and they could not be expected to do so if the persons so taught could not be restrained from setting up as rivals in the same place.

Such a restraint was no injury to the public, because if a man were restrained from carrying on his trade or profession in a particular place, he could carry it on in any other place, and the public would still have the benefit of his work.

And as manufactures and large businesses sprang into existence, it was seen that some protection was necessary for those who invested their capital, in order to prevent employees from learning their trade secrets, and then setting up business in opposition, and using the knowledge so acquired, to the detriment of their previous employers. Otherwise, manufacturers and merchants would be discouraged from investing their capital, which would not be good for the community.

When a man sold his business, no injury could result to the public if he agreed not to carry on a similar business in the same place. On the other hand, if he could not so restrain himself, he would not obtain so good a price for his business; so that such a restraint, while not injurious to the public, might be a benefit to the individual.

So we find in some of the later cases, the reason given for allowing these restraints is that instead of being injurious, they are actually beneficial to the public.

Baron Parke, who was by no means a strong advocate of the doctrine of public policy, (as his judgment in the case of Egerton v. Brownlow shows), explained the reason for allowing contracts for the partial restraint of trade, as follows:-

"Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individuals with whom the contract is made, and a sacrafice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they shall be enforced.

Many of these partial restraints of trade are perfectly consistent with public convenience and general interest, and conduce to the benefit of trade"

(Mallan v. May (1843) 11 M. & W. 653, 665)

There is a dictum of Maule, J., in Rannie v. Irvine (1844) 7 M. & Gr. 969, 977, to the same effect as follows:-

"The general rule against covenants in restraint of trade is founded upon this: that the law favours trade for the sake of the public and not for the sake of the parties engaged in it, and the reason of the exception engrafted upon the rule is that the exception is a furtherance of the rule itself."

And Best, C.J., in Homer v. Ashford, (1825), 3 Bing. 322, 326, said, "The first object of the law is to promote the public interests, the second to preserve the rights of individuals. The law will not permit any one to restrain a person from doing what the public welfare and his own interests require that he should do. Any deed therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the Kingdom, would be void, because no good reason can be imagined for any person imposing such a restraint upon himself. But it may often happen that individual interest and general convenience render agreements not to carry on trade or act in a profession in a particular place, proper. Manufactures or dealings cannot be carried on to any great extent without the assistance of agents and servants. These must soon acquire

a knowledge of dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort are not injurious restraints of trade, but securities necessary to those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry."

It was said in The Company of Taylors v. Clarke, 2 Show. 351, that "whatsoever a man may lawfully forbear that he may oblige himself against, except where a third person is wronged or the public is prejudiced by it," and this statement was quoted by Lord Chief Justice Wilmot in Lowe v. Peers, Wilm. 377, with the remark that "it seems to be the substance of everything which can be said on this subject."

The difficulty is, however, in all questions of public policy, to decide when the public is prejudiced, and this is amply illustrated by the history of the law with respect to covenants in restraint of trade.

Subsequent to the case of Colegate v. Bachelor, numerous cases were decided in which contracts in partial restraint of trade were allowed, but contracts in general restraint of trade found no favour with the Courts.

The Courts, very shortly after that case, adopted a much more elastic doctrine than is there laid down, and in the case of Rogers v. Perry (1614) 2 Bulg.135: it was decided that a restraint for a "time certain" and a "place certain might be, and in that case was held to be, binding.

The defendant there had agreed, in consideration of a certain sum, that he would not exercise the trade of a joyner in a shop, part of a house demised to him, for 21 years. Croke, J. is reported as having said, "The doubt which at first troubled me, was for the binding of one that

he should not use and exercise his trade being his livelihood," and Coke, C.J., "This is not so, being for a time certain, and in a place certain, but no general restraint there is here."

The report goes on to say that "The Court agreed with Croke, J., herein, that a man cannot bind one that he shall not use his trade generally, this is not good: but Coke, C.J., Croke, J., and the whole Court agreed all in this clearly, that as this case here is for a certain time and in a place certain, a man may be well bound and restrained from using his trade."

In the case of Broad v. Jollyfe (1620) Cro. Jac. 596, a Mercer sold his shop in Newport in the Isle of Wight, to another Mercer in the same place and agreed not to carry on the same business in that place. It was held that the agreement was a valid one and "that upon a valuable consideration one may restrain himself that he shall not use his trade in one particular place." In this case there was no limitation as to time, but the element of valuable consideration was insisted on.

In the report of the case of Prugnell v. Anne Gosse, (1673) Aleyn 67, there occurs the following passage:

"And this was agreed by Roll for law, who took these differences, that where a bond or promise restrains the exercise of a trade, although it be as to a particular place only, yet if it be upon no consideration, the bond is void; but if there were a consideration for the restraint, as if A assign a shop or sell braided ware to B, there, in respect of the prejudice which may accrue to B, if A should continue to trade, such a bond or promise is good.

And so it was adjudged in Forward's case upon a writ of error out of Bridgenorth, but although there be such consideration, yet if the restraint be general

throughout England it is void."

This case lays down three propositions,

1. A restraint as to a particular place without consideration, is void.

2. A restraint as to a particular place for consideration, is good.

3. A general restraint throughout England, even for consideration, is void.

In Mitchell v. Reynolds (1711) 1 P. Wm. 181, a bond was executed by the defendant when he sold his business of Baker and assigned the bakehouse in Liquorpond Street, Holborn, to the plaintiff, by which the defendant bound himself not to exercise the trade of a Baker within the parish of St. Andrews, for the term of five years.

The Court held "that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the bond is good; and that the true distinction of this case is not between promises and bonds but between contracts with and without consideration: and that wherever a sufficient consideration appears, to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, but with this constant diversity viz., where the restraint is general not to exercise a trade throughout the Kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party."

This case was long the leading authority on restraint of trade, and Parker, C.J., afterwards Lord Macclesfield, in a remarkable judgment, "endeavoured to state the law upon this head and reconcile the jarring opinions." He laid it down that where it does not appear whether or no the contract is made for good consideration, a restraint is prima facie bad, for the following reasons:-

1st. In favour of trade and honesty.

2nd. For that there plainly appears a mischief, but the benefit (if any), can only be presumed: and in that case the presumptive benefit shall be overborne by the apparent mischief.

3rd. For that the mischief is not only private, but public.

4th. There is a sort of presumption that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, everybody is affected thereby."

And he added later in his judgment, "In all restraints of trade the law presumes them bad, but if the circumstances are set forth that presumption is excluded, and the Court is to judge these circumstances and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained."

The questions considered in the case of Davis v. Mason (1793). 5 T.R. 119, were:-

1. The existence of consideration.
2. Whether it was a "fair" consideration.
3. Whether the restraint was reasonable.
4. Whether there was injury to the public.

The plaintiff in that case took the defendant as his assistant in the business of a "Surgeon, Apothecary, and Man-midwife," and the defendant agreed not to practice on his own account for fourteen years, within ten miles of the place where the plaintiff lived.

The agreement and bond given to secure performance of it, were held good by Lord Kenyon, C.J., who said, "The question has been at rest ever since the case of Mitchell v. Reynolds. A bond in restraint of trade cannot be arbitrarily taken, and without consideration; some consideration must appear. But here, the plaintiff being established in business as a Surgeon at Thatford, the defendant

wished to act as his assistant with a view of deriving a degree of credit from that situation, on which the former stipulated that the defendant should not come and steal away his patients; this seems to be a fair consideration for the bond. Then it was objected that the limits within which the defendant engaged not to practice are unreasonable, but I do not see that they are necessarily unreasonable, nor do I know how to draw the line. Neither are the public likely to be injured by an agreement of this kind since every other person is at liberty to practice as a Surgeon in this town."

In Horner v. Graves (1831) 7 Bing. C.P. 735, the defendant, a Dentist, agreed not to practice within 100 miles of York, in consideration of receiving instruction and a salary from the plaintiff.

Tindall, C.J., in a judgment which in modern times has had the approval of the House of Lords, held that the covenant was unreasonable and void. He laid down the law as follows:-

"We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy."

In Warde v. Byrne (1839), 5 M. & W. 548, a town traveller in the service of a Coal Merchant agreed not to solicit or sell to any customers of his employer for two years; and not to follow or be employed in the business of a Coal Merchant for nine months after leaving the service of his employer.

This was held to be a general restraint of trade and void. Parke, B., said in his judgment that "Where a limit as to space is imposed the public on the one hand do not lose altogether the services of the party in the particular trade: he will carry it on in the same way elsewhere; nor with the limited space will they be deprived of the benefit of the trade being carried on, because the party with whom the contract is made will most probably within these limits, exercise it himself. But when a general restriction limited only as to time is imposed, the public are altogether losers for that time, of the services of the individual, and they do not derive any benefit whatever in return."

In Mallan v. May (1843) 11 M. & W. 653, the defendant agreed to serve the plaintiffs, who were dentists, for the term of four years and, after that, not to carry on business in London or in any town or place in England or Scotland where the plaintiffs might be practising, before the end of the term: This was held good only as to London. Here again, Parke, B. laid it down that the interests of the public must be the deciding element, and that partial restraints were upheld because their enforcement is beneficial to the public.

Hitchcock v. Croker (1837) 6 Ad. & E. 438, was a case in which there was no limit as to time, but the agreement was nevertheless held to be valid and enforceable. The plaintiff, a Druggist, took the defendant into his service as an assistant at an annual salary, and the defendant agreed not at any time thereafter to exercise the business of a Chemist or Druggist within three miles of the town of Taunton.

The Court held:

1. That there was a legal consideration for the contract.
2. That the Court could not enter into the question

whether the consideration was equal in value to the restraint agreed to by the defendant.

3. That the restraint was not shown to be unreasonable or oppressive by the circumstance that its duration was not limited to the life of the plaintiff or to the time during which he should carry on his business.

This case settled definitely, that the adequacy of the consideration was not a question for the Court, and Parke, B., in Leighton v. Wales, 3 M. & W. 545, said, "It is clear since Hitchcock v. Croker, that the Court cannot inquire into the extent or adequacy of the consideration."

The next case of importance, Whittaker v. Howe (1841) 3 Bean 383, indicates a departure from the rule hitherto accepted, that there must be some limitation as to space. This is the first reported case where a covenant in restraint of trade, in which the restraint extended to the whole of Great Britain, was enforced by the Courts.

A Solicitor had sold his practice and covenanted not to practise in any part of Great Britain for 20 years. Lord Langdale in giving judgment, quoted the principle laid down by Mr. Justice Tindal in Horner v. Graves that the test of reasonableness, is "whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public," and added, "Now, whatever may be the talents, knowledge, and experience of Mr. Howe, and I am disposed to rate them highly, I cannot say that in my opinion the public interest will be interfered with or affected by his not being allowed to practise as an Attorney and Solicitor in Great Britain for 20 years without the consent of Mr. Whittaker".

The doctrine that contracts in restraint of trade are void, as being contrary to public policy, was at an

early date adopted in the Courts of the United States of America.

In Alger v. Thatcher (1837) 31 A.M. Dec. 119, the Court examined many English cases on the subject and quoted with approval from the judgment of Best, C.J., in Homer v. Ashford, 3 Bing. 322.

In Alger v. Thatchford, a bond conditioned that the obliger should never hereafter in his own name, or in the name of another, conduct, carry on, use, or employ, the art trade or occupation of an iron founder or caster, or be concerned, interested, employed, or engaged, directly or indirectly, in any manner whatsoever, or under any pretence whatever, in the business of founding or casting iron, was held to be void as being in general restraint of trade.

Morton, J., in delivering the judgment of the Court said, "The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations.

1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community, as well as to themselves.

3. They discourage industry and enterprise and diminish the products of ingenuity and skill.

4. They prevent competition and enhance prices.

5. They expose the public to all the evils of monopoly."

1. A. COMBINATIONS IN RESTRAINT OF TRADE

Another class of contracts in restraint of trade which have been held to be contrary to public policy are combinations for the purpose of avoiding competition.

The only reported early English case in which a combination of this sort came before the Courts for consideration appears to be the case of Cousins v. Smith, (1807) 13 Ves. 542.

The Wholesale Grocers of London had combined to form "The Fruit Club," for the purpose of buying up the whole of the imported fruit. The plaintiffs had been members of the Club, but withdrew. Then, finding that they could not obtain supplies, they entered into an agreement with "The Fruit Club," not to oppose that body in the purchase of certain cargoes, in consideration of its supplying them with one fourth of the cargoes at cost price.

"The Fruit Club" brought an action for £815/3/8, the price of the fruit supplied, which the plaintiffs in this action refused to pay, alleging that they had been fraudulently charged more than cost price. The plaintiffs then sought an injunction against the action.

Lord Elden refused this, and expressed his opinion of the transaction as follows:-

"My opinion upon the transaction as stated in this Bill is, that this is a case in which the Court ought not to assist the plaintiff."

"The transaction as stated in the Bill is a combination of the whole body of Grocers in London; the effect of which is, that all persons dealing in this article are compelled to purchase on the terms dictated by the Committee having the means of buying up all the fruit imported from all parts of the world; and holding this language, that

those who do not buy from them exclusively shall not have any supply. This is not, according to the legal definition of the term, forestalling, much less regrating; still less monopolising; but in the consideration of a Court of Equity, it contains the mischief of all three.

First, there is a conspiracy against the Venders: next, a conspiracy against the world at large, enabling these persons to buy at any price they think proper; and then, it is true, they can, if they please, sell at a lower price than a fair competition in the market would produce; but it must also be recollected that they can sell upon their own terms; and the manner in which their discretion will be exercised is obvious."

In the American reports, there are under this head, many early cases of which two of the more important are mentioned here:-

The first of these is Hooker v. Vandewater (1847) 47 Am. Dec. 258, a case in which several transportation Companies combined to establish and maintain fair and uniform rates of freight, and to equalise the business of forwarding on the Erie and Oswego Canals among themselves, and to avoid all necessary expense in doing the same, for a limited period.

It was held that this agreement was injurious to trade and commerce, contrary to public policy, and therefore void.

Jewett, J., in delivering the judgment of the Court, said, "It is a general proposition that an agreement to do an unlawful act can not be supported at law, that no right of action can spring out of an illegal contract; and this rule applies not only when the contract is expressly illegal, but whenever it is opposed to public policy or founded on an immoral consideration."

The chief ground, however, in which the contract was set aside, was that it fell within a Statute which provides

that, "if two or more persons shall conspire to commit an act injurious to trade or commerce they shall be deemed guilty of a misdemeanour," for the learned Judge concludes the judgment thus:-

"The transaction amounted, as I think, to a conspiracy to commit an act injurious to trade, within the legal meaning of the Statute denouncing it as a crime, and was therefore illegal and void."

The other case is Stanton v. Allen (1848) 49, Am. Dec. 282.

In that case Articles of Association were entered into by the proprietors of transportation lines, whereby they agreed to stock all the earning of their boats; to appoint an agent to act under the advice of a committee, and do such acts as the committee should advise; to give such committee the power of making rates of transportation to govern the association; to make returns in writing to the agent each month, of all freight and passengers transported for the preceding month, computed at such rates as the committee had established for that month, and of the tolls on the same, and to make divisions and settlements on certain days.

This agreement, and a promissory note given on a settlement made under the Articles of Association, were both held to be void.

McKissock, J., in delivering the judgment of the Court said, "While the introductory terms of the agreement proposed nothing apparently objectionable, the ultimate object is very manifest, and is of a different character. It is nothing less than the attainment of an exemption of the standard of freights and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition.

Besides as much as possible to secure the exclusion of others from their fair share of business, each party is bound, if he shall have more freight than he can carry, to offer it to some of the associates.....

The association thus being secured against internal defection and external encroachments, and the members having thrown their concerns into stock, to derive an income in proportion to the number of shares they hold, and not according to their merit and activity in business, and safe against the reduction of compensation that would otherwise follow mean accommodation and want of skill and attention, the public interest must necessarily suffer grievous loss."

After pointing out that as the canals over which the Companies operated, were State property, there might also be a reduction of revenue, he continued, "Though the branch of the law relating to public policy is liable to be misunderstood and extended beyond its proper dimensions, still it must not on that account be neglected and disparaged. The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the greatest preservative principles of a State. Sound morality is the corner stone of the Social edifice. Whatever therefore, disturbs that is condemned under that fundamental rule."

A reference was then made to many cases on public policy, including some English cases, and the learned Judge added, "Finally, I conclude that the association in question had a manifest and necessary tendency to diminish the revenue of the State, impair the utility of a great public work intimately connected with the interests of the whole people, and that it must be eminently injurious to trade. The Articles of Association therefore, unquestionably contravene public policy, and are

manifestly injurious to the interest of the State. Hence they are void at Common Law."

During the judgment, McKissock, J., referred to the case of Hocker v. Vandewater, as follows:-

"That decision being conclusive on the main point in the present case, I might have rested on that authority alone, if I had not supposed that the occasion called for an opinion as to the legality of such an association on the principles of the Common law."

The learned Judge thus places it beyond any possibility of doubt, that the main ground of the decision of the Court was the Common Law relating to public policy.

1. B. FORESTALLING, ENGROSSING & REGRATING

The Common Law relating to the old offences of forestalling, engrossing and regrating, is also based on public policy, and may be conveniently mentioned here.

Forestalling appears to have been the offence of buying up goods on their way to market with a view to enhancing prices.

Engrossing was apparently buying up the nesessaries of life for the purpose of "regrating," i.e. reselling at high prices, and seems to correspond with the modern "corner."

Several English Acts deal with these offences, particularly 5 & 6 Ed. 6 C. 14, which is supposed to be declaratory of the Common Law, and it appears from the case of R. v. Waddington (1800) 1 East. 143, that these were common law offences and punishable notwithstanding the repeal of the abovementioned Statute.

In that case, the defendant was charged with spread-

ing rumours with intent to enhance the price of hops, and with engrossing large quantities of hops with intent to sell them for an unreasonable profit, and thereby enhance the price.

He was found guilty and fined £500, and sentenced to four month's imprisonment, and further until the fine was paid.

Lord Kenyon, C.J. dealt at some length with the injury to the public that resulted from such acts, and referred to Adam Smith's "Wealth of Nations," and other works on economics, for the purpose of informing himself as "to the policy of this system of laws," and said that he did not "profess to be a competent Judge in this conflict of public opinion," but that in his view, if the defendant "went there for the purpose of making his purchases in the fair course of dealing, with a view of afterwards dispersing the commodity which he collected, in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shews plainly that he did not make his purchase in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price, who can deny that this is an offence of the greatest magnitude? It was the peculiar policy of this system of laws to provide for the wants of the poor labouring class of the country. If humanity alone cannot operate to this end, INTEREST AND POLICY must compel our attention.

It is our duty to take care that persons in pursuing theirown particular interests, do not transgress those laws which were made for the benefit of the whole community. I am perfectly satisfied that the common law re-

mains in force with respect to offences of this nature."

And Grose, J., referring to the suggestion that finding the defendant guilty would be an interference with freedom of trade said, "God forbid that this Court should do anything that should interfere with the legal freedom of trade. But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public by protecting the poor man against the avarice of the rich; and from all time it has been an offence against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessaries of life, for the purpose of enriching an individual."

It should be mentioned that the Court held that hops were a necessary of life. Lord Kenyon, C.J. pointed out that, "if hops are become a necessary ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the engrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law."

This case is now of little more than historical interest, and as shedding some light on the later decisions in cases dealing with combinations in restraint of trade.

In England, the offences abovementioned were abolished by Statute in 1844.

In the Australian States, however, and in America, no such legislation has been passed.

But, as pointed out in Story on Sale, p. 490, "these three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy."

2. MARRIAGE BROCAGE CONTRACTS

The Courts have, from a comparatively early date, discouraged everything then tends to interfere with, disturb, or prejudice the status of lawful marriage.

"The law does not oblige any person to marry..... but besides legal obligations, every member of civil society is under a variety or moral obligations, which municipal laws do not enforce, but which the law of nature, which is the law of God, calls upon us to perform.....and I cannot name a greater than matrimony, being one of the first commands given by God to make mankind after the creation, repeated againafter the deluge.....and there cannot be a duty of greater importance to Society, because it not only strengthens, preserves, and perpetuates it, but the peace, order, and decency of society depend upon protecting and encouraging it," (Lord Chief Justice Wilmot, in Lowe v. Peers, Wilm. at 371).

Whatever view may be taken to matrimony, as the subject of a divine command, there can be no two opinions as to its being of great importance to the State, for the reasons stated by Lord Chief Justice Wilmot.

"The institution of marriage," said an American Judge, "is the first act of civilization and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals or laws," (Noice v. Brown, 20 Amer. Rep. 388).

It is not surprising therefore, that the Courts have taken upon themselves the duty of protecting the marriage relationship, by discouraging transactions which tend to prevent persons from entering into the

married state. Contracts in general restraint of marriage therefore, have been, and still are, regarded as contrary to the best interests of society, and consequently unenforceable; and in some cases also, conditions in wills having the same tendency, have been held to be invalid.

It is also important that all marriage contracts should be entered upon freely, and should not be the subject of any influence exercised for a money consideration. We find therefore, that the Courts refuse to enforce contracts made in consideration of procuring marriage, "marriage brocage contracts," as they are commonly called.

It was in Courts of Equity that marriage brocage Contracts were first declared to be illegal. There was, during the seventeenth century, and at least part of the eighteenth century, no objection taken to these contracts by Common Law Courts, and bonds given upon such contracts were enforceable at law.

As late as 1805, we find Lord Chancellor Eldon referring to the fact that Common Law Courts had not, "until lately," interfered with these contracts, although they had frequently been cut down in Equity, (Cocks v. Richards 10 Ves. 429, 440).

Courts of Equity, in the exercise of the original jurisdiction, gave relief and ordered such bonds to be delivered up to be cancelled.

Even in Equity there was at first a difference of opinion as to whether some fraud, coercion, or a total failure of consideration was not necessary before a marriage brocage contract could be set aside.

This question was, however, settled by the House of Lords in the case of Hall v. Potter (1695) Show, P.C., 76 3 Lev. 411.

In that case, there was no suggestion of any deceit,

fraud, or coercion, and the marriage had actually taken place.

Thomas Thynne, Esq., "having intention to make his address to the Lady Ogle," gave a bond of £1,000 penalty to the respondent's husband, to pay £500 in ten days after his marriage with the Lady Ogle."

The respondent assisted in promoting the marriage which afterwards took place.

After the death of Thynne, the respondent Potter brought an action on the bond against the appellants, as executors of Thynne, and having proved the marriage, obtained a verdict for £1,000.

The appellants preferred their Bill in Chancery to be relieved against the bond as given upon an unlawful consideration. The Court decreed the bond to be delivered up and satisfaction to be acknowledged upon the judgment.

This decree was reversed by the Lord Keeper, upon a rehearing, but was upheld by the House of Lords upon appeal. The report by Levinz states that, "all the Lords but three or four were of opinion that all such contracts concerning marriages, are of dangerous consequence, and not to be allowed."

Long before this case, however, Courts of Equity had, in particular cases, decided against marriage brocage contracts. In Arundel v. Trevellian (1634) 1 Rep. Ch. 87. and again in Drury v. Hocke, (1686) 1 Vern. 412, marriage brocage bonds were ordered to be delivered up to be cancelled. Subsequently, relief was given in the cases of Smith v. Brunning (1700) 2 Vern. 392, and in Keat v. Allen (1707) 2 Vern. 588. In Smith v. Brunning the Court went so far as to order the repayment of money that had been paid pursuant to the contract.

In these earlier cases, however, public policy was not mentioned as the ground for the decisions.

But in the case of Coles v. Gibson, (1750), 1 Ves. Sen. 503, the Court definitely assigned injury to the public as the chief ground for giving relief from marriage brocage contracts.

Lord Chancellor Hardwicke in his judgment in that case said, "To be sure, this Court has been extremely jealous of any contract of this kind, made with a guardian or servant, especially with a servant in respect of the marriage of persons over whom they have an influence, (and has been justly so, nothing tending more to introduce improper matches); and by rules established, not regarding whether the match is proper or no, if brought about by a marriage brocage contract, sets it aside not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation; therefore, though a proper match as it was in Hall v. Potter, yet for the same of the mischief that would be introduced, and to prevent that influence which servants would more especially gain over young ladies, the Court sets it aside."

There is a dictum to the same effect in the earlier case of Debenham v. Ox (1749), 1 Ves. Senr. 276, where Lord Chancellor Hardwicke said, "In all these cases the Court sets them aside not for the party's sake, but for the benefit of the public: as a marriage brocage bond: or a bond by the husband to return part of the wife's portion to her father, without the privity of the husband's relations: or, on the other hand, a contract to give back part of the estate. In all this, the husband has done wrong, and is particips criminis, yet because the objection that infects the bond arises from public considerations, the Court will relieve.

The case of King v. Burr (1810), 3 Mer. 693, was an action to recover the expenses of entertainments given by the plaintiffs, under an agreement with the

defendant to introduce him to a woman of fortune, with a view to marriage.

A Bill of Discovery in support of the action was brought in Chancery, to which the defendant demurred. The demurrer was allowed, Lord Chancellor Eldon saying that he would not grant discovery in support of such an action.

This appears to be the only reported case in the early part of the nineteenth century in which a marriage brocage contract was brought before the Court.

3. RESTRAINT OF MARRIAGE

As in Marriage Brocage Contracts, so in contracts in restraint of marriage, Courts of Equity granted relief.

In the earlier cases the grounds of the relief thus afforded varied with the particular case. In many cases the reason of the decision is not stated. There was generally some circumstance of fraud or deceit, which the Court held sufficient justification for the relief given.

Cases of this description were Peyton v. Bladwell (1684), 1 Vern. 240, and Redman v. Redman, 1 Vern. 348, decided a little later. In both these cases, fraud was assigned as the reason for setting aside the contract.

In the case of Baker v. White (1690), 2 Vern. 215, the plaintiff, while a widow, had given the defendant a bond, conditioned that if the plaintiff, then a widow, should afterwards marry she would pay the defendant £100 within eight days after the marriage.

The defendant also, had given the plaintiff a bond, conditioned to pay her executors £100 if she should not marry again during her lifetime. Both parties were sui juris and there seems to have been no suggestion of

any fraud or deceit, yet the Court ordered the bond to be delivered up to be cancelled.

In Key v. Bradshaw, (1689), 2 Vern. 102, a bill was brought for relief against a bond in common form, for payment of money, but proved to have been made on an agreement that the plaintiff should marry her servant or forfeit the penalty mentioned in the bond.

The Court decreed the bond to be delivered up to be cancelled, on the general ground that it was "contrary to the nature and design of marriage, which ought to proceedfrom a free choice, and not from any compulsion."

In Woodhouse v. Shepley, (1742), 2 Atk. 535, a bill was brought by Hannah Woodhouse to be relieved against a bond given by her to Ralph Shepley, the condition of the bond being that she should marry the defendant within thirteen months after her father's death, and no other person.

A similar bond had been given by the defendant to the plaintiff.

The bond had been given without the knowledge of the plaintiff's father, who did not favour the defendant as a suitor for his daughter's hand.

Lord Chancellor Hardwicke decreed the bond to be delivered up to be cancelled and said in his judgment, that "bonds of this sort, where parents are living, are liable to great fraud and abuse; that to decree in favour of such a bond would be a great encouragement to persons to be upon the catch to procure unequal marriages against the consent of parents; and though they dare not colemnize the marriage in the lifetime of the parent, but only engage their affection and draw the unfortunate person into a bond to forfeit their whole fortune, as is the case here, yet it is of very dangerous consequences and tends to bring great misfortune into families."

The Lord Chancellor gave other minor grounds for his

decision, but that theabove is the chief ground appears from what he said on the question of costs. "As to costs, I think it would be too hard to make him pay them, as here is no actual fraud, and he might think he had acted fairly by her; since therefore, I decree this chiefly on public and general considerations, there shall be no costs on either side."

This appears to have been the first reported case of this kind in which "public considerations" were definitely assigned as the ground for relief.

The principle of this case was applied in the case of Lowe v. Peers, (1768), 4 Burr. 2225, and again in the case of Cocks v. Richards, (1805), 10 Ves. Jnr. 429.

The case of Lowe v. Peers was an action brought upon a marriage contract under seal, in the following terms:

"I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself. If I do, I agree to pay the said Catherine Lowe, £1,000, within three months after I shall marry anybody else." The defendant married somebody else and an action was brought.

The agreement was held to be in restraint of marriage and void, and Ashton, J. said, "the restraint of a first marriage is contrary to the general policy of the law, the public good, and the interests of society."

Lord Mansfield said in the same case, "All these contracts ought to be looked upon (as Lord Hardwicke said in the case of Woodhouse v. Shepley), with a jealous eye. In that case, Lord Hardwicke did not proceed on any circumstances of particular fraud, but on public and general considerations."

The same case came before the Exchequer Chamber, upon a writ of error, (Wilm. 364), when Lord Chief Justice Wilmot delivered the unanimous opinion of the Court

to the effect that the deed was void. He said at p. 372, "A covenant of this kind does not only hinder a greater moral and social good, it does not only interfere and check that 'profectum in bono,' which we owe to God and our country, but it tends to evil and the promotion of licenticusness; it tends to depopulation, the greatest of all political sins; it is a contract 'vergens ad perniciem,' and therefore has a moral turpitude in it.....

To entertain an action for the breach of such contracts would be setting the laws of God and man at variance; it would be making the common law counteract its own favourite dominant principle, 'salus populi suprema lex.'"

In Cocks v. Richards, a judgment having been obtained on a bond given in restraint of marriage, a motion was made for an injunction to restrain the defendant Richards from proceeding to execution. The injunction was granted on what were clearly grounds of public policy.

Lord Chancellor Eldon in delivering his judgment said, "The case has been represented in two views: first, as a bond against policy, and, to be relieved against upon the principle in Woodhouse v. Shepley; next as an instrument binding a person in a penalty."

And again, in commenting on the case of Woodhouse v. Shepley, he said, "Lord Hardwicke does not deny that a recovery might have been had at law; but states the various grounds upon which the plaintiff was entitled to relief in equity; first, that to permit such a bond to stand is against the policy of the law.....
The authority of Lord Hardwicke, attending to all the circumstances, decides that this is a case in which, upon the first ground he takes, it is due to consideration of great public magnitude to determine here, whether a bond such as this is to be enforced; whether it ought to be

enforced at law, I will not say: especially after a decision at law. The Court of Exchequer seem to think it a case in which there might be a recovery at law: that would not prevent relief in equity. Courts of law have not, till very lately, taken upon themselves to canvass marriage brocage and such contracts which have been constantly cut down in equity."

It will appear from this judgment, that almost up to that time, it had been the practice of Common Law Courts to enforce marriage brocage bonds and bonds in restraint of marriage, while relief was given in equity on grounds of public policy.

3. A. CONDITIONS IN WILLS.

The doctrine of public policy was also applied to a limited extent, to conditions in wills in restraint of marriage.

This was done however, only in cases where the condition was in absolute restraint of marriage, and the rule seems to have been first adopted from the ecclesiastical Courts, which, at one time, had control of such cases.

In the case of Long v. Dennis, (1767), 4 Burr. 2052, Lord Mansfield said, "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigour and strictness. They are contrary to sound policy."

Lord Thurlow, in the case of Scott v. Tyler, (1788) Dick. 712, alluded to, and briefly traced the history of the law regarding conditions in wills in restraint of marriage. He said, "The earlier cases refer in general terms to the Canon Law by which all legacies are to be

governed.....Towards the latter end of the last and the beginning of the present century, the matter is more loosely handled. The Canon law is not referred to, (professedly at least), as affording a distinct and positive rule for annulling the obnoxious conditions; on the contrary they are treated as partaking of the force allowed them by the law of England.

But in respect of their importing a restraint of marriage, they are treated at the same time, as unfavourable, contrary to the common weal, and good order of Society."

In the case of Rushton v. Cobb (1839), 9 Sim. 615, and in Morley v. Reynoldson, 2 Hare 570, conditions in general restraint of marriage were held to be void. In the latter case, Vice Chancellor Wigram said, "The testator in this case has so expressed himself as to import an intention to create a general restraint upon the marriage of the legatees, and the limitation over with that object, is therefore prima facie void."

But neither in this case nor in Rushton v. Cobb was any reason assigned, beyond that the conditions were in general restraint of marriage.

Conditions which were only in limited restraint of marriage were not regarded as contrary to public policy, such as a condition attached to a legacy restraining the legatee from marrying a particular person, as in the case of Jarvis v. Duke (1681) 1 Vern. 19. In that case, Sir E. Duke, by his will, devised a legacy of £2,000 to one of his daughters, but if she should marry one Bacon then the legacy to be void. Lord Chancellor Nottingham in the course of his judgment said, "But here, in this case, the father himself having actually revoked the legacy upon his daughter's disobedience, the father has in this case been Chancellor, and that with equity too; such an example of presumptious disobedience highly meriting

such a punishment, she being only prohibited to marry with one man by name, and nothing in the whole fair garden of Eden would serve her turn but this forbidden fruit."

Conditions too, restraining marriage without the consent of a particular person, were generally regarded as good.

It was so decided in the early case of Bellasis v. Ermin, (1663), 1 Ch. Cas. 22, and in the case of Fleming v. Waldegrave, 1 Ch. Cas. 58, in the following year.

Numerous cases followed in which the decisions not always consistent. In Garret v. Pretty, (1693), 2 Vern. 293, a legacy of £3,000 was given by a man to a daughter, but should she marry without the consent of a certain friend, the legacy to cease. She married without consent, but the Court held, without stating any reasons, that she was entitled to the legacy in spite of the condition.

In Harvey v. Ashton, (1737), 1 Atk. 361, Perrin v. Lyon (1807), 9 East, 170, such conditions were held to be good.

In cases where marriage with consent was the condition, and there was no limitation over, the Court frequently held that such conditions were "in terrorem" only, and refused to give any further effect to them.

4. SEPARATION DEEDS.

Jurisdiction in all matters relating to marriage once belonged to the Ecclesiastical Courts, and these Courts allowed no separation a mensa et thoro, except propter saevitiam aut adulterium, and this law, according to Lord Chancellor Eldon, was "founded upon policy, for the sake of keeping together individual families constituting the great family of the public."

But when the Civil Courts obtained jurisdiction in matters of this kind, contracts for voluntary separation of husband and wife were sanctioned, though there appears to have been for a long period great reluctance in recognising their validity.

Deeds of Separation seem first to have received the sanction of the Courts, in cases where, upon a husband and wife agreeing to live separate, the husband covenanted with a trustee that he would maintain the wife.

Later, agreements were enforced which were made between the husband and wife without the intervention of any trustee; though the policy of such agreements was frequently doubted. Eventually, however, it became settled that an agreement between a husband and wife, by which the husband agreed to maintain his wife upon an immediate separation, would be enforced; but not one in which the parties contemplated not an immediate, but a future separation.

In the case of Angier v. Angier (1718), Prec. Chan. 496, a husband and wife had separated and the husband entered into articles with a trustee and agreed to pay his wife £52 a year maintenance. The Court decreed performance of the articles.

In Head v. Head (1747), 4 Atk. 547, the Court decreed payment of arrears of maintenance to Lady Head, under an agreement for separation, but that, Sir Francis Head having offered to receive his wife again, in case she did not return in a month the maintenance should cease for the future; and on the other hand, if she returned home, and the defendant refused to receive, maintain, and treat her as his wife, the separate maintenance should continue.

In this case there was no trustee.

In the case of Fletcher v. Fletcher, (1788), 2 Cox 99, Buller, J., laid it down that "the general jurisdiction of this Court to enforce performance of articles of separation is too well established to admit of any doubt," but he added, "another ground of these cases has been stated to be that of public policy; and on this counsel materially differ; and I do not feel it necessary to say which of their arguments are best founded; but so much I must say, that it cannot answer the ends of public policy, to permit a separation to take place on too easy terms, or without a very sufficient cause."

In Guth v. Guth (1792), 2 Bro. C.C.615, specific performance was decreed of articles of separation between husband and wife (without a trustee) by which they agreed to live apart "from that day" and the husband agreed to provide maintenance for his wife.

Sir Richard Arden there indicated the reasons which led Courts to sanction these agreements, viz., the desirability of avoiding publicity. He said, "In such cases, where parties have been unhappy and it has been found expedient to enter into such a deed of separation, surely it was neither necessary or fit that a wife should proclaim to the public every circumstance which may have occasioned it: neither is it necessary for this Court to know every particular, to enforce an execution of it."

This decision was however, doubted by Lord Loughborough in Legard v. Johnson (1797), 3 Ves. 352, and by Lord Chancellor Eldon in St. John v. St. John (1803), 11 Ves. 526. The latter said, "As to the case of Guth v. Guth, I feel with Lord Rosslyn all his doubts upon that case: which, notwithstanding what was said in Lord Rodney v. Chambers (2 East.283), is the only instance in which the Courts did enforce the deed..... The contract of marriage cannot be affected by any contract between the parties. It is admitted everywhere, that by the known law, founded upon policy for the sake of keeping together individual families constituting the great family of the public, there shall be no separation a mensa et thoro, except propter saevitiam aut adulterium.....It is very difficult upon true principle, with reference to the policy of law, to maintain the dicta upon this subject." But later he added, "But if dicta have followed dicta, or decision has followed decision to the extent of settling the law, I cannot upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject. It is better that the case should go to the House of Lords than that the law should remain in this state upon a point connected with the very well being of Society."

It was held in the case of Lord Rodney v. Chambers, alluded to by Lord Eldon in St. John v. St. John, that a covenant by a husband to pay to trustees a certain annual sum by way of separate maintenance for his wife in the case of their <u>future separation</u>, is valid in law.

Lord Ellenborough, C.J., appears not to have drawn any distinction in that case between agreements for immediate and agreements for future separation, and was of opinion that the law as to such agreements had been long settled by previous decisions.

He said in his judgment, -- "If it were now a question whether any contract could by law be made which tenders to facilitate the separation of husband and wife, I should have thought that it would have fallen in better with the general policy of the law to have prohibited any such contracts; but they are now become inveterate in the law."

In the case of Bateman v. Ross (1813), 1 Dow P.C.235, Lord Eldon expressed an opinion that a reconciliation after separation entirely does away with the effect of it.

The report in Dow at p. 245 of the Lord Chancellor's judgment on this point reads as follows:-

"In regard to the point of reconciliation notwithstanding what might be found in some of the reports he held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effect of it. This rested upon the ground of public policy as it must not be permitted to parties to make agreements for themselves to hold good whenever they choose to live separate."

In a later case, Westmeath v. Westmeath (1820), Jac. 126, Lord Chancellor Eldon again expressed very strong doubts as to the policy of giving effect to deeds of separation.

In that case a deed executed in 1817 provided that should there be any renewal of dissentions between the parties they should separate. The disputes continued, and in 1818 a deed was executed providing for their immediate separation.

Lord Westmeath sought an injunction to restrain proceedings at law for recovering an annuity secured by the later deed.

The Lord Chancellor said, when giving judgment, "If the question whether the Courts would or would not act upon articles of this sort were not prejudiced by any

decisions, I should say that I think no Court ought to act on them; for whether the contract of marriage be, as it is represented by some, a civil contract only, or whether it be both civil and religious, it is one of a very peculiar nature: it is one which the parties cannot dissolve; one by which they impose duties on themselves, and by which they engage to perform duties by their offspring; duties which are imposed as much for the sake of public policy as of private happiness. The circumstances that the complaint against an instrument on groundsof public policy is made by one who is a party to it, is of no consequence; for the relief is given to the public and not to the individual."

As to the first deedwhich anticipated a future separation of the parties it was admitted that it could not stand, but the Lord Chancellor in view of previous decisions refused to grant the injunction saying that "if either of the instruments in question be void on grounds of public policy it seems to me that they must be void at law as well as in equity and there is no reason why it should not be tried at law."

In Hindley v. The Marquis of Westmeath (1827), 6 B. & C. 200, these deeds were before the Court of King's Bench. Lord Abbott there said that it was "impossible to contend" for the validity of the deed of 1817. The Court also found that though the 1818 deed provided for an immediate separation, the parties did not in fact separate, and that therefore that deed was also void.

The same deeds eventually in 1830 came before the House of Lords 1 Dow & Clark, 519. (and Sub.nom. Westmeath v. Salisbury 5 Bli. N.S. 339), on an appeal from a decision of the Court of Chancery in Ireland, to the effect that the deed of 1817 providing for future separation was void, but ordering the deed of 1818 to be retained for twelve months to enable the parties to try the question of its validity at law.

Lord Chancellor Lyndhurst and Lord Eldon were both clearly of opinion that the earlier deed was void. With regard to the other they also thought that owing to the fact of the parties having lived together after its execution it also was void; but they merely enlarged the time for giving the parties an opportunity of trying the question at law.

In Warrender v. Warrender (1835), 2 Cl. & F. 488, 561, Lord Lyndhurst expressed the following opinion on deeds of separation. "The strongest articles of separation may be drawn up and signed with full acquiescence of the husband and wife yet he may sue her and she may sue him notwithstanding. It is at the most a temporary arrangement, a permission to live elsewhere, but the legal domicile remains as it was. One may pledge himself not to claim or institute a suit for conjugal rights; but he cannot be bound by any such pledge for it is against the inherent condition of the married state, as well as against public policy."

In Wilson v. Mushett (1832) 3 B. & Ad. 743, a deed providing for an immediate separation was held by Lord Tenterden, C.J., Littledale, J., and Parke, J., and Taunton J., to be valid at law, and not avoided by subsequent co-habitation.

Parke, J., said in his judgment in that case, "The question is whether or not the bond on which this action is brought be void? There is nothing to show that it is so. If it had appeared that the true object of the bond was not to provide for an immediate separation Hindly v. The Marquis of Westmeath (6 B. & C. 200) would be applicable, and the instrument would be as invalid as if an intention had been expressly stated inconsistent with law."

In the Cocksedge v. Cocksedge (1844) 14 Sim. 242, Mr. Cocksedge had, prior to his marriage, entered into articles of agreement containing a covenant to make provi-

sion for his wife in case of any separation taking place between them. They separated and a Bill was filed in Chancery praying for specific performance of the articles. In his answer Mr. Cocksedge said that he had been advised that, as far as the articles purported by anticipation to secure a provision for his wife in the event of any separation taking place between them during their joint lives, they were contrary to public policy and void.

On a motion for the appointment of a receiver of rents of Mr. Cocksedge's estate the Vice-Chancellor, alluding to the contract said, "When the contract is that in the event of any separation taking place between the husband and wife, the husband shall make a certain provision for his wife the Court sees that it is an inducement to the wife to be guilty of the worst conduct..... If the bad conduct of the wife may be the contingency on which the husband will be bound to make the provision the contract must fail altogether."

The House of Lords in,1848 in the case of Wilson v. Wilson I H.L.L. 538, decided that a deed providing for immediate separation was good, and the decree of the Vice-Chancellor granting specific performance of the articles of separation so far as they concerned the arrangement of property agreed upon, was affirmed.

An exhustive examination of the authorities on both sides was made in this case, and Lord Chancellor Cottenham came to the conclusion that the authorities were against the view that a deed of separation between husband and wife is necessarily contrary to public policy....He said, "If an agreement for the separation and living apart of a husband and wife be so contrary to public policy, and therefore illegal, as to make void all arrangements of property arising from it, then in all cases, the only question would be whether the arrangement of property was in consideration of, or dependent on such illegal agreement."

He cited several cases and concluded that the authorities both in law and equity were against such a contention.

5. CONTRACTS CONTRARY TO MORALITY

It was probably the desire to protect and encourage the marriage relationship that led the Courts to decline to enforce contracts made in consideration of sexual immorality.

At all events the Courts from a comparatively early date regarded contracts made in consideration of future illicit intercourse as made upon an unlawful consideration, and the later cases leave no doubt that public policy is the ground upon which the consideration was held to be unlawful.

In the case of Priest v. Parrot (1750) 2 Ves. Sen. 160, a single woman was seduced by a married man who gave her a bond to secure an annuity and the bond was set aside.

In Walker v. Perkins (1764) 3 Burr 1568, a bond to pay an annuity in consideration of seduction and future cohabitation was held by Lord Mansfield to be void, such annuity being praemium prostitutionis.

In Gray v. Matthias (1800) 5 Ves. 286, a bond had been given which was apparently in consideration of past cohabitation, and afterwards a further bond was given to secure continuance of the illicit relationship by an annuity in case of a separation, the immoral consideration showing on the face of the bond. It was held that the first bond could not be impeached but the second was declared to be void. McDonald. C.B. said. "As to the second bond it was equally clear that where this sort of consideration appears on the face of the instrument. it cannot be countenanced

in a Court of Equity, to set aside all questions of religion and morality, for an obvious reason of public policy: all proper connection can arise only in the honourable state of marriage."

Benvon v. Nettlefield (1850) 3 Mac & G. 94, was a case in which Samuel Yate Benvon had granted annuity to one Caroline Nettlefield in consideration of future illicit intercourse and been sued at law by her trustee. Benvon pleaded the illegal nature of the contract and filed a Bill against the trustee for discovery in aid of his defence in the action, and a general demurrer having been allowed by the Vice-Chancellor, Benvon appealed to the Chancellor who overruled the demurrer.

The Lord Chancellor (Truro) said in that case, "A good deal has been said as to the principle to be applied to cases of this kind and as to how far a defence of the nature just referred to should be favoured. It must, however be remembered that the law in sanctioning such a defence does not do so out of consideration for the party urging it but on the ground of public policy."

6. WAGERING CONTRACTS.

A consideration of Wagering Contracts, though of little practical importance, since these contracts are now governed by Statute, is important from a historical point of view in dealing with the doctrine of public policy, for it has been asserted that from the earlier attitude of the Courts towards these contracts arose the modern general form of the doctrine.

"As a matter of history there seems to be little doubt that the doctrine of public policy as far as

regards its assertion in a general form in modern times, if not its actual origin, arose from wagers being allowed as the foundation of actions at Common Law. Their validity was assumed without discussion until the Judges repented of it too late." (Pollock on Contracts 5th Ed. 298).

As already indicated the "actual origin" of the doctrine dates back to a much earlier period than its application by the Common Law Judges to wagering contracts, but it cannot be denied that in these cases it was pushed to the utmost limits, and it is probable that "its assertion in a general form in modern times," commenced with the judgment of Lord Ellenborough in the case of Gilbert v. Sykes (1812) 16 East. 150, where he laid it down that the tendency of a contract to public mischief or inconvenience renders it invalid.

At Common Law wagers were not illegal and actions on "indifferent wagers upon indifferent matters" were tried in the Courts.

The early reports in fact, contain numerous cases in which wagering contracts upon a great variety of subjects have been enforced at Law. One of the earlier of these cases is Andrews v. Herne, 1 Lev. 33, in which a wager was laid of 20/- to £20 that Charles Stuart would be King of England within twelve months, he being then in exile, about six months before his restoration. This wager was held to be valid, and the amount of it recovered.

In another case, The Earl of March v. Pigott (1771), 5 Burr 2802, two heirs made a bet as to which of their respective fathers would die first, and this was also held to be enforceable.

The subject of the wager in Good v. Elliot (1790) 3 T.R. 693, was whether one Susannah Tye had, before a particular date, bought a certain waggon, and payment of the wager was enforced.

In these and numerous other cases wagers on many diverse subjects were enforced by the Courts. In fact, such contracts were generally enforced unless there was some circumstance in the case which the Court considered made it inadvisable to give effect to the particular wager.

Thus, where two persons made a bet upon a point of Court practice for the purpose of obtaining the decision of the Court upon it, as in the case of Henkin v. Guerss 1 Esp. N.P.C. 236, the Court held that it was not a fit question to be tried.

In the case of Da Costa v. Jones (1778) 2 Cowp. 729, three classes of case were mentioned in which wagers would not be enforced:-

1. Where the case involved the feelings or interests of a third person.
2. Where an action on the wager led to indecent evidence.
3. Where the wager was contrary to public policy.

Many Judges seemed to regret that the Courts had ever enforced wagering contracts at all, and this regret has been hinted at by both Judges and text writers as a reason why the Courts, when it was too late to decide against all such contracts, fixed upon the doctrine of public policy as a means of placing at least some restriction on what they evidently regarded as public evil. Thus in Da Costa v. Jones, 2 Cowp. 729 at p. 735, Lord Mansfield said, "And this species of contract has in fact gone to an extent that is much to be complained of; whether it would have been better policy to have treated all wagers originally as gaming contracts and so have held them void is too late now to discuss; they have too long and too often been held valid contracts."

Buller, J.? in Good v. Elliot, 3 T.R. 693 at p. 697, quoted this dictum of Lord Mansfield's and added; "With great deference to that very high and respectable authority

I doubt whether it be too late to consider that question or not; for in Bruce v. Ross, Dom. Proc. 14th April 1788, a decree in Scotland was affirmed on the ground that all idle wagers are void.....And the great and laudable pains, which on all occasions have been taken to preserve a uniformity between the laws of that country and this, make the case of considerable authority here."

And Lord Kenyon, C.J., in the same case said, "I entirely agree with what was said by Lord Mansfield in Da Costa v. Jones that wagers have gone to an extent which is much to be complained of, and if we were sitting here in a legislative capacity it might perhaps be prudent to declare that no wagers whatever ought to be allowed, but it is our duty jus dicere not jus dare." And he added: "I should be glad to go as far as I could to put a stop to the mischief arising from this species of gambling by wagers, but that would be in my opinion to make law, and these mischiefs therefore must be left to the correction of the legislature."

And in Eltham v. Kingsman (1818) 1 B. and Ald. 683 at p. 688, Abbott, J., said, "The Court ought to endeavour to put a stop to wagers as far as they can consistently with the rules of law, and I think that a Judge at Nisi Prius would best exercise his discretion by refusing to try questions arising out of them."

These expressions of opinion indicate the trend of judicial thought at that time concerning wagering contracts, and it may well be that the Courts went as far as they could to remedy the wagering evil without seeming to usurp the functions of the legislature.

Certain it is that the doctrine of public policy was carried to greater lengths in connection with these contracts than in any other branch of the law.

In later cases, more than one opinion was expressed that the Courts had gone too far. In Egerton v. Brownlow (1853), 4 H.L.C. at 124, Parke, B., said, "Courts

have been anxious to discountenance all wagers in which the parties have had no interest, and been astute, even to an extent bordering on the ridiculous, to find reasons for refusing to enforce them."

And Lord Campbell in Ramlall Thackoorseydass v. Soogumnull Dhondmull (1848) 6 Moore P.C. 300 at 309, in dealing with the question of the validity of wagering contracts said, "I regret to say that we are bound to consider the Common Law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons and does not lead to indecent evidence, and is not contrary to public policy. I look with concern, and almost with shame, on the subterfuges and contrivances and evasions to which Judges in England long resorted in struggling against this rule and I rejoice that it is at last constitutionally abrogated by the Legislature, an event which would probably have happened much sooner without the abortive attempts to accomplish the objects by judicial decision."

Whether or not these strictures are considered justified will depend to some extent at all events on individual opinion, as even the more extreme of the decisions have received commendation from Judges of high standing.

The more important of the cases are here mentioned:-

In Squires v. Whisken (1811) 3 Camp. N.P.C. 140, Lord Ellenborough refused to try a wager on a cockfight because the discussion of such a question tended to the degradation of Courts of Justice, and was inconsistent with that dignity which it is essential to the public welfare that a Court of Justice should always preserve.

In Jones v. Randall (1774) 1 Cowp. 37, the subject of a wager was "whether a certain decree of the Court of

Chancery would be reversed in the House of Lords." The decree was reversed, and the plaintiff brought an action on the wager and obtained a verdict for fifty guineas.

On a motion for arrest of judgment, Lord Mansfield and three other Judges held that the wager was not contra bonos mores nor contrary "to any principle of sound policy."

The case of Da Costa v. Jones (1778) 2 Cowp. 729, which to quote Lord Mansfield's words, "made a great noise all over Europe," was an action upon a wager made ten years before, concerning the sex of a person known as Monsieur Le Chevalier D'Eon who had "acted in that character in a variety of capacities" having apparently "assumed the character of a man, fought the battles of her country, and served it as a Minister of State."

Judgment having been obtained at the trial for the amount of the wager, a motion was brought to arrest the judgment and a rule to show cause obtained.

This rule was made absolute on the ground that such a wager was illegal "because it is not only an injury to a third person but it disturbs the peace of Society," (per Lord Mansfield, p. 735), and also because the trial of such an action led to indecent evidence being given.

The case of Allen v. Hearn (1785) 1 T.R. 56, was an action for £100, the amount of a wager between two voters on the result of an election of a member to serve in Parliament. The Court composed of Lord Mansfield, C.J., Willis, J., Ashurst, J., and Buller, J., all agreed that it was an illegal wager.

Lord Mansfield said in his judgment, "Whether this particular wager had any other motive than the spirit of gaming I do not know, but this question turns on the species and nature of the contract, and if that be in the eye of the law corrupt, and against the fundamental principles of the Constitution, it cannot be supported in a

Court of Justice. One of the principal foundations of this constitution depends on the proper exercise of the franchise, that the election of members of Parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote."

Atherfold v. Beard (1788), 2 T.R. 610, was a case in which an action was brought upon a wager of five guineas as to whether the Canterbury collection of duties for the year 1786 would amount to more than the Canterbury collection for the preceding year; the plaintiff affirmed that it would, the defendant that it would not. A verdict was given at the trial on the defendant's admission that he had lost the wager. On a motion for arrest of judgment it was held by Ashurst, J., Buller, J., and Grose, J., that the wager was illegal on grounds of public policy. Ashurst, J., said, "Now I am of opinion that the present case falls within the principle of these wagers which have been determined not to be good; the Courts have said that wagers shall not be allowed which tend to introduce indecent discussions or which in the event may have an influence on the public policy of the Kingdom. On this principle a wager in the event of an election of Members to serve in Parliament was held to be illegal because the persons laying the wager were interested in altering the free course of election. The present wager appears to me to fall under the same class of objection because it is against the sound policy of the Kingdom. It might be attended with mischievous consequences to permit any two persons by means of laying an impertinent wager to bring forward a discussion of this sort and to expose to all the world the amount of the public revenue."

In the much discussed case of Gilbert v. Sykes (1812 16 East. 150, the defendant, Sir Mark Sykes agreed that if the plaintiff Gilbert would then pay the defendant one hundred guineas he would pay the plaintiff one guinea a

day as long as Napolean Bonaparte should live. The one hundred guineas was paid, and the defendant paid one guinea a day to the plaintiff up to the 25th December 1804. The plaintiff claimed one guinea a day from that date, amounting to £2296. Evidence showed that the bet arose out of a conversation concerning the probability of the assassination of Napoleon. The jury found a verdict in favour of the defendant and the plaintiff moved for a new trial.

Lord Ellenborough in delivering his judgment, laid down the principle that "wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience such a contract has been held to be void;" and after referring to previous cases added, "Then is not the interest created by this wager likely to induce more proximately mischievous consequences to the public than the other instances which have been considered as having that tendency. The mischief is to be more regarded at a time when it has been announced by that enemy in the preservation of whose life the plaintiff has thus created an interest to himself year after year, that there is a large force collecting on the opposite coast ready to be poured into this Kingdom, and every Sunday the minds of the subjects are kept alive to the danger, and shall it be allowed to a subject to say that in case of such an event happening as an invasion of the Kingdom by a French Ruler, that the loss of 365 guineas a year depending on that life, would have no operation on his mind when opposed to the call of active duty towards his country; that the moral duties which bind man to man are in no hazard of being neglected when put in competition with individual interest; that it is not an object to us to prevent even the suspicion and to repel from us the malignant imputation that we countenance in any manner the idea of assassinating an enemy and thereby guard against any attempt on his part to retaliate upon a life most dear to us all. Wagers of

this description have a tendency to encourage these notions; I cannot therefore consider them innoxious. Therefore, founding my opinion upon all the circumstances in evidence in this case, I consider it as a wager against public policy, and of immoral tendency and that no new trial should be granted."

Grose, J., agreed that there should be no new trial, but was not prepared to say that an action would not lie. He said, "I do not now enter upon the questions whether the action lies; I have upon a former occasion fully considered it and I then thought that the action would lie, and am not prepared to say now that it does not."

Le Blanc, K., took the view that the wager was against public policy, and that in his opinion, "It is both impolitic and immoral to bet concerning the life of a Soverign whether he shall come to his death by assassination or other violent means."

And Bayley, J., said of this wager, "It gives to one person a pecuniary interest in the violent death of another by whatever means procured, and an interest which he has no right to create by his own voluntary act; and this when supplied to the person of a foreign potentate, is also particularly impolitic; because it tends to create disgust in this country amongst foreign potentates to have such subjects discussed in our Courts of Law. And if this were allowable in one instance a very considerable interest might be created by the same means in great numbers of persons in this country in prejudice to its interests in case of an invasion."

In view of a certain amount of judicial ridicule to which the decision in this case was subsequently subjected, the various reasons given for holding the wager contrary to public policy are worth noting.

1. The plaintiff's interest in the continuance of Napoleon's life might operate on his mind in opposition to his

duty to his country in the case of an invasion of England by Napoleon, (per Lord Ellenborough), and if allowed in one instance a considerable interest of a similar kind in the preservation of Napoleon's life might be created by a large number of persons having similar bets, (per Bayley, J.).

2. Such a wager might lead to the assassination of Napoleon, and this might lead to a reprisal by the assassination of our own Sovereign, (per Lord Ellenborough).

3. It would tend to create disgust in England amongst foreign potentates to have such subjects discussed in the Courts of Law, (per Bayley, J.).

The decision in this case received very severe criticism from some of the Judges in Egerton v. Brownlow 4 H.L.C.1. Baron Parke doubted much if the matter were res nova, that the case would be decided in the same way, and Baron Alderson made the following comment:- "In the last case, Gilbert v. Sykes, this was pushed to a great length, almost amounting to the ridiculous, when it was gravely put that it might induce the reverend plaintiff there, to commit high treason by protecting the life of Napoleon in case of invasion, or induce Sir Mark Sykes the defendant, to try to put an end to his payment by the assassination of that Prince."

Another much criticised case is Eltham v. Kingsman (1818) 1 B. & Ald. 683. This was an action on a wager made between the plaintiff and one Brown, the respective proprietors of two carriages for the conveyance of passengers for hire, and known as "Fly by Nights," that a certain Colonel Longford should go in the Plaintiff's car and no other that evening, to the Assembly Rooms. The Plaintiff bet his watch against Brown's and the two watches were deposited in the hands of the defendant as Stakeholder. Before the event had happened upon which the wager was laid, the plaintiff demanded back his watch, which was refused, and Brown, having afterwards won the wager, it was delivered to him. At the trial, the Judge held that the plaintiff was entitled to have his watch back but

gave leave to move for a nonsuit.

The Court held that the wager was illegal as having a tendency to inconvenience the public, Abbott, J. giving his reasons as follows:-

"The Court ought to endeavour to put a stop to wagers as far as they can consistently with the rules of law; and I think that a Judge at Nisi Prius would best exercise his discretion by refusing to try questions arising out of them; for many persons who have important questions affecting their rights before the Court, are improperly delayed by the time that is consumed in these idle discussions..... But that is not the only view that in my judgment may be taken of the case: for the tendency of such a wager may be not only to produce inconvenience to a third party, but to the public; for the wager might be laid not merely to carry one or two persons, but thirty or forty, and so great tumult, confusion, and disturbance, might be produced."

In the case of Evans v. Jones (1839, 5 M. & W. 77, an action was brought to recover the amount of a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge.

On demurrer, the Court consisting of Lord Abinger, C.B., Parke, B., and Maule, B., decided unanimously that the wager was illegalas being contrary to public policy.

Lord Abinger, C.B., in his judgment, approved the judgment of the Court in Gilbert v. Sykes. He said, "Here the party has acquired by the wager a direct interest in procuring the conviction of the prisoner, and although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to prevent the course of justice, is a sufficient foundation for the illegality of such a wager. This was well establish ed by the case of Gilbert v. Sykes, a case which was much discussed and the decision in which excited considerable

interest. A strong feeling at that time prevailed against Napoleon Bonaparte who threatened an invasion of this Kingdom, but it gave great satisfaction to myself and all who took an interest in the administration of public justice to hear the principle pronounced by Lord Ellenborough, and the first Common Law authorities, that a wager on the duration of his life was illegal, as being against public policy, as having a tendency to encourage his assassination, which, even in the instance of a public enemy should receive no encouragement from the law."

And Maule, B., said, "This wager is clearly objectionable as the tendency of it is to pervert the course of public justice; and whenever a wager has such a tendency it is against public policy and therefore void."

In the case of Ramlell Thackoorseydass v. Loogumnull Dhondmull (1848) 6 Moore P.C. 300, the soundness of Lord Ellenborough's view of the law was questioned by Lord Campbell. This was an action arising out of a wager upon the average price that opium would fetch at the next Government sale at Calcutta.

The opium to be sold was the property of the Government of India, and the proceeds were to form part of the public revenue.

The Supreme Court of Judicature at Bombay was divided on the question of the legality of the wager, Sir D. Pollock C.J., holding that such a contract tended to interfere with the price of opium in the market and was contrary to public policy, and the case was so decided, the other Judge, who held the contrary view, being the junior.

This decision was reversed on appeal to the Privy Council. Lord Campbell in delivering the judgment said, "I regret to say that we are bound to consider the Common Law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests

or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy."

But though Lord Campbell agreed that no action could be maintained on a wager that is contrary to public policy, he did not agree with the doctrine as laid down by Lord Ellenborough in Gilbert v. Sykes, that wherever the toleration of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void.

In that case the "tendency" to public mischief was insisted on as the ground for illegality, not the probable or actual consequences, and this was the doctrine applied in the case of Eltham v. Kingsman, and strongly approved by the Court in the later case of Evans v. Jones.

Lord Campbell on this point, said in the Indian case, "But the great question here, is whether the wager gave either party an interest which is to be considered injurious to individuals or to the Government. We are of opinion that although to a certain degree, it might create a temptation to do what was wrong, we are not to presume that the parties would commit a crime, and as it did not interfere with the performance of any duty, and as if the parties were not induced by it to commit a crime, neither the interests of individuals or of the Government could be affected by it, we cannot say it is contrary to public policy." And he added, "Had the case of Gilbert v. Sykes (16 East. 150), respecting the life of Napoleon been decided on demurrer, or in arrest of judgment, it would have been an authority of great weight in support of the doctrine that a wager that has any tendency to tempt a man to offend against the law is illegal. But we must recollect that it was discussed on a motion for a new trial after a verdict for the defendant against evidence, and that the Court was mainly influenced in refusing a new trial by the consideration that, according to the evidence the wager arose out of a conversation respecting the probability of Napoleon being assassinated, so that it was consid-

ered tantamount to a wager that he would be assassinated within one hundred days. It is likewise remarkable that Mr. Justice Grose who, when he differed with the rest of the Court, was generally thought by the profession to be right, was of opinion that this wager under all the circumstances was lawful, although he concurred in refusing a new trial.

The doctrine contended for, is disproved by the consideration that time-bargains in English funds were not unlawful till the stock-jobbing acts, although such bargains gave an interest to raise or to depress the funds injuriously to individuals and to the State."

Lord Campbell however, though he did not admit the tendency to public evil as the deciding factor, agreed as above stated, that public policy was a ground for deciding the legality or otherwise of these wagering contracts.

There appears to have been no question by any of the Judges in these wagering cases, as to the existence of the doctrine of public policy as a ground for legal decision; and the doctrine as laid down by Lord Ellenborough in Gilbert v. Sykes, and approved in other subsequent cases, namely that contracts which have a tendency to produce public injury are illegal, and so not enforceable in the Courts, is the doctrine which was afterwards approved and adopted by the House of Lords in the case of Egerton v. Brownlow.

7. ASSIGNMENT OF SALARIES OF PUBLIC OFFICERS.

The interests of the public demand that public servants should not be allowed to assign their salaries.

This is on the ground that public officers receive their salaries to enable them to properly perform their public duties and to enable them to maintain the dignity of whatever office they occupy.

A public servant who has assigned his salary may be so worried by his impecuniosity that he is not able to give the public business that attention which it requires. He would also be exposed to the temptations to which persons in impoverished circumstances are always exposed, and this may render him less fitted to discharge his duties as a public officer, and detriment to the public service may result.

This rule, however, only applies to assignments of salary or emoluments not yet accrued due, that which is already payable being assignable like any other existing debt.

One of the most important of the early authorities on this question is Flarty v. Odlum (1790), 3 T.R. 681, The question in that case was whether the half-pay of an insolvent officer should be included in his schedule.

It was held that it should not, as it could not be legally assigned. Lord Kenyon, Ch. J., expressed the opinion that emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would be therefore highly impolitic to permit them to be assigned.

And Buller, J., said in the same case, "I know of no authority by which an officer may sell his half-pay; and on principles of policy he ought not to be permitted to do

it. If the question had been whether or not the pay which was actually due might be assigned I should have thought it, like any other existing debt, assignable, but that does not extend to future accruing payments."

It had been previously decided in the case of Stuart v. Tucker (1777), 2 Black W. 1137, that though the half-pay of an officer was not assignable at law, in equity the use of it might be assigned. This case however was never followed.

The Court in Lidderdale v. The Duke of Montrose (1791), 4 T.R. 248, followed the decision in Flarty v. Odlum and held, "that on the best consideration which they had been able to give to the question they saw no reason to retract the opinion which they had delivered in Flarty v. Odlum; that on principles of public policy, as well as on account of the interest of the officers themselves, they were clearly of opinion that by law such assignments were void."

The next important case is Stone v. Lidderdale, (1795), 2 Anst. 533, in which the defendant assigned to the plaintiff all his interest in his half-pay as an officer, to secure to the plaintiff the payment of an annuity of £20 granted in consideration of £120 in cash paid by the plaintiff to the defendant.

It was held by MacDonald, C.B., that it was contrary to public policy for the officer to assign his half-pay, which "is intended by the State to provide decent maintainence for experienced officers both as a reward for their past services and to enable them to preserve such a situation that they may always be ready to return into actual service."

The Chief Baron said, "The Courts of Justice are not indeed to enter into any general abstract notions of public policy in their decisions, in opposition to the express intention of the parties; but, in deciding upon the nature of a public grant, the great object of public policy in

making that grant is to be attended to."

Lord Alvanley in the course of his judgment in the case of Arbuckle v. Cowtan (1803), 3 B. & P. 321, said, "It is now clearly established that the half-pay of an officer is not assignable, and unquestionably any salary paid for the performance of a public duty, ought not to be perverted to other uses than those for which it is intended. Notwithstanding the case of Stuart v. Tucker, in which it was held that the half-pay of an officer was assignable in equity, it was expressly decided in Flarty v. Odlum that it was not assignable at all; which decision met with general approbation."

In Palmer v. Bate (1821), 2 Brod. & B. 673, the Clerk of the Peace for the City of Westminster assigned to trustees all the emoluments and profits which should, during his life, become due to him as Clerk of the Peace or in respect of his office, after deducting the salary of his deputy, upon trust to pay interest on certain debts due by him.

It was held that this assignment was not valid in law.

In Grenfell v. The Dean & Canons of Windsor, (1840), 2 Beav. 544, the question was whether an assignment by the Canon of Windsor of the Canonry and the profits to secure a sum of money was valid, and it was argued that such an assignment was not contrary to public policy.

Lord Langdale, M.R., held that the duty to be performed was not shown to be a public duty or in any way connected with the public service and that the Canon had a right to make the assignment, and during the course of his judgment he made the following remarks upon the question as to whether the assignment was against public policy, "Now if it has been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument because there are various

cases in which public duties are concerned, in which it may be against public policy that the income arising for the performance of those duties should be assigned, and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them.....If in this case the residence in Windsor Castle, and the the attendance on divine service had been stated in the answer or in any way shown to be for the benefit of the public, or for the maintainence of the dignity of the sovereign for the benefit of the public, I should have thought the case worthy of a very different consideration."

In Wells v. Foster, (1841), 8 M. & W. 149, the defendant had held a situation as Clark in the Audit Office for unwards of 20 years when the establishment was reduced, and he was placed on a retired allowance of £130 a year granted to him, not for life, but as an allowance for maintainence until he should be called on to serve again. He executed an assignment of this annuity and an action was brought upon the covenants in the deed of assignment.

The Court held that on grounds of public policy the annuity was not assignable.

Parke, B., said in his judgment, "I concur in the opinion that this action is not maintainable upon the ground that on principles of public policy the allowance granted to the defendant is not assignable by him..... But viewing the matter on the ground of public policy, we are to look not so much to the tenure of this pension, whether it is held during life or pleasure, as whether it is, in either case, such a one as the law ought to allow to be assigned."

He then pointed out that the true distinction between pensions which may and those which may not be assigned is that a pension granted entirely for past services may

be assigned: but a pension which is not granted exclusively for past services but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of past services, may not be assigned, and he concluded, "I think the true view of this case is that the defendant is still to be considered as in the public service although not at present actually performing any duty in it: and that the compensation allotted to him under this act is by way of salary the object of which is to enable him to maintain such a position in life as will save him from the necessity of risking his character by incurring those temptations which persons reduced to poverty are necessarily exposed to and which would render him an unfit person to be again employed as a servant of the Crown. For this purpose public policy requires that he should not be permitted to assign it away."

The Privy Council decided in the case of Arbuthnot v. Norton, (1846), 5 Moore P.C. 219. that the assignment by a Puisne Judge of the Supreme Court of Madras of a sum "equal to the amount of six month's salary," directed by 6 Geo. IV Ch. 85, to be paid to the legal representatives of the Judge in case of his death after six month's occupation of office, was a valid assignment. The opinion of the Privy Council was expressed by The Right Hon. Dr. Lushington, who, with regard to the argument that such an assignment is contrary to publi c policy, said, "With regard to the last question, which is a question certainly which their Lordships have thought deserving of greater attention and consideration than either of the preceding points that were discussed at the bar: viz., whether this assignment is against public policy or not -- we have come to the conclusion that it is not against public policy.

In giving this opinion we do not in the slightest degree controvert any of the doctrines whereupon the

decisions have been founded, against the assignment of salaries by persons filling public offices; on the contrary, we acknowledge the soundness of the principles which govern those cases; but we think this case does not fall within any of these principles, and we think so because this is not a sum of money which, at any time during the lifetime of Sir John Norton, could possibly have been appropriated to his use, or for his benefit for the purpose of sustaining with decorum and propriety the high rank in life in which he was placed in India."

It would appear from the decisions in the cases quoted and the dicta of the Judges that at this time it was well settled that the salary of any person actually employed in the public service was not assignable.

Also that no valid assignment could be made of a pension or allowance, granted to a person who had been engaged in the public service, partly as a reward for past services and partly as a retainer for future service if required, but that this did not apply to pensions granted wholly as a reward for past services.

8. SALE OF PUBLIC OFFICES.

Since the reign of Edward VI the sale of certain public offices has been illegal by Statute 5 & 6 Edw. VI Ch. 16. But apart from Statute altogether, and in cases not covered by any Statute, it has been frequently held that Contracts for the sale of offices in which the public are interested are illegal, as being contrary to public policy.

The ground upon which the Courts have so held are, that the public are entitled to have the services of persons best qualified to fill the office to which they receive appoint-

ments, and that if money paid to secure the appointments, persons not so qualified may be appointed and the public service suffer accordingly; and also that appointments obtained by means of payment are in the nature of a fraud upon the public.

Decisions to this effect have not been confined to the Government service exclusively, but have been extended to other cases in which the public interests are concerned.

In Garforth v. Fearon (1787), 1 H. Bl. 327, the defendant applied for and obtained the office of Collector of Customs and Subsidies in the Port of Carlisle and other Ports, having previously signed an agreement to hold the office in trust for the plaintiff, and to allow him to appoint such deputies as he should nominate and empower him to receive the salary, stipend, wages and fees of the office.

The defendant did not account to the plaintiff for the profits he received and an action was brought.

The agreement was held to be void by Lord Loughborough who said, "This transaction concerns a public office deemed by law to be a place of public trust; prohibited to be sold: and even the deputation of which, where such deputation may be made, cannot be the object of a sale." After pointing out that Garforth was the real officer but was not accountable for the due execution of the office, and that he could enjoy the office without being subject to the restraints imposed by law on such officers, he added, "Now what is this but in plain terms, this proposition; viz., that the public is abused, and the King deceived in the application? I should therefore not find much difficulty to conclude if there were nothing more in the case, that the common law would not support an assumpsit on such an agreement."

In Parsons v. Thompson (1790), 1 H. Bl. 322, the plaintiff was master joiner of His Majesty's dockyard at Chatham, and, in consideration that he would procure himself

to be superannuated the defendant agreed that, in case he should succeed the plaintiff in the office of Master Joiner of the dockyard, he would allow the plaintiff his extra pay from the yard books during his natural life. The Court refused to enforce the payment of extra pay to the plaintiff. Lord Loughborough set out the reasons as follows:-

"On the trial of this cause two points were made, one, whether the agreement was legal, the other, what was the meaning of extra pay. The second question is immaterial, if the first be against the plaintiff. But it is to be observed, that if the construction be as the plaintiff contends, that all which the defendant could receive as Master Joiner would be 2/6 a day the objection to the validity of the agreement is still more apparent; because it would have this effect that no exertion of the defendant for which extra pay would be due would be beneficial to himself which might produce public mischief," and further on he adds, "What is the consideration here? That the plaintiff represented himself as unfit for service and entitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true there was no ground for any bargain with the defendant.....If false the public is deceived, the pension misapplied, and the service injured."

In Blatchford v. Preston, (1799), 8 T.R. 89, one Captain Blatchford paid the defendant £5,000 to procure him an appointment to the command of the "Foulis", a ship in the East India Company's Service: in consideration of which the defendant promised to repay him or his representatives the same sum when any other person should be appointed to the command of the ship or any other ship built upon her bottom.

Another person having been appointed to the command of the "Cirencester," a ship built in lieu and on the bottom of the "Foulis", which had been wrecked, Blatchford's executors brought an action.

The Court held that the contract could not be made the basis of an action, as it was against the principles of public policy, the East India Company being regarded as "a limb of the Government of the country."

Lord Kenyon, C.J., said in his judgment, "There is no rule better established respecting the disposition of every office in which the public are concerned than this, detur digniori; on principles of public policy, no money consideration ought to influence the appointment to such offices," "..... the public will be better served by having persons best qualified to fill offices appointed to them; but if money be given to those who appoint, it may be a temptation to them to appoint improper persons."

And Ashurst, J., "It is a clear rule of law that no right of action can spring out of an illegal contract. This contract is illegal, as being against the principles of public policy, and therefore I agree with my Lord that the plaintiffs cannot recover upon it."

In Card v. Hope (1824), 2 B. & C. 661, Card and Canaan being part owners of the ship "Herefordshire," employed in the service of the "East India Company," agreed to sell five sixteenth shares to Hope, and that Hope should be appointed to the command of the ship; and Hope agreed that Card and Canaan, or the surviver of them, should continue to be the managing owner or husband of the ship. Hope did not allow the plaintiffs to continue the managing owner or husband of the ship, and an action was brought.

The Court decided that this agreement could not be enforced on grounds of public policy stated by Abbott, C.J.,

as follows:-

"It is part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration the law enables a majority of the part owners to employ their ship, even against the will of the minority that the ship may not remain unemployed. A power of employment vested in the majority seems to import a power of appointing officers, and in practice the majority certainly exercise that power. But such a power carries with it a duty, the duty of exercising a free and impartial judgment in the choice of every person who is to be entrusted with the management of the outfit and with the navigation of the ship, ut dentur digniori. Any contract, which is calculated to have the effect of fettering the judgment and of binding the party to concur in the nomination of particular persons at the peril of an action, is a violation of that duty. And if such contracts could be allowed by law, they must operate as a discouragement to persons to become part owners of ships. The duty, however, is owing, not only to the Charterers and other part owners, but also to all those whose life and property may be embarked in her. And consequently a violation of the duty is contrary to the interest of the Charterers and part owners, but also to another and most important object, namely, the protection and safety of the lives and property embarked in her."

The American Courts have followed the English decisions in declaring sales of office void as contrary to public policy.

In Outen v. Rodes (1821), 13 Am. Dec. 193, a contrart by the Clerk of the County of Fayette to "farm" the office to Abner Fields for one year for the sum of 1,000 dollars to be paid to him by Fields, the latter to perform all the duties and receive all the profits and emoluments of the office during that period, was held to be void under the

Statute of 5 & 6 Edw. VI, and Boyle, C.J., said, "But it is evidently against public policy, and contracts of the same character, even when not within the provisions of the Statute, have in England been treated as contracts of turpitude and have been invariably held by the Courts of that country as illegal and void."

In Groton v. The Inhabitants of Waldborough (1834), 26 Am. Dec. 530, the office of Town Constable had been put up by auction and bought by the plaintiff, who sought to recover back certain payments he had made. It was held that the sale was contrary to public policy, and the plaintiff, being in pari delicto, could not recover back the money he had paid.

Weston, J. said, "The Counsel for the defendants at once concedes that no action could be maintained by the town for the stipulated price: but that had been paid for three successive years; and this action is brought to reclaim the money, admitting the unlawfulness of the sale to its fullest extent, and that it is directly against public policy to sustain it, we can perceive no reason why the buyer is not to be regarded as guilty as the seller. He participated equally in the unlawful transaction."

In Filson v. Himes (1846), 47 Am. Dec. 422, an action was brought to recover the balance due for the sale of a store and its contents. Part of the consideration for the sale was a promise by the defendant to procure the removal of the post office to the plaintiff's place of business and that he should be appointed postmaster.

The whole agreement was held to be void as being contrary to public policy.

Gibson, C.J., in delivering the judgment of the Court made the following observations on the doctrine of public policy, "But notwithstanding what was said by Mr. Justice Burrough in Richardson v. Mellish, 2 Bing. 252, that

public policy is an unruly horse that carries you, when you bestride it, you know not whither. the settled law of this day is, that this same public policy may render the sale of an office illegal even in England, and Chief Justice Best, arguing in restraint of its influence conceded in the same case that wherever the proof clearly puts the contract on the contravention of public policy, the principle must prevail. But were the English common law otherwise such contracts could not be tolerated by the Courts of a country whose government is founded theoretically on the most pure and exalted virtue."

9. AGREEMENTS TO INFLUENCE APPOINTMENTS TO PUBLIC OFFICES.

Agreements to use influence to procure appointments to public offices, or to recommend persons for such appointments are also contrary to public policy. Thus in the case of Law v. Law (1735), 3 P. Wms. 390, A, by his interest with the Commissioner of Excise obtained an office in that branch of the Revenue for B, who in consideration thereof gave a bond to A to pay him £10 per annum as long as B should enjoy the place. The bond was relieved against.

Lord Chancellor Talbot said, "It is a fraud on the public and would open the door to the sale of offices relating to revenue."

In Hanington v. Du-Chatel (1781), 1 Bro. C.C. 124, Lord Rochford (defendant's testator), being groom of the stole to His Majesty, had agreed to recommend the plaintiff's testator to a certain vacancy, in consideration of his granting annuities to four other persons, amounting in all to annuities of £195.

Lord Chancellor Thurlow, admitting that it was not within the Statute of Edw. 6, but treating it as a matter of "public policy of the law," and similar to marriage brocage contracts, where, though the parties are private persons the practice is publicly detrimental, ordered an injunction of an action brought for arrears of one of the annuities until the hearing. At the hearing the injunction was made perpetual.

10. CONTRACTS TENDING TO INTERFERE WITH THE COURSE OF JUSTICE.

Agreements which tend to interfere with the course of justice are contrary to public policy.

This principle was first enforced in our Courts in connection with agreements to stifle criminal prosecutions and was laid down in the comparatively early case of Collins v. Blantern (1767), 2 Wils. 341, by Chief Justice Wilmot.

That case was an action of debt on a bond for £700; To the declaration the defendant pleaded that one John Rudge had indicted two of the obligors and three others for perjury: that Rudge the plaintiff and the five indicted persons agreed that the plaintiff should give Rudge his note for £350, in consideration of his not appearing to give evidence on the trial, and that the obligors should give their bonds to the plaintiff as an indemnity for giving the note: and that the note and bond were respectively given for the illegal consideration mentioned.

It was held on demurrer that the bond was void at common law.

In delivering judgment Chief Justice Wilmot said: "This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the Commonwealth: for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice;" and later he added, "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law: and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers agree upon this. No polluted hand shall touch the pure fountains of justice."

In the case of Edgcombe v. Rodd, (1804), 5 East. 294, the same principle was applied to an agreement not to prosecute for a Statutory misdemeanour, the punishment for which was a fine of £20.

That case was an action of trespass for assault and false imprisonment brought against three justices who had, on the information of one Marshall, committed the plaintiff for trial at the next ensuing Quarter Sessions for maliciously disturbing a dissenting congregation, contrary to the provisions of the Toleration Act, 1 W. & M. C. 18, the penalty for which offence was a fine of £20. In default of finding sureties the plaintiff was committed to prison to await his trial. Before the next ensuing Quarter Sessions, Marshall, with the consent of the defendants, agreed not to further prosecute the plaintiff, who agreed to accept his discharge in full satisfaction of the assault and imprisonment.

Judgment was given for the plaintiff against the Justices on the ground that the agreement stipulating for the discharge of the plaintiff was illegal and void.

Grose, J., shortly stated his view of the case as follows:-

"Put the case that the plaintiff was guilty, then

public justice has been defeated and the agreement was illegal. But if he were innocent; then he would have been entitled by law to his discharge, and the defendants having only consented to that which by law he was entitled to have made him no satisfaction."

The other judgments proceeded on similar lines and Le Blanc observed. "This, it must be remembered, was a prosecution for a public misdemeanour and not for any private injury to the prosecutor."

In Pool v. Bousfield, (1807), 1 Camp. 55, an action on a Bill of Exchange for £104, it was proved that for good and legal consideration the plaintiff had released the sum of £54/8/-, and had agreed to discharge the acceptor as to the balance in consideration of his undertaking not to move the Court of King's Bench against the plaintiff that he might answer the matters of an affidavit.

Lord Ellenborough held that the agreement was corrupt and invalid.

It was decided in Kirwan v. Goodman (1841), 9 Dowl. 330, that an agreement to relinquish proceedings to strike a Solicitor off the roll fell within the same rule.

The plaintiff in that case, Mrs. Kirwan, had employed the defendant as her attorney, and in the course of his employment he misconducted himself to such an extent that a rule was granted requiring him to show cause why he should not be struck off the roll.

In order to induce Mrs. Kirwan not to prosecute her rule further, Goodman gave her a warrant of attorney which secured the payment to her of a considerable sum of money to be paid within a certain time. The money was not paid, and Mrs. Kirwan pressing her claim, Goodman obtained a rule to set aside the warrant of attorney.

Williams, J., held that the case came within the principle of Peel v. Beusfield. He also referred to Collins and Blantern and said, "The result of these authorities is, that it is contrary to the policy of the law that such a consideration should be allowed. If the attorney had misconducted himself in his professional capacity, and an inquiry was commenced, it ought to proceed. A warrant of attorney given for the purpose of stifling enquiry cannot be allowed to stand."

In ex parte Critchley (1846), 3 D. & L. 527, a warrant of attorney was given as the consideration for the withdrawal of a charge of embezzlement pending before a Magistrate, who entertained doubts whether or not a partnership existed between the prosecutor and the accused. It was held that the warrant of attorney was invalid.

It was, however, laid down as law in Keir v. Leeman (1846). 9 Q.B. 371, that a compromise will be allowed in all cases where the offence though made the subject of a criminal prosecution, gives the injured party a right to sue for and recover damages in an action.

That was a case in which the plaintiff had indicted several persons for riot and assault upon a constable during the execution of a fi fa. The defendants, (who were third parties), in consideration that the plaintiff would at their request not further prosecute, promised to pay the balance in the original action remaining unsatisfied, and in consideration of this promise, and with the assent of the Judge, the plaintiff forebore to prosecute further. An action was brought on the promise made.

Tindal, C.J., held that the plaintiff could not recover. He said, however, that in any offence which involved damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding that the offence may also be of a public nature, to compromise or settle his private damage in any way he may think fit. And added, "In the case before us the

offence is an assault coupled with riot and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence."

On a somewhat similar principle to that of the foregoing cases, an agreement not to proceed with a petition presented against the return of a member of the House of Commons on the ground of bribery was declared in Coppock v. Bower (1838), 4 M. & W. 361, to be illegal.

Lord Alridges, C.B., expressed his view of this aspect of the case as follows:-

"Now this is a proceeding instituted, not for the benefit of the individual, but of the public, and the only interest which the law recognises is that of the public. I agree, that if the persons who prefers that petition finds in the progress of the inquiry that he has no chance of success, he is at liberty to abandon it at any time. But I do not agree that he may take money for so doing, as a means of depriving the public of the benefit which would result from the investigation."

So too an agreement to interfere with the proper working of the Bankruptcy Laws was in Merot v. Wallace (1789) 3 T.R. 17, held to be illegal.

In that case a promise made by a friend of the Bankrupt when he was on his last examination, that, in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, the friend would pay these sums, was held to be void on the ground that such an agreement is contrary to the policy of the Bankruptcy Laws, and by Grose, J., on grounds of public policy, stated as follows:-

"The creditors are only interested as far as respects the payment of their debts; but the public are interested in knowing whether the Bankrupt ought to be restored to his former credit by obtaining his certificate. It has

been contended that the creditors are not injured by this agreement but it is a detriment to the public, which is a matter of greater importance.....the principle objection which I make to this action is the injury to the public in permitting this kind of agreement to prevent the examination by the Commissioners."

It is also contrary to public policy for any creditor secretly to bargain for or obtain a larger demand than the other creditors. This was decided in Jackman v. Mitchell (1807), 13 Ves. 581.

In that case, Isaac Jackman, the plaintiff's father, proposed to his creditors a deed of composition, but the defendant refused to agree unless the plaintiff would give him a bond to secure the balance of his claim beyond the composition. The plaintiff executed the bond and the defendant executed the deed of composition, and other creditors were in consequence induced to execute it also. The fact of the existence of the bond was kept a secret from the other creditors.

Lord Chancellor Elden held that the bond was bad in equity and at law also, and ordered it to be delivered up with costs, "as in these cases which proceed upon grounds of public policy the relief is given on account, not of the individual but of the public."

11. MAINTENANCE AND CHAMPERTY

Maintenance and Champerty were illegal at Common Law on account of their "direct and manifest tendency to pervert the course of justice," (Tindall, C.J., in Stanley v. Jones, 7 Bing., 369).

Maintenance is, "when one maintaineth the one side without having any part of the thingin plea or suit," (Coke Litt. 368b).

Champerty is a species of Maintenance in which the party maintaining, bargains for a part of the thing which is the subject of the suit.

Agreements of this kind were illegal at Common Law, and were made punishable by certain early Statutes. These Statutes however, were generally regarded as merely declaratory of the common law, which discouraged such transactions in the public interest: and transactions which do not fall within any of these Statutes, but which nevertheless, though not actually constituting the offence yet savour of maintenance or champerty, have been held to be contrary to public policy.

It was so held in the case of Strachan v. Brander (1759), 1 Eden 303. In that case, the sum of £1,000 was raised by a subscription from several persons, (defendants in the case), and advanced to the plaintiff, an impecunious heir, to enable him to obtain possession of his heritage; the plaintiff executed an absolute bond for £4,000 to one of the defendants, conditioned for the payment of £2,000. This bond was attested by one Willis a Solicitor, who was one of the defendants, and had advanced part of the money. Some time later, a defeasance was executed, declaring that if the plaintiff did not recover the estate or half of it, the bond was to be delivered up. Lord Chancellor Northington ordered the bond to be delivered up upon payment of the actual amount advanced with interest, and the Solicitors costs. He said that "the bargain for receiving £2,000 for £1,000 on the contingency in the defeasance was unconscionable, SAVOURETH OF CHAMPERTY, AND IS DANGEROUS TO PUBLIC JUSTICE."

This decision was quoted with approval by Lord Chancellor Eldon in the case of Wood v. Downes (1811), 18

Ves. 120 at p. 127. And in Prosser v. Edmonds (1835), 1 Y. & C. Ex. 481. Lord Abinger, in the course of his judgment said on this subject. "There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which upon general principles, and by analogy to such acts, a Court of Equity will discourage the practice." He then referred to the case of Wood v. Downes and added, "Lord Eldon, in decreeing relief, adopted not only the ground that the party was the Solicitor to the plaintiffs, but that the transaction was contrary to good policy." And at the end of his judgment, "Upon these principles it appears to me that this is a case of a purchase of a litigated title. Many cases are to be found to that effect, that, where the title actually is in litigation, an agreement to divide the subject of the dispute is not available in equity. But the policy of the law is not confined to these cases only."

In Reynell v. Sprye (1851), 1 DeG. M. & G. 660, Sir Thomas Reynell was supposed to have a right to an interest in certain property, the extent of which interest was uncertain, and was likely to be resisted and questioned and not susceptible of immediate or easy proof. Captain Sprye agreed to undertake to obtain evidence, for the purpose of establishing the right at his own expense in consideration of his having half the benefit of what should be obtained.

Knight Bruce, L.J., said, "Theagreement may or may not have amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence, but must in my judgment be considered clearly against the policy of the law, clearly mischievous, clearly such as a Court of Equity ought to discourage, and relieve against."

12. CONTRACTS TENDING TO IMPROPERLY INFLUENCE LEGISLATION.

An agreement with the object of inducing a member of the legislature to act partially or corruptly is contrary to public policy and void.

There appears to have been no early English decision in which an agreement of this sort has been held to be void, though in several cases the question was raised and the principle, concerning which there can be no room for argument, has been recognised.

Thus in the Vauxhall Bridge Company v. Earl Spencer 2 Madd. 356, a private Bill for the purpose of building a bridge across the Thames, known as the Vauxhall Bridge, passed by the House of Commons, was opposed in the House of Lords of Earl Spencer and others on the ground that the building of the new brdige would decrease the tolls from the existing Battersea Bridge in which Earl Spencer was interested. An agreement was entered into by the Vauxhall Bridge Company with Earl Spencer and others, by which the latter were secured from loss, and in consideration of this he withdrew all opposition to the Bill. This agreement was not made known to Parliament.

The agreement was held to be illegal by Sir Thomas Plumer, V.C., on the ground that it was contrary to public policy. He said -- "The object of the agreement was to prevent an opposition to the Bill in Parliament and it was to be concealed from the Legislature. Such an underhand agreement was a fraud on the Legislature and contrary to the principles of public policy."

The judgment was, however, reversed by Lord Chancellor Eldon on appeal (Jac. 64), apparently on the ground that the owners of the Battersea Bridge were entitled to protect

their interests, and that it is usual in the case of private Bills for parties to arrange such matters amongst themselves.

It has also been held that a Peer who is a landowner may make such an agreement to protect himself against loss through a proposed railway passing through his land. Such was the case of Lord Howden v. Simpson, 10 Ad. & El. 793 and 9 Cl. & F 61, in which Sir John Simpson and others agreed to pay Lord Howden £5,000 as compensation for damage which his residence and estates would sustain from a proposed railway. Tindal, C.J., in the Exchequer Chamber said -- "We have no hesitation in saying that if it were averred in the plea and proved that the sum of £5,000, or any part of it, was really paid as a consideration for Lord Howden's giving his vote for, or withholding his vote against the Bill, and that the statement in the deed was in this respect a mere colour to conceal the real nature of the transaction, the deed would have been thereby rendered corrupt and illegal and consequently void."

The principle was applied and explained with great lucidity by Rogers, J., in the American case of Clippinger v. Hepbaugh (1843). 40 Am. Dec. 519. This was an action on an agreement entered into by the defendant to pay the plaintiff 100 dollars on condition that the plaintiff should succeed on procuring the passage of an Act of the Legislature, authorising the defendant and his wife to sell certain land which had been devised to the wife for life, with remainder in fee to the children, and to invest the money in their discretion for the children's benefit.

The Bill was drawn by the plaintiff, passed by the Legislature and the land sold in accordance with it. The Court below being of opinion that the plaintiff could recover, the defendant brought error.

It was held that the agreement was void as being contrary to public policy.

Rogers. J., in delivering the judgment of the Court said,-- "already is there too much reason to believe that this indispensible branch of government, without which our whole political fabric would crumble into ruins, has in some instances been contaminated by sinister and improper influence brought to bear on members, and no doubt having their source in the direct and indirect efforts of individuals, retained under the hope of reward in the event of success. It cannot be avoided that such influences privately and secretly exerted under false and convert pretenses must operate on legislative action .....It is therefore most erroneous to assume, as is done by plaintiff's counsel that a practice leading to such consequences is not contrary to private interest and public morals.....In the face of many painful examples, it is idle to say that individual extraneous influence, acting secretly on members of the legislature, is not pernicious to the best interests of society."

After referring to the case of Wood v. McCann, 6 Dana 366, he added -- "The whole reasoning of the Court however, goes to establish these propositions which can not be reasonably doubted. That the law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil, or political institutions of the State. That a contract to procure, or endeavour to procure, the passage of an Act of the legislature by any sinister means, or even by using personal influence with the members would be void, as being inconsistent with public policy and the integrity of our political institutions. And any agreement for a contingent fee, to be paid on the passage of a legislative act, would

be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object. These are the broad fundamental principles to the truth of which we subscribe and which cover the whole ground on which the case rests. It matters not that nothing improper was done, or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an important branch of the Government."

13. TRADING WITH AN ENEMY

All trading or commercial intercourse with an enemy is at common law contrary to public policy.

Long before the question was raised in the common law Courts the Admiralty Courts had, on numerous occasions, decided that trading with a country at war with Great Britain was illegal and rendered the ship and goods liable to confiscation. The earlier of these cases, however, are not reported.

The best known of the reported cases is that of The Hoop (1799), 1 C. Rob. 196, decided by Lord Stowell, then Sir William Scott.

In that case several British Merchants had purchased goods in Holland, then occupied by France - at that time at war with England, and shipped them on board a neutral vessel for Glasgow, Scotland.

The goods so shipped were of a class then particularly needed for the use of Glasgow and essentially necessary to the agriculture and manufacture of that part of the Kingdom.

They had been shipped under an assurance from the Commissioners of Customs in Scotland that they might lawfully be imported without any licence from the Crown by virtue of Statute. 35 Sec. 3. c. 15.

Sir William Scott in giving judgment said, -- "In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the enemy, unless with the permission of the Sovereign, is interdicted;" and after pointing out that a similar law existed in certain European countries, - "By the law and constitution of this country, the Sovereign alone has the power of declaring war and peace. He alone therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilliable with the general interests of the State. It is for the State alone on more enlarged views of policy and of all the circumstances which may be connected with such an intercourse, to determine when it shall be permitted and under what regulations. In my opinion no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State."

And after referring to numerous cases in the Admiralty Court, he added, - "What the common law of England may be, it is not necessary, nor perhaps proper for me to enquire,

but it is difficult to conceive that it can by any possibility be otherwise, for the rule in no degree arises from the transaction being upon the water, but from principles of public policy and of public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country."

Some doubt however, appears to have existed for some time in the minds of the common law Judges as to whether all trading with an enemy was illegal. The question generally arose in the common law Courts in connection with actions on policies of insurance over goods purchased from an enemy country.

The earlier decisions vary considerably, owing apparently to the different views held by Judges as to whether such insurances were necessarily injurious to the State In many cases the defendants forebore to raise the question, and the judgments so obtained led to the opinion being held by some Judges that such insurances were legal and enforceable.

In one such case Lord Chancellor Mansfield appears to have been of opinion that trading with the enemy was not necessarily unlawful, on the ground that such trading might in some cases be beneficial to the State.

This was in Henkle v. Royal Exchange Assurance Company (1749) 1 Ves. Dec. 318, 319, where he said, "It might be going too far to say all trading with enemies is unlawful; for that general doctrine would go a great way, even where only English goods are exported, and none of the enemies' imported, which may be very beneficial."

The decision, in Bell v. Gilson (1798) 1 Bos. & Pul. 345, also left the matter still doubtful. It there was held that an insurance on goods purchased in Holland during hostilities between Holland and Great Britain by a

British Agent resident there, and shipped for British subjects, was a legal insurance.

Buller, J., discussed the doubts that existed as to the legality of such insurance generally. "In later times," he said, "I well remember to have seen many policies tried professedly on enemy's property without ever hearing the objection raised. Lord Mansfield did all in his power to prevent so dishonourable a defence being made. When the case of Gist v. Mason came on, I more than once conversed with Lord Mansfield on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said that in former times it was considered for the best interests of the country to insure enemy's property, and in the persuasion of its being for the interest of the country he always discountenanced any objection on that head. He never went beyond the ground of expedience. At present I think such insurances are not expedient; the state of the countries at war is such as to make them otherwise."

Buller, J., nevertheless decided that the insurance in this case was valid, on the ground, apparently, that the insurance money went to a British Subject, for he said, "Here no profit goes to the enemy."

That case, however, was overruled by the decision of Lord Kenyon, C.J., in the case of Potts v. Bell (1800) 8 T.R. 549. - following the law as laid down by Sir William Scott (afterwards Lord Stowell). in the case of The Hoop.

An action was brought by Bell and others against Potts, on a policy of insurance on the ship "Elizabeth" and goods on board, at and from Rotterdam to Hull.

The goods had been purchased by an agent resident in the enemy country after the outbreak of war, though it did not appear that they were purchased from an enemy. They were shipped in a neutral ship.

In the Court of Common Pleas, judgment was given for the plaintiff, but this was reversed upon a writ of error.

Lord Kenyon, C.J., in giving judgment said that the cases cited, "were so many, so uniform, and so conclusive to show that a British subject's trading with an enemy was illegal, that the question might be considered finally at rest, that these authorities, it was true, were mostly drawn from the decisions of the Admiralty Courts and that after all the diligence which had been used there was only one direct authority on the subject to be found in the Common Law Books, and that one was to the same effect, but that the circumstance of there being that single case only was strong to show that the point had not been since disputed, and that it might now be taken for granted that it was a principle of the common law that trading with an enemy without the King's licence was illegal in British Subjects."

It was soon afterwards decided by Lord Alvanley, C.J., in a judgment in the case of Furtado v. Rogers (1802), 3 Bos. & Pul. 191, that an insurance effected on an enemy ship before war breaks out does not entitle the holder of the policy to recover for loss from capture by a British ship after was is declared.

As the noble and learned Lord pointed out in the course of his judgment, such insurances had been prohibited with regard to such ships and goods during a previous war by legislative enactment (21 Geo. 2 c 4), and that no further legislative interference took place until the passing of 33 Geo. 3 c.27.

The insurance in question was effected prior to the passing of the last mentioned Act.

The former Act, Lord Alvanley remarked, "was at least a legislative declaration of the impolicy of such insurances."

Alluding to the doubts that had existed concerning the validity of such an insurance, he said, "It is well known that for a considerable time, not only some politicians entertained an opinion that insurance on enemy's property were beneficial, but that a great Judge went so far as to try causes in which this point directly appeared, and permitted foreigners in their own names and for their own benefit during the war, to recover on policies of insurance on foreign goods against British capture. The opinion of that learned Judge as to the policy of such insurances, is well known, and it is supposed that he would not have sanctioned them unless his opinion in point of law had been equally favourable. But we have now the best evidence that his sentiments in that respect were different from what they were supposed to be. Though he did try causes upon such insurances, he always entertained doubts upon the law and endeavoured to keep out of sight a question which might oblige him to decide against what he thought for the benefit of the country." And after referring to the abovementioned legislation he continued - "We are all of opinion that on the principles of English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country, and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament.

As to the reasons for holding such insurances detrimental to the best interests of the country, Lord Alvanley said, "with respect to the expediency of these insurances it seems only necessary to cite a single line from Bynershoek (Quaest. juris Pub. lib. 1 c 21, Marshall p.31), and part of a passage in Valin (Marshall p.32). The former says 'Hostium Pericula in se suscipere quid est aliud quam eorum commercia maritima promovere,' and the latter, speaking of the conduct of the English during the war of 1756, who permitted these insurances says - 'The consequence was, that one part of that nation restored to us by the effect of insurance, what the other

took from us by the rights of war'"

After referring to many cases of insurance of enemy goods in which the question of illegality on this ground was not raised, he continued, "There is no express declaration therefore of the Court of King's Bench, either for or against the legality of such insurances, and the question comes now to be decided for the first time. We are all of opinion that to insure enemies' property was at common law illegal, for the reasons given by the two foreign jurists to whom I have referred. If this be so, a contract of this kind entered into previous to the commencement of hostilities must be equally unavailable in a court of law, since it is equally injurious to the interests of the country."

The law as laid down in Furtado v. Rogers was approved by Lord Ellenborough in the case of Kellner v. LeMessurier (1803), 4 East. 396. He said in his judgment in that case, "A policy containing an insurance against British capture ee nomine, would be illegal and void upon the face of it, as being directly and obviously repugnant to the interests of the state, having an immediate tendency to render ineffectual, to the extent of the indemnity created thereby, all offensive operations at sea, adopted on the part of His Majesty and his subjects, for the purpose of weakening the strength and diminishing the resources of the enemy ----------A recent judgment of the Court of common Pleas in the case of Furtado v. Rogers, 3 Bos. & Pul. 191, has in substance decided against the legality of such a contract: in the general grounds of which judgment I entirely agree."

In another similar case in the same year, Gamba v. LeMessurier, 4 East. 407, Lord Ellenborough, referring to the argument of Counsel in the case said, "The other grounds upon which he principally rested his argument for

the defendant have not induced us to alter the opinion we formed on the hearing of the former case, for it by no means follows that an action can be maintained on a contract detrimental to the interests of the state, because until a particular statute was made to prohibit ransom bills, actions were in fact maintained on such bills; for as it was observed at the Bar, at the time when such contracts were allowed to be sued upon, it was supposed that the interests of the country were rather advanced than prejudiced by them."

And in the case of Brandon v. Carling (1803), 4 East. 410, the same learned Lord pointed out that what could not be done by express terms could not be done by a generality of terms, and that "whenever the generality of the terms of assurance might in their application to the covering of any particular risk produce, if effect were given to them in their extended sense, a similar contravention of public interest, the insurance must be construed in such a manner as to exclude the particular event or peril which could not, for the reason abovementioned, be so made the subject of a legal insurance in direct terms by a British underwriter, so that where the insurance is on goods generally, a proviso to this effect shall in all cases be considered as engrafted therein, viz., 'provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer.' Because during the existence of such hostilities the subjects of one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other. And in like manner and upon similar principles of public policy, the risk of dentention of princes, &c., must be understood to be restrained and qualified by an implied proviso 'that it shall not extend to cover any loss happening in the course of any contraband

adventure, in which the goods would become liable to seizure as forfeited by the laws of this country.'"

These cases established the law that the object of war being as much to cripple the commerce of the enemy as to capture his property, all trading with the enemy, or as Lord Alvanley put it in Furtado v. Rogers, "all commercial intercourse" with the enemy is prohibited by a declaration of war, and that such intercourse is illegal except with the licence of the Crown.

It was however decided in several cases of which only Bell v. Reid (1813), 1 M. & S. 726, need here be mentioned, that a natural born British subject domiciled in a foreign and friendly country may lawfully exercise the privileges of a subject of the country in which he is domiciled, to trade with a country at war with Great Britain.

In that case, a British born subject, domiciled in America, effected a policy of insurance on ship, freight, and goods at and from Virginia to any Baltic Ports.

The ship was captured on her way to Elsineur in Denmark, which was then at war with Great Britain, but in amity with America.

In delivering judgment, Lord Ellenborough said, "Assuming then on general principles of reason, and public convenience, that all intercourse with ports of an enemy is illegal, for what purpose soever it be, the question here is whether such resort in the case of a natural born subject domiciled in a neutral country, stands upon a different principle," and after alluding to cases previously decided, he added, "Contemplating these uniform authorities according to which a trading with an enemy by a British subject domiciled abroad, has been regarded as innocent, and entitled to protection from condemnation, i t is impossible for us upon the occasion to hold that these cases

were not well decided."

Willison v. Patterson (1817), 7 Taunt. 439, was a case of a kind altogether different from those previously mentioned. In that case the defendant, a British subject resident in England, had in his hands certain goods of one Nuchelen, an alien enemy. The latter drew a bill on the defendant, payable to his own order, and endorsed the bill to the plaintiff. The latter sued on the bill after the war was over.

The Court held that he could not recover, and Gibbs, C.J. said, "By the general rule, I cannot help thinking that an alien enemy resident in France has no right to draw on this country for a fund due to him here; for that, I take to be the very sort of communication which the policy of the law meant to prevent."

The American case of "The Rapid," (1814), 8 Cranch, 155, appears to have gone further than any early English case on the subject of trading with the enemy. In that case the charterer had purchased before the declaration of war, and all that was done was to visit a small island which was enemy territory, for the purpose of bringing away the charterer's property, which had been bought before the war and deposited there. The cargo of "The Rapid" was nevertheless confiscated.

It was argued in that case that any commercial intercourse is trading with the enemy, for the reason that if such intercourse were permitted it would facilitate the means of carrying on traitorous correspondence.

Johnson, J., in delivering the judgment of the Court said, "Was this a trading in the eye of the prize law such as will subject the property to capture? The force of the argument on this point depends on the terms made use of." "The object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has therefore no necessary connection

with the offence. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed; and by substituting this definition for that of 'trading with the enemy' an answer is given to this argument."

And Mr. Justice Story in the case in the Court below (1 Gallis 295), expressed the opinion, "that not only all trading in its ordinary acceptation, but all communication and intercourse with the enemy were prohibited."

In the case of "The Julia" (1814), 8 Cranch 181, Story J., in delivering the judgment of the Court adopted the opinion of the Circuit Court of Massachussets in which the law is stated generally, as follows:- "I laid it down as a fundamental proposition, that, strictly speaking, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware, that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse," and after quoting from text writers he added, "But independent of all authority, it would seem a necessary result of war, to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war, every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of the enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited."

"The ground upon which trading with the enemy is prohibited, is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the

State. The principle is extracted from a more enlarged policy, which looks to the general interests of the nation, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice."

In Grimewold v. Waddington (1819), 16 Johns 447, Chancellor Kent said that no intercourse was allowed with an enemy "on the obvious dictates of reason, as well as the plainest deductions of public policy. If individuals could carry on a friendly intercourse while the Government was at war, the act of government and the acts of individuals would be contradictory," and at page 483, "there is no authority in law for any kind of private, voluntary unlicensed business, communications or intercourse with an enemy. It is all noxious, and in a greater or less degree it is all criminal. There is wisdom and policy, patriotism and safety; in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and prolong the calamities of war."

14. ASSISTING REBELLIOUS SUBJECTS OF FRIENDLY FOREIGN POWERS

It is contrary to public policy for a British subject to do anyact or enter into any transaction which has for its object the rendering of assistance to rebellious subjects of a Power at peace with the British Government, who are endeavouring to cast off their allegiance and establish their independence.

The question was raised but not decided in the case of Jones v. Garcia del Rio (1823) Turn. & R. 297.

The claim was for the return of certain moneys paid on Scrip of a loan issued by the defendant on behalf of the Government of Peru, which was then a Government not acknowledged by the Government of Great Britain, and for an injunction to restrain the defendant's Bankers from parting with moneys held by them on his behalf.

"I want to know," said Lord Chancellor Eldon, "whether, supposing Peru to be so far absolved from the Government of Spain that it can never be attached to it again, the King's Courts will interfere at all while the Peruvian Government is not acknowledged by the Country. What right have I, as the King's Judge, to interfere upon the subject of a contract with a country which he does not recognise?

Another question is, whether, if individuals choose to advance their money for the purpose of assisting a colony opposed to its parent state, that parent state being at peace with this country, the Courts of Justice here will assist them to recover their money and will not leave them to get it as they can?"

The question remained unanswered, the case being decided on other grounds, "without again adverting to the question of public policy."

In the case of De Wutz v. Hendricks, (1824), 2 Bing. 314, however, it was decided that the raising of a loan in England for the purpose of assisting the Greeks, then in arms against the Turkish Government to whom they were subject, was illegal.

Best, C.J., gave his reasons as follows:-

"It is contrary to the law of nations, which in all cases of international law is adopted into the municipal code of every civilized country for persons in England to enter into engagements to raise money to support the subjects of a Government at amity with our own in hostili-

ties against their Government, and no right of action can arise out of such a transaction."

And in Thompson v. Powles (1828) 2 Sim. 194, the Court held that a transaction arising out of a loan to a Government of Guatemala, a revolted Colony of Spain, not recognised by the British Government, could not be recognised by the Court.

The Colony mentioned had issued bonds at six per cent as securities for a loan, and the defendant acting in collusion with another, by falsely representing that he had bought some of them induced the plaintiff to become a purchaser.

The Court held that the defendant would have been answerable to the plaintiff for the loss sustained upon his purchase, but that as the original contract was made with a Government not recognised by Great Britain, the Court could not relieve him.

Taylor v. Barclay (1828), 2 Sim. 213, was action on a transaction arising out of the same loan.

The defendant demurred to a Bill of Discovery, and in delivering judgment, Sir L. Chadwell, Q.C., said, "It appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King. Now I apprehend that what Lord Elden proceeded upon was a general doctrine of policy, that is, that he would not allow a person to sue, at least as plaintiff, in the Court of Chancery, who founded his case upon the representation that there was that existing as an independent Government, acknowledged by this country, which in fact, was not so. It is impossible for me to suppose that any other than some such general principle as that influenced him when I observe what his Lordship did in the case of Bire v. Thompson." (Not reported but the facts were shortly stated by the learned Vice-Chancellor from the brief he held in that case).

And at the end of his judgment he said, "My opinion is, without making any new law, which I entirely disclaim, but merely following the precedents which Lord Eldon laid down as bottomed on sound policy, that I must allow the demurrer."

15. AGREEMENTS TO UNDULY INFLUENCE A TESTATOR.

It is well known law that a will which a testator has been induced to make by means of what is known as "undue influence" may be set aside. So it has been held that an agreement to unduly influence a testator is contrary to public policy. This was decided in the case of Debenham v. Ox (1749), 1 Ves. Sen. 276.

In that case a bond was given by the plaintiff to the defendant's wife in consideration that she would make use of the influence and power she had over Thomas Yerle, the plaintiff's grandfather, an old man of eighty-two, to induce him to dispose of his whole estate for the plaintiff's benefit, and give security that he would not alter the will he made in the plaintiff's favour. It was sought to have this bond delivered up to be cancelled.

Lord Chancellor Hardwicke said in delivering judgment, "This is new in specie; there being no case of a bond by way of reward for influence over another person's estate for the benefit of the obliger. As to the bond itself, it is admitted to be given without consideration, and that which is insisted on would be going further than the policy of the law would admit."

When dealing with the question of costs he said, "But

as to costs, the defendant ought to pay them. Indeed there is hardly a case of a bond set aside for fraud or improper consideration, but it ought to be with costs from the bad ingredient: but this differs: the plaintiff himself being particeps criminis, so that if it had not been for the ingredient of public policy he could hardly have come here for relief. In all these cases the Court sets them aside not for the party's sake but for the benefit of the public; as a marriage brocage bond; or a bond by the husband to return part of the wife's portion to her father without the privity of the husband's relations; or on the other hand a contract to give back part of the estate. In all this, the husband has done wrong, and is particeps criminis: yet because the objection that infects the bond arises from public considerations, the Court will relieve."

16. AGREEMENT BY FATHER OF BASTARD CHILD WITH PARISH OFFICERS

In the case of Cole v. Gower (1803), 6 East. 110, the facts were as follows:-

The Statute 6 G. 2 C. 31, authorises Parish Officers to take security from the putative father of a bastard child to indemnify the parish. Gower, who was charged with being the father of a bastard child, compromised with the parish authorities for a sum of £20 to be secured by his giving three joint promissory notes by himself and one Piggott, one at two months for £6; the second at 12 months for £7; and the third at 24 months for £7.

The parish officers were asked when the notes were given whether they expected payment of the notes in case the child died, and replied in the affirmative.

The child was born dead. The parish officers had only incurred expense to the extent of £3/14/-, and were offered £5 by the defendants. This was refused and an action brought on the first promissory note.

The Court held that the parish officers could not recover on the notes as the transaction was contracy to public policy.

The reasons were stated by Lord Ellenborough as follows. "I am of opinion that the plaintiffs are not entitled to recover beyond the sum paid into Court, whether considering the contract void upon principles of public policy, or considering it with relation to the individuals with whom it was made, as a contract for gain or loss by persons clothed with a public trust upon the subject matter of their trust, and giving them an interest in the mal-execution of it. It is a shocking consideration that by means of such a security as this the parish officers, who have a public duty imposed upon them to take care that the father shall make a proper provision for the maintenance of the child, acquire an interest that the child should live as short a time as possible: ----------considering the security as given to the parish officers only in their individual capacity, it is giving them a temptation to deal with negligences at least, in that most important trust - the care of children of tender age, which is committed to them. But if made to them in their representative capacity, and the parish were to receive the benefit of the money when recovered, which was the manifest intention of the parties, it is placing parish officers in a situation which the legislature did not mean to do and which public policy forbids."

Le Blanc, J., agreed and stated that he based his judgment upon the ground of public policy.

17. INSURANCE OF SEAMEN'S WAGES

By the common law of England Seamen are, on grounds of public policy, debarred from insuring their wages. The reason of this is that the existence of such an insurance in time of danger might induce seamen not to do their utmost to save the ship and freight.

The common law rule was that "freight is the mother of wages," i.e., that the wages were dependent on the freight being earned by the ship, so that when a ship was lost in the course of a voyage the seamen lost the wages they had already earned.

This "head" of public policy is no longer of more than historical importance, for, since The Merchant Shipping Act 1894, seamen are entitled to be paid the wages earned to the time the ship is lost. This does away with the reason for not allowing seamen to insure their wages, and the principle 'cessante ratione cessat ipsa lex' probably applies. Moreover, in England by the Marine Insurance Act 1906, and in the Commonwealth of Australia by the Marine Insurance Act 1909, seamen are now allowed to insure their wages.

There is a great dearth of early authority on the common law rule owing to the fact that prior to 1798 the reports of the Admiralty Court were not published.

The principle that "freight is the mother of wages" is expressed by Lord Stowell in 'The Neptune' (1824) 1 Hagg. Ad. 227, as follows -- "The payment of wages is made by the policy of maritime States to depend on the successful termination of the voyage, entitling the owner to his freight." And later on in his judgment he said -- "Be it remembered that by the general and just policy of all Maritime States the total loss of the ship, occasioned solely by the Act of God visiting the deep with storms and tempests, brings with it the loss of all wages (except advances) al-

though the general rule is, that the Act of God prejudices no man; and although the mariner has contributed nothing to the mischance but exerted his utmost endeavours to prevent it; and although he is prohibited by law from protecting himself from loss by insurance as his owner is empowered to do for his."

The case under consideration was whether, where a part of a vessel had been saved by the exertions of the crew they were entitled to payment of their wages, so far as the wreckage and fragments would form a fund, although no freight had been earned.

Lord Stowell said that the dearth of domestic authority "drives us necessarily to the consideration of what is the most reasonable rule or principle and the most useful and beneficial in practice." And after mentioning the prevailing practice in other maritime states he added -- "Taking as far as may be proper the benefit of that collateral authority, I am of opinion, that private justice and public utility range themselves decisively on that side of the question which sustains the claim of the mariner."

It was suggested in argument that the mariners, if entitled to anything at all, were entitled to payment for salvage instead of for wages, but Lord Stowell decided against this. "On all views" he said, "of the relative justice between the parties and of public policy and convenience, there can be no doubt that the rule of wages has the advantage upon the clearest grounds."

In the case of The Lady Durham (1835) 3 Hagg. Ad. 196, Sir John Nicholl also stated the law as to the inability of a seaman to insure his wages as follows:-- "The policy of the law requires that a seaman should not insure his wages, he must take the risk of the ship and stand by her at every hazard."

The question in that case was whether a seaman could claim his wages when the ship and cargo had been insured by

the owner and lost. And Sir John Nicholl added, -- "An insurance of the ship does not benefit the seaman; for if the seaman could look to the insurance of the ship as a security for his wages, it would be a substitution for his own private insurance and would defeat the policy of the law. A seaman generally knows whether the ship be insured or not, and if such insurance could enure to his advantage, it might make him indifferent and moderate -- if not extinguish -- all exertion on his part."

These cases sufficiently indicate the application of the doctrine of public policy to the question of the insurance of seamen's wages. As has already been stated the "public policy" of the present day demands that seamen be allowed to insure their wages like any other workmen, and this has been given effect to through the medium of the legislature.

18. MONEY PAID PURSUANT TO AN ILLEGAL CONTRACT

It was laid down by Wilmot, C.J., in the case of Collins v. Blantern (1767) 2 Wils. 341, that, "Whoever is a party to an unlawful contract, if he hath once paid money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again; you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back."

The maxim in such a case is in pari delicto potior est conditio defendentis, and the rule is based on public policy.

The decisions in the early cases indicate, however,

that Judges were not always of the same opinion as to the policy of allowing a man who has obtained money by means of an illegal contract to keep it, and there are a number of decisions to the contrary. By some Judges the opinion was held that it is better policy in such a case to compel a refund of the money and to place the parties in the same position as if no such contract had been made.

Thus, in the early case of Wilkinson v. Kitchin (1696) 1 Lord Raymond, 89. A man accused of a crime gave his Solicitor £70 to expend in bribes for the purpose of securing his discharge. The trial, however, was not proceeded with and he brought an action to recover the money. It was held that he was entitled to a verdict for the amount although the money had actually been spent in bribes.

So also, In Smith v. Bruning (1700) 2 Vern. 392, the Court decreed a gratuity of Fifty Guineas paid under a marriage brocage contract to be refunded.

On the other hand, in Smith v. Bromley (1760) 2 Doug. 696 n., Lord Mansfield held that money paid for the purpose of defrauding creditors could not be recovered back, and laid it down that, "If the act is in itself immoral, or a violation of the laws of public policy, then the party paying shall not have this action; for where both parties are equally criminal against the general laws the rule is potior est conditio defendentis."

And again in the case of Clarke v. Shee (1774), 1 Cowp. 197, the same learned Judge said, "There are two sorts of prohibitions enacted by positive law, in respect of contracts. First, to protect weak or necessitous men from being over-reached, defrauded or oppressed. There the rule, in pari delicto potior est conditio defendentis does not hold; and an action will lie; because the defendant imposes on the plaintiff it is not par delictum. The next sort of prohibition is founded upon general reasons of policy and public expediences. There both parties

offending are equally guilty; par est delictum, et potior est conditio defendentis."

In a later case, Neville v. Wilkinson (1782) 1 Bro. C.C. 543, where the cases are discussed, Lord Chancellor Thurlow is reported as having "declared his opinion, that in all cases where money was paid for an unlawful purpose, the party, though particeps criminis, might recover at law; and the reason was that, if Courts of Justice mean to prevent the perpetrations of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before."

And in Lacaussade v. White (1798), 7 T.R. 535, it was held that money paid over to the other party to an illegal wager, after the event, could be recovered back, the Court holding, "that it was more consonant to the principles of sound policy and justice that wherever money has been paid over on an illegal consideration, it may be recovered back by the party who has thus improperly paid it, than by denying the remedy to give effect to the illegal contract."

These conflicting decisions led Lord Mansfield, a few years later, to express the opinion that, "The law is got into sad confusion by contradictory decisions respecting illegal contracts."

There may be something in favour of the view expressed in Lacaussade v. White, but in later cases the opposite doctrine found favour and eventually became firmly established, and dispelled the confusion caused by the conflicting earlier decisions. Lacaussade v. White was apparently not followed in any subsequent case.

In a similar case, Howson v. Hancock (1800), 8 T.R. 576, the contrary was held, that where money deposited on an illegal wager has been paid over to the winner by the consent of the loser, the latter cannot recover it back.

Lawrence, J., there observed that, "In the case of Smith v. Bromley, Lord Mansfield said that where both parties are equally criminal against the general laws of public policy, the rule is potior est conditio defendentis;" and he adopted this view of the law.

In Vandyck v. Hewitt (1800) 1 East, 96, it was held that money paid for the purpose of effecting an illegal insurance could not be recovered back.

Lord Kenyon, C.J., there said, "The rule has been settled at all times, that where both parties are in pari delicto, which is the case here, potior est conditio possidentis."

And Le Blanc, J., pointed out that, "The ground of the determination in Lacaussade v. White has been since very much canvassed in the later case of Howson v. Hancock, where it was considered that money deposited upon an illegal wager, and paid over to the winner, could not be recovered back from him."

Since these decisions the rule has been firmly established, and does not appear to have since been questioned. There are, however, exceptions to the rule.

The first is that where the contract is executory, or has not been wholly carried out, and there is locus poenitentiae. In such a case either party to the contract may repent of his illegal bargain and rescind it. The Court will then aid him in recovering any money he has paid in pursuance of it.

This rule was indicated by Buller, J., in the case of Lowry v. Bourdieu (1780) 2 Doug. 468, where it was held that a premium paid on an illegal policy of insurance could not be recovered back after the ship had arrived safely.

Buller, J., said in that case. "There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind the contract

you must do it while the contract continues executory."

In Cotton v. Thurland (1793) 5 Term. Rep. 405, it was held that money placed in the hands of a stakeholder to abide the result of a fight could be recovered back even after the fight, if it had not been paid over.

So also in Aubert v. Walsh (1810), 3 Taunt. 277, it was held that where the illegal object had not been carried out, money deposited upon an illegal wager could be recovered back.

The case of Cotton v. Thurland was followed in Smith v. Bickmore (1812. 4 Taunt. 474. The plaintiff in that case deposited a sum of money in the hands of a stakeholder to abide the result of a boxing match between himself and another. After the fight and before the money was paid over he demanded it back. It was held that he was entitled to recover it.

Mansfield. C.J.. remarked that "the case seemed made for the express purpose of confirming Cotton v. Thurland; and he confirmed it accordingly.

The law, as laid down in Cotton v. Thurland and Smith v. Bickmore was followed in Hastelow v. Jackson (1828) 8 B. & C. 221, where, after a fight, the money had been demanded from the stakeholder but was nevertheless paid over. Bayley, J., there said, that the law must be considered settled by the abovementioned cases.

And in the case of Bone v. Eckless, 29 L.J.Ex. at 440, Bramwell, B., said, "Clearly an authority to pay over money for an illegal purpose may be revoked before the money is paid over. In Hastelow v. Jackson that proposition of law was laid down, although there the plaintiff had to prove, as part of his case. that he had entered into an illegal contract: he did not however seek to recover upon it..... The law is in favour of undoing or defeating an illegal purpose, and is therefore in favour of the recovery of the money before the illegal purpose is fulfilled, not afterwards."

Another exception to the general rule that money paid under an illegal contract cannot be recovered back is to be found in cases in which the parties are not in pari delicto.

It has been held that parties are not in pari delicto where the illegality of the contract is created by a Statute, the object of which is to protect one class against another.

So in Jacques v. Golightly, (1776) 2 W. Black, 1073, it was held that money paid as a premium for insuring lottery tickets could be recovered back.

This decision was followed in the case of Browning v. Morris (1778) 2 Cowp. 790, where Lord Mansfield pointed out that "the Statute is made to protect the ignorant and deluded multitude who, in hopes of gain and prizes and not conversant in calculation, are drawn in by the office keepers!"

He laid down the law as follows:- "The rule is 'in pari delicto potior est conditio defendentis,' and there are several other maxims of the same kind. Where the contract is executed and the money paid in pari delicto, this rule certainly holds, and the party who has paid it cannot recover it back. For instance, in bribery, if a man pays away a sum of money by way of a bribe he cannot recover it in an action: because both plaintiff and defendant are equally criminal. But where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men, the one from their situation and condition being liable to be oppressed or imposed upon by the other, there the parties are not in pair delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

The same law was applied by Lord Lough borough in the case of Jacques v. Withy (1788) 1 H. Bl. 65, and the judgments in these cases were quoted with approval, and the

principle adopted by Lord Ellenborough in the case of Williams v. Hedley (1807) 8 East. 378.

And in any other case in which the party who has received the money under an illegal contract is more blameworthy than the other, the Courts give relief, e.g. if there is anything in the nature of oppression on one side.

A case of this description is Smith v. Cuff (1817) 6 M. & S. 160, in which the defendant, being a creditor of the plaintiff, entered into a composition deed with the other creditors to receive ten shillings (10/-) in the pound, under an agreement with the plaintiff that the latter would give the defendant promissory notes for the remainder of the debt. The notes were given and negotiated, and the holder of one enforced payment from the plaintiff in an action.

It was held that the plaintiff could recover back the amount from the defendant. Lord Ellenborough said, "This is not a case of pari delicto; it is oppression on one side and submission on the other; it never can be predicted as par delictum, when one holds the rod and the other bows to it. There was an inequality of situation between these parties; one was creditor the other debtor, who was driven to comply with the terms which the former chose to enforce."

In Osborne v. Williams (1811) 18 Ves. 379, the packet vessel "Diana" in the service of the Post Office was sold by a father tohis son upon the Post Office officials promising that the son should then have the command of the vessel in place of the Father. The sale was effected and the son received the post. The son then agreed to accept a salary of £200 as Commander of the Packet. The Court held that the son was entitled to an account, as the agreement was substantially the act of the father, and the parties were therefore not in pari delicto.

Relief was also given to "the most excuseable of the two," in the case of Reynell v. Sprye, 1 De G. M. & G. 656.

The parties in that case had entered into an agreement

which secured of maintenance.

Knight Bruce, L.J., stated his reason for giving judgment in the plaintiff's favour as follows:-

"It is obviously true that Sir Thomas Reynell participated in the transaction which I have just described and characterised, and if he and Captain Sorye had been, to use the old legal phrase, in pari delicto, and public policy ought not to be considered as interested in favour of allowing one to sue the other for relief against the contract, there might possibly be ground for contending that Sir Thomas Reynell's suit ought to fail. But where the parties to a contract against public policy, or illegal, are not in pari delicto, (and they are not always so), and where public policy is considered as advanced by allowing either or at least the most excuseable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities of which Osborne v. Williams, 18 Ves. 379, is one."

19. DISQUALIFICATION OF JUDGES ON GROUND OF INTEREST

It is a maxim of English Law that "no man shall be judge in his own cause" and this principle is as old almost as the law itself.

There is very high authority for saying that the principle is founded on considerations of public policy. Indeed it is hard to conceive any other ground upon which it may be founded.

In modern English law the principle has been pushed to great lengths; from the Lord Chancellor to the humble

Justice of the Peace, no one with any pecuniary interest in a cause is qualified to take part in the trial of it. If he does the decision may be set aside. Such a decision is not void but only voidable, and remains good until it is set aside.

No doubt in the great majority of cases neither Judge nor justice would be influenced, even unconsciously, by any pecuniary interest in the case before the Court. It is not, however, the probability, but the possibility of, or tendency towards any such influence, and consequent possible injustice to litigants that is the reason for the disqualification.

The opinion was once expressed by Holt, C.J., that even an act of Parliament could not abrogate this rule of the common law.

In the City of London v. Wood (1702) 12 Mod. 669 at p. 687, that learned Judge expressed himself as follows: "What my Lord Coke says in Bonham's case is far from any extravagancy for it is a very reasonable and true saying that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party, and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under and restore him to a state of nature; but it cannot make one who lives under a Government Judge and party."

The same view is expressed in Day v. Savadge (1614) Hob. 85, 87, where the following passage occurs; "even an Act of Parliament itself, made against natural equity, as to make a man a Judge in his own cause, is void in itself, for jura naturae sunt immutabilia, and they are leges legum."

Decisions against Judges sitting in cases in which they have an interest are found at a very early date.

In the Earl of Darby's case, (1615), 12 Co. Rep. 114, it was held, "that the Chamberlain of Chester being sole Judge of Equity cannot decree anything wherein himself is a party, for he cannot be a Judge in propria causa, but in such a case, where he is a party, the suit shall be heard in the Chancery coram domine Rege."

In an anonymous case (1699) 1 Salk 396, it is stated "per Holt, C.J., the Mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the Charter was sole Judge of the Court."

In Great Charte v. Kennington (1743) 2 Strange 1172, two Justices of the Peace made an order for the removal of a pauper from the parish in which one of the Justices was an inhabitant. This order was set aside, the Court holding that, though it was the practice for such Justices to sit in these cases, the practice could not overturn so fundamental a rule of justice as that a party interested could not be a Judge. And as to the case of corporations, it was said that it might be allowed to prevent a failure of justice, if there were no other justices.

In The King v. Yarpole (1790) 4 T.R. 71, two Justices removed a pauper from Leominster to Yarpole, and an appeal was made to the Sessions. At the sessions the order was confirmed by eight Magistrates to seven, but of the majority three were rated at Leominster.

The Court quashed the order of the Sessions on the ground that the three Magistrates were interested.

If however, the parties know that a Justice or Magistrate is interested and make no objection at the time they cannot afterwards object.

Thus in The Queen v. The Cheltenham Commissioners

(1841) 1 Q.B. 467, 475, Lord Denman, C.J. said, "Nor do I say that there may not be cases in which a Magistrate who is interested may sit; for, if all parties knew that he is interested, and make no objection, at any rate if there be anything like a consent, or if the Magistrate take no part, or if he take a part upon being desired to do so by all parties, in all these cases it would be monstrous to say that the presence of the Magistrate vitiated the proceedings."

It was decided in The Queen v. The Justices of Hertfor-shore (1845) 6 Q.B. 753, that if one of the Magistrates hearing a case is interested in the result the Court is not properly constituted, even though, without his vote, there is a majority in favour of the decision, and although he does not actually take part in the decision but only joins in discussing the matter with the other Magistrates.

In his judgment in that case, Lord Denman, C.J., said, "It is contended that as the majority, without reckoning his vote, was in favor of the confirmation, the order is not vitiated. But after making every possible deduction from the strength of my opinion.....still in my judgment a decision is vitiated by any one interested person taking part in it..... I think that the prima facie case is not answered by the fact that Mr. Fordham left the Bench before the actual decision took place; for it is quite consistent with this, that he may have joined in the discussion so far as to affect the result."

Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759, is the leading case on the question of disqualification of Judges on the ground of interest.

In that case a public Company filed a bill in Equity against a land owner, in a matter which largely involved the interests of the Company. The case was heard before the Vice-Chancellor, who granted the relief sought by the

Company. The decision of the Vice-Chancellor was, on appeal, affirmed by the Chancellor, who had an interest as a shareholder in the Company to the extent of several thousand pounds, a fact which was unknown to the defendant in the suit.

It was held that the Chancellor was, on the ground of interest, disqualified from sitting as a Judge in the cause, and that his decree was voidable and must be reversed.

The opinion of the Judges was taken, and expressed by Parke, B., to the effect that the order of the Vice-Chancellor was neither void nor voidable, he not being a deputy of the Chancellor, but that the order of the Chancellor was voidable on account of interest, but not void.

The House accepted the opinion of the Judges and Lord Campbell said, "No one can suppose that Lord Cottenham could be in the remotest degree influenced by the interest that he had in this concern; but, my Lords, it is of the highest importance that the maxim that no man is to be a Judge in his own cause should be held sacred. And that it is not to be confined to a case in which he is a party, but applies to a cause in which he has an interest. Since I have had the honor to be Chief Justice of the Court of Queens Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals, when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such influence".

In all of the cases mentioned, and in many others, the Court merely accepted and applied the maxim "Nemo in propria

causa judex esse debet," and did not indicate the ground upon which it is based; but in Egerton v. Brownlow 4 H.L.Cas. at 240, Lord St. Leonards expressed the decided opinion that the rule is based on grounds of public policy. He said, "And your Lordships have shown by your decision in a case that was decided lately by this House (Dimes v. The Grand Junction Canal Coy., 3 H. L. Cas. 759), that a Judge with the smallest interest was incapable of trying a cause, not because anybody supposed that he would be influenced, (nobody supposed so), but because the principle is, that a man shall not have an interest in a matter which he is to decide. You must take the general principle. But it is said by the learned Judges, "Yes that is a principle of law." No doubt it is, but upon what was the principle founded? Does any man doubt that it was founded upon public policy?"

This view has also been accepted in the American Courts; and Taft, C. J., in the City of Detroit v. Detroit Railway Company 54 Fed. Rep. 1, said, "Men may be unconsciously influenced by personal motives and public policy will not trust any Judge, however great and pure, when such motives are present. No one claims that in many cases the Judge is not able to discard utterly from his consideration of the merits of the case, every motive of pecuniary interest, but the policy of the law forbids that litigants should be exposed to the possibility of bias arising therefrom."

20. PROTECTION OF JUDGES AND OTHERS IN LEGAL PROCEEDINGS

Judges and others, acting in a judicial proceeding, are protected from liability for acts done or words spoken during the discharge of their functions, which would otherwise be actionable.

To allow such actions to be maintained against Judges would tend to prevent capable persons from accepting judicial positions, and would also subject them to vexatious actions at the caprice of every disappointed suitor; "and let in upon the judicial authority a wide, wasting and harassing persecution."

It is essential in the interests of the public that Judges should be in a position to fearlessly administer justice, and to leave them subject to the dread of an action subsequent to every trial, and the consequent worry and expense, would tend to rob them of that independence without which no Judge is in a position to give his best services to the State.

The earliest reported case on this subject appears to be Bushell's case (1674) 1 Mod. 118, in which an action for false imprisonment was brought by one Bushell against Lord Mayor Starling and Recorder Howell. The imprisonment complained of had been previously expressly declared to be illegal by the Court of Common Pleas, upon discussing the case on a writ of habeas corpus (Vaughan, 135).

On hearing a motion on behalf of the defendant Hale, C.J. said, "I speak my mind plainly that an action will not lie.....and in the case of an erroneous judgment given by a Judge, which is reversed by a writ of error, shall the party have an action of false imprisonment against the Judge? No, nor against the officer neither."

The same case was before the Court later, (Hamond v. Howell, 2 Mod. 218), when the Court were of opinion "that the bringing of this action was a greater offence than the fining of the plaintiff and committing him for non-payment; and it was a bold attempt both against the Government and justice in general."

In Groenvelt v. Burwell (1707) 1 Salk 396, the college of Physicians of London, being empowered to inspect govern and censure all physicians practising in London, fined Dr. Groenvelt £20 and sentenced him to twelve month's imprisonment, for administering insalubres pillulas and noxia medicamenta.

The doctor was taken in execution upon the sentence, and brought trespass against the officers and censors.

Holt, C.J. held that the censors had a judicial power, and that they were Judges of a Court of Record, because they could fine and imprison, and said that though the pills and medicines were really salubres pillulas and bona medicamenta, yet no action lies against the censors because it is a wrong judgment, in a matter within the limits of their jurisdiction; and a Judge is not answerable either to the King or the party for the mistakes and errors of his judgment in a matter of which he has jurisdiction; "it would expose the justice of the nation and no man would execute the office upon peril of being arraigned by action or indictment for every judgment he pronounces."

In Miller v. Seare (1777) 2 W. Bl. 1141, De Grey, C.J., made a distinction between Judges in superior and inferior Courts. He said, "It is agreed the Judges in the King's Superior Courts are not liable to answer personally for their error in judgment; and this not so much for the sake of the Judges as of the suitors themselves ..... The protection in regard to the Superior Courts is absolute and universal; with respect to the inferior, it is only while they act within their jurisdiction."

In The King v. Alwon (1765) Wilm. 243, Wilmot, C.J., laid it down that a Judge is protected in respect of acts done judicially out of Court, as well as those done in Court. He said, "I can make no difference between a Judge acting in Court or judicially out of Court, but that he has not the same plentitude of power; but still he acts under the patent which made him a Judge. When he issues the warrant as Conservator of the Peace, the Court punishes the disobedience; why? Because it is the act of a Judge in his judicial capacity. The libel is on his conduct in his official capacity as Judge, for what he does in his chamber, imputing to the King a breach of that oath which he took at his coronation to administer Justice to his people. Striking a Judge in the Street would not be a contempt; but 'tis otherwise if he is in the exercise of his duty. 'Tis for the sake of the public.'"

This dictum was quoted with approval in Taaffe v. Downes, a case heard in the year 1813 in the Court of Common Pleas in Ireland (reported 3 Moore 36 Note a). In that case trespass was brought against the Lord Chief Justice Downes of the Court of Kings Bench in Ireland, for assault and false imprisonment.

The Lord Chief Justice had in Chambers granted a warrant to arrest the plaintiff for a breach of the peace. It was held by three of the four learned Judges who heard the case, that the protection of the Judge extended to acts done in his judicial capacity out of Court, as well as those done on the Bench.

Mayne, J., said, "The King does justice through his Judges - they are his delegates; and they are accountable to him alone for the pure and honest performance of their trust; and they and the King are, towards the people in dispensing the law, as it were, one individual authority. There must be some place and part in the stage of proceedings, some point in the administration of the law, where

unqualified confidence is to be reposed and acknowledged; and in the declaring of justice to the nation, that place rests with the King's Judges..... It is a solecism in the law I say, that the plaintiff's case is against the independence of the Judges. The principle contended for would annihilate that independence. Judges are to be equally independent of the Crown and the people. The honest, good and constitutional mind will always wish to find them entirely free and unbiased; and will rather entrust them with a high and unquestionable authority, and if guilty leave their punishment to Parliament alone, than hazard their fortitude and independence by the alarm and questions, pains and expense, of as many actions as there may be acts of duty encountering the bad passions and prejudices of mankind.....If you once break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting and harassing persecution, and establish its weakness in a degrading responsibility."

Fox, J., said in the same case, "The principle of law of exemption from being sued for matters done by Judges in their judicial capacity, is of the greatest importance. It is necessary to the free and impartial administration of justice, that the persons administering it should be uninfluenced by fear and unbiased by hope. Judges have not been invested with this privilege for their own protection merely; it is calculated <u>for the benefit of the people</u>; by ensuring to them a calm steady and impartial administration of justice."

These cases show clearly that the protection of Judges is given in the interests of the public, in other words, it is contrary to public policy to allow such actions to be maintained.

It was held however, in Houlden v. Smith (1850) 14 Q.B.

841, that a Judge of a Court of Record is answerable in an action when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends.

In that case a judgment summons was issued by order of the Judge of the Spilsby Court, calling upon the plaintiff to appear at the Spilsby Court and be examined as to his estate and effects. The plaintiff dwelt at Cambridge, out of the district assigned to the Spilsby Court, and, upon his non-appearance, the Judge, knowing the facts, but believing that he had authority, committed him for contempt.

Patterson, J., in the course of his judgment said, "Although it is clear that the Judge of a Court of Record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the Court wrongly done, not in pursuance of, though under colour of, a judgment of the Court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction."

Protection is also afforded to Counsel witnesses and parties, similar to that given to Judges, for words spoken during the course of any judicial proceeding in which they are concerned.

In the very early case of Cutler v. Dixon (1585) 4 Co. Rep. 14 b., in the King's Bench, it was held that no allegation in articles of peace exhibited to Justices is actionable, it being a proceeding in the course of justice "and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain for fear of infinite vexation."

In Brock v. Sir Henry Montague (1606) Cro.Jac. 90, an action was brought against the defendant, a barrister, for saying of the plaintiff during the conduct of a case, "He was arraigned and convicted of felony."

It was held that an action was not maintainable, "for

a counseller in law retained, hath a privilege to enforce anything which is informed him by his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false .....and although it be false he is excusable, being pertinent to the matter; but if he give in evidence anything not material to the issue, which is scandalous, he ought to aver it to be true, otherwise he is punishable; for it shall be intended as spoken maliciously and without cause, which is good ground for action."

In Boulton v. Clapham (1640), Jones W. 431, an action was brought against the defendant, for that during a Court proceeding he maliciously said in the hearing of the Justices and Officers of the Court, concerning the plaintiff's affidavit, "there is not a word true in that affidavit; and I will prove it by forty witnesses."

It was held that these words were not actionable; for that the words were spoken in answer to the affidavit, in defence of himself and in a legal judicial way.

Lord Mansfield held in the case of Astley v. Younge (1759) 2 Burr. 807, that for libellous words in an affidavit used in a Court in a defence, no action lies. The words complained of were, "Sir John Astley in his affidavit hath sworn falsely, and I have proved to the Court the contrary of what Sir John hath sworn; Sir John hath great estate, but I would not for his whole estate have sworn as he did."

Lord Mansfield laid it down as law, in The King v. Skinner (1772) Lofft. 55, that "neither party, witness, counsel, jury or judge, can be put to answer civilly or criminally for words spoken in office."

In that case a motion was brought to quash an indictment against one Skinner, a Justice of the Peace of the town of Poole, for scandalous words spoken by him in a

general session of the County, in which he said to the grand jury, "You have not done your duty; you have disobeyed my commands: you are a sedicus, scandalous, corrupt and perjured jury."

In Tretman v. Dunn (1815) 4 Camp. 211, an action was brought against the defendant for saying of the plaintiff, "He has been transported before and ought to be transported again. He has been robbing me of nine quartern loaves a week."

These words were spoken during the course of another action between the same parties.

Lord Ellenborough held, that if the defendant used the words in a judicial mode for the purpose of his defence, he was justified. On the contrary, if he spoke thereon ad invidiam and in a calumniatory manner, an action would lie though uttered in the room where the Court of Conscience was sitting.

The case of Hodgson v. Scarlett (1818) 1 B. & Ald. 232, was an action against a Barrister for words spoken by him as counsel in a cause. The words complained of were, "Some actions are founded in folly, some in knavery, some in both, some in the folly of the attorney, some in the knavery of the attorney, some in the folly and knavery of the parties themselves. Mr. Peter Hodgson was the attorney of the parties, drew the promissory note, fraudulently got Bowman to pay into his hands £150 for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney."

It was held that the words were not actionable.

Abbot, J., said in his judgment, "I am therefore of opinion that no action can be maintained unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable. It would be impossible that justice could be well administered,

if counsel were to be questioned for the too great strength of these expressions."

Holroyd, J., in the same case quoted with approval the following dictum of Lord C. B. Comyns. "I apprehend that a counsel is in the same situation and under the same protection as the party himself, with this exception, perhaps, that a party from his comparative ignorance of what is or is not relevant may be indulged in a greater latitude, and not be restricted within the same limits as counsel, whose superior knowledge of itself should be sufficient to restrain him within due bounds," and he added, "If however it be proved that they were not spoken bona fide, or express malice shown, then they may be actionable; at least our judgment in the present case does not decide that they would not be so."

21. PROTECTION OF PUBLIC OFFICERS.

Protection is afforded to public officers, on grounds of public policy, against actions for acts done in their official capacity.

No action will lie against a public agent for anything done by him in his public character or employment, although alleged to be a breach of such employment and constituting a personal liability.

The reason is that the liability to such actions would deter men from entering the public service, for men would be loth to accept any office of trust under such conditions, and the public service would thus suffer injury.

One of the more important of the earlier cases on this subject is MacBeath v. Haldimand (1786) 1 T.R. 172, in which a Governor of Quebec was sued for work and labour done and goods supplied for use at a fort called Michilimakinac, situated on Lake Huron, Canada. The Court held that the Governor incurred no personal liability, and the principle governing such cases was indicated in the judgment of Ashurst, J., who said, "Great inconvenience would result from considering a Governor or Commander as personally responsible in such cases as the present for no man would accept of any office of trust under Government upon such conditions."

The decision in this case was followed soon afterwards in the case of Unwin v. Wolseley, 1 T.R. 674.

In the later case of Gidley v. Lord Palmerston (1822) 3 B. & B. 275, the principle was more fully and clearly stated.

In that case an action was brought against Lord Palmerston as Paymaster-General, by the Executors of Christopher Holland deceased, to recover a retiring allowance granted to Holland who had been a clerk in the public service, and for which the money had been voted by Parliament.

Dallas, C.J., held that the action would not lie. He said, "It will be sufficient to advert to a class of cases too well known and established to require to be more particularly mentioned, and which in substance and result have established that an action will not lie against a public agent for anything done by him in his public character or employment, although alleged to be, in the particular instance, a breach of such employment and constituting a particular and personal liability."

After quoting from the judgments in MacBeath v. Haldimand and citing Unwin v. Wolseley, the learned Chief Justice proceeded, "I am aware that these cases are not in

their circumstances precisely similar to the present, and perhaps in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than I am now satisfied I ought to have done, but in their doctrine they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature would expose them to an infinite multiplicity of actions, that is, to actions at the instance of every person who might suppose himself aggrieved; and though it is to be presumed that actions improperly brought would fail, and it may be said that actions properly brought should succeed; yet the very liability to an unlimited multiplicity of suits, would, in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself."

22. PRIVILEGE FROM DISTRESS.

Upon public grounds somewhat similar to those on which the law with regard to contracts in restraint of trade is based, certain goods connected with or used in trade and commerce have been held not liable to be distrained for rent.

Reference has already been made to the cases of Read v. Burley (1597) Cro. Eliz. 596, in which yarn taken to a spinner to be spun was held not distrainable, for the reason that the trade of a Clothier is 'pro bono publico;' and Trassell. v. Morris (1617) Noy 19, in which, for the same reason, an oxhide brought to market could not be dis-

trained.

Willis, L.C.J., in the later case of Simpson v. Hartopp (1744), Willis 512, which is still the leading case on the subject, summarised the five sorts of things which were not distrainable at Common Law, as follows:-

1. Things annexed to the freehold.
2. Things delivered to a person exercising a public trade, to be carried, wrought, or worked up or managed in the way of his trade or employ.
3. Cocks or sheaves of corn.
4. Beasts of plough and instruments of husbandry.
5. The instruments of a man's trade or profession.

Referring to 2, he said, "Things sent to be delivered to a person exercising a trade, to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are."

And referring to 4, he said, "Beasts of the plough &c., were not distrainable in favour of husbandry, which is so great advantage to the nation, and likewise because a man should not be left quite destitute of getting a living for himself and his family."

He added that the same reasons hold in the case of the instruments of a man's trade or profession. But the two last are privileged only in case there is not distress enough besides: otherwise they may be distrained.

Dallas, C.J., in the case of Gilman v. Elton (1821) 3 Brod. & B. 75 at 79, pointed out that the Common Law rule giving a landlord the general right to distrain, was a rule to prevent a particular species of inconvenience, but that it was found that this rule, when universally enforced, created another kind of inconvenience, extensive in its

nature, which necessitated the introduction of certain exceptions. "In like manner therefore and on the same principle of public convenience a rule has been adopted in favour of trade and commerce."

This learned Judge, therefore, bases both the rule giving the landlord a general right to distrain, and also the exceptions to that rule, on "public convenience."

The question in the case was whether goods of the principal in the hands of a factor could be distrained by the landlord of the factor's premises, and the learned Judge asked, "But will it be gravely urged, that the commerce of London should be annihilated, and persons at a distance compelled to sell on the spot, or to travel to London, for the purpose of saving their goods from distress? Can this be consistent with public benefit or advantage?" and in answer to his own question he said, "It seems to me that all the decided cases are consistent with public advantage, and that it would be at once detrimental to the public and inconsistent with the cases, if we were to hold, that goods in the hands of a factor were liable to seizure in the manner contended for."

Bayley, B. in Adams v. Grave, 3 Tyr. 326, indicated the same principle in dealing with the question whether goods in the hand of an auctioneer, for the purposes of sale by the auctioneer are or are not privileged.

He said in his judgment in that case, "I am of opinion that they are privileged, and I think they are privileged because it is for the convenience of trade and the general commonwealth..... They are privileged because interest reipublicae that buyer and seller should be brought together; that a man should have an opportunity of going to some particular place to which goods might be brought for the purpose of sale."

There seems to be no room for doubt that public policy is the principle upon which the rule concerning these

exemptions is founded, and this is the opinion expressed by Blackburn, J., in the comparatively modern case of Lyons v. Elliott (1876) 1 Q.B. 210 at 214, where he says, "The ground of the privilege is public policy for the benefit of trade."

23. TENANT'S FIXTURES.

It would appear that the exceptions grafted, in favour of tenants, upon the old Common Law rule, that whatever is fixed to the freehold becomes part of it, are based upon public policy.

This is apparent from the judgment of Lord Chancellor Hardwicke in the case of Lawton v. Lawton (1743) 3 Atk.13.

The material question in that case was whether a fire engine set up for the benefit of a colliery by a tenant for life, should be considered as personal estate and go to his executor, or be regarded as fixed to the freehold and go to the remainderman.

In giving the judgment Lord Hardwicke said, "To be sure, in the old cases, they do go a great way upon the annexation to the freehold, and so long ago as Henry the Seventh's time, the Courts of law construed even a copper and furnaces to be part of the freehold.

Since that time the general ground the Courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the publick to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed

only by screws, and marble chimney pieces, is now allowed to be done.

Coppers and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire engines, and in brew houses especially, pipes must be laid through the walls and supported by the walls, and yet, notwithstanding this, as they are laid for the convenience of trade, the landlords will not be allowed to retain them."

Again he said, "It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and an heir at law, or tenant for life, and remainderman. But even in those cases it does admit the consideration of publick convenience for determining the question."

And again, "Which way does the reason of the thing weigh most, between a tenant for life and a remainderman and the personal representative of the tenant for life, or between an ancestor and his heir and the personal representative of his ancestor? Why no doubt in favour of the former, and comes near the cause of a common tenant, where the good of the publick is the material consideration which determines the Court to construe these things personal estate, and is like the case of emblements, which shall go to the executor, and not to the heir or remainderman, it being for the benefit of the Kingdom which is interested in the produce of corn and other grain, and will not suffer them to go to the heir ..... These reasons of publick benefit and convenience weigh greatly with me and are a principal ingredient in my present opinion."

24. JUSTIFICATION OF TORT.

It has already been pointed out, that the early Judges sometimes justified the commission of a tort where "it sounded for the public good," as making fortifications on another man's land in war time, or pulling down a house on fire for the safety of the neighbouring houses.

This principle was applied in the early part of last century in the case of Burdett v. Abbott (1811) 14 East,1.

The plaintiff, a member of the House of Commons, had been ordered by the House to be committed to the Tower for a breach of the privileges of the House, in printing a certain libellous and scandalous paper in Cobbett's Weekly Register. The speaker issued his warrant accordingly. The plaintiff locked himself in his house, and the defendant, with the assistance of armed soldiers, broke in through a window, arrested the plaintiff and lodged him in the Tower.

The trespass was held justified on the ground that it was in the interests of the public.

After referring to Cooke's case (Cro. Car 557) Lord Ellenborough said in his judgment, "Upon the authority therefore of that case I should say that it stands perfectly clear that an execution at the suit of an individual cannot be carried into effect by breaking open the outer door; and therefore it remains to be considered whether in this case the house was broken in the execution of process for the particular interest of an individual, or whether it was done for the public weal?" and later he added, "that the mode of executing the warrant in this case by breaking the house, after due notification and demand of admittance without effect, is justifiable upon the ground of its being an execution of a process for contempt, to which the personal privilege of the individual in respect to his door must give way to the public good."

25. EVIDENCE

It is contrary to public policy that evidence of certain matters should be given in the Courts, and on this ground evidence which would otherwise be admissible is excluded.

1. In Public prosecutions and informations for fraud against the revenue laws, no evidence is admissible for the purpose of revealing the channels through which the information, that led to the prosecution, has been obtained.

"It is perfectly right," said Eyre, C.J., in the trial of Thomas Hardy for High Treason (24 Hon. St. Tr. at 808), "that all opportunities should be given to discuss the truth of the evidence given against the prisoner, but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channels by means of which that detection is made, should not be unnecessarily disclosed. If it can be made appear, that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in this particular case."

And again in the same case (at 815), - "My apprehension is, that among those questions which are not permitted to be asked are allthose questions which tend to the discovery of the channels, by whom the disclosure was made to the Officers of Justices, that it is upon the general principle of the convenience of public justice not to be disclosed; that all persons in that situation are protected from discovery."

So also, it was decided by Pollock, C. B., in The

Attorney-General v. Briant (1846) 15 M. & W. 169, an information for a breach of the revenue laws, that a witness may not be asked whether he himself was the informer. It was contended by the Attorney-General that the rule was general and that it was founded on public policy; and that if the question tended to disclose the source of information on which the executive government had acted it could not be put. Counsel for the defence contended that the question was intended to test the credibility of the witness, and that although a witness might not be asked who the informer was, he might be asked if he himself were the informer.

Pollock, C. B., said, as to this point, "There is no authority either way: but the rule clearly established and acted on is this, that, in a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience. This is the ground on which the decision took place in Hardy's case, and in Watson's case; and we think the principle of the rule, applies to the case where a witness is asked if he himself is the informer, and therefore that the question could not be asked."

2. Facts may not be disclosed or documents given in evidence which may be prejudicial to the public service of the State.

Communications between State Officials in the discharge of their duties are on this ground not admissible.

In Anderson v. Hamilton (1816) 2 Brod. & Bing. 156 N., correspondence between the Governor of a dependency of the Crown and the Secretary of State was excluded.

Action was, in that case, brought by the plaintiff against the defendant, the Governor of Heligoland, for

false imprisonment, and counsel sought to give in evidence a certain letter, written by the defendant to the Secretary of State, concerning complaints made by the plaintiff against the defendant.

Lord Ellenborough held that the letter was not admissible, giving his reasons as follows:-

"It might be pregnant with a thousand facts of the utmost consequence respecting the state of the Government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we are in alliance."

In Wyatt v. Gore (1816) Holt N.P.C. 299, a communication made by the Lieutenant-Governor of Upper Canada to his Attorney-General concerning the conduct of the plaintiff (who was Surveyer-General for the Province), was held to be privileged.

Gibbs, C.J., said in his judgment, "The witness is not bound to answer; and in delicacy, he will not answer such questions, whether the conversations, in which reference was made to Mr. Wyatt's conduct as Surveyor-General, were on public or private business, they ought not to be disclosed. The Governor consults with a high legal officer on the state of his Colony; what passes between them is confidential; no office of this kind could be executed with safety, if conversations between the Governor of a distant Province and his Attorney-General, who is the only person on whom such a Governor can lean for advice, were suffered to be disclosed.

It was held in Cooke v. Maxwell (1817) 2 Stark 183, that directions which were given by the Governor of a British Colony to one acting under his instructions could not, on grounds of public policy, be given in evidence, but Bailey, J., held that evidence could be given of what was done under these instructions. He said, "The law will not work injustice, and if the document cannot, on

principles of public policy, be read in evidence, the effect will be the same as if it was not in existence, and you may prove, not the contents of the instrument, but what was done by the order of the defendant."

The principle illustrated by the cases above mentioned also applies to communications made by one Military Officer to another in the course of his duty. This was decided in the case of Home v. Bentink (1820) 2 Brod. & B. 130.

The Commander-in-Chief of the Army directed an assembly of commissioned Military Officers to hold an enquiry into the conduct of Home, a commissioned Officer in the Army, and Home sued the President of the enquiry for a libel stated to be contained in his report thereon.

It was held that the report was a privileged communication, and that it was properly rejected as evidence at the trial.

Dallas, C. J., in delivering judgment in the Exchequer Chamber said, "Now, before I examine the few instances alluded to as applying to cases of this description, let us see upon what ground and principle the present case rests. It is agreed that there are a number of cases of a particular description, in which, for reasons of state and policy, information is not permitted to be disclosed. To begin with the ordinary cases, and those of a common description in Courts of Justice. In these Courts, for reasons of public policy, persons are not to be asked the names of those from whom they receive information as to the frauds on the revenue. In all trials for high treason of late years the same course has been adopted; and if parties were willing to disclose the sources of their information, they would not be suffered to do it by the Judges. What is the ground upon which these cases stand, except it be the ground of danger to the public good,

which would result from disclosing the sources of such informations? It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed, and therefore, independently of the character of the Court, I should say on the broad rule of public policy and convenience, that these matters, secret in their natures and involving delicate enquiry and the names of persons, stand protected ---------- It seems, therefore, to us upon the broad principle of state policy and public convenience and upon the principle of all the cases cited, the Chief Justice of the Court of King's Bench was perfectly right in not suffering these minutes to be brought forward at the trial."

In Smith v. East India Company (1841) 1 Phillips 50, it was held that correspondence that passed between the Court of Directors of the East India Company and the Commissioner for the Affairs of India, in pursuance of the requisitions of 3 & 4 W. 4 C. 85, concerning a dispute which had arisen between the Company with respect to a commercial transaction with a third party, was privileged on the ground of public policy.

Lord Lyndhurst there said, "Now it is quite obvious that public policy requires, and looking to the Act of Parliament, it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Company, that it should be subject to no restraints or limitations; but it is also quite obvious, that if, at the suit of a particular individual, these communications should be subject to be produced in a Court of Justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded and reserved. I think, therefore, that these communications come within

that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated without infringement of the policy of the Act of Parliament, and without injury to the public interests."

So also State Secrets may not be disclosed in evidence.

Thus in R. v. Watson (1817) 2 Stark 116, the Court held that a Clerk in the Ordnance Department could not be asked whether a plan produced and shown to him was a correct plan of the Tower of London, on the ground "that it might be attended with public mischief to allow an Officer of the Tower to be examined as to the accuracy of such a plan."

3. Statements by parents to prove non-access, for the purpose of bastardising their children, are also excluded from evidence in cases where the direct issue is legitimacy.

"It is a rule," said Lord Mansfield in Goodright v. Moss (1777) Cowp. 591, "founded on decency, morality and policy, that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious."

This rule appears to have been definitely settled by the Court of King's Bench in the case of The King v. Reading (1734) Cas. T. Hard 79, where Lord Hardwicke, C.J., said, "It seems she may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which is usually carried on with such secrecy, that it will admit of no other evidence. But then, in the present case, it is gone further, for the wife is the only evidence to prove the absence and want of access of her husband, whereas this might be made to appear by other witnesses, and therefore the wife shall not be admitted to prove it,

since there is no necessity than can justify her being an evidence in this case. It must be of very dangerous consequence to lay it down in general, that a wife should be a sufficient sole evidence to bastardize her child, and to discharge her husband of the burthen of his maintenance."

This case was followed in Rex v. Rook (1752) 1 Wils. K. B. 340, where an order made upon the sole evidence of the wife, as to the nonaccess of her husband, was quashed.

In the case of The King v. The Inhabitants of Kea (1809) 11 East 132, where Justices had admitted evidence by the wife as to non-access of the husband, the order they made was quashed on appeal. Lord Ellenborough said, when this case was called on, "that to hold this evidence receivable would be in direct contradiction to The King v. Reading and other cases; which were not meant to be overruled in The King v. Guffe (8 East 193); the Court in that case intending that the wife had been examined only as to those facts which she might legally prove, and not to the non-access of the husband; the principle of public policy precluding her from being a witness to that fact."

Counsel who appeared for the support said, that if the Court considered that the rule stood on the broad ground of public policy, affecting the children born during the marriage as well as the parties themselves, they could not pretend to argue in support of the order. To this, the Court unanimously assented.

The reason of the rule appears from this case to be that the admission of such evidence affects, not only the parties themselves but the children born during the marriage. The rule applies to evidence by the husband as well as of the wife.

This was decided in the case of The King v. The Inhabi-

tants of Scurton (1836) 5 A. & E. 180. At the hearing of that case in the first instance the Justices allowed the husband to be asked in cross-examination, for the purpose of proving non-access, whether he did not at the time in question live one hundred miles from his wife, in cohabitation with her sister. In giving judgment on the appeal, Lord Denman, C.J., referred to Starkie on Evidence, and the cases of Goodright v. Moss and Rex v. Kea, and after pointing out that it is there laid down, "that parties shall not be permitted after marriage to say that they had no connection," added, "Then, it being clear and indisputable law that, for the purpose of proving non-access, neither husband nor wife can be a witness, the question is whether the circumstances of the present case bring it within that rule. The sessions have expressly said that they are satisfied with the proof of non-access if they were right in admitting Tickle's (the husband's) evidence; without which it was not sufficiently proved. They have, therefore, admitted the husband to prove what, by a rule of law, clear and undoubted and of obvious public utility, they could not receive as evidence from him."

4. A Judge cannot be compelled to disclose what took place before him in Court.

This appears from the case of Regina v. Gazard (1838) 8 C. & P. 595, where it was proposed to examine the Chairman of the Quarter Sessions as to what evidence was given before him.

Patterson, J., said, "It is a new point, but I should advise the Grand Jury not to examine him. He is the President of a Court of Record, and it would be dangerous to allow such an examination, as the Judges of England might be called upon to state what occurred before them in Court.

Similarly it was held in Curry v. Walter (1795) 1 Esp.

456, that a Barrister need not give evidence as to the making of a motion before the Court, and what he had then said.

So also, an affidavit of a juryman, impeaching the verdict of the jury, will not be received in evidence; nor will a juryman's unsworn statement.

In the case of Vaise v. Delaval (1785) 1 T.R.11, a motion was made to set aside the verdict of a jury on the ground that the jury had tossed up in order to arrive at their verdict. Lord Mansfield held that the affidavits of two of the jurymen, stating this fact, could not be received.

In the case of Jackson v. Williamson (1788) 2 T.R.281, the jury had made an obvious error in the amount of their verdict. The case was an action for damages for trespass against a Sheriff, who had seized a lighter belonging to the plaintiff. The Sheriff sold it for £31 and evidence was adduced to show that it was worth £60.

The jury gave a verdict for only £30. It was sought to have this amount increased to £61, and in support of the motion an affidavit by all the jurymen was produced, to the effect that they had all intended their verdict to be for £30 in addition to the £31 for which the lighter was sold.

The Court refused to admit the affidavit as "if the affidavit could be made by all the jury, upon the same principle it could be made by some. Such a practice would be productive of infinite mischief; and it was better that the present plaintiff should suffer an inconvenience, than that such a rule should be introduced."

CHAPTER III.

EGERTON v. BROWNLOW.

It will be seen from the foregoing pages that the doctrine of public policy had, prior to the case of Egerton v. Brownlow (1853) 4 H.L.C.I., been applied in a great variety of cases and by Judges of the highest repute, both in Courts of Equity and in the Common Law Courts. In the words used by Baron Pollock in the opinion delivered by him in that case it "is supported by decisions in every branch of the law and the names of nearly all the great lawyers will be found associated with this doctrine in some shape or other."

Nevertheless, in the case of Egerton v. Brownlow, which, as already stated, is the leading modern authority on the subject, the doctrine was very seriously assailed by a large majority of the eleven Judges whose opinions had been sought by the House of Lords. Had the opinions of this majority been accepted there is no doubt that public policy would then and there have received its death-blow.

Eight out of eleven Judges, including Baron Parke, delivered opinions distinctly hostile to public policy as a ground for legal decision; and there are not a few among more modern Judges who regard the doctrine with as great disfavour as did the majority of the Judges in that case.

The doctrine, however, was very strongly and ably supported by Chief Baron Pollock, and more mildly by Baron Platt, and the opinions of the minority were accepted and adopted by the House of Lords.

The facts of the case so far as they concern this subject are shortly as follows:--

By the will of the seventh Earl of Bridgewater a series of life estates were limited, subject to certain provisoes, one only of which need be mentioned here. This proviso was as follows:--

"Provided always and I declare my will to be that if the said John Hume Lord Viscount Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void; and that if the Earldom of Brownlow shall descend and come to him and he shall not have acquired or shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs of his body before the end of five years next after he shall become Earl Brownlow then and in such case the several uses and estates hereinbefore directed to be limited to the said John Hume Viscount Alford and to trustees during his life for preserving contingent remainders, and to the heirs male of his body shall thenceforth cease and be absolutely void, and my said hereditaments and real estates hereinbefore devised shall in either of the said cases go over and be enjoyed according to the subsequent limitations declared and directed by this my will."

One of the questions submitted for the opinions of the Judges was whether this proviso was void, and this led to a general consideration of the doctrine of public policy.

It is much to be regretted that a case involving a question of such importance should have been argued just as the Judges were going on circuit, and many of them were unable, owing to their duties in this respect, to give to the question the consideration which its importance demanded; and some of their opinions are, for that reason, not entitled to the weight which might otherwise

have been given to them.

Chief Baron Pollock had in the first place come up from the Home Circuit for the purpose of giving the opinion of himself and Baron Platt; and Mr. Justice Williams, who was the only Judge not on circuit, was present to give an opinion which had been prepared by Baron Parke in consultation with those of the Judges who agreed with his view. The House of Lords, however, considered the question of such importance that they requested the Judges to deliver individual opinions, and adjourned consideration of the case to enable this to be done.

Even then, Earle, J., and Wightman, J., did not deliver individual opinions, making the apology that "As we are at this time fully occupied on the Northern Circuit we hope that your Lordships will permit the opinion which will be read as that of Mr. Baron Parke, to be read as expressing our opinion also, and the reasons for that opinion."

Crompton, J., too pointed out that his opinion was given without properly consulting the authorities. To use his own words, "Absence from town on circuit without the papers in the case and without books to consult -------- will I hope furnish an excuse for not going more into detail, and for the hasty manner in which I have been obliged, in obedience to your Lordships' requisition, to put together what has occurred to me on the subject."

In fact the majority of the Judges appear to have been seriously hindered by their judicial duties from giving full consideration to the question.

The most important opinion in favour of the validity of the proviso was delivered by Baron Parke, and his opinion on the question of public policy contains within it most of the ground covered by the opinions of the Judges who agreed with him.

Some of the criticisms contained in that opinion,

although they did not then find favour with the House of Lords, have since been echoed by Judges of very high authority, and for this reason, and because the more important objections to the doctrine are contained in it, the opinion of that learned Judge is here given at some length, as also are extracts from the opinion of Lord Chief Baron Pollock.

Baron Parke said: --

"The principal question argued at your Lordships' bar was that the provisoes were illegal. I am of opinion that none of them is illegal. The main ground on which it is argued that the provisoes are illegal, is that they are against 'public policy.' This is a vague and unsatisfactory term and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the

community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise. The term 'public policy' may indeed be used only in the sense of the 'policy of the law' and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail. But we are clearly of opinion that this cannot be shown here.

Prima facie, all persons are free to dispose of their property according to their will and pleasure, and are free to make such contracts as they please, and are morally and legally bound by them provided, in both cases, they adopt the formalities required by the common and statute law. We find, however, from the sources of information from which we derive our knowledge of the common law, that contracts have been deemed to be illegal and void in many cases; none of them, however, resembling the present. One great class of cases has been that of wagers. Courts have been anxious to discountenance all wagers in which the parties have had no interest, and been astute, even to an extent bordering upon the ridiculous, to find reasons for refusing to enforce them; such is the case of the wager in Eltham v. Kingsman (1B. and Ald. 687).

Others, with just reason, they have refused to enforce,

where persons have voluntarily interfered in the affairs of another, and made wagers, the decision of which would affect his feelings or be outrages on decency. Such is the case of Da Costa v. Jones (Cowp. 729). The question of the sex of an individual could not be made the subject of a wager: but if it arose in the course of litigation with respect to the real rights of parties, for instance in suing for a legacy left to a male, the inquiry, however indelicate it might be, could not be avoided. In other cases of wagers, where the effect would be to make a man a Judge in his own cause -- such as the case of a wager laid by a Judge upon the event of a cause which he is to decide -- it would be against the established rule "nemo in propria causa judex esse debet" to allow him to acquire an interest in it. Jones v. Randall (Cowp. 38). In the case of Gilbert v. Sykes (16 East, 150), the Court certainly went a great length in holding a wager to be void on the life of the late emperor of the French. I doubt much whether, if the matter were res nova, that case would be decided in the same way. But if this had not been the case of a wager, but of a policy by one who had an interest in the life of the late emperor of the French, would there be any question as to the right of the assured to recover after his death?

There are other cases in which contracts or provisoes have been held to be illegal on principles long recognised by the common law; such as marriage-brocage-bonds, conditions, or contracts not to marry, in restraint of trade, against alienation of land, including those violating the law of perpetuities; others have been forbidden upon principles long established in Courts of Equity, where a contract creates an interest at variance with a duty: all these rest upon established authority. Another case referred to was that of Cole v. Gower (6 East, 110), where

a promissory note for a certain sum was given to parish officers to indemnify a parish against the expenses of the maintenance of an illegitimate child. The ground of that decision clearly was, that an agreement for a certain sum was against the provisions of the statute 6 Geo. 2, c. 31, which only authorises an indemnity. When public policy is there spoken of by the Judges, it must be understood to be spoken of in reference to the provisions of the statute. It is a statement of the probable reason for making the law, in order to shew the true construction of the law made. It would not be contended, that a bond for a given sum upon a contract by the obligee to support a man for his life would be void on the ground of public policy, as tending to the insecurity of life."

Pollock, C. B., said --

"This doctrine of the public good or the public safety, or what is sometimes called 'public Policy' being the foundation of law, is supported by decisions in every branch of the law; and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good and on that alone; and the name and authority of nearly all the great lawyers (whose decisions and opinions have been extensively reported) will be found associated with this doctrine in some shape or other."

After quoting numerous authorities from Lord Coke onwards he proceeded: --

"Now the principle that certain contracts are illegal, and therefore void, because they are against public policy or the public good, is familiar to every lawyer. Why are seamen not allowed to insure their wages (which is their part of the adventure), as well as the owner his ship, or the merchant his goods? Because it is for the public good that they should have no motive to relax in their exertions to preserve the ship and cargo. Why are trustees

not allowed to enter into contracts with their cestuique trust? Why was it held by Lord Ellenborough unlawful for the putative father of an illegitimate child to compound with the parish and to pay or secure a gross sum to the parish, they taking the chance of the expense being more or less? Because it was against public policy. And this doctrine has been confirmed in several cases in every Court in Westminster Hall. So in the case of wagers, it is now fully established that no contract in the nature of a wager is valid which is against public policy. It is true in Walcot v. Tappin (1 Keble, 56 and 65), and in Andrews v. Herne (1 Lev. 33), which, though so differently named, turn out to be the same case, the plaintiff was allowed to recover twenty pounds from the defendant who had betted that sum against twenty shillings paid to him on the event of Charles Stuart becoming King of England in six months. No objection was taken to the unlawfulness of the bet, and the royalist who had backed his sovereign recovered against the republican who had betted twenty to one against him: but in Good v. Elliott (3 T.R. 693), Buller, J., pronounces the contract illegal; and in Gilbert v. Sykes (16 East, 150). Mr. Le Blanc expressly says no such action could now be maintained.

In that last case of Gilbert and Sykes, Lord Ellenborough lays down - 'Wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void:' and he cites the authority of Lord Mansfield in Jones v. Randall (Cowp. Rep. 37). The result of the cases seems to establish this distinction; that, where a contract is directly opposed to public welfare, it is void, though the parties may have a real interest in the matter, and an apparent right to deal with it; but where the contract is altogether gratuitous, and the parties have no interest but

what they themselves create by the contract, it is sufficient that there be any tendency whatever to public mischief to render the contract void. An attention to this distinction will reconcile all the cases, and will furnish an answer to much that has been said in favour of this condition. This condition is purely gratuitous. If, therefore, it has any tendency to public mischief, it is void.

My Lords, after all these authorities, am I not justified in saying that, were I to discard the public welfare from my consideration, I should abdicate the functions of my office, I should shrink from the discharge of my duty? I think I am not permitted merely to follow the particular decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example. I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise.

The conclusions to which I have arrived, from the decided cases and the principles they involve, are, that all matters relating to the public welfare -- all acts of the legislature or the executive -- must be decided and determined upon their own merits only; and that it is against the public interest (and therefore not lawful) for any one officiously, wantonly, and capriciously, without any motive but his own will, to create any pecuniary interest or other bias of any sort in the decision of a matter of a public nature, and which involves the public welfare, the party creating that interest having no special and particular individual interest in the subject-matter with which he inter-meddles. My Lords, in the case of wagers and contracts this has been repeatedly and solemnly decided by all the Courts (and the case of conditions is an a fortiori case). It is no doubt some restraint upon the freedom of human action, and some limit to the contracts a man may make and

to the mode in which he may use or dispose of his property, but (as far as wagers are concerned) it was (before the late Act of Parliament) the clear, settled, established law of the land, vouched by the decisions of every Court in Westminster Hall, spread over a period of upwards of a century; and the Judges who have concurred in these decisions include every illustrious name that has adorned the profession of the law during that time."

As has been already indicated the Noble Lords with the exception of the Lord Chancellor, accepted for the most part, the doctrine as expressedin the opinion of Pollock, C.B., and held that the proviso had a tendency toinfluence the devisee to conduct which might be inconsistent with his public duty as a subject, and prejudicial to the public good, by inducing "the appropriation of funds derived from the estate in endeavours to obtain the desired title."

This case definitely decided that the tendency of the transaction to injure the public is the essential and determining factor, and not actual injury to the public, or the probability of such injury.

Thus Lord Lyndhurst in the course of his judgment said - "The enquiry must in each instance, where no former precedent had occurred have been into the tendency of the act to interfere with the general interest." And again -- "The question then is whether a proviso such as we are considering would have, if acted upon, a tendency to influence improperly the performance of these duties to which I have referred. I think it would have such a tendency and I consider it therefore, to be against the public good and consequently illegal and void."

Lord Brougham said -- "The tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded. Gifts, bequests, conditions, con-

tracts are illegal from their tendency to promote unlawful acts, without regard to the amount of the inducement held out, or interest created, the position of the parties, or any other circumstances which go to affect the probability of the unlawful act being done."

And Lord Truro said -- "Public policy in relation to this question is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public." ..... The facts of which the tendency to affect the public interest is to be determined in this case are these; a vast estate is given and the continuance and permanency of the gift is sought to be made to depend upon the event of a certain title of peerage being obtained, the object as declared, being to annex the estate to the title required; and the question is, has the hope of retaining an estate of £70,000 a year by the acquisition of the title referred to, any tendency to influence the devisee to a conduct which may be inconsistent with his public duty as a subject, and prejudicial to the public good? This question relates to the tendency of the hope upon practical conduct.

..... The question is not affected by the character or supposed character of the individual who may be placed in such circumstances; the general tendency of being placed in such a situation is the point to be considered."

This appears to have been regarded as a rule of general application in all cases whether any precedent existed or not. Lord Chief Baron Pollock was certainly of this opinion. "I think I am not permitted," he said, "merely to follow the particular decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example." (p.149)

Lord Lyndhurst too in his judgment gave expression to a similar view.

He said -- "It is unnecessary to cite authorities in support of this well established rule of law. What cases come within the rule must be decided as they successively occur. Each case must be determined on its own circumstances. When the case of a trustee dealing with his cestui qui trust was first considered, it must, in the absence of precedent, have been determined upon weighing the public mischief that would arise from giving sanction to such dealing. So as to transactions between attorneys and clients;- also as to seamen insuring their wages, and other similar cases referred to in the course of argument. The enquiry must, in each instance, where no former precedent had occurrred, have been into the tendency of the act to interfere with the general interest. The rule then is clear. Whether the particular case comes within the rule, it is the province of the Court in each instance, acting with due caution, to determine;" (p. 160, 161).

Lord Truro, too, expressed a very decided opinion, that the principle is one of general application. He said at page 195 :--

"In considering the question of the legality of the proviso, and the inexpediency of unnecessary restrictions upon the free disposition of property by will, or by any other means known to the laws, it cannot be denied that such dispositions are subject to some limits and restraints, and that the law will not uphold such as have a tendency prejudicial to the common weal; every man is restricted against using his property to the prejudice of others."

"The principle embodied in the maxim, sic utere tuo in alienum non laedas, applies to the public, in at least as full force as to individuals. There are other maxims equally expressive of the principle, nihil quod est inconveniens est licitum, and salus reipublicae suprema lex. The principle I conceive to be universal, as governing as well

transfers by deeds as the validity of contracts and dispositions by will. --- It must be superfluous in this House to cite authorities to prove the existence of such a general law."

And after quoting the authority of text writers and decided cases, he added -- "This principle has been expressed in different language, but in all cases to the same import as applying to matters contrary to law, because against the public good."

CHAPTER IV.

CONSIDERATION OF OBJECTIONS TO PUBLIC POLICY

It would appear from the opinion expressed by Baron Parke in the case of Egerton v. Brownlow, that that learned Judge (in common with the majority of the Judges whose opinions were sought in that case) denied the existence of public policy as a valid ground for legal decision except in so far as it might be taken to mean 'the policy of the law;' which in his view means that "a contract or condition is illegal which is against the principle of the established law." He somewhat grudgingly admitted that some of the rules of theestablished law "may have no doubt been founded upon the prevailing and just opinions of the public good," and instanced the illegality of covenants in restraint of trade and marriage: but he was not prepared to admit that the prevailing and just opinion of the public good was a ground upon which Judges might decide a case for which no precedent existed, but was of opinion that, apart from following the law as established in previous cases, they should leave questions concerning the public good to the legislature.

Lord Chief Baron Pollock, on the other hand, held the view that he was not permitted merely to follow the particular decisions of those who had the courage to decide before him, and to be afraid, in a new and unprecedented case, of imitating their example, but that he was bound to look for the principles of these decisions, "and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise."

As already stated, the House of Lords adopted this view, and applied the doctrine to the "new and unprecedented case" before them, holding that the condition in the will

had a tendency to public injury, and was therefore void.

The opinion of Lord Chief Baron Pollock is, undoubtedly, supported by the weight of previous authority, and it is impossible to peruse the numerous cases in which the doctrine had previously been applied, without coming to the conclusion that there is much justification for the statement of the Lord Chief Baron that the doctrine "is supported by decisions in every branch of the law."

On the other hand, the opinion of Baron Parke is based upon objections inherent in the doctrine itself. Consequently this opinion has had a very marked effect on the trend of judicial thought, and on the decisions of the Courts in cases involving a consideration of the doctrine of public policy, and has since been referred to and quoted with approval by Judges of the highest authority.

The objections referred to are, briefly:-

1. That Judges in applying the doctrine of public policy, are exercising the lawmaking function which belongs to the legislature.

2. That public policy in its application as a ground for legal decision results in uncertainty and instability in the law owing,

   (a) To the fact that it changes from time to time with the advance of civilization, and decisions on that ground have therefore little value as precedents.

   (b) To the difficulty of ascertaining the tendency of a transaction to injure the public, since the question is one of law on which no evidence is called.

Few modern jurists will dispute the statement that ~~the~~ English Judges are, and always have been in their secondary capacity, in fact if not in theory, lawmakers as well as interpreters of the law.

Nor have their legislative activities been confined to direct applications of the doctrine of public policy. Much of the common law is judge made law; so also is the great

body of English law known as Equity.

"I may observe," said Hellish, L.J., "that the whole of the rules of Equity, and nine tenths of the rules of common law have in fact been made by the Judges." (Allen v. Jackson (1875) 1 Ch. D. 405).

As already pointed out, the doctrine of public policy was applied not only at common law, but also in equity.

Equity, however, has become, like the common law, practically jus strictum, and opponents of the application of the doctrine of public policy hold that there should be no further extension of that doctrine, but that questions concerning the "public good" should be left to the legislature.

All Judge made law is open to the objection that it is ex post facto legislation; it has retrospective application, and the unfortunate litigant has no means of knowing beforehand what the law is, and is therefore unable to comply with it.

It was Bentham who compared judge made law with the laws a man makes for his dog. "It is the Judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of you wait till he does it and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do, they won't so much as allow of his being told; they lie by till he has done something which they say he should not do, and then they hang him for it. What way has any man of coming at this dog law?" (5 Bentham Works 235).

This criticism may certainly be applied with justice to law built up on the doctrine of public policy. Obviously, every decision on this ground in a new case makes new law, which has retrospective application; no man can

divine beforehand what a judge might or might not regard as having a tendency to injure the public, and there is no means of knowing beforehand what the law might be in a case in which public policy is the ground for the decision.

It was impossible for the testater who made the will out of which the case of Egerton v. Brownlow arose, or even the lawyer who drew the will, to foresee that the proviso would be declared illegal by the House of Lords. It took eleven learned judges and five learned Lords to discover the fact that the proviso had a tendency to public injury, and that was after the will had been in operation for thirty years without any such apparent injurious effect.

In modern days when the Legislature deals with almost every conceivable subject there is less scope than in former times for the application of the doctrine of public policy to new cases.

Not only, however, is it in cases now in specie but also under the well known "heads" of public policy that the application of the doctrine results in "judge made law." The best illustration of this is the development in the law as to contracts in restraint of trade, which has taken place without any interference by the legislature, but solely by means of successive decisions of the Courts.

As already pointed out all contracts in restraint of trade were at one time considered to be contrary to the best interest of the State, but this general rule was modified when, though it was thought that a general restraint must always be prejudicial to the public, it was perceived that contracts for the partial restraint of trade were not necessarily injurious either to the party upon whom the restraint was imposed, or to the public, but that such restraints might actually be beneficial to both.

Then came the difficulty of deciding when a partial restraint was or was not injurious to the public, and at

different times the judges imposed various tests in their endeavours to do this.

It was at one time insisted that the consideration must be 'adequate' (Mitchell v. Reynolds 1 P. Wm. 181), but at a later stage it was held that the adequacy of the consideration was not a matter for the Courts to consider, but that the parties themselves were the best judges of this question (Hitchcock v. Crcker, 6 A. & E. 438).

Then again the test of 'reasonableness' of the restraint was introduced (Davis v. Mason 5 T. R.118); and later still in some cases like Ward v. Byrne 5 M.& W. 548, and Hinde v. Gray, 1 Man.& G. 195, it was held that there must be some limitation as to space, while in others like Whittaker v. Howe,3 Beav.383, and Jones v. Lees,1H. & N. 189, restraints with no space limitation were held to be valid and enforceable.

Then for many years during the nineteenth century there was a controversy as to whether there ever existed a rule that 'general' restraints were necessarily invalid; some judges holding that such a rule did exist and others of equal standing holding the contrary (post,Chapter V.1.a).

A still further element of controversy was introduced into the consideration of these contracts, namely, as to whether "freedom of trade" or "freedom of contract" was the more important from the point of view of public policy (post, Chapter V. 1.b).

The House of Lords in the case of Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Company (1894), A.C. 535, put an end to the distinction in this respect between "general" and "partial restraints."

In that case both Lord Herschell and Lord Morris admitted the existence of rule and both agreed that the time had come to alter it.

Lord Herschell in his judgement said, "I respectfully

differ from the view which appears to be indicated, that there was not at any time a rule of common law distinguishing particular from general restraints," and after alluding to the changed conditions of commerce and trade he added, "I think then that the same reasons which led to the adoption of the rule require that it should be frankly recognised, that it cannot be rigidly adhered to in all cases."

Lord Herris was equally candid. He said, "I desire to express my opinion that the weight of authority, up to the present time, is with the proposition that general restraints of trade are necessarily void. It appears however to me that the time for a new departure has arisen, and that it should now be authoritatively decided that there should be no difference in the legal consideration which would invalidate an agreement whether in "general" or "partial" restraint of trading."

Under this well known "head" then, the obvious result of successive applications of the principle of public policy, or, as Lord Herschell put it, "the same reasons which led to the adoption of the rule" have led to alterations in the law from time to time without any act of the legislature.

To a lesser extent developments and alterations have taken place in other branches of the law, though these do not extend to so recent a date as in the case of contracts in restraint of trade.

Prior to the case of Wilson v. Wilson,1 H.L.C. 538, it had been held in many cases that deeds or agreements for separation between husband and wife were contrary to public policy, but it was definitely decided in that case that such deeds or agreements, if they contemplate an immediate separation, are valid. This change was pointed out by Sir G. Jessell, M.R. in the case of Besant v. Wood (1879) 12 Ch.

D. 605, 620, where he said, "For a great number of years both ecclesiastical Judges and law Judges thought it was something very horrible and against public policy that the husband and wife should agree to live separate, and it was supposed that a civilized country could no longer exist if such agreements were enforced by Courts of Law whether ecclesiastical or not. But a change has come over judicial opinion as to public policy; other considerations arose and people began to think that after all it might be better to avoid in many cases the expense and the scandal of suits of divorce by settling their difference quietly out of Court, although the consequences might be that they would live separately, and that was the view carried out by the Courts when it became once decided that separation deeds were not against public policy."

So also in the law as to distress for rent, the early general rule at Common Law, that a landlord was entitled to distrain whatever he found on the tenant's premises, was modified and various exceptions grafted to it pro bono publico, (Simpson v. Hartopp, Willis 512).

And similarly, exceptions to the general rule, that whatever is fixed to the soil becomes part of the soil, were made from time to time in favour of tenants, on the same ground, (Lawton v. Lawton 3 Atk. 13).

Is there then any greater objection to Judge made law based on the ground of public policy than to Judge made law based on any other principle?

The nature of the doctrine leaves it open to the objection that it is a shifting or unstable ground for legal decision. That which is considered good policy at one time may not be considered good policy at another. That which was good for the public of the sixteenth century is not necessarily also good for the public of the twentieth century, and conflicting rules may be, and are

found to be based on the same doctrine at different periods. Society progresses and the circumstances under which the community exist are subject to change in consequence.

"One thing I take it to be clear" said Kekewich, J., in Davies v. Davies (1887) 26 Ch. D. 359, 364, "and it is this, - that public policy is a variable quantity; that it must and does vary with the habits, capacities and opportunities of the public."

Bowen, L.J., in Maxim Nordenfeldt Gun & Ammunition Company v. Nordenfeldt (1893) 1 Ch. 630,661, pointed out that, "Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable on proper occasions of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce."

And Lord Watson in the same case before the Court of Appeal (1894) A.C. 535, 553, said, "A series of decisions based upon grounds of public policy, however eminent the judges by whom they are delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of its commerce must, as time advances and its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts."

These observations were made in a "restraint of trade" case, but the same objection applies in other branches of the law based on public policy.

The dictum of Jessel, M.R., in the case of Besant v. Wood quoted above, indicates a similar change of public opinion with regard to deeds of separation. In fact the

same objection applies to every branch of the law in which developments take place on the ground of public policy.

The dicta above quoted indicate a difficulty in the application of the doctrine of public policy which does not occur in the application of what Lord Watson in the passage quoted above, called "purely legal" principles. Public policy, upon which the doctrine is based, is not always the same. It changes with the growth and development of social ideas and varies with public opinion from time to time. How then should the judge arrive at his conception of the public good? He must, to use Lord Watson's words, consider the "course of policy pursued by the country," on the assumption, no doubt, that the country pursues the policy that it believes to be for its own good. There are many other modern judicial dicta to the same effect, commencing with Lord Truro in Egerton v. Brownlow 4 H.L.I, 198, who said, "Now my Lords the materials for arriving at a sound conclusion upon the question must be gathered from a consideration of the political and social state of the country."

In the judgment of the Privy Council in Evanturel v. Evanturel, L.R. (1874) 6 P.C.1, 29, the following passage occurs:-

"The determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

Lord Watson said in Nordenfeldt v. Maxim Nordenfeldt Gun & Ammunition Company (1894) A. C. 535, 553, "In England at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in

my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time."

Lord Cozens-Hardy, M.R., in Herbert Morris, Limited v. Saxelby (1915) 2 Ch. 57, 76, said, "The validity or invalidity of covenants in restraint of trade are not regulated by Statute. It depends on the Common Law which is founded upon public policy. This varies from time to time. The Judges have to interpret the phrase "public policy" according to the ideas current in this country at a particular date."

And in the recent Australian case Wilkinson v. Osborne (1915) 21 C.L.R. 89, 97, Isaacs, J., said, "In my opinion the "public policy" which a Court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted, either formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognise and enforce."

And again in the same case, "But the point to bear in mind is that the principle, which is to be the standard of legality, must at the time be one which is of general recognition in the community as one essential to its corporate welfare."

It appears, then, that it is the duty of the Judge, when a question of the application of the doctrine of public policy arises, "to ascertain with as near an approach to accuracy as circumstances permit what is the rule of policy for the then present time," and this involves a consideration of "the course of policy pursued by the country" "the political and social state of the country;" "the principles

which for the time being guide public opinion;" "the ideas current in the community at a particular date;" or whether a particular principle is or is not "one which is of general recognition in the community as one essential to its corporate welfare."

How is the Judge to do this effectively? The question is always one of law upon which no evidence is called, and the Judge is called upon to decide without any other means of knowing or judging theeffect or consequences of the particular transaction other than that of his own knowledge. This was pointed out by Lord Bramwell in Mogul Steamship Company v. McGregor (1892) A.C. 27, 45, where he said, "No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the Judge do that without any evidence as to its effect or consequences."

Consequently the Judge must rely upon his own knowledge of the "political and social state of the country" or "the ideas current in the country at a particular date" &c. when deciding these cases.

It was this difficulty that occurred to Best,C.J. nearly a century ago when he said in Richardson v. Mellish (1824) 2 Bing. 229 that the Courts of law "have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of public policy..... And let that doubtful question of policy be settled by that high tribunal, namely, the legislature which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles."

It is worthy of note however that Best, C.J. found it necessary in a later case (Fletcher v. Lord Sondes 3 Bing. 501, 590) to solve his doubts by reference to public policy.

He there said, "I am aware that these are rather con-

siderations of public policy than law. But my Lords if there be any doubt what is the law the Judges solve such doubts by considering what will be the good or bad effects of their decision."

The objection, nevertheless, is a serious one and lends great weight to the arguments of those who are in favour of leaving questions of public policy to be determined by the legislature.

Whether the Judge attempts to see the matter through the public eye, or merely relies upon his own view of what is or is not for the public good, his decision will to some extent depend upon his own knowledge, education, habits of thought, and even political opinions. Upon these will depend to some extent his interpretation of "the principles which for the time being guide public opinion."

And this lends an additional element of uncertainty to the law based directly on public policy, for, as Jessel, M.R., pointed out in Besant v. Wood (1879) 12 Ch. D. 605, 620, what one man or one Judge might think against public policy another might think altogether excellent public policy.

And Baron Alderson's caustic comment on this aspect of public policy in Egerton v. Brownlow, 4 H.L.C.I., 109, was "The truth is that an active imagination may find a bad tendency arising out of every transaction ~~arising~~ between imperfect mortals: and to use this as a criterion for determination, would make every case depend on the arbitrary caprice of an acute Judge."

Judges are not however as a rule arbitrarily capricious in dealing with cases that come before them, and it is remarkable, considering the great difficulty of applying the doctrine of public policy, how well the Judges have builded on a somewhat shifting foundation, and how they have from time

to time moulded the law to suit the public need. It is also worthy of note, that the law so built up has met with little interference at the hands of the legislature, and in most cases, such interference has been in the direction of confirming the law as laid down by the Judges.

The objection nevertheless is a real one, for Judges like other men have their limitations, and cannot always free themselves from the results of their education, habits of thought, social environment or their economic and political opinions.

The difficulties indicated have induced many Judges to adopt the attitude that any extension of the doctrine is to be avoided; who think that any alteration in the law made necessary through a change in public opinion should be left to the legislature, and that, as Cave,J., said in re Mirams.(1891) 1 Q.B. 594, 595, public policy is a branch of the law which certainly should not be extended "as Judges are more to be trusted as interpreters of the law than as exponents of what is called public policy."

There are, however, Judges who agree with the dictum of Lord Baron Pollock in Egerton v. Brownlow 4 H.L.C.1, 152, that in "a perfectly new case (a case altogether primae impressionis) the Judges are bound to hold fast to the principles of the Common Law, to remember the maxim "salus republicae suprema lex" and if the particular transaction in question is in principle contrary to the public good, to pronounce it invalid.

Among the learned Judges of modern times who agree with the opinion expressed by Baron Parke in Egerton v.Brownlow is Lord Halbury,and his judgment in the case of Janson v. Driefontein Consolidated Mines Limited (1902) A.C.484,491, contains the weightiest pronouncement in favour of that view to be found in any recent case.

"I do not think," he said in that case, "that the phrase 'against public policy' is one which in a Court of

law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. If such a principle were admitted, I should very much concur with what Sergeant Marshall said in the first edition of his work on marine insurance a century ago: 'to avow or insinuate that it might, in any case, be proper for a Judge to prevent a party from availing himself of an indisputable principle of law in a Court of Justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a Judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day, or to apply the same decision to different, or different decisions to the same circumstances, as his notions of expedience might dictate.'

But I do not think the law of England does leave the matter so much at large as seems to be assumed. In treating of various branches of the law, learned persons have analysed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or

what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things, and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful; and not because a Judge or Court have a right to declare that such and such things are in his or their view contrary to public policy." And towards the end of his judgment the noble and learned Lord quoted at length and with approval from the opinion of Baron Parke in Egerton v. Brownlow.

It should be remembered, however, that "these things" have been "assumed to be by the Common Law unlawful" because in the opinion of the Judges they were considered to be contrary to the public good; and that whether or not a Judge or Court now has a right "to declare that such and such things are in his or their view contrary to public policy" the Courts and Judges formerly did beyond doubt exercise such a right where no precedent could be found or a 'purely legal' principle on which to base their decisions. Nevertheless the opinion of Lord Halsbury is worthy of very great respect; and the question arises whether Judges should or should not any longer, in new cases, base their decisions directly on the principle of public policy.

In the early stages of a country's history there will obviously be many matters untouched by any legislation and on which it will fall to the Judges to 'declare' the law to the best of their ability, and as the public good is the foundation of law, that principle must almost of necessity form the immediate ground of some of their decisions, where no precedent or other principle can be found.

As the State develops, more and more subjects are dealt with by the legislature until, at length, there is but little scope for the exercise by the Judge of his secondary function.

There are many things which legislature cannot do in the earlier stages of a State's growth, partly because proper machinery is wanting, partly because political dissensions intervene, partly because legal ideas are fluid, fluctuating and unfit for expression in terms at once broad and definite.

Moreover, in even the most highly organised States, some things always remain which a legislature cannot conveniently deal with or where its action needs to be constantly supplemented, and perhaps even corrected, by some organ which can do the work in a more delicate and tentative manner (Bryce Studies in History and Jurisprudence Vol. II, 272).

It is obviously desirable that the law should be certain, but absolute certainty in every possible case is unattainable. No code can be devised to cover every possible contingency; no legislature can make laws to meet every case that may arise; and even at this advanced stage of civilization when each succeeding year produces its regular volume of new legislation, Judges are sometimes called upon to make or 'declare' the law for the case under consideration. This is "inevitable in a world of imperfections, and could only be avoided by an infinite code devised by an omniscient legislator," (Dr. Jethro Brown, L. Q. Review, April, 1916, 180).

And although the legislature now deals with almost every conceivable subject cases still arise for which no precedent can be found, and to which no 'purely legal' principle is applicable, and which it is found necessary and expedient to decide by considering whether or not the particular transaction or act has or has not a tendency to public injury.

And are Judges, in a case arising out of a transaction which has an obvious and manifest tendency to public injury, no longer to apply the doctrine of public policy if the case does not fall conveniently under one or other of the

so called 'heads.'

The doctrine is undoubtedly difficult of application, but that is not a sufficient reason for not applying the principle in a proper case; no one will dispute that it should only be applied with the greatest caution; it may be taken for granted that no Judge will decide a case solely on the ground of public policy if he can find any other 'purely legal' principle upon which to base his decision, and the above question is perhaps best answered by the fact that Judges still find it necessary to decide doubtful cases by considering the question of the tendency to public injury.

And it will be found that, since the decision in Egerton v. Brownlow, there has been considerable development in the law by means of the application of the doctrine of public policy. In some cases this development has taken place under the well known 'heads,' as in the case of the law as to contracts in restraint of trade; in others the Judges find little difficulty in classifying what are really new cases under one or other of these 'heads.' Such are cases like Spiers v. Hunt (1908) 1 K.B. 720, and Wilson v. Carnley (1908) 1 K.B. 729, dealing with the question of promises to marry made by persons already married, and the recent case of Neville v. The Dominion of Canada Newspaper Company (1915) 3 K.B. 556, in which Lord Cozens-Hardy, M.R. classed the case under the head of restraint of trade, while Pickford, L.J. preferred to base his decision directly on the ground of public policy, without reference to restraint of trade.

So also, in the still more recent case of Horwood v. Millar's Timber and Trading Company (1916) 2 K.B. 44, in the Court of Appeal (1917) 1 K.B. 305, an entirely new case, the decision in the Court below was based on restraint of trade. This was obviously out of respect for Lord Halsbury's dictum above mentioned, in which he denies, "that any Court

can invent a new head of public policy." But in the Court of Appeal at least two of the three Judges decided the case directly on the ground of public policy.

Other modern cases decided on the same ground are Macintosh v. Dunn (1908) A. C. 390, In re Beard (1908) 1 Ch. 383, and the Australian case of Tyley v. Bruce (1916) 21 C.L.R. 277.

The above-mentioned cases (except Spiers v. Hunt and Wilson v. Carnley, which are classed under "Immoral Contracts"), are dealt with at the end of the next chapter under the heading "Other modern Cases." They indicate that Judges in carrying out their functions and giving effect to the ancient principle that they must come to a decision in every case, with authority if such authority exists, but without it if necessary, still find it, in unprecedented cases expedient and necessary to base their decisions on the broad ground of public policy.

CHAPTER V.

PUBLIC POLICY SINCE EGERTON v. BROWNLOW.

1. RESTRAINT OF TRADE.

a. "GENERAL" & "PARTIAL" RESTRAINTS.

During the nineteenth century, prior to the decision of the House of Lords in the case of Nordenfeldt v. Maxim Nordenfeldt Gun and Ammunition Company Limited (1894) A.C 549, there was a great difference of opinion as to whether a rule existed at Common Law to the effect that a covenant in general restraint of trade was necessarily invalid.

There seems to be very little doubt that such a rule did exist and the diversity of opinion appears to have arisen from the fact that the rule was based on public policy, which had altered with the passage of time and the progress of civilization.

Some Judges preferred to regard the rule as fixed and settled by previous decisions, and paid no regard to the fact that the reason for it did not necessarily exist in every case of a general restraint of trade. Other Judges preferred to go behind the rule to the principle on which it was based, and recognised that a rule based on public policy was capable of alteration with altered circumstances; and just as early Judges varied the old rule that all restraints on trade were invalid, when they perceived that a partial restraint might in fact be beneficial to the party restrained and that to allow such a restraint did not necessarily involve injury to the public, and as Maule, J., expressed it in Rannie v. Irvine (1844) 7 M. & Gr. 969,977, "the reason for the exception engrafted upon the rule is a furtherance of the rule itself," so it was eventually recognised that even a general restraint of trade need not of

necessity be injurious to the public, and in some cases might be perfectly valid.

The rule above mentioned was held to exist in the cases of Ward v. Byrne (1839) 5 M. & W. 548, and Hinde v. Gray (1840) 1 Man. & G. 195, and the more recent case of Allsopp v. Wheatcroft (1871) Law Rep. 15 Eq. 59.

Ward v. Byrne has already been noticed. In that case Baron Parke clearly laid it down that in his opinion a restriction without limitation as to space was invalid for the reason that "when a general restriction limited only as to time is imposed the public are altogether losers for that time of the services of the individual, and they do not derive any benefit whatever in return."

In Hinde v. Gray the covenant was by the lessor of a Brewery that he would not "during the continuance of the demise, carry on the business of a Brewer or Merchant for the sale of ale &c., in S. or elsewhere." This covenant was, on the authority of Ward v. Byrne held to be unenforceable.

Allsopp v. Wheatcroft was a case in which a covenant was entered into by a clerk and traveller with a firm of Brewers that he would not during his service or within two years afterwards either directly or indirectly sell, procure orders for or recommend or be in anywise concerned or engaged in the sale of or recommendation, either on his own account or for any other person, public Company, or corporation, of any Burton ale or Porter brewed at Burton, or offered for sale as such, other than the ale beer or porter brewed by the plaintiffs.

There was no limit as to space and Sir John Wickes V.C. applied the supposed rule that such general restraints are invalid.

The learned Vice Chancellor said, "There has been a natural inclination of the Courts to bring within reasonable

limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in Ward v. Byrne and in Hinde v. Gray and in other cases, and the rule, if not obviously just, is at any rate simple and convenient."

The earliest decision on the other side appears to be the case of Whittaker v. Howe (1841) 3 Beav. 383, which has been previously dealt with. In that case a restriction extending to the whole of Great Britain was enforced.

So also in Jones v. Lees (1856) 1 H. & N. 189, a covenant prohibiting the selling of a certain article anywhere in England without a certain invention of the plaintiffs being applied to it was held to be good.

Vice Chancellor Sir W. M. James in Leather Cloth Company v. Lorsont (1869) 9 Eq. 345, held that a restriction which extended to the whole of Europe was not unreasonable. In that case the plaintiff Company was formed for the purpose of purchasing from the defendant and working certain patents for leather cloth and theagreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on nor will they to the best of their powers allow to be carried on by others in any part of Europe any other manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory of the vendors."

The learned Vice Chancellor held that this restriction was not greater than was necessary for the protection of the purchasers and he made the following remarks regarding the doctrine of public policy applicable to such cases.

"All the cases when they come to be examined seem to establish this principle, that all restraints upon trade are

bad as being in violation of public policy unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract. The principle of this public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand public policy requires that when a man has by skill or by any other means obtained something which he wants to sell he should be at liberty to sell it in the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate and therefore enables him to enter into any stipulation however restrictive it is provided that restriction in the judgment of the Court is not unreasonable having regard to the subject matter of the contract."

Fry, J., in Rousillon v. Rousillon (1880) 14 Ch. D. 351, 366, pointed out that if the rule existed at all it would apply to two classes of case, namely, one in which such a limitation as to space is reasonable, and the other in which it is unreasonable. In the latter class of case, where the universality of the restriction is unreasonable, the rule would be unnecessary and have no operation since such a case is covered by the rule requiring a restraint to be reasonable.

Therefore the rule would only operate in cases where the universality of the prohibition was reasonable; which it should not do.

Later on in the same case Fry, J., said, "I have, therefore upon the authorities to choose between two sets

of cases, those which recognise and those which refuse to recognise this supposed rule, and for reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable."

The whole question was discussed in the Court of Appeal in Davies v. Davies (1887) 36 Ch. D. 359.

There Cotton, L.J., expressed the decided opinion that the law still held covenants in general restraint of trade to be bad.

He appears however to have regarded those restraints only as "general" in which there is no limit either as to space or time.

In commenting on the decision of Fry, L.J., in Rousillon v. Rousillon he said, "I think undoubtedly he used expressions which showed that he took a somewhat wider view than I do of the law, a looser view, perhaps I may say without disrespect. In that case of Rousillon v. Rousillon there was the limit of time which might have made the covenant a limited one and not a general covenant in absolute restraint of trade."

Fry, L.J., however, adhered to his previously expressed opinion though he did not definitely decide that the old rule was no longer law. He said, "I think that the law with regard to public policy is one of a very different description from the law which is laid down in absolute terms for all time. It would be strange and I think it would be unreasonable if a contract which might now be for the public benefit were held void because in the reign of Henry V. or in the reign of Elizabeth that contract was contrary to public policy."

And later on after referring to the case of Mitchell v. Reynolds he added, "I may be wrong but it appears to me that the ground on which in that case it was said that the condition must be partial in point of space was clearly expressed by the learned Judge when he said, 'It can never be useful to any man to restrain another from trading in all places though it may be to restrain him from trading in some unless he intends a monopoly which is a crime.' The Judge who decided that case seems, therefore, to have thought that a total restraint could never be necessary for the protection of the parties. If he was wrong in that assumption it would be a matter for future inquiry how far the limit he created or imposed on that ground is or is not binding on the Courts of the present day."..... And in reply to an interjection by Cotton, L.J., he said, "I desire not to decide it but to say that I think the enquiry is still one which is open and worthy of great consideration whenever it shall come up for decision before the Courts."

Bowen, L.J., in the same case expressed the opinion that if any change were to be made in the principle of the common law "which" he said "has remained unassailed for centuries," it would be better left to the House of Lords, and that if the rule were to be modified with reference to the requirements of modern society it could only be done if the case in question ranged itself under one of two heads "either that the covenant in its unrestricted form was one which was a benefit to the public in which case it might be said that that would destroy the reason for insisting on the old rule which was derived from the public policy of the Kingdom: or secondly if it was reasonably necessary for the protection of the covenantee."

These are precisely the grounds on which the House of Lords a few years later in the famous case of Nordenfeldt v. Maxim Nordenfeldt Gun & Ammunition Company Limited (1894)

A. C. 549, decided once for all that there should be no distinction as to the principle applicable to "general" and "partial" restraints of trade.

In a prior case, however, the view of the law expressed by Fry, L.J., in Rousillon v. Rousillon was approved by Chitty, J.

This was the case of Badische Anilin und Soda Fabrick v. Schott Segyer & Co. (1892) 3 Ch. 447, another case in which the restraint was unlimited as to space. The plaintiffs were a German firm carrying on a world wide business in Aniline and Alizarine dyes, and the defendants were their Agents for certain North of England Counties. The defendants bound themselves not to enter any similar business and not to start a business of that kind themselves nor to give information of any kind about the business for a period of three years after the termination of their agency contract.

Chitty, J., held that as the business of the plaintiffs was world wide this was a reasonable restraint, and he quoted with approval the judgment of Fry, J., in Rousillon v. Rousillon and his reading of the law that there is no absolute rule that a covenant in restraint of trade is void merely because it is unlimited in regard to space.

In Nordenfeldt v. Maxim Nordenfeldt Gun & Ammunition Company Limited the appellant Nordenfeldt was the patentee and manufacturer of guns and ammunition for purposes of war, and having transferred his patents and business to the respondent Company, covenanted that he would not for 25 years engage either directly or indirectly in the business of a manufacturer of guns, except on behalf of the Company.

The House of Lords held this was a valid covenant though unrestricted as to space, as, having regard to the nature of the business and the limited number of customers the restriction was not wider than was necessary for the

protection of the Company's interests nor injurious to the public interests.

In that case Lord Herschell laid down as a rule of general application to all restraints of trade the rule applied by Tindal, C.J., to cases of partial restraint. He said, "I do not intend to throw doubt on what was decided in these cases for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of common law distinguishing particular from general restraints and treating the former as exceptions from the general principle that contracts in restraint of trade are invalid."

After dealing with the advance of civilization and the altered conditions of trade in modern times the learned Lord added, "I think then that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases," ---------- "I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in Horner v. Graves in considering whether the agreement was reasonable." Tindal, C.J., said, "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favour of whom it is given and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and if oppressive it is in the eye of the law unreasonable.'

The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I

think a restriction applying to the entire Kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest".

Lord Ashbourne too, disregarded altogether the distinction between 'general' and 'partial' restraints of trade. He said, "Each case has had to be considered on its own facts. It is really impossible to divide all cases into the two categories of covenants in general and partial restraint of trade, requiring distinct treatment and needing different policies."

And later in his judgment he added, "Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable and not larger than the protection of the respondents required; I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of."

Lord Morris agreed with Lord Herschell and admitted the old rule, but was of opinion that it should be abandoned.

He said, "I desire to express my opinion that the weight of authority up to the present time is with the proposition that general restraints of trade were necessarily void. It appears, however, to me, that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal consideration which would invalidate an agreement whether in general or partial restraint of trading. These considerations I consider are, whether the restraint is reasonable and is not against the

public interest."

This case disposed finally of the controversy as to the existence of the rule that a covenant in restraint of trade with no limitation as to space must necessarily be void.

In the same case Lord MacNaughten laid down a general rule which has since then been quoted with approval in almost every important case of the kind.

He said, "The true view at the present time I think is this. The public have an interest in every person carrying on his trade freely, so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification and indeed, it is the only justification, if the restriction is reasonable, reasonable that is in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

1. b. FREEDOM OF CONTRACT

versus

FREEDOM OF TRADE

Perhaps the most interesting feature in the modern development of the law with regard to contracts in restraint of trade is the conflict between two opposing realms of public policy, namely, that which favours "freedom of trade" and that which favours "freedom of contract."

Sir G. Jessel, M.R., said in Printing and Numerical Registering Company (1875) L.R. 19 Eq. 462, that "if there is one thing which, more than another, public policy required it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider, - that you are not lightly to interfere with this freedom of contract."

The minds of judges have, since then, frequently halted between the consideration of this "paramount public policy" and "freedom of trade", which the law so much favours. The result has been a diversity of opinion which has been partly responsible for an almost endless stream of litigation on cases in which these questions have been considered.

In the realm of politics "freedom of trade" formed the basis of one of the stock arguments amongst those who opposed legislative interference in industrial matters, and who thought that parties ought, as a general rule, to be left to make their own contracts in their own way and to abide by the result.

This doctrine influenced to some extent the minds of judges, and the cases, during the latter part of the nineteenth century, abound in instances in which this influence is

reflected in their decisions.

These decisions appear to have varied according to the weight accorded by the judge to the argument in favour of freedom to trade, or that in favour of freedom to contract.

Cases of contract in restraint of trade in recent times are, for the most part, either contracts between employer and employee, or contracts between the vendor and purchaser of a business. In many instances no distinction was made in the application of the doctrine of public policy to these two classes of case, and the influence of the "freedom of contract" argument resulted in a certain harshness in some of the decisions in the cases of the former class.

It is now generally recognised that there is a distinction between the two classes of case. In contracts between employer and employee the latter is frequently at a great disadvantage. Though he may be of "full age and competent understanding" he may in fact not really have the "utmost liberty of contracting." He is sometimes under the necessity of having employment and signs a contract which he would not otherwise do. He is to some extent compelled by stress of circumstances to enter into a contract by which he restrains himself from freely exercising his trade after leaving the service of the employer with whom he makes the contract.

Apart altogether from this restraint, the employer usually receives full consideration in services rendered for the money paid to his employee, and the restraint is frequently harsh and unjust to the employee while not really necessary for the protection of the employer's interests. The result is that the employee is prevented from earning his livelihood, to his own detriment and that of the public.

In this class of case the Courts now look with 'a jealous eye' on attempts on the part of employers to restrain

an employee from earning his livelihood at his own trade or occupation.

If such a contract is unreasonable, taking into consideration the interests of the parties concerned and of the public, it will not be enforced; and it will be regarded as unreasonable if it unduly interferes with a man's freedom to earn his livelihood.

In cases between vender and purchaser, on the other hand, the parties are usually in a position to contract on a footing of equality.

It is, moreover, generally necessary for the vender of the goodwill of a business to restrain himself in some way from carrying on in competition with the purchaser, or the latter would not get what he bargained for. The vender cannot otherwise give to the purchaser the full benefit of the business he has bought, and such a restraint will therefore generally be enforced by the Court, unless it is wider than is reasonably necessary for the protection of the purchaser; and the Courts are more inclined in such cases to leave the parties to the consequences of their own decisions as to what is reasonable between themselves. In these cases freedom of contract is now usually regarded as more important than freedom of trade, while in the former class of case more weight is given to freedom of trade. In both classes of case the deciding factor is the public interest. The conflict between these two "public policies" was indicated by Fry, L.J., in his judgment in the case of Rousillon v. Rousillon (1880), 14 Ch. D. 351, where, after pointing out that in the Court of Queen's Bench the burden of proof was cast upon the party alleging the invalidity of a contract, he said, "And such, in my opinion, ought to be the rule of law upon this point, because the defendant is seeking to put a restraint upon the freedom of contract, and he who

does that must, I think, shew that it is plainly necessary for the purpose of freedom of trade."

Lord MacNaghten, in the Nordenfeldt case quoted the following dictum of Lord Campbell in Talles v. Talles (1 E. & B. 391, 413):-- "It is clear there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation to his promise to the plaintiff," and added -- "This of course is not decisive in itself. It is an element for consideration of more or less weight according to circumstances. But Lord Campbell's observation serves to bring into contract the two principles which have to be adjusted in all these cases -- freedom of contract and freedom of trade."

In E. Underwood & Son, Limited v. Barker (1899) 1 Ch. 300 and 305, Lindley, M.R., expressed the following opinion:- "If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into: and to allow a person of mature age to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, prima facie at all events, contrary to the interests of any and every country," and after mentioning certain exceptional cases, such as contracts induced by fraud he added -- "Omitting all such cases the public policy which allows a person who obtains employment on certain terms understood, and agreed to by him, to repudiate his contract% conflicts with, and must to avail the defendant, prevail for some sufficient reason over the manifest public policy which as a rule holds him to the bargain."

Rigby and L.J. in the same case said -- "It has been clearly recognised in recent times that public policy is at least as much concerned in holding persons to their

contracts as in prohibiting contracts in restraint of trade."

In this particular case these views appear to have resulted in a somewhat harsh judgment. The plaintiffs in the case were hay and straw merchants in an extensive way with permanent places of business in Great Britain and France. The defendant agreed to enter the plaintiff's employ as clerk and foreman in Calais and elsewhere at a weekly wage of 35/-, and on doing so was required to enter into an agreement which provided, inter alia, that for the space of twelve months next after his leaving or being dismissed he would not carry on the business of a hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of hay and straw merchants in the United Kingdom of Great Britain and Ireland, or in France, or in the Kingdom of Belgium, or Holland, or in the Dominion of Canada. There was a further restriction for the space of five years which applied only to France.

The defendant worked at Calais for about four months and was then removed to London at an increased wage of two pounds per week. After being in the plaintiffs' employment for a little over a year he was dismissed and entered the service of a hay and straw merchant in London. The plaintiffs sought an injunction which was granted by Kekewich, J., in terms of the agreement. The defendant appealed and Lindley, M.R. and Rigby L.J., upheld the decision of the Court below.

Lindley, M.R., said in his judgment -- "I can find no circumstances to relieve the defendant from his bargain on the ground of public policy; if the restraint put upon him is no wider than is required for the protection of the plaintiffs in their business."

And Rigby, L.J., said he agreed with all that had been said by the Master of the Rolls and during his judgment added

"I cannot however think that in the present case any such exceptional question of public policy is involved..... I think that the only question here is, whether the restraint to be dealt with is reasonably necessary for the protection of the employer."

It is submitted that this view places a wrong construction on Lord MacNaghten's rule, which Lindley, M.R., quoted with approval, and loses sight of one of the reasons why, in the earlier cases, restraints of trade were held to be injurious to the public.

Lord MacNaghten's statement of the law does not omit altogether the interests of the covenantor. It runs -- "It is sufficient justification, and indeed the only justification if the restriction is reasonable -- reasonable that is in reference to the interests of the parties concerned and reasonable in reference to the interests of the public."

The learned judges appear however to have siezed upon the latter part of the rule which says -- "So framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." And it appears to have been overlooked that the interests of the public might not be properly protected if a man dependent on his own exertions for a livelihood were prevented from exercising his calling for twelve months, and that the reasons for regarding such restraints of trade as contrary to public policy are, that it is contrary to the best interests of the community that the public should be deprived of a person's services, or that he should be prevented from earning an honest livelihood at his own trade or business.

In any case such dicta even of Noble Lords must always be taken secundum subjectam materiam, and the House of Lords in the Nordenfeldt case was dealing with the case of

the sale of a huge business concern, in which the parties were on equal terms, while in Underwood v. Barker the contract was between a master and servant in which the latter was at a considerable disadvantage.

Vaughan William L. J., came to a different conclusion from those of the Master of the Rolls and Rigby, L. J. He said -- "I cannot think that the rule of law that all covenants in restraint of trade or binding an individual not to earn his living in the best way he can, are prima facie (if there is nothing more) contrary to public policy, and therefore void, has been rescinded by recent decisions." He then referred to the Nordenfeldt case and said that none of the Noble Lords in that case "considered that the test of reasonableness of the contract for the protection of the contractee can be applied to the exclusion of the consideration how far the contract restraining individual liberty has a tendency injuriously to effect the interests of the public." He pointed out the distinction between a sale of a business as in the Nordenfeldt case and a contract between Master and Servant, and said -- "In the case of master and servant, the servant does not enter into the contract with the same freedom of choice as that with which a person buys a business, and the restraint on the servant from earning his livelihood in the manner best suited to his capacity seems to me to be a restriction of individual liberty in which the public has a deep interest." And after quoting from the judgments delivered in the Nordenfeldt case he said -- "These observations which I have quoted seem to me to show that in considering what is a reasonable protection for the covenantee to whom the restriction covenant is given, one cannot leave out of consideration the interest of the public in freedom of trade and in the liberty of the covenantor to earn a livelihood in any lawful industry." Again at a later stage in his judgment he added --

"It is true that the restriction is limited to twelve months, but during that twelve months the defendant is to be debarred from earning even weekly wages as a clerk in the business of his life. It seems to me oppressive and against the public interest that employers, engaging at weekly wages servants who are already versed in the trade, should bind those servants not to take service in that trade with other masters, even though the restriction shall be only for twelve months or some other limited time."

This judgment of Vaughan Williams L.J. indicates a change in public opinion which had then already commenced with regard to "freedom of contract", namely, that there can be no real "freedom of contract" where one of the parties has not the same freedom of choice as the other, as in this case where a man who must have employment is required to enter into a restrictive covenant before he gets it.

The English Courts now generally recognise the distinction between the case of a contract for the sale of a business where the parties are usually on an equal footing and may generally be left to do their own bargaining, and the case of a master and servant where the parties do not meet on a similar equality. In the latter class of case in recent years at all events the Freedom of Contract doctrine has been losing ground in favour of non interference with the liberty of every man to earn his livelihood at the trade or business to which he has been accustomed, both in his own interests and in that of the public generally.

A much more lenient attitude than that of Lindly M.R., and Rigby L.J., in Underwood v. Barker, was adopted towards the covenantor in a contract of this class by the Court of Appeal in the case of Sir W. C. Leng & Co. Ltd. v. Andrews (1909) 1 Ch. 763. In that case an agreement by a junior reported on a provincial newspaper to the effect that he would not either on his own account or in partnership with any other person be connected, as proprietor, employee or

otherwise, with any other newspaper business carried on in the town or within a radius of twenty miles, was held to be unreasonable and against public policy. This was held apart from the fact that the defendant was an infant when he executed the agreement.

Cozens-Hardy, M.R., said -- "It is now settled that unless there are circumstances showing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support, that restriction will be held not binding upon him," and later when commenting on the restriction in question he added, -- "To my mind that is unreasonable and against public policy in a business of this nature and in an employment of this nature."

And Farwell, J., after quoting with approval the doctrine laid down by Lord MacNaghten in the Nordenfeldt case, said -- "That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction.

The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else."

The attitude of the Courts in modern times was further indicated by the House of Lords in the case of Mason v. Provident Clothing and Supply Company Limited (1913) A.C. 724. The facts were shortly as follows:-- The defendant Mason entered into a contract of employment with the plain-

tiffs, a Clothing and Supply Company, by which he agreed that he would not, within three years from the termination of his employment, be in the employ of any person firm or company carrying on or engaged in a business the same as or similar to that of the plaintiff company, or assist any person employed or assisting in any such business within twenty-five miles of London.

The House of Lords, reversing the decision of the Court of Appeal, held that this restriction was wider than was reasonably necessary for the plaintiff's protection.

Viscount Haldane L.C., quoted with approval the principle applicable to such cases as enunciated by Lord MacNaghten in the Nordenfeldt case, and at a later part of his judgment said -- "It is no doubt, as a general rule, wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in, and make it necessary for the Court to scrutinize agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the Courts have to check, and the Judges have to see that Lord MacNaghten's test is carefully observed."

Lord Shaw of Dunfermline pointed out that in these cases there are two conflicting rights involved namely the right to bargain and the right to work or trade, and added -- "But the public interest reconciles these two and removes all antagonism by the establishment of a principle and a limit of general application. It may be that bargains have been entered into with the eyes open which restrict the field of liberty and labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used to afford more than a reasonable protection to the covenantee. In every case

in which it exceeds that protection the public interest, which is always upon the side of liberty, including the liberty to exercise our powers to earn a livelihood, stands invaded, and can accordingly be invoked to justify the non-enforcement of the restraint." And later in his judgment he said, "In my opinion there is much greater room for allowing, as between buyer and seller, a large scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work."

In a still later case, North Western Salt Company v. Electrolytic Alkali Company Limited (1914) A. C. 461, 471, Viscount Haldane L.C., pointed out the difference between the attitude of the Courts towards agreements for service and agreements between commercial firms or companies regulating their trading relations. He said -- "My Lords, where the controversy is as to the validity of an agreement say for service, by which some one who has little opportunity for choice has precluded himself from earning his living by the exercise of his calling after the period of his service is over, the law looks jealously at the bargain, but when the question is one of the validity of a commercial agreement for regulating their trading relations entered into between two firms or companies, the law adopts a somewhat different attitude -- it still looks carefully at the interests of the public, but it regards the parties as the best judges of what is reasonable between themselves."

Again in Goldsell v. Goldman (1914) 2 Ch. 603, 613, Neville, J. said, -- "Men in want of employment or to a less degree in want of money, are very likely to be induced to sign any document to get it and there are cases where men on a few shillings a week, for which they give ample

consideration in other ways, are induced to sign contracts which make it exceedingly difficult for them to obtain employment elsewhere, and I think it might be left to the discretion of the Court to refuse an injunction in cases which it considers harsh."

Sargent J., in S. V. Nevanas & Co. v. Walker and Foreman (1914) 1 Ch. 413, adopted a similar attitude. The plaintiff Company in that case were meat importers and agreed to employ the defendant Foreman as Manager of the Company at Liverpool for five years from January 1909. Clause 7 of the agreement provided, in effect, that the manager would not, for a period of one year after leaving the plaintiff Company's employment, be engaged in any manner whatsoever, ~~in~~ either directly or as agent for others, in the meat import business anywhere within the United Kingdom.

The defendant had been engaged in the meat import business since he was fifteen years of age.

Sargent J., held that the clause was void as being an undue restraint of trade. He said -- "To preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification."

In a recent case in the High Court of Australia, Brightman v. Lamson Paragon Ltd. (1914) 18 C.L.R. 331, however, the decision of Lindley M.R. in the case of E. Underwood Ltd. v. Barker was quoted with approval by Rich, J., and his decision was upheld by Griffiths, C.J., Isaacs J., and Gavan Duffy, J., in the High Court of Appeal.

In that case John Brightman had been the General Manager of the respondent Company from 1903 to 1906 and had agreed, inter alia, that he would not, for ten years after the termination of his agreement, if and so long as the Company or its assigns carried on business in Australia or

New Zealand, either by himself or in partnership or in connection with or as agent or employee of any other person or company carry on or be concerned in carrying on directly or indirectly within any of the States of Australia or New Zealand the business of manufacturer or vendor of cash or cheque books used for any purpose whatsoever.

After eight years' service with the Company as their Manager, he resigned and entered the employment of another Company carrying on a similar business in Sydney. Rich, J. held that the restraint was reasonable and granted an injunction, and this decision was unheld on appeal.

Isaacs, J., in delivering his judgment on the appeal, quoted Lord MacNaghten's dictum in the Nordenfeldt case and made the following comment -- "It is quite true that by the law the interests of both parties are conserved but in this way, that the covenantee is entitled by law, if he can get such an agreement from the covenantor, to have all reasonably necessary provision for his adequate protection. That is so whether the agreement is one relating to the sale of a business or the engagement of an employee. On the other hand the covenantor is entitled, whatever he has actually agreed to do or to abstain from doing, to have the fullest liberty of action consistent with all reasonably necessary precautions consented to for the adequate protection of the covenantee. That is the frontier line, so to speak, dividing the interests which the law preserves for both parties."

The reasons which apparently led the Court to come to the above-mentioned decision were expressed by Rich, J., when he delivered judgment in the first instance. He said, "The most lucrative contracts made by the plaintiff Company are those extending over periods from five to ten years. The defendant was placed by the Company in a position of great trust and confidence for the purpose of reorganizing

the plaintiffs business. As General Manager he had full knowledge of every detail of the plaintiff's business and of the names of the customers. The object of a covenant such as the present is to prevent rivals in trade from becoming acquainted with the secrets of the internal management of the business and with the names of the customers."

The fact remains however that the defendant was debarred for ten years from earning his livelihood in any part of the Commonwealth of Australia or New Zealand in the business of his life. He must either seek some new occupation, or go abroad to some other country. Whether this is "reasonable in reference to the interests of the public" (in this case the Commonwealth of Australia) is, to say the least, extremely doubtful, leaving out of consideration altogether the interests of the covenantor.

The same class of case was dealt with in England by the Court of Appeal in the recent case of Herbert Morris Ltd. v. Saxelby, (1915) 2 Ch. 57. The decision in this case, which has since been affirmed by the House of Lords, contrasts strongly with the decision of the High Court of Australia in the case last dealt with. The defendant had been employed by the plaintiffs, who were makers of certain special classes of lifting machinery. He entered their employment at fifteen years of age as junior draftsman and rose to the charge of their selling department. When he received this appointment he entered into an agreement that he would not for seven years from the date of his ceasing to be employed by the plaintiffs, either in the United Kingdom of Great Britain or Ireland be concerned with sale or manufacture of pulley blocks, hard overhead runways etc., or be concerned or assist in any business connected with such sale or manufacture.

The defendant was altogether ten years in the employ-

ment of the plaintiff Company and then entered the employment of a rival firm, admittedly in breach of his agreement. The chief objection of the company to this was expressed by Mr. Morris in his evidence, as follows:--

"We should be injured because he could teach them much gained from his experience with us. Their methods are antiquated. I object to their being instructed in our particular methods. Defendant could do this with regard to the productions made at our works. He could introduce our sheet system - the methods by which we produce them and the formulas we use. We have gone past Molesworth and laid down formulas of our own. We don't want these told to our rivals."

Sargant, J.. nevertheless decided that the restraint was unreasonable. He said -- "And I am satisfied that if an injunction is granted against the defendant as asked, he and the public will be deprived of the benefit of a great skill and experience which he has acquired in the course of his training and service at the plaintiff's works." and at the conclusion of his judgment, after stating that the plaintiffs were straining every nerve to secure and retain advantages over their competitors, and that as a general rule they were entitled to do so, he added -- "but in the present case they seem to me to have pushed their policy to an extent which is unreasonable to the defendant and prejudicial to the public and which ought not to be supported in this Court."

The decision of Sargant, J., was upheld by Lord Cozens-Hardy M.R., and Joyce J., in the Court of Appeal. (Phillmore L.J. dissenting).

Lord Cozens-Hardy said, "The restriction, though not in terms lifelong, is, as the learned judge says, for the very considerable period of seven years, a period which is not practically distinguishable from the whole life,

since during the whole of such period he would have necessarily to earn his living in some other kind of business, and with little hope of returning to his original employment." ----------"At the date of the agreement he had been for ten years in the employment of the company. His whole training was in connection with the heavy goods in question. I cannot think it was reasonable to require him to put aside all the skill and experience acquired during these ten years, and to begin life afresh."

The whole Court quoted with approval Lord MacNaghten's statement of the law in the Nordenfeldt case. Lord Cozens-Hardy added that he thought "regard must be had to the interest of the covenantor and not solely to the interest of the covenantee." He also divided the contracts in restraint of trade into three classes which he said required separate treatment as follows :--

1. A trade secret may justly be protected by an absolute covenant without limit as to time or space.

2. The Vendor of goodwill ought not to be allowed to derogate from his own grant, and a wide restriction may properly be given to protect the enjoyment by the purchaser of that which the Vendor has sold.

3. In a contract of service there is a less freedom of negotiation and a far greater risk of oppression, and the Court ought to guard more carefully the interests of the covenantor.

Phillimore L.J. apparently did notapprove of what he called "tenderness for the special position of the employee." After quoting Lord MacNaghten's dictum he said -- "Still with the later cases, since the Nordenfledt case, there has entered in some subtle way into the discussion of the reasonableness of the covenant, some explicit state-

ment of regard or tenderness for the special position of the employee."

His reason for this attitude is disclosed when, after quoting the dictum of Sargant J., in the same case where he draws the distinction between cases of sale of a business and contracts of employment, he said -- "But I doubt Sargant J's way of treating the question subjectively has its danger. It leads to your considering the effect upon the employee twice over. The law starts with considering the effect upon him, and every restriction on his liberty is pro tanto objectionable, not by reason of tenderness for his interests but because it is against public policy to restrict any one."

The tendency however in recent times appears to be for the Court in cases between employer and employee to give, in the public interest, at least as much consideration to the interests of the employee who makes the covenant as to the interests of the employer in whose favour it is made. On the other hand in contracts for the sale of the goodwill of a business and in contracts between firms or companies to regulate their trading relations, the tendency is, while carefully safeguarding the interests of the public, to regard the parties as the best judges of what is reasonable between themselves.

The law as to agreements in restraint of trade was discussed in the High Court of Australia by Griffith, C.J., in the "Coal Vend" case, The Adelaide Steamship Coy., Ltd., v. The King and The Attorney General of the Commonwealth (1912) 15 C. L. R. 65, 76. where he was dealing with agreements between great trading concerns. In his judgment in that case the learned Chief Justice said, "The doctrine now recognised is that the validity of an agreement in restraint of trade as an enforceable agreement between the parties to it depends upon considerations of the actual

public interest. It is recognized that freedom of trade is not the only matter to be considered. Freedom to make contracts and the obligation to perform contracts honestly made upon good consideration are also regarded as matters in which the public are interested. If, therefore, the bargain taken as a whole is not unfair to the party who binds himself, in the sense that he receives an adequate consideration for the promise to restrict his own future freedom, the public interest is not regarded as affected merely by the restriction unless there are other stipulations in the bargain which injuriously affect the public."

It should be noted that the law as here laid down would revive the doctrine which prevailed before the decision in Hitchcock v. Croker (6 A. & E. 438) namely, that the Court must consider the adequacy of consideration. It was laid down in that case that this was a question for the parties themselves and not for the Courts to consider. It appears however from the above dictum, that in considering the contract between the parties it may, in the opinion of Griffith, C.J., be necessary to look at the adequacy of the consideration as an element in the determination of its reasonableness.

The last sentence in the dictum above quoted appears to indicate that the learned Chief Justice was of opinion that the question of public interest is identical with the question of reasonableness as between the parties, unless, apart from the restraint itself, there are other stipulations in the contract injuriously affecting the public. The learned Chief Justice had previously pointed out that the doctrine "depends upon considerations of actual public interest," and it should be borne in mind that the only reason the Courts have for considering the reasonableness or otherwise of these contracts is the public policy which demands that there shall not be an injurious

restraint of trade, injurious that is to the public. This injury may, of course, be conveyed to the public through the covenantor, who is a member of the community, and in safeguarding his interests the public interest may at the same time be sufficiently safeguarded. But, as Phillimore L.J. pointed out in Herbert Morris Ltd. v. Saxelby, it is not out of any special "tenderness" for the interests of the covenantor but for the sake of the public that the Court enters into the question of reasonableness at all. Apart from the question of the public welfare, "unreasonableness" is not a ground for refusing to enforce a contract.

When the case of Herbert Morris Limited v. Saxelby (1916) A.C. 688, recently came before the House of Lords, Lord Atkinson expressed his view of the law on the subject of restraint of trade as follows -- "If the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void." And Lord Parker of Waddington laid it down that in considering the reasonableness of the transaction as between the parties the question of injury to the public is not to be taken into account. He said -- "It will be observed that, in Lord MacNaghten's opinion, two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the parties; secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down the test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the

interests of the public it must be in no way injurious to the public."

He then went on to say with regard to the former test, "I think it clear that what is meant is, that for a restraint to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and covenantee."

Later in his judgment he added -- "It was suggested in argument that the interests of the public ought to be considered and weighed in determining whether a restraint is reasonable in the interests of the parties. I dissent from that view. It would entirely destroy the value of Lord MacNaghten's tests of reasonableness. The first question in every case is whether the restraint is reasonable in the interests of the parties. If it is not, the restraint is bad. If it is, it may still be shown that it is injurious to the public."

It should be noted that with reference to the question of adequacy of consideration, Lord Parker expressed a view contrary to that of Griffith C.J. in the Australian "Vend Case," and adhered to the rule in Hitchcock and Creker. On this question the learned and noble Lord said -- "It was at one time thought that, in order to ascertain whether a restraint were reasonable in the interests of the covenantor, the Court ought to weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint, but any such process has long since been rejected as impracticable. The Court no longer considers the adequacy of the consideration in any particular case."

This view of the law appears to leave something to be desired from the point of view of the covenantor, but it is to be remembered that, in cases at all events between em-

player and employee, his protection is bound up with that of the public which requires that he should not be unduly restrained from earning his livelihood. This was expressed in the same case by Lord Shaw of Dernfermline who said -- "The public interest coincides with his own in preventing him on the one hand from being deprived of the opportunity of earning his living, and in preventing the public on the other, from being deprived of the work and service of a useful member of society." And again later in his judgment he added -- "Furthermore my Lords I may be allowed to allude to what I think is a misapprehension upon this topic of the public interest and the interest of the contracting parties. It is too apt to be supposed that these things are in collision or antagonism." And after mentioning the well-known dictum of Lord MacNaghten in the Nordenfeldt case he added -- "The interest of the covenantor has also to be considered and Lord MacNaghten's words specifically referred to the interest of both parties. But the interest of the covenantor entirely equates, in kind though not in degree, with the interest of the public."

It appears clear therefore that, if the covenant affords not more than adequate protection to the covenantee, and the interests of the public are protected, the interests of the covenantor must of necessity be sufficiently protected also.

It is to be observed also that each of the learned and noble Lords who delivered judgments on this case insisted on differentiating the case of the sale of the goodwill of a business from the case of a master and servant or employer and employee.

A covenant against competition is in the case of the sale of the goodwill of a business necessary to secure to the purchaser what he is contracting to buy, and the law as Lord Shaw pointed out "declines to permit a vendor to derogate

from his own grant" and "nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which would make its buyer insecure."

On the other hand he said -- "In the case of restraints upon the opportunity to a workman to earn his livelihood a different set of considerations come into play. No actual thing is sold or handed over by a present to a future possessor. The contract is an embargo upon the energy and activity and labour of a citizen.....:..... In this latter case there is not a something already realised made over to and to the use of another.but there is something to be created, developed, and rendered to the individual advantage of the worker and to the use of the community at large."

Lord Shaw appeared to regard the reconciliation of the adverse claims of freedom of trade and freedom of contract as a "perrenial problem" and his remarks on this question indicate the difficulties that must always be encountered in the attempt, and the difficulty also of obtaining any finality in cases which rest upon the ground of public policy. He said -- "In these cases as I have pointed out there are two freedoms to be considered -- one the freedom of trade and the other freedom of contract, and to that I will now again venture to add that it is a mistake to think that public interest is only concerned with one; it is concerned with both. It may be, and probably is, that jurisprudence has reflected the evolution of economic thought by accentuating at one period freedom of trade and at another freedom of contract; but the stage of balance and reconciliation which has now been reached is, it may be observed, in truth a reversion to, and a restatement of the perrenial problem set forth in the penetrating judgment of Lord Macclesfield in Mitchell v. Reynolds in which speaking more than two centuries ago, he says -- 'The revelations of the

books upon these contracts seeming to disagree, I will endeavour to state the law upon this head and to reconcile the jarring opinions.'"

1. C. PLEADING.

The above-mentioned case of North Western Salt Company Limited v. Electrolytic Alkali Company Limited (1914) A.C. 461, is important as defining the proper attitude of judges where questions of public policy are raised in actions on contracts in restraint of trade, and as showing the necessity for raising the question of illegality on the pleadings. so as to allow evidence to be adduced as to the attendant circumstances. The case is an authority for the following propositions:-

1. Where the written contract is ex facie in restraintof trade so as to be against public policy, it is the duty of the judge to refuse to enforce it.

2. This is also true when it appears that the contract when taken in connection with the attendant circumstances is in like manner in restraint of trade.

3. If the contract is not ex facie illegal and it is desired to set up the defence that it is illegal as being in restraint of trade, this must be pleaded, otherwise no evidence of the attendant circumstances will be admitted for the purpose of proving the illegality.

4. If in the course of a case, although the contract is not ex facie illegal, some fact or circumstance comes to light which renders it illegal on grounds which nothing will cure it is the duty of the judge to refuse to enforce the

contract although the illegality is not pleaded.

The general principle was shortly stated by Lord Moulton as follows:-- "If the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie legal, and it has only before it a part of the setting, which it is not entitled to take as against the plaintiff as fairly representing the whole setting."

The evidence given too must be confined to the circumstances existing when the contract was made. The question whether a contract is reasonable or whether it is injurious to the public is purely one of law, and no evidence can be given of the actual or probable consequences of carrying out the contract. On this point see The Attorney General of the Commonwealth of Australia v. The Adelaide Steamship Company Limited (1913) A. C. 781, 797 which came before the Privy Council on appeal from the High Court of Australia. Lord Parker of Waddington there said -- "It must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after considering the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences if the contract be carried into effect, is admissible."

1. d. COMBINATIONS IN RESTRAINT OF TRADE

Reference has been made to the case of Cousins v. Smith 13 Ves. Jun 542, and the American cases of Hooker v. Vandewater 47 Am. Dec. 258, and Stanton v. Allen 49 Am. Dec. 282, in which combinations of trading concerns for the purpose of avoiding competition were held to be illegal. The principle that such agreements are contrary to public policy has since been applied in many instances both in cases where employers have combined for the purpose of avoiding competition and keeping up prices, and where workmen have combined to keep up wages. Not every combination of this sort is illegal but only such as are injurious, or have a tendency to be injurious, to the public. Where it appears that any such contract has a tendency to be detrimental to the public interest it will not be enforced by the Courts.

The first modern decision in the English Courts dealing with combinations of employers was the 'Cotton Spinners Case,' Hilton v. Eckersley (1855) 6 El. and B. 47. In that case eighteen Cotton Spinners in Wigan and the neighbourhood entered into a bond. The condition of the bond recited that certain combinations of workmen existed which deterred persons from hiring themselves to the obligors and that the legal control of their establishments was thus interfered with, and that these combinations arbitrarily levied funds from persons employed by the obligors and that it had become necessary to take steps to vindicate their rights, and that therefore they had agreed "to carry on their works in regard to the amount of wages to be employed therein, and the times or periods of the employment of the work people and the hours of work and the suspending of work, and the general discipline and management of their works in conformity to law, for a

period of twelve calendar months in conformity with the resolution of a majority of the obligors present at any meeting convened as provided in the bond."

It was sought to enforce this bond against the defendant Nathaniel Eckersley. The case was heard in the first instance in the Court of Queen's Bench, where Lord Campbell, C.J., and Crompton, J., (Earle, J., dissenting) decided that it was in restraint of trade and so contrary to public policy. This decision was affirmed by the Exchequer Chamber.

In his judgment in the Court below, Crompton, J., said -- "I think this bond is void as being in restraint of the freedom of trade, and from its mischievous and dangerous tendency pointed out in the argument with respect to strikes and combinations .....In the present case the agreement is that in certain events all the parties contracting are to close their works. And the consideration of the promise of each is the promise of the others likewise to close their works. So that the public are not recompensed for the ceasing of one party, by the other parties being able to carry on their trade with increased facilities.....One of the most objectionable parts of this bond is that it takes away the freedom of action of the individual to carry on the trade and to open and close his works according as it may be for his interest or that of the public." And again -- "As soon as the party agrees to bind himself by penalties to give up his right of retiring from such combination that freedom of trade which it is the policy of the law to protect seems directly interfered with. Suppose in the present case, that the workmen agree to proper and reasonable terms and that the majority still insist on closing, the individual obligor is obliged to shut up his own mill, and to be in effect a party to the closing of seventeen others, although he is perfectly satis-

fied that in doing so he is acting contrary to his own interests, as well as to the interests of the workmen, the trade, and the public."

In the Exchequer Chamber the judgment of the Court (which included Parke, B., Alderson, B., and Platt, B.), was delivered by Alderson, B., who after stating the contents and general effect of the bond, said -- "The bond therefore, if not altogether illegal and punishable, is framed to enforce at all events a contract by which the obligors agree to carry on their trade, not freely as they ought to do, but in conformity to the will of others; and this not being for a good consideration is contrary to public policy. We see no way of avoiding the conclusion that if a bond of this sort between masters is capable of being enforced at law an agreement to the sameeffect amongst Workmen must be equally legal and enforceable; and so we shall be giving a legal effect to combinations of workmen for the purpose of raising wages and make their strikes capable of being enforced at law."

Collins v. Locke (1879) 4 A.C. 674, was a later case that came before the Privy Council on an appeal from the Supreme Court of Victoria. The Appellants and Respondents carried on the business of Stevedoring in the Port of Melbourne, and for the purpose of preventing competition in their business entered into an agreement between themselves and other parties to divide up the stevedoring business so that the Appellants should be entitled to the stevedoring of all ships that should arrive in Melbourne consigned to J. H. White & Coy., and the Respondents to those consigned to Holmes, White & Co., R. Towns & Co., or King, Menz & Coy., and that the other parties should be entitled to do the stevedoring for ships belonging to certain other firms. Each party agreed not to be in any way concerned in or interfere with the stevedoring of any other firm than to which the agreement respectively entitled them. There was a

provision that should any firm refuse to allow their stevedoring to be done by the party to which it was allotted by the agreement and required any of the other parties to do it, the party doing it would give an equivalent to be determined by arbitration to the party so losing it. This provision was held not to be unreasonable either as regards the party in whose favour it operated or as regards the merchant.

There was, however, another provision the effect of which was that if any of the shipping firms named ceased to do business the party losing such firm should be entitled to select another carrying on business of equal importance, and if the firm so chosen refused to allow its stevedoring to be done by the party selecting it, all the parties to the agreement were to be deprived of the work. This was held to be in restraint of trade.

Concerning this provision, Sir Montague E. Smith, in delivering judgment said -- "The covenant in such cases restrains three of the four parties to the agreement from exercising their trade without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public by depriving the merchants of the power of employing any of those parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship as between themselves has been allotted, however great and well founded their objections may be to employ him."

Another important case is Mineral Water Bottle Exchange and Trade Protection Society v. Booth (1887) C. D. 465. In that case the plaintiff was incorporated under the Companies Act 1862 for the purpose of protecting the property and promoting the interests of its members who were mineral

water manufacturers in London and elsewhere in England and one in Sydney, New South Wales.

One of the Articles of Association provided that "No member of the Society shall employ any traveller carman or outdoor employee, who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service."

An action was brought against the defendants to restrain them from employing one John West contrary to the provisions of this article. Chitty, J., in the first instance held that the article was an unreasonable restraint of trade and refused the injunction. His decision was upheld by the Court of Appeal where Fry, L.J., said, after stating the general effect of the article -- "I think therefore the restraint of trade and of the liberty of Her Majesty's subjects in gaining employment is far in excess of any legitimate purpose of the contracting parties."

It was laid down as law in the Queen's Bench Division in Urmston v. Whitelegg Brothers (1890) 63 L. T. 455, that combination for the mere purpose of raising prices is in restraint of trade and not enforceable in a Court of law. In that case the Memorandum of Agreement of The Bolton Mineral Water Manufacturers' Association, of which the defendant was a member, provided that no member should for ten years after joining the association sell soda water at less than ninepence per dozen bottles.

Day, J., in delivering the judgment of the Court said -- "If a contract for raising prices against the public interest is a contract in restraint of trade this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public, of the Legislature, and therefore of the judges, on the matter, and many old fashioned offences have disappeared; but the

rule still obtains that a combination for the mere purpose of raising prices is not enforceable in a Court of law."

It should be remembered that combinations in restraint of trade are not illegal in the sense that they are an offence against the law. It was not an offence at Common Law to be a party to a contract in restraint of trade. The parties were always at liberty to hold themselves bound by such contracts and to act on them if they thought fit. They were only illegal in the sense that the Courts would not enforce them.

This distinction was discussed in Mogul Steamship Company v. McGregor Gow & Co., (1892) A. C. 25. In this case a combination of ship owners endeavoured to secure the carrying trade between London and the Yangtsekiang River exclusively for themselves, and at profitable rates, by offering rebates and other favourable terms to persons who would deal exclusively with them, and agreeing that the number of ships to be sent to the loading port by members of the Association and the apportionment of cargoes and the freights to be charged should be regulated.

The plaintiffs, who were not in the Association, sent ships to the Yangtsekiang for cargoes and the associated owners cut the freights so low that they were unremunerative and threatened to dismiss any of their agents who loaded the plaintiff's ships. The plaintiffs brought an action for damages against the defendants for conspiracy.

This case has been frequently quoted as an authority for the proposition that a combination, such as existed in this case, is not illegal. In one sense this is true, in another however it is altogether misleading.

Part of the plaintiffs' case was that the defendants had conspired to form an association which was unlawful and in doing so caused the injury complained of.

Lord Halsbury pointed out in his judgment that there are two senses in which the word "unlawful" is used; one in the sense of not enforceable, as in the case of contracts which are contrary to public policy through being in restraint of trade and which the law treats as if they had not been made at all: and the other, "unlawful" in the more accurate sense of contrary to law. He added -- "It has never been held that a contract in restraint of trade is contrary to law in the sense I have indicated. A Judge in very early times expressed great indignation at such a contract. And Mr. Justice Crompton undoubtedly did say (in a case where such an observation was wholly unnecessary to the decision and therefore manifestly obiter) that the parties to a contract in restraint of trade would be indictable. I am unable to assent to that dictum. It is opposed to the whole current of authority."

This case is not an authority for the proposition that a combination, such as that entered into by the defendants, is not an illegal one in the sense that it is unenforceable as being in restraint of trade. On the other hand several of the noble and learned Lords expressed the contrary opinion. Thus Lord Bramwell said (at p. 46) -- "I think, upon the authority of Hilton v. Eckersley and other cases, we should hold that the agreement was illegal, that is, not enforceable at law." And Lord Hannen (at p. 58) said-- "It was contended that the agreement between the defendants to act in combination which was proved to exist, was illegal as being in restraint of trade. I think it was so in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it."

It is true Lord Watson said (p 42) -- "Theagreement of which the appellants complain left the contracting parties free to recede from it at pleasure, and is not obnoxious to the rule of public policy which was recognised in Hilton v.

Eckersley." But his reason for thinking that the case was distinguishable from Hilton v. Eckersley was evidently the fact that the agreement left the parties free to recede from it at their pleasure, which the agreement in Hilton v. Eckersley did not do.

In other of the judgments doubts were expressed on the question but no decided opinion given, and that for the reason that it was not necessary to do so. What every one of the learned Lords did decide, and all that it was necessary for them to decide, was that the combination was not unlawful in the sense of being "contrary to law."

This appears very clearly from the judgment of Lord Morris (p. 51). He said -- "But suppose the combination in this case was such as might be held to be in restraint of trade, what follows? It could not be enforced. None of the parties to it could sue each other. It might be held void because its tendency might be held to be against the public interests. Does that make, per se, the combination illegal? What a fallacy would it be that what is void and not enforceable becomes a crime."

In the United Stated of America so long the paradise of trusts and combinations of every description the cases under this head are much more numerous than in England. The principle laid down in the early case Stanton v. Allen has been frequently applied, and in a variety of cases.

One of these was Morris' Run Coal Co. v. Barclay Coal Co., (1871), 8 Am. Rep. 159, in which five coal corporations entered into an agreement to divide the market for the bituminous coal from the two coal regions of which they had control in certain proportions stated in the agreement: to appoint a committee to take charge of all the business of all the corporations, and also a general sales agent. There were provisions that each

company should deliver its proportion of the coal at such times and to such parties as the committee should direct that the committee should adjust prices and that the general agent should direct a suspension of shipment or delivery of coal by any of the companies making sales or deliveries beyond its proportion.

An action was brought on a draft given pursuant to this agreement, and it was held that the agreement between the parties was illegal as being contrary to public policy, and that the draft, too, was tainted with the illegality.

Agnew, J., after reviewing the English and American authorities in restraint of trade said -- "Testing the present contracts on these principles, the restrictions laid upon the production and price of coal cannot be sanctioned as reasonable, in view of their intimate relation to the public interests. The field of operation is too wide and the influence too general." And again -- "This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the coal supply is suspended the demand first becomes importunate and prices must rise: or if the supply goes forward the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint; while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply, or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community and leaves few of its members untouched by its withering blight."

Another important case was Texas & Pacific Railway Company v. Southern Pacific Railway Company (1889) 17 Am. St. Rep. 445, in which the two Railway Companies had agreed to "pool" the traffic between El Paso and Galveston, and

between New Orleans and El Paso, and to divide their joint earnings. The defendant company acknowledged the existence under this agreement of a pool balance in favour of the plaintiff company, but set up the illegality of the contract. The Court held that the plaintiff had no remedy. Peche, J., said in the course of his judgment, "It is, therefore, too clear for further argument or illustration that the first, the lasting, and the inevitable result of the agreement to the public was to stifle competition, and, as competition is the life of trade, the effect of the contract must necessarily and eventually have been injurious to public interests, and hence it was contrary to public policy."

In Emery v. Ohio Candle Coy. (1890) 21 Am. St. Rep. 819, an unincorporated company, called the Candle Manufacturers' Association, was formed for the purpose of increasing the price and decreasing the manufacture of candles within the territory covered by the agreement under which it was formed.

The Ohio Candle Company joined the association in 1883 and withdrew next year. This company paid a sum of money into the association and a further sum was due to it as its share of the profits. The committee offered to repay the sum paid in but not the sum due as profits, for which an action was then brought. The Court were of opinion that the suit could not be maintained "for the reason that the objects of the assocation were contrary to public policy, and in no way to be aided by the Courts."

The views expressed in the dicta of Agnew, J., and Peche, J., regarding the virtues of competition would probably not find unqualified acceptance in English or Australian Courts in modern times, though formerly similar opinions were expressed byEnglish Judges.

Thus in Mogul Steamship Company v. McGregor, Gow & Coy.,

(1892) A. C. 25, 51, Lord Morris said -- "In these days of instant communication with almost all parts of the world competition is the life of trade."

Competition however, is not now regarded with quite the same favour as when the above-mentioned cases were decided, and it is scarcely necessary to point out that a combination in restraint of trade, though from its nature it must interfere with competition, is not necessarily injurious to trade or the public. On the other hand it has been recognised by modern judges that such a combination may be an actual benefit to the public.

A combination of this sort may for example, enable the parties to it to pay better wages while at the same time charging reasonable prices to the consumer, or enable manufacturers to remain in business who would otherwise have to close their works.

The modern view was expressed by Viscount Haldane in North Western Salt Company Ltd., and Electrolytic Alkali Company Ltd. (1914) A. C. 461. 469, where he said, -- "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an illregulated supply and unremunerative prices may in point of fact be disadvantageous to the public. Such a state of things may if it is not controlled, drive manufacturers out of business or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from the public point of view."

A dictum of Griffiths, C.J., in the Australian case The Adelaide Steamship Coy., Ltd., v. Attorney-General of the Commonwealth of Australia (1912) 15 C.L.R. 65, 76, is to the same effect. He said-- "The bargain may be such as to give or bring about advantages to the public

or a considerable part of it of such a nature as to counterbalance or, to use Lord Campbell's language in Tallis v. Tallis, to provide 'a compensating good' to the public, as against the injury which according to the old doctrine, would prima facie be caused by the restrictive stipulation. This view of the law is of course consistent with the ordinary course of human affairs. Cut throat competition is not now regarded by a large portion of mankind as necessarily beneficial to the public." And again -- "It is recognised that consumers of a commodity are a part, not the whole of the public, and that in considering the question whether a contract in restraint of trade is detrimental to the public, regard must be had to the public at large. It may be that the detriment, if it be one, of enhancement of price to the consumer, is compensated for by other advantages to other members of the community which may indeed include the establishment or continuance of an industry which otherwise could not be established or would come to an end."

Nevertheless the possibilities of injury to the public from combinations to restrain trade are so great that in the United States of America, and in the Commonwealth of Australia, it has been deemed necessary to pass legislation for the purpose of curbing the operations of trusts and combines and of making it a punishable offence in certain cases to be a party to any such combination.

In the United States an Anti Trust Act was passed in 1890. Section 1 of that Act provides --

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanour and on conviction thereof, shall be punished by fine not exceeding 5,000

dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

Section 2. Every person who shall monopolise or attempt to monopolise or combine or conspire with any other person or persons to monopolise any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanour with the same penalty as in Section 1.

Provision is also made for enforcing the provisions of the Act by means of injunction.

It will be noted that the language in Section 1 is extremely wide and, strictly construed, includes every contract in restraint of trade or commerce, and every combination in restraint of trade or commerce whether in the form of a trust or otherwise.

This led to some difficulty in construing the section, and in some of the earlier decisions there was a tendency to give too wide a significance to the words "restraint of trade."

The leading case under the Anti Trust Act is now Standard Oil Coy. v. United Stated, 221 U. S. R. 1.

This was a case in which proceedings were taken under that Act against some 71 corporations and partnerships and seven other individuals that formed the huge combination known as the Standard Oil Trust, formed for the purpose of securing control of the petroleum oil trade.

The Court below held that "the acts and dealings established by the proof operated to destroy the 'potentiality of competition' which otherwise would have existed, to such an extent as to cause transfers of stock which were made to the New Jersey Corporation, and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the Act, but also to be

an attempt to monopolise and a monopolisation bringing about a perrenial violation of the second." With this finding the Supreme Court of the United States agreed and affirmed, with minor modifications, the decree of the Court below commanding the dissolution of the combination and providing means for effecting this purpose.

Mr. Chief Justice White, who delivered the opinion of the majority of the Court, said with reference to the construction of Sections 1 and 2 of the Anti Trust Act -- "The merely generic enumeration which the statute makes of the Acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion, which is that it was expressly designed not to unduly limit the application of the Act by precise definition, but, while clearly fixing a standard, that is by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law, and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute."

"And a consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded."

And later he added -- "That it was intended that the standard of reason which had been applied at the Common Law, and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

The result of this decision is that the effect to be given to the term "restraint of trade" which is undefined in the act, is determined by Common Law standards, and that not every combination in restraint of trade falls within Section 1 but only such as would have been unenforceable at common law as being contrary to public policy.

Standard Oil Cov., v. United Stated America was closely followed by United States of America v. American Tobacco Company. 221 U. S. R. 106.

It was held that the combination in this case (consisting of 65 American and two English Corporations and 29 individuals) was one in restraint of trade, and an attempt to monopolise the business of tobacco in interstate commerce was held to be within the prohibitions of the Act, and the trust was ordered to be dissolved. The Court applied the principle laid down in The Standard Oil Company v. United States, to the effect that the words "restraint of trade" at common law, and in the United States of America at the time of the adoption of the Anti Trust Act, only embraced acts, contracts, agreements, or combinations which operated to the prejudice of the public interests by unduly restricting competition, or by unduly obstructing the due course of trade, and that Congress intended that these words as used in the Act should have a like significance.

The learned Chief Justice also in the same case expressed the following opinion of the Anti Trust Act -- "In view of the general language of the statute, and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibition of the statute."

The first Australian attempt to deal with combinations in restraint of trade is contained in the Australian Industries Preservation Act 1906-1909, Part II of which provides (inter alia)

Section 4 (I). Any person who either as principal or agent makes or enters into any contract or is or continues to be a member of or engaged in any combination in relation to trade or commerce with other countries or among the states: --

(a) With intent to restrain trade or commerce to the detriment of the public, or

(b) With intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth having due regard to the interest of producers, workers, and consumers,

is guilty of an offence. Penalty: Five Hundred Pounds.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

Section 7 (I). Any person who monopolises or attempts to monopolise or combines or conspires with any other person to monopolise any part of the trade or commerce with other countries or among the States with intent to control, to the detriment of the public, the supply or price of any service merchandise or commodity is guilty of an offence. Penalty: Five Hundred Pounds.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

Section 10 contains provisions for enforcing the Act by means of an injunction.

Two difficulties were met with when it became necessary to enforce this legislation --

1. The necessity of proving detriment to the public.

2. The necessity of proving "intent."

The result was that the act was, for the purpose of dealing with combines, found to be practically worthless in the first case which came before the Court namely, The Adelaide Steamship Coy., v. Attorney-General of the Commonwealth of Australia, which later came before the Privy Council on appeal from the High Court of Australia (1913) A.C.781.

The material facts in the case were shortly as follows:- The owners of a majority of the coal mines in the Newcastle district in New South Wales, owing to excessive competition and the unremunerative prices obtained for coal, entered into an agreement to restrict the output of coal from their mines and to raise and fix the price of coal sold by them. A further agreement was entered into with several ship-owners who did the bulk of the coal carrying trade to the other States, and who were also coal merchants in those States, whereby the mine owners agreed to sell to the ship owners all the coal required for the interstate trade and not to sell for that trade to any other than the shipowners. The latter agreed to buy all the coal required for that trade from the mine owners and not to carry or deal in any other coal, and also not to resell coal at a higher price than that provided for in the agreement. It was against the ship owners, parties to the latter agreement, that proceedings were taken.

The Privy Council agreed with the High Court of Australia that neither "detriment to the public," nor intent to cause such detriment had been proved, and that it was necessary to prove both before the proceedings could be successful.

Lord Parker of Waddington, who delivered the judgment of the Privy Council, said the contract was "obviously an agreement in restraint of trade;"but he had previously laid

it down that "it is one thing to hold that a particular contract cannot be enforced because it belongs to a class of contracts the enforcements of which is not considered to be in accordance with public policy, and quite a different thing to infer as a fact that the parties to such contract had an intention to injure the public."

Referring to the case of Standard Oil Coy. v. United States and American Anti Trust Act he said -- "The Sherman Act, construed strictly, makes every contract or combination in restraint of trade and every monopoly or attempt to monopolise a statutory misdemeanour, irrespective of any sinister intention on the part of the accused, and irrespective of any detriment to the public. The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the Act. The enforceability of the contract becomes in this way the test of its legality. There is, however, no justification for applying a similar test in the case of an Act which, like the Act of 1906, only deals with contracts or combinations or monopolies or attempts to monopolise which involve detriment to the public, and in which a sinister intention is of the essence of the offence."

After the hearing before Isaacs, J., in the Court of first instance an Amending Act (No. 29 of 1910), was passed by which the words "in restraint of or" were inserted before the words "with intent to restrain" in Section 4 of the 1906 Act and the words "to the detriment of the public" were eliminated altogether.

Corresponding amendments were made in Sections 7 and 10.

It was also made a defence for the defendant to prove-- that "the matter or things alleged to have been done in restraint of, or with intent to restrain, trade or commerce, was not to the detriment of the public" and "that the restraint of trade or commerce effected or intended was not unreasonable."

This brings these provisions practically into line with the American Anti Trust Act, except that, by the Australian legislation, the onus is placed upon the defendant of showing that the restraint was not unreasonable, and that there was in fact no detriment to the public.

1. e. TRADE UNIONS.

The principle applied in the case of combinations of employers applies equally to combinations of workmen. Where such combinations are in restraint of trade so as to have a tendency to public injury the agreement between the parties is, at common law, not enforceable.

The earliest reported trade union case is Hornby v. Close (1867) 2 Q.B.D. 153, the decision in which arose out of an information laid against Close for unlawfully withholding certain moneys belonging to the Bradford Branch Society of the United Order of Boilermakers and Iron Shipbuilders.

The information was laid under 18 and 19 Vic. C. 63, which provides for the punishment of defaulting officers, "in the case of any friendly Society established for the purposes mentioned in Section 9, and for any purpose which is not illegal." One of the main objects of the Society was that of a trades union and the support of members when on strike.

The Justices before whom the information was heard were of opinion that the rules of the Society set forth an illegal purpose, and that they therefore had no jurisdiction. The Court of Queen's Bench upheld this view,

following the principle of the decision in Hilton v. Eckersley.

Cockburn, C.J., said -- "I am very far from saying that the members of a trades union constituted for such purposes would bring them within the criminal law, but the rules of such a society would certainly operate in restraint of trade, and would therefore in that sense be unlawful." And Blackburn, J., said he thought the rules illegal "in the sense of void according to the principle of Hilton v. Eckersley -- a case of combination of masters, but the same principle must apply to combinations of men -- that they are not enforceable at law."

Farrer v. Close (1869) 4 Q.B.D. 603, was a similar case of an information under the same Act. The justices held that they had no jurisdiction and an appeal was brought. The Court was equally divided on the question as to whether the rules of the society were in restraint of trade, so as to bring the case within the principle of the decision in Hornby v. Close, and the appeal was dismissed.

In Swaine v. Wilson (1889) 24 Q.B.D. 252 it was decided that, where the general objects of a society are legal, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society so as to prevent a member recovering money payable to him under a rule which is not illegal.

The claim was against the defendants as officials of a society, called The Bradford Power-Loom Overlookers Friendly Society, to recover £50 to which the plaintiff claimed to be entitled under the rules. Denman, J., decided in favour of the plaintiff and defendants appealed. The decision was upheld by the Court of Appeal. Lindley L.J. there said -- "Rules made for the bona fide purpose of protecting the funds of the society from claims which can be avoided by reasonable care and management will not be invalid on the

ground that they are in restraint of trade, provided the rules are not unduly oppressive or obviously detrimental to the public.

The law as to the contracts of trade unions was modified in England when the Trades Union Act was passed in 1871, and it was made possible for Trade Unions to enforce some, but not all, agreements made by them with their members.

Section three of that Act provides that the purposes of a trade Union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust. But Section four provides that the Act shall not enable the Court to entertain legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:-

1. Concerning the conditions on which they shall or shall not sell their goods, transact business, employ, or be employed.

2. Any agreement for the payment by any person of any subscription or penalty to a trade union.

3. Any agreement for the application of the funds of a trade union,-

(a) to provide benefits for members,

(b) to furnish contributions to any employer or workman not a member of such trade union in consideration of such employer or workman acting in conformity with the rules and resolutions of such trade union,

(c) to discharge any fine imposed upon any person by sentence of a Court of Justice.

And by Section 23 the term Trade Union was defined to include such combinations of workmen and masters, workmen and workmen, or masters and masters for regulating the relations between them or imposing restrictive conditions on the conduct of trade or business as would if the act had not been passed have been deemed to have been an unlawful combination by

reason of some one or more of its purposes being in restraint of trade.

The provisions of these sections of this Act were adopted in South Australia by The Trade Union Act 1876, and similar Acts were passed in most if not all of the Australian States.

It is very apparent, however, that although Trades Unions were by this legislation rendered no longer illegal, only a very limited number of their contracts are enforceable, namely those which are not included in the exceptions mentioned in Section 4. The Act was in fact in the first place designed rather to render officials liable for misappropriation of funds than for enabling the Union to enforce its contracts with its members.

The operation of this Act came under the notice of the Court of Chancery in Rigby v. Connel (1880) 14 Ch. D. 483. The plaintiff had been expelled from the Journeyman Hatters Fair Trade Union of Great Britain and Ireland for refusing to comply with the following rule of the Union:--

"Any journeyman binding his son in a 'foul' shop shall be fined £5 and not entitled to any benefit until he has paid his fine and contributed 26 weeks according to rule."

(A "Foul Shop" was one in which non-unionists were employed).

The plaintiff claimed to share in the benefits of the Union and that the defendants might be restrained from excluding him therefrom.

Jessel, M.R., in his judgment, after referring to the Trades Union Act and reading the above mentioned rule, said -- "I see a great number of other stipulations of a character which are not only in restraint of trade, but so much in restraint of trade, limiting the subject of it,

that I have no doubt that before this Act was passed these rules would have been altogether illegal, and if nothing in the Act therefore will assist the plaintiff, he must still be in the position of a member of an illegal association coming to a Court of Justice to assist him to enforce his rights under that illegal association."

The effect of The Trades Union Act 1871 was fully considered by the House of Lords in Russell v. Amalgamated Society of Carpenters and Joiners (1912) A.C. 421. This was a case in which an action was brought by the widow of James Russell, a former member of the Amalgamated Society of Carpenters and Joiners, a duly registered trade union. Russell had been a full member having paid his contributions for about 40 years. In the later years of his life he fell into ill health and received sick benefit from the Society until he was removed to the St. Pancreas Infirmary, and thence to a lunatic asylum where he subsequently died.

The action was for the recovery of a sum of money which represented accumulated superannuation benefit under the rules of the Society.

The House of Lords held that she could not recover because the Society was an illegal association at Common Law, as its main purposes were in unreasonable restraint of trade, and that the rules relating to the illegal purposes were not severable from those which related to the provident purposes of the Society.

After considering the effect of Sections 3 and 4 of The Trades Unions Act 1871 Lord Shaw of Dunfermline expressed his opinion of the effect of these sections as follows: --

Then the Act (Sec. 3) steps in to declare that they shall not for that reason (i.e. restraint of trade) be unlawful, but (Sec. 4) that nothing in the Act shall enable a Court of Law to entertain legal proceedings to enforce the

agreements which it cites. Quoad these things remain as they were. That is to say, if the association be illegal on account of its purposes being in restraint of trade, it remains the case just as it was before, that the law cannot be invoked to support it, to regulate it, or to control it, in the particular matters set out in Section 4 of the Act."

And Lord Robson said -- "It is to be observed that the Act did not go the length of abrogating or altering the general law against restraint of trade. It grafted an exception on it in favour of certain classes of persons, but by Section 4 it maintained the principle of the old law, even against these persons, to the extent of refusing the assistance of the Courts in the direct enforcement of contracts between members of a trade union, when the purposes of the union were in restraint of trade." When this case was before the Court of Appeal (1910) 1 K.B. 506 Vaughan-Williams L.J. made some remarks on the general question of restraint of trade as applied to Trade Unions which are worthy of notice. He said -- "It is not every restraint of trade which will render an agreement unlawful, in the sense that it cannot be enforced by an action at Common Law. To have that effect a restraint of trade must be such as in some way to prejudice the interests of the community. It may do that in a case where the freedom of contract of an individual is restricted to an unreasonable extent by an agreement which he has entered into, or in a case where the area from which employers, not parties to the agreement, can seek to obtain workmen is unreasonably restricted.....in a case where for instance the rules of the trade union prohibit their members from working with non-union men there is a restraint of trade to the prejudice of employers and workmen other than members of the trade union, quite independently of any action of their

own." And at a later stage in his judgment he said -- "With regard to Clause 3, which provides that where one of the committees of the union therein mentioned considers it to the best interest of members of the union that they should refuse to work with non-union men, they shall be entitled to trade privileges, it appears to me that this clause does involve a restraint of trade inconsistent with the public interest."

The matter was again discussed in the Court of Appeal in Baker v. Ingall (1912) 3 K.B. 106. In that case the defendant was a member of a friendly society registered under The Trades Unions Acts of 1871 and 1876. He met with an accident and became apparently incapacitated for life, and received £100 from the society under a rule providing for such cases. The rule further provided that all members receiving this benefit should sign an agreement to refund the money in the event of their returning to their trades. The defendant signed such an agreement, but recovered and returned to his trade. The Society, by its officers, brought an action to recover back the sum of £100.

Vaughan-Williams L.J. and Buckley L.J. (Kennedy L.J. dissenting) held that the society was illegal at common law as having purposes in restraint of trade, and that the action was brought directly to enforce an agreement for the application of the funds of the trade union to provide a benefit to a member within the meaning of Section 4 of the Trade Union Act 1871, and was therefore not maintainable.

The question of the validity of Trade Union rules also came under the notice of the High Court of Australia in the Amalgamated Society of Engineers v. Smith (1913) 16 C.L.R. 537 on appeal from the Supreme Court of Queensland. (Sections 25 and 26 of the Queensland Trades Union Act correspond with Section 3 and 4 of the English and South Australian Acts).

In that case a member of The Amalgamated Society of Engineers had been called upon to strike, which involved a breach of contract on his part. He refused and was expelled from the Society. The Full Court of Queensland held that he was entitled to be restored to membership, and this decision was upheld by the High Court, upon the ground, amongst others, that the expulsion was not authorised by the rules. It was held also that the action was not one which the Court was precluded from entertaining by Section 26 (Section 4, English Act) of The Trades Act, as it did not fall within any of the classes of contracts there mentioned, and therefore, though defendants set up the illegality of the rules as being in restraint of trade, and this was fully argued, it was not necessary to decide the question. Barton A.C.J. however, in his judgment said that "it is not enough to point to a rule, or to more rules than one, operating in restraint of trade, unless it is seen that the objects of the Society are in restraint of trade. On the other hand, that may be shown by the substance of objectionable rules, for it may be such as to be inconsistent with the notion that the true object of the Society is not in restraint of trade."

It will appear from the cases cited that rules and contracts of trade unions may still be illegal as being in restraint of trade.

In the Commonwealth of Australia and in some of the Australian States some further modifications of the Common Law have been made by statute; for example under the Commonwealth Conciliation and Arbitration Act 1904-1911, industrial organisations registered under that Act may recover subscriptions due by members, which could not be done under the English Trade Unions Acts. But except in so far as altered by statute the Common Law Rule still applies, and rules and agreements of trade unions which are in restraint of trade to the extent of being injurious to the public cannot be enforced.

2. MARRIAGE BROCAGE CONTRACTS.

Apparently the only reported case on the question of Marriage Brocage Contracts since King v. Burr in (1810) 3 Mer. 693, is the case of Hermann v. Charlesworth (1905) 2 K. B. 123 C. A.

The action in that case was brought to recover back a sum of money paid by the plaintiff to the defendant who was the proprietor of a paper known as "The Matrimonial Post and Fashionable Marriage Advertiser."

The plaintiff paid a fee of £52 and agreed to pay a further sum of £250 in consideration of being introduced to, and put in correspondence with a gentleman, that would result in her marriage with him.

No marriage resulted from the efforts of the defendant and the plaintiff sued for the return of the £52 paid.

The County Court Judge held that the contract was a marriage brocage contract and void, and that the plaintiff was entitled to recover back the money.

This decision was reversed by the Divisional Court consisting of Lord Alverstone, C.J., Kennedy, J., and Ridley, J.

The plaintiff appealed and the Court of Appeal upheld the decision of the County Court Judge.

Collins, M.R. quoted with approval the dictum of Lord Hardwicke in Cole v. Gibson (1 Ves. Sen. 503) and said, -- "The decision is important, as showing that the essence of the mischief arrived at arises not merely where the contract relates to a particular case in which the match may or may not be a proper one, but because contracts of this class are against public interest."

He also referred to the case of King v. Burr (of which Cozens-Hardy L.J., had the record searched and it was found that the case was almost on all fours) and added, - "So it

appears that the very point raised in that case - the fact of there being a choice given of a number of persons and merely an effort to bring about marriage with a particular person - was raised and decided on the ground of public policy. In my opinion, both on principle and authority, the transaction in this case comes within the rule which invalidates marriage brocage contracts."

3. RESTRAINT OF MARRIAGE

No modern case of a contract directly in restraint of marriage appears to be reported.

The question arose incidentally in the case of Robinson v. Ommanney (1883) 23 Ch. D. 285, in which a covenant by an unmarried woman not to revoke or alter her will was held good except in so far as it was in restraint of marriage, marriage being one mode of revoking the will.

Jessel, M.R., pointed out that "so far as it was in restraint of marriage it was bad; you could not of course bring an action for breach of the covenant by the marriage of the covenanter, but that does not destroy the covenant."

The law as to conditions in wills restraining marriage is so settled as now to be nothing more than a question of construction in each particular case.

Thus Sir G. Jessel, M.R. said in Bellairs v. Bellairs (1874) 18 Eq. 510 at p. 516:-- "Is the rule one of policy or one of construction? If it is a rule of construction, then it is more than analogy. Now if the rule were really one of policy, you never could evade it by a change in the form of words. But it is admitted you can so evade it;

that if you put it in the form of a limitation - if, for example, you had given this interest to this young lady until she married, and then upon her marriage had given it over - it is not disputed that that would have been good. Therefore, it seems to be a rule of construction. The reason of the rule may have been policy; but the actual question the Court has to decide is whether, according to the construction, it is a condition or a limitation, and if it is found to be a condition, then the reason which made that condition is terrorem only may have been founded on policy or supposed policy; but it is the construction that decrees that it is to be in terrorem, and therefore, strictly speaking, it is a question whether the testator has absolutely prohibited the marriage, or whether he has intended merely to threaten that which he knows cannot be carried into effect, because the Court construes it to be in terrorem."

A modern case in which a condition in a will in restraint of marriage was held to be void, is Morley v. Rennoldson (1895) 1 Ch. d. 449, where a testator, by a codicil to his will, stated that in consequence of the nervous debility of his daughter, his will was that she should not marry, and in case of her marriage (or death) his trustees should hold his residuary estate in trust for the persons mentioned in the gift over in his will.

With respect to this Lord Halsbury said -- "When we look at the whole instrument - that is, the will and the codicil taken together - it is plain that the testator intended that his daughter Margaret should not marry, and he did all that he could do to give effect to that intention, but the law does not permit his intention to be carried out."

There are two classes of case in which it has been held that a restraint of marriage is valid (1) where it is confined to a particular class of persons, (2) where the

restraint refers to a second marriage.

In Jenner v. Turner (1880) 16 Ch. D. 188, a testatrix devised her real estate to her father for life, remainder to her brother for life, remainder to his first and other sons in tail, with remainders over. She then bequeathed the proceeds of her residuary personality to her brother absolutely, but declared that if her brother should marry a domestic servant or person who had been a domestic servant the devises and bequests in his favour should be null and void. The brother married a person who had been a domestic servant. The Court held that the condition was valid.

Bacon, V.C., said, "Under this will no question can arise in which public policy can be said to be involved. The condition is not in restraint of marriage generally, for it was competent for John William Turner to choose a wife from the whole female world except only that portion of it which comprises domestic servants."

He then referred to the case of Perrin v. Lyon 9 East. 170, in which a testator devised his real estate to his daughter subject to the condition that if she should marry a Scotchman then she should forfeit all benefit under his will; and pointed out that this condition was held to be valid.

That a condition restraining a widow from remarrying is good, was held in the case of Newton v. Marsden (1862) 2 J. & H. 356. In that case a testator declared certain trusts for the benefit of the widow of his nephew and her children, with a condition subsequent that the trusts for the benefit of the widow should cease if she married.

The condition was held to be good by Vice Chancellor Sir W. Page-Wood, who said in the course of his judgment,- "For myself I cannot see why a husband should be allowed to impose a condition contrary to the general policy of the law, unless you put it as Lord Cranworth did, on the ground that

the husband is supposed to have an interest in his wife remaining a widow, and that this consideration is sufficient to counteract the general policy of the law. The only solid foundations that I can discover for any such supposed interest rests upon the interests of the children; and in the case now before me this applies much in the same way as in the case of a husband providing for his wife and family. The testator put himself, as it were, in loco parentis to the children, and not knowing what course a stepfather may take, he directs that the mother's interest shall cease on a second marriage. But I prefer to rest my decision on what is perhaps the safer as well as the broader ground, namely, that there is no authority in the common law, independently of the civil law, for saying that a condition restraining the marriage of a widow is void."

In a later case Allen v. Jackson (1875) 1 Ch. D. 399, it was decided that the same rule applies to a widower. In that case a testatrix gave the income of certain property to her niece (who was also her adopted daughter) and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over.

The Court of Appeal held that this proviso was valid, and that there was no distinction between the restraint of the second marriage of a man and that of a woman.

"It seems to have been laid down," said James, L.J., by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. That, of course, can be the only principle which can be the foundation of any rule at all on the subject. The general restraint of marriage, for some reason or other, probably a good reason, is to be discouraged, and a condition subsequently annexed by way of a forfeiture to a marriage is

therefore void. That is the law both as to a man and woman: but it has been most distinctly settled that with regard to the second marriage of a woman, that law does not apply, that whether the gift be a gift to a widow by a husband, or a gift to the widow by some other person, the law does not apply to that case, and that such a condition is perfectly valid."

The learned Lord Justice then went on to say that he failed to see any distinction whatever between the second marriage of a woman and that of a man, and that "the most ancient common law perhaps that we have in the country, the law of Gavelkind in Kent, has expressly provided that the second marriage of a husband entitled to freebench in his wife's estate is to operate as a forfeiture of that freebench: and it is difficult to understand any principle of public policy which would make that a right thing in Kent and an improper thing in Surrey."

4. SEPARATION DEEDS.

As has already been pointed out, there was a time when every agreement for separation between husband and wife was considered contrary to public policy, but since the decision of the House of Lords in Wilson v. Wilson I H.L.C. 538 it is no longer regarded as contrary to public policy for a husband and wife to agree to live separate, provided that the agreement contemplates an immediate separation. It is thought that where husband and wife have decided in any case to live apart it is better to allow them to agree to do so, and as to the terms of their separation, than to put them to the inconvenience and publicity of having their

disputes discussed in the Court.

As Sir G. Jessel, M.R., pointed out in Besant v. Wood (1879) 12 Ch. D. 605, 620. "For a great number of years both ecclesiastical Judges and lay Judges thought it was something very horrible and against public policy that the husband and wife should agree to live separate, and it was supposed that a civilised country could no longer exist if such agreements were enforced by Courts of Law whether ecclesiastical or not. But a change has come over judicial opinion as to public policy, other considerations arose and people began to think that after all it might be better to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of funds out of Court, although the consequence might be that they would live separately and that was the view carried out by the Courts when it became once decided that separation deeds were not against public policy," and referring to the case of Wilson v. Wilson he said, "the House of Lords decided in that case that there was nothing against public policy in the deed of separation itself, and I think it must be considered to be established by that case that any notion of such deeds being against public policy was finally dispelled or got rid of."

Agreements, however, whether post nuptial or antenuptial which contemplate a <u>future</u> separation of husband and wife are still regarded as contrary to public policy. Such agreements may operate as an actual inducement to one of the parties to seek a separation and are therefore not countenanced by the Courts. It is only where the parties have reached the stage where separation is inevitable and where the separation does actually take place forthwith that these agreements are regarded as enforceable.

That such agreements for future separation are invalid was definitely decided in the case of Cartwright v. Cartwright (1853) 3 DeG. M. & G. 982.

In that case the father of the husband had conveyed certain freehold property to the use of trustees during the life of the wife in trust for her separate use, with a proviso that if a separation should take place by reason of any disagreement between the husband and wife or otherwise the rents and profits should, from the time of such separation, be paid to the husband.

It was held that the proviso was in the nature of a condition and was void as being contrary to public policy. Lord Justice Knight Bruce said, "Now I apprehend the theory of the law to be that a man and his wife cannot live in a state of separation from each other (in the only sense, or in either of the only senses in which that term can possibly be understood here) without some failure on the part of one or both in the performance of duties in the fulfilment of which society has an interest. Here certain rights in property have been conferred by an antenuptial settlement on the intended husband and the intended wife, in the event of the marriage taking place, subject to a proviso for materially varying those rights in a manner favourable to the husband if a separation, by reason of any disagreement or otherwise, should take place. Understanding the term as I have already stated, I am of opinion that such a proviso is against public policy."

A similar decision was arrived at in the case of H. v. W. (1857) 3 K. & J. 382.

In that case an antenuptial settlement provided that the income of the settled fund should be paid to the wife during her life but "if she should so long continue to live with her husband and should not live separate and apart from him through any fault of her own," and in the event of her living apart through any such fault, the income to be paid to the husband.

Vice Chancellor Sir W. Page-Wood said, "The consequence

then of holding this to be a good limitation would be that it might induce the husband, if the wife left him through her own fault, to consent to her continuing to live apart from him in order that he might be able to appropriate the life income, and for this reason he might refuse to take steps to enforce the restitution of conjugal rights. The policy of the law in such cases, for very good reasons, endeavours in the very highest degree to secure the observance of conjugal rights."

And later in his judgment he said, "it seems to me to be decided that, by the policy of our law, no state of future separation can ever be contemplated (during the existence of coverture) by agreement made either before or after marriage.

It is forbidden to provide for the possible dissolution of the marriage contract which the policy of the law is to preserve intact and inviolate."

The law is the same if such a provision is contained in a will.

In the case of in re Moore Trafford v. Macnochie (1887) 39 Ch. D. 116, a testator directed his trustees to pay to his sister Mary Macnochie "during such time as she may live apart from her husband, before my son attains the age of 21 years, the sum of £2/10/- per week for her maintenance whilst so living apart from her husband."

Mary Mcconochie and her husband did not live apart until after the testator's death, and the latter knew at the date of his will that they were living together. About a year after his death they separated.

Kay, J., said in his judgment, "As a matter of construction it is impossible to hold that any of these payments are given to her while living with her husband. The living apart from her husband is of the essence of the gift in this sense - that it is the measure of the duration of these payments."

He held that Mary Macnonochie was not entitled to any payment of £2/10/- weekly.

Where parties are already living apart under a separation order and agree to live together upon terms, one of which is that a certain sum is to be paid to the wife if the husband is guilty of conduct which will entitle her to a further separation, such an agreement is not contrary to public policy. This was held by Walton J., in Harrison v. Harrison (1910) 1 K.B. 35. The learned Judge pointed out that the parties were already living apart and the agreement was made to enable them to live together again.

The learned Judge however said with reference to agreements for future separation, "Various cases were cited from Westmeath v. Salisbury downwards showing that as a general rule agreements which provide for a future separation between husband and wife are against the policy of the law and cannot be enforced. Speaking generally I accept that proposition."

5. CUSTODY OF CHILDREN

Apart from statute law it is contrary to public policy for a father to contract to part with the custody of his children. The rights which the law gives to a father and the duties it imposes on him are not for his benefit but for the benefit of his children, from the point of view of the welfare of the State. So any agreement by which he purports to deprive himself of his right to their custody, or his right to have them educated in the religion of their father, cannot be enforced. Where the father is dead the same rule applies to the mother.

The question was considered in the case of Hope v. Hope (1857) 8 De G. M. & G. 731. In that case an agreement was entered into by which Mrs. Hope agreed to abandon her suit for divorce instituted against her husband and not to oppose the suit for divorce instituted by him against her. One term of the agreement provided that Mrs. Hope should have the custody of one of the children.

The Court held that the latter provision was unenforceable, and concerning it Lord Justice Turner said that it was "in contravention of the settled law and policy of the country" and that "the law of this country gives to the father the custody of the children and the control over them and it gives him that custody and control, not for his own gratification, but on account of his duties with reference to the public welfare."

It was also so held in the case of Vansittart v. Vansittart (1858) 4 K. & J. 62, where a divorce suit had been commenced by plaintiff against her husband on the ground of adultery and cruelty. This suit was compromised and an agreement entered by which it was provided, inter alia, that Mrs. Vansittart should have the custody of the children, some of whom were over seven years of age, and certain stipulations were made respecting their education.

Vice-Chancellor Sir W. Page-Wood held that the agreement was invalid. He pointed out that it was quite competent for the parties to compromise the suit but not in such a way as to give Mrs. Vansittart the control of the children over seven years of age which she could not have acquired by any result of her divorce suit. He also said, "But in fact the stipulation is not one for which the husband had a right to bargain. Upon grounds of public policy the case in this respect is open to the same objections as that of Hope v. Hope.....Here the husband yields up the children above seven years of age to the custody of the wife, and

enters into stipulations as to management, education, and religious principles of his children, all of which he ought to superintend himself, bartering away, as it were, to his wife rights and privileges to which she would never be entitled as the natural result of her divorce suit."

Walrond v. Walrond (1858) Johns 18, in the same year, was a somewhat similar case in which a treaty for separation, which provided that a daughter should reside with her mother and be under her sole control and management, was held to be unenforceable.

So also the antenuptial agreement of a man to give up to his wife the control of the religious education of his children cannot be enforced.

This was decided in the case in re Agar-Ellis, Agar-Ellis v. Lascelles (1878) 10 Ch. D. 49. In that case a protestant, on his marriage with a Roman Catholic lady, agreed that the children of the marriage should be brought up as Roman Catholics. After the marriage, however, he insisted that the children should be brought up as Protestants. The three children of the marriage, all of whom were girls and at the time of the proceedings, aged nine, eleven and twelve, respectively, had been, unknown to the father, instructed by the mother in the Roman Catholic religion and sent to a Roman Catholic Church, and at length refused to obey the father's instructions to attend a Protestant Church. The father sought to have the children made wards of the Court, and the mother presented a petition with a view to their being brought up as Roman Catholics.

The Court of Appeal held that the mother should be restrained from taking the children to confession or to Roman Catholic places of worship without the consent of the father, and from inculcating in their minds the doctrines of the Roman Catholic Church as distinguished from the Protestant.

James, L.J., in delivering the judgment of the Court said, "As between the husband and wife it is manifest that

the wife could not, by a course of consistent and persistent disobedience to the husband's wishes and commands, give herself any right. It was conceded by counsel, and in truth, it is on principle and authority settled so as to be beyond question or argument, that the antenuptial promise is in point of law absolutely void. But the main argument before us has been and has properly been, not on the question of conflict of rights between husband and wife, for there can be no such conflict as to the education of children, but as between the father and the children themselves, or as between the father and the law which is bound to protect the children from any abuse of the parental power. It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of his rights," and after pointing out that the Court may for misconduct deprive the father of his rights or that the latter may have abdicated them by a course of conduct, he added, "But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right."

Some alteration was made in the law in England by 36 & 37 Vic. 1 C. 12 Sect. 2, which provides that "No agreement contained in any separation deed made between father and mother of an infant or infants shall be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother, provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

This section, then, altered the law so as to allow a father by a deed of separation to divest himself of his rights and duties in favour of the mother of his children.

In every other case however the common law rule still holds good. And even where a father has, by an agreement to which the above section applies, parted with the custody of his child to the mother, he may recover it if the Court is of opinion that the agreement is not for the child's benefit.

The law was so applied in the case of in re Besant (1879) 11 Ch. D. 508, where a deed of separation had been executed between a clergyman the Rev. Frank Besant and his wife Annie Besant, by which it was agreed that the latter was to have the custody of their daughter during eleven months of each year. Mrs. Besant held atheistical opinions and refused to give or allow her daughter to be given any religious education. She also lectured publicly in support of her views and in conjunction with Mr. Charles Bradlaugh published an obscene pamphlet called "Fruits of Philosophy" for which she and Bradlaugh were convicted, but the conviction was quashed on a technical point. On the petition of Mr. Besant for the custody of his daughter, the Court held that it was not for the benefit of the infant that she should be under the care of such a woman as Mrs. Besant, and the custody of the child was ordered to be given to the father.

Similar provision to those of 36 & 37 Vic. C. 12 Section 2, have been adopted in the Australian States, so that the law here is similar to that in England, and, apart from Statute law, the rule of public policy still applies, that a father cannot part with the custody or control of his children so as to divest himself of his rights and duties as their guardian.

In every case however public policy demands that the interests and welfare of the child shall be paramount, and in a case where a parent has parted with the custody of the child the Court will, if it is of opinion that it would not be for the welfare of the child to be returned to the parent's cus-

tody, refuse to make an order.

This was held in the case of The Queen v. Gyngall (1893) 2 Q.B.D. 232.

The mother and legal guardian of a female infant aged about fifteen, whose father was dead, applied by habeas corpus for the custody of her child.

The mother had been a ladysmaid and was now a dressmaker. Owing to her occupation she was obliged to leave her daughter from time to time in the custody of different persons, and finally with the defendant who kept a convalescent home under the patronage of the Rev. and Mrs. Duckworth. The child had been baptized and brought up in the Roman Catholic faith, but during her residence with the defendant she showed a preference for and entertained Protestant views, and this apparently was the chief reason for the application by the mother.

The child did not wish to return to her mother and the evidence showed that the latter was not in a position to properly maintain and educate her.

The Court held, that, though the mother had not been guilty of any misconduct which would disentitle her to the custody of the child, it was, having regard to the welfare of the child, essential that the Court refuse to give the mother the custody of her.

Lord Esher, M.R., said, "The child in this case is about 15 years of age and is more than ordinarily intelligent. She is actually in a position to earn something for herself, or will certainly be in that position very shortly. In a year she will have a right to act on her own views. She is happy where she is and is well treated. It appears to me that under the circumstances of this case it would be absolutely cruel to take the child away from the position in which she is, at the age at which she has arrived and with the feelings which she entertains, and to

deliver her over to a mother struggling with adversity, and who would, I believe be obliged to hand her over to persons whom she does not know and for whom she has no regard and amongst whom she would be surrounded by a religious atmosphere the contrary to that to which she is more accustomed, and so to put her in a position in which she would probably not be happy, and where there is nothing to show that she would be in any respect better off than she is now."

A provision in a will inserted with the object of deterring a father from performing his parental duties was held void as being contrary to public policy in the case of In re Sandbrook, Noel v. Sandbrook (1912) 2 Ch. 471.

The testatrix in that case left her residuary estate in trust for her two grandchildren, with a proviso that in case either one or both of them should "live with or be or continue under the custody, guardianship, or control of their father.....or be in any way directly under his control all benefits, profits and income provided to be given under this my will to both or either of them as the case may be, shall cease and determine and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit, or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control."

Parker, J., said, with respect to this condition, "It appears to me that this condition is inserted in the will with the direct object of deterring the father of these two children from performing his parental duties with regard to them, because it makes their worldly welfare dependent on his abstaining from doing what it is certainly his duty to do, namely, to bring his influence to bear and not to give up his right to the custody, the control, and education of his children" .....And at the conclusion of his judgment he said, "Having regard to all these circumstances it appears

to me that this condition is open to about every objection to which it could be open. It is open to the objection of being void because it is contrary to public policy, and it is open to the objection of being void because it is so vague."

It has also been decided in the case of Humphreys v. Polak (1901) 2 K.B. 385 C.A., that the mother of an illegitimate child has, even at common law, duties toward her offspring of which she cannot legally divest herself, and that any agreement by which she purports to do this is not enforceable.

In that case the mother agreed to leave her child with the defendants who agreed to maintain and bring up the child as though she were the defendants' own, and for ever relieve the mother of all liability and responsibility in connection with the bringing up of the child.

The defendants, after keeping the child some time, refused to maintain it any longer. The Court held that the mother could not enforce the agreement.

Stirling, LJ., said, "That right is given to the mother not for the benefit or gratification of the mother, still less as part of her property, but in order to enable her to discharge the duties which the law imposes on her in respect of the infant, and for its benefit."

6. CONTRACTS TENDING TO IMMORALITY

It has already been pointed out that contracts made for an immoral consideration have from an early date been treated as illegal on grounds of public policy.

The Courts have gone further than this and have refused to enforce contracts which, though not made for an illegal consideration have had the effect of assisting or contributing to the accomplishment of immorality.

In the case of Pearce v. Brooks (1866) L.R. 1 Ex. 213, the plaintiffs agreed to sell a brougham on the hire purchase system to the defendant, a woman of ill repute, with the knowledge that the latter intended to use it for an immoral purpose. Fifty Pounds were paid as a deposit but the brougham was returned before the purchase was completed. The Court held that the plaintiffs could not recover a forfeiture of fifteen guineas agreed to be paid if the brougham were returned.

Pollock, C.B., said, "I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied,..... nor can any distinction be made between an illegal and an immoral purpose."

An assignment of a lease of a house, where the assignee knew the house was to be used as a house of illfame, was held to be tainted with the immoral purpose, in the case of Smith v. White (1866) L.R. 1 Eq. 626, and the lessee, who had been compelled under his lease to pay for repairs, could not recover from the assignee though the assignment contained a covenant to indemnify the lessee against the covenants in the lease.

The Court went still further in the case of Upfill v.

Wright (1911) 1 K.B. 506, and refused to allow a landlord to recover rent for premises let to a woman who was the kept mistress of a certain man who frequently visited her at the house, a fact which was known to the landlord's agent at the time he let the premises.

The Court in that case held that no distinction could be made, for the purpose of this rule, between a common prostitute and the kept mistress of one man.

6 b. PROMISES TO MARRY BY MARRIED PERSONS.

Another class of contract which may be placed under the head of immoral contracts, and which not only tend to induce immorality but also to interfere with marriage relationship, are promises to marry made by persons who are themselves already married. Such promises are contrary to public policy and no action will lie if the promisor refuses to carry out his promise unless the fact of his being married was, at the time the promise was made, unknown to the promisee.

The first important English case of this class is Wild v. Harris (1849) 7 C.B. 999. In that case a married man promised to marry a single woman who was at the time unaware that he was married. A verdict was given in her favour, and on a motion in arrest of judgment the Court of Exchequer held that there was sufficient consideration for the promise, and that the defendant could not be allowed "to rely upon his own wrong, - to set up his own fraudulent concealment of his marriage in order to discharge himself from his promise, the plaintiff having performed her part

of the consideration by remaining unmarried and ready to marry the defendant until she discovered that he was already a married man."

Milward v. Littlewood (1850) 5 Ex. 775 was a similar case and the decision in Wild v. Harris was followed with approval by Alderson B., and Parke B; and by Pollock C.B., because he felt himself bound by it, but at the same time expressing his disapproval. He said, "I think it is inconsistent with that affection which ought to subsist between married persons that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think that by the law of the land such a promise is good."

The ground upon which the claim in these two cases was upheld is said to have been estoppel or warranty of capacity, but this is not at all apparent from the judgments.

Wild v. Harris was followed in the State of Tennessee U.S.A. in the case of Cover v. Davenport (1870) 2 Am. Rep. 706.

That also was an action for breach of promise of marriage made by a married man to a single woman, the latter being at the time ignorant of the fact that he was married. She afterwards discovered it and still continued the relationship for some time.

One of the Counts alleged that the defendant "fraudulently represented himself to be sole and unmarried." At the time the action was brought the defendant's wife was still alive.

The Court held that the plaintiff was entitled to recover damages, but that the jury might consider in mitigation of damages the fact of her consenting to the continuance of the contract.

Wild v. Harris was also followed in the Supreme Court of the State of Massachussetts in Kelly v. Riley (1871) 8 Am. Rep. 336, which was a case of the same sort.

It was however decided in the case of Paddock v. Robinson (1871) 14 Am. Rep. 112, that an agreement to marry made by two married persons, each knowing that the other to be married, was invalid.

Lawrence, C.J., in delivering the judgment of the Court said, "We cannot understand how an action can be maintained on such a promise. It cannot be performed except on the death or divorce of the husband of one party and the wife of the other; and to hold that it is valid because it may be performed on such a contingency would be to introduce into social life a dangerous and immoral principle. Only in the most corrupt condition of Society could such agreements be tolerated. They are in themselves a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong - a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose - such a contract should certainly not be recognised as valid in a Court of Justice."

He referred to the abovementioned cases of Wild v. Harris and Milward v. Littlewood, and pointed out that in each of these cases the plaintiff was an innocent party and did not know the defendant was married, and that the latter could not therefore set up his fraudulent concealment of the marriage as a defence.

So also, an agreement by a married man to marry a single woman when a divorce should be decreed between him-

self and his wife in a suit then pending, was held to be contrary to public policy by the Supreme Court of the State of New Jersey in the case of Noice v. Brown (1876) 20 Am. Rep. 388.

Beasley, C.J., in delivering judgment said, "I cannot see the faintest semblance of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is wholly void if when it is made it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation and disturbance is a part of the policy of every people possessed of morals and laws," and at the conclusion of his judgment he added, "If a husband can bind himself to a future marriage conditioned on getting a divorce, so he can incur a similar obligation to be put in effect on the dissolution of his marriage by the death of his wife. Such contracts are highly impolitic and highly scandalous, and are therefore illegal."

A somewhat similar case is the English case of Prevost v. Wood (1905) 21 T. L. R. 684, where Mr. Justice Darling held that an agreement by the defendant to marry the plaintiff when the latter obtained a divorce from her husband was contrary to public policy.

The whole question was considered by Phillimore, J., in the case of Spiers v. Hunt (1908) 1 K.B. 720, and by the Court of Appeal in Wilson v. Carnley (1908) 1 K.B. 729.

In Spiers v. Hunt a married man promised to marry, on the death of his wife, a single woman who knew that he was married.

Phillimore, J., held that the contract could not be enforced. He said, "Upon consideration I have come to the

conclusion that in general, such a contract as this is against public policy and morals and not to be enforced. It is, in my opinion, within the language of Sir George Jessel in Printing and Numerical Registering Company v. Sampson, L.R. 19 Eq. 462, 465, as a contract which will induce one of the parties to do something against the general rules of morality."

Wilson v. Carnley (1908) 1 K.B. 729, was a case in which the facts were similar to those in Spiers v. Hunt. The Court of Appeal decided that the decision of Phillimore J., in that case was correct in principle, and Vaughan Williams L.J., quoted his judgment with approval. He also said, "I have no doubt that this was a contract which had a tendency to make the defendant who, in the lifetime of his wife had promised to marry another woman, do something which was in contravention of the obligations which are recognised in this country as owing from a husband to his wife. It is sufficient to say that this is obviously a contract which a husband in his wife's lifetime could not enter into without being disloyal to his wife..... it is a contract against public policy as tending to make the husband disregard the acknowledged rules of morality as to married life, and therefore cannot be enforced."

Farwell, L.J. said, "In my opinion no such action will lie on the ground that such a promise is against public policy. The doctrine by which contracts are held to be void on the ground of public policy is based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals. I think that the Courts of this country still recognise as fully as ever the sanctity of the marriage tie, whether it be regarded from a merely civil or from a religious point of view."

And Kennedy, J., said, "In my opinion the contract

sued upon in this case, both upon the authorities in our law and upon general principles, is one which according to the view which has heretofore prevailed and still prevails as to the obligations of marriage, clearly comes within the class of contracts which are held to be unenforceable on grounds of public policy as being intrinsically immoral in their nature."

7. ASSIGNMENT OF SALARIES OF PUBLIC OFFICERS

No great development has taken place in recent times in the general law under this head and the law, as laid down in the earlier cases previously referred to, has been followed.

This may be summarised as follows:-

1. The salary of a public officer already accrued due may be assigned like any other debt.

2. The salary of a public officer not yet due is not assignable.

3. The pension of a retired public officer given to him wholly for past services is assignable.

4. The salary of a public officer given to him partly in consideration for past services and partly as a retainer for future services is not assignable.

5. The office must be a strictly public one, that is to say, the money for the payment of the salary must come out of the national and not a local fund.

The dictum of Buller, J., in Flarty v. Odlum 3 T.R. 681, that the pay of an officer, which is actually due, may be assigned like any other debt does not appear ever to have been questioned, and obviously the objections as to assign-

ing future pay do not exist with respect to pay already due.

With regard to the assignment of future pay of public officers there is very little modern authority owing no doubt to the fact that the law on this point has long been regarded as definitely settled.

In the case of Ex parte Harnden (1859) 5 Jur. N.S. 852, Joseph Harnden was in the employ of Her Majesty's Dockyard at Chatham at a salary of £150 per year. He also carried on business as an eating-house keeper and became bankrupt. The Commissioner granted a second class certificate to Harnden upon condition of his paying to the Official Assignee the sum of £20 annually out of his salary until his creditors should have been paid 7/6 in the pound.

Sir J. Knight Bruce, L.J. said that the condition must be expunged, "for it was contrary to public policy that the salaries of public servants should be reduced below that amount which the authorities considered adequate payment for the duties which those servants had to perform."

The later case of Althorpe v. Althorpe (1887) 12 P.D. 192, appears to be the last reported case in which the law on this point was questioned.

In that case the respondent in a suit for the restitution of conjugal rights was ordered to pay his wife's costs of the suit. The respondent was a Surgeon in the Royal Navy with rank equal to that of a Lieutenant, and the costs not having been paid, an application was made to attach his pay. This was refused by Butt, J., and an appeal was brought.

The Court of Appeal were unanimous in their opinion that the pay could not be attached, and that, though it was not protected by any statutory enactment, it was protected by the general law.

Cotton, L.J. pointed out that the pay was given to the officer to enable him to discharge his duties, and that since half pay, as decided in Flarty v. Odlum (3 T.R. 681),

could not be assigned because it is granted to a man in order to keep him in a state to perform his duties, then a fortiori pay given him to enable him to perform duties in praesenti could not be assigned.

And Lindley, L.J. said, "I am surprised at this appeal. It has always been taken for granted that the full pay of an officer on service cannot be assigned, the only doubt has been as to half-pay."

The law with regard to the assignability of pensions was laid down by Baron Parke in his judgment in the case of Wells v. Foster, 8 M. & W. 152, already previously referred to. He drew the distinction between a pension given to a man entirely for past services, and a pension given not exclusively for past services but as a consideration for some continuing duty or service in addition to past services. He said, "The correct distinction made in cases on this subject is that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life or merely during the pleasure of others. In such a case the assignee acquires a title to it both in equity and law, and may recover back any sums received in respect of it by the assignor after the date of assignment. But where the pension is granted not exclusively for past services but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of service which the party has already performed, it is against the policy of the law that it should be assigned."

The law as there laid down was applied in the case of Willcock v. Terrell, (1878) 3 Ex. D. 323. where it was held that the pension of a county Court Judge, which was given to him entirely as a reward for past services, was assignable and liable to seizure under writs of sequestration.

In that case Cotton, L.J., in delivering the judgment of the Court of Appeal said, "Where a pension is granted by

the Crown to one who, though not for the time being engaged in any active duties, is still liable to be called to active service, and is therefore to be considered in the service of the Crown, as the half pay of an officer, the pension is to be considered as to some extent granted in order to maintain the grantee until he is called upon to serve again." He then quoted with approval the following passage from the judgment of Parke, B., in Wells v. Foster; -- "A man may assign a pension given to him entirely for past services whether granted to him for life or during pleasure."

That the office must be a strictly public one was decided definitely in the case of In re Mirams, (1891), 1 Q. B. 594.

It was held in that case that the assignment of the salary of a Chaplain to a Workhouse and Workhouse Infirmary was not void as being contrary to public policy.

The salary in that case was paid out of a poor-rate and the Chaplain, though appointed by the guardians, could only be dismissed by the Local Government Board.

Cave, J., there laid it down that "to make the office a public office the pay must come out of national and not out of local funds, and the office must be public in the strict sense of the term."

8. CONTRACTS TENDING TO INTERFERE WITH THE COURSE OF JUSTICE

a. AGREEMENTS TO STIFLE PROSECUTIONS

The case of Keir v. Leeman (1846) 9 Q.B. 371, under this head has already been mentioned.

In that case it was held that an agreement had been

made to compromise an indictment for an assault, coupled with riot and the obstruction of a public officer, was illegal.

Tindal, C.J., there stated the limitation to the rule to be, that any case may be compromised in which the offence involves damages to an injured party for which he can maintain an action.

This principle was followed in Fisher & Co. v. Apollinaris Company (1875) 10 Ch. app. 297. There the Apollinaris Company had instituted a prosecution against Fisher for unlawfully enclosing mineral water in bottles bearing the trade mark of the Company, and he was committed for trial. Fisher gave the Company a written apology, no evidence was offered at the trial, and he was acquitted. The Company published the apology and Fisher sought to restrain them from doing so. The question was raised as to whether this compromise was legal, and the Court, reversing the decision of Sir R. Malins V.C., held that it was.

Sir W. M. James, L.C., said in the course of his judgment, "This is one of those misdemeanours where the person injured has the choice, between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway, on the terms of the defendant's agreeing to remove the nuisance or repair the highway."

This dictum of Sir W. M. James was, however, not followed in Windhill Local Board of Health v. Vint (1890) 45 Ch. D. 351, where it was laid down that an offence of a public nature cannot be the subject of a compromise.

The plaintiffs in that case brought an indictment against the defendants for interfering with and obstructing a public road.

At the trial an agreement for compromise was made be-

tween the parties which was initialled by the Counsel and sanctioned by the Judge, and afterwards confirmed by a deed executed by the plaintiffs and defendants. The defendants by this deed covenanted to restore, within seven years, the road which they had broken up, and the plaintiffs covenanted that when this was done they would consent to a verdict of "not guilty;" the indictment in the meanwhile was to lie in the office as a security for the observance of the terms of the deed.

The defendants failed to perform the covenants contained in the deed and an action was brought.

The Court of Appeal held that the agreement was against public policy.

Cotton, L.J., said, "I do not intend to enter at all into the question whether an agreement to stifle any prosecution is illegal or not. That does not arise here, because this was merely a prosecution on a public matter - a matter which concerned the public." After alluding to certain arguments of Counsel concerning the reason for the rule he said, "To my mind the reason of the rule goes deeper than that; it is that the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public." And later he said, "You are taking the administration of the law and the object which the law has in view out of the hands of the Judge and putting it into the hands of a private individual. That to my mind is illegal."

Fry L.J. referred to Keir v. Leeman, 9 Q.B. 371, and said, "That lays down this principle, which I take to be one of general application, that where the matters of indictment are matters of public concern, they are not the subject of compromise."

And Lopes, L.J. said, after citing Keir v. Leeman, "Now

there can be no doubt that in the present case the offence was of a public nature; and in my opinion the consideration for the agreement which was entered into was the consent to an acquittal in the future, which seems to me in effect to be a stifling of a prosecution. I think the agreement in question was against public policy and illegal."

It is to be noted that Cotton L.J., expressly refrained from saying whether or not an agreement to stifle any prosecution is illegal; and the question will no doubt be considered in the future whether the rule should or not be made general. If, as stated in this case, the reason of the rule is that "it takes the administration of the law out of the hands of those to whom it is committed" and puts it into the hands of a private individual, this reason applies to every misdemeanour whether there is also a right of action for damages or not, and the public are clearly interested in having every person guilty of any misdemeanour punished.

In the case of Williams & Others v. Bailey (1866) 1 H.L 200, the House of Lords held that an agreement by a father to give a mortgage over his property to secure Bankers against losses caused through forgeries committed by his son, was void. There was no direct threat of prosecution and no express agreement not to prosecute. One of the Bankers, however, during the course of the negotiations made use of the following words in addressing the appellant. "If the Bills are yours we are all right. If they are not we have only one course to pursue and we cannot be parties to compounding a felony."

The decision of Vice Chancellor Stuart that the agreement to give the mortgage was void was upheld on the ground that one of its objects was to stifle a criminal prosecution the understanding being that there should be no prosecution; and also on the ground that the father was not under the circumstances a voluntary agent, the forgeries being used to

extort the security from him in order to save his son.

During the course of his judgment Lord Westbury said, "I regard this as a transaction which must necessarily for purpose of public utility be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which if such transactions existed to any considerable extent would be found productive of great injury and mischief to the community."

In the case of In re Mapleback, Ex parte Caldicott (1876) 4 Ch. D. 150, James Mapleback owed Henry Butt £100 and forged the latter's name to a bill for a further £100. He then induced Butt to meet the forged Bill and gave him a Bill of Sale over his property to secure the total debt of £200. Butt afterwards took possession of the goods comprised in the Bill of Sale and realised the amount owing to him. Mapleback became insolvent, and the trustee brought an action against Butt to recover the proceeds of the goods sold.

Bacon, C.J., held that the Bill of Sale was void and that the money should be repaid. He said, "I thought it was the duty of every citizen of these realms if a crime was committed against him to prosecute the offender. That is a prima facie duty. I thought it was unlawful for him to sell that duty, or to make a bargain about it. In the present case it has been abundantly established that this has been done, and I repeat, to sell the duty is unlawful and an offence against public policy."

The Court of Appeal, while pointing out that if the appellant had been plaintiff he would have been in a very difficult position, held that if there was a legal misdemeanor the bankrupt was a party to it and the parties were in pari delicto; and as the appellant had actual possession of the money received for the goods, this could not be recovered

back.

In Pound v. Grimwade (1888) 39 Ch. D. 605, the plaintiff gave a bond to one Hiscock to secure £3,000 and a mortgage for £3,000, the consideration for which was that the plaintiff should be "free from any legal proceedings" in connection with the loss of money in transactions between Hiscock and one Cameron, whom the plaintiff had introduced. The latter brought an action against Hiscock's trustee in Bankruptcy to set aside the bond and mortgage.

Stirling, J., found onthe evidence that the words "legal proceedings" in the bond were meant to include and did include criminal proceedings, and also that as part of the consideration there was to be no public mention at the trial or in the newspapers or otherwise of the plaintiff's name in criminal proceedings then pending against Cameron, but that there was no duress or undue pressure on the part of Hiscock, and that the bond and mortgage were not executed under pressure of threats of criminal proceedings. He held nevertheless that the consideration was partly illegal. He said, "It included, I think, not only a stipulation that no criminal proceedings should be begun against the plaintiff, but also stipulations as to the conduct of the pending criminal proceedings against Cameron by which the course and result of those proceedings might have been affected."

"Now in Egerton v. Brownlow, Lord Lyndhurst says, 'It is admitted that any contract or engagement having a tendency however slight, to affect the administrations of justice is illegal and void.....Upon this principle it has been repeatedly held that agreements tending to effect the course of legal proceedings are illegal, even though these proceedings may not be strictly criminal in their nature.'"

In Jones v. Merionethshire Permanent Benefit Building Society (1892) 1 Ch. 173, the Secretary of the defendant

Society had embezzled certain of the Society's funds and the plaintiffs gave two promissory notes for £200 and £150. and certain collateral securities. In a written undertaking by the plaintiffs it was stated that the notes were given in consideration of the Society not suing the Secretary to recover the sum embezzled. No promise was made by the Directors not to prosecute, but Vaughan-William, J., found as a fact that it was an implied term in the agreement that the Society would not prosecute, and held that the agreement was void, and that therefore the Society could not recover on the promissory notes.

This finding was upheld by the Court of Appeal.

Bowen, L.J., pointed out that the law is not anxious to discourage reparation but that the person injured "must make no bargain about that. If reparation takes the form of a bargain then, to my mind, the bargain is one which the Court will not enforce," and he added, "the consideration for the notes was the corrupt bargain to stifle the prosecution. I use the term corrupt in the sense that it is a bargain which public policy forbids the Court to give effect to."

b. AGREEMENTS TO INDEMNIFY BAIL.

Agreements to indemnify Bail are void as being contrary to public policy in that the public is thereby deprived of the security of the person who makes himself responsible for the appearance of the accused at the trial.

There is a dictum of Jervis, C.J., to this effect in Jones v. Orchard (1855), 16 C.B. 614, 624, where he said, "The rule was moved on the ground that a contract in a

criminal case to indemnify the bail against the consequences of a default of the principals appearance on the trial of the indictment, is contrary to public policy, and therefore that the law will not presume such a contract. It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded and that such a contract would be contrary to public policy, inasmuch as it would be in effect giving the public the security of one person only instead of two."

This opinion was approved by Stephen, J., in the case of Wilson v. Strugnell (1881), 7 Q.B.D. 548, in which £100 had been paid to indemnify bail.

Stephen, J., said, "I am of opinion that the contract to indemnify the bail against his liability was contrary to public policy and therefore illegal and void. I should have been prepared to hold thus upon the obvious principle that the effect of the contract is to deprive the public of the security of the bail, but I think that the opinion of the Court in Jones v. Orchard is a direct authority for the view which I take."

Stephen, J., held however that as the bail had not been estreated and the £100 had not been paid for the purpose for which it was intended, the contract had not been completely executed, and the trustee in Bankruptcy of the accused person could recover the £100 back.

In Hermann v. Jeuchner (1885), 15 Q.B.D. 561, however, it was held by the Court of Appeal that, where £49 was deposited by the defendant in a criminal case with his surety for two years as a security, the agreement was illegal, and that the money paid could not be recovered back. The Court were of opinion that Stephen, J., was wrong in this case in the Lower Court, and in the case of Wilson v. Strugnell in holding that the contract was not completely performed.

It makes no difference if the indemnity is given by a person other than the prisoner. This was decided in the case of Consolidated Exploration and Finance Company v. Musgrave (1900). 1 Ch. 37.

North, J., there held that the transfers of certain shares in the plaintiff Company by one Ainsworth to the defendant, in consideration of his giving bail for another, was void, and ordered the shares to be retransferred. He pointed out that the bail has certain powers over the person of the accused, and may seize him and command the assistance of the Sheriff in doing so in order to prevent him from absconding, and that therefore "it is essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has to prevent the accused from disappearing: this is essential for the protection of the public and anything that tends to prevent or hinder his so doing, is illegal." He also added, "It is said that the public still have in the person who gives the indemnity the same security of a person whose interest it is to produce the prisoner. That is not so, for he has not the power of the bail."

In The King v. Porter (1910), 1 K.B. 369, it was held by Lord Alverstone, C.J., in the Court of Criminal Appeal, that an agreement by an accused person to indemnify two persons who had given bail for him was illegal as tending to produce a public mischief, and that the parties to the agreement were guilty of conspiracy.

The learned Chief Justice said, "It is in our opinion difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond, and for many years it has been held that not only are the bail

responsible on their recognizance for the due appearance of the person charged, but that if it comes to their knowledge that he is about to abscond they should at once inform the police of the fact."

c. AGREEMENTS AGAINST THE POLICY OF THE BANKRUPTCY LAWS.

As already indicated, agreements which offend against the spirit of the Bankruptcy Laws are invalid. The cases of Neret v. Wallace (1789), 3 T.R. 17, and Jackman v. Mitchell (1807) 13 Ves. 581, have already been alluded to.

The principle of Neret v. Wallace was applied in the case of Hall v. Dyson (1852), 17 Q.B. 785, although in that case it did not appear that the money was to be paid out of the insolvents estate. The agreement was, in fact, made with the insolvents solicitor by a creditor who, in consideration of the payment of a sum of money, agreed to withdraw his opposition to the discharge of the insolvent.

Lord Campbell, C.J. said in the course of his judgment, "There is no doubt that the plaintiff might withdraw his opposition if he chose, but he had no right to agree to do so in consideration of receiving money. When Simpson v. Lord Howden, 9 Cl. & Fin. 61, which has been cited for the plaintiff, was before the House of Lords I concurred with the rest of their Lordships in holding the agreement which was the subject of dispute to be valid; but we did so on the ground that there was nothing in the agreement itself to show that it was necessarily of an illegal character or in fraud of the public. In the present case the creditor is, as it were, bought off; and he was under a moral

obligation to continue his opposition, inasmuch as, by giving notice of it, he had led the other creditors to believe that he really intended to oppose. The consequence of his withdrawing is that justice is disappointed because the adjudication is made without the proper investigation having taken place .

The case of Hall v. Dyson was followed in McKewan v. Sanderson (1875) 20 Eq. Cas. 65..

In that case a guarantee had been given by the defendant to the London & County Bank, that the loss of the latter on certain Bills and acceptances of the defendant's brother should not amount to more than £2,000. The defendant's brother, at the time, had commenced proceedings for the liquidation of his affairs. The Bank, in consideration of the guarantee, forebore to take proceedings against the defendant's brother or to prove against his estate.

Sir R. Malins, V.C., held that the agreement was illegal. He cited with approval the abovementioned dictum of Lord Campbell, and, after pointing out that the Bank obtained an advantage over the other creditors, said, "Upon all these grounds it is perfectly impossible on this Bill that the Bank can succeed upon this guarantee it being opposed to all public policy."

In Kearley v. Thompson (1890), 24 Q.B.D. 742, it was held that an agreement not to appear at the public examination of a Bankrupt, nor to oppose his discharge, was illegal but that although the agreement had only been partly performed, the sum of £40 paid pursuant to it could not be recovered back, the parties being in pari delicto.

With reference to agreements for compounding with creditors Sir Frederick Pollock in his work on Contracts (6th Ed. p. 267). says: "A composition with creditors is in most cases something more than an ordinary civil contract, it is in truth a quasi-judicial proceeding and as such is

to a certain extent assisted by the law. Public policy, therefore, as well as private rights, requires that such a proceeding should be conducted with good faith, and that no transaction which interferes with justice being done therein should be allowed to stand."

The principle applied in Jackman v. Mitchell that a secret agreement by which one creditor obtains a larger dividend than the other creditors is illegal, was reaffirmed in Mare v. Sandford (1859) 1 Giff. 288.

Vice Chancellor Stuart in that case said, "Where the Court has interfered to set aside such a transaction it has done so on the ground of public policy and of the transaction being such as the law should in the highest degree discountenance," and he quoted with approval the following passage from a text book by Mr. Adams, "The very circumstance that some creditors have already executed, is an inducement to the rest to follow their example. The reason why they have so executed can only be known to the other creditors from the representations of the debtor, and, if the real reason is the result of any secret arrangement, the influence of their example is a fraud on the rest. All such secret arrangements therefore are utterly void."

At the conclusion of his judgment he added, "I shall give you costs: but that I do not from the merits of the plaintiff which are very small, but from the demerit of the defendants and because as Lord Elden said, the transaction is so much against public policy that the Court has always, when such transactions occur, felt it its duty to stamp its reprobation of the transaction by giving costs.

Mare v. Warner (1861), 3 Giff. 100, was a similar case in which a bankrupt compounded with his creditors for five shillings in the pound, but gave one his I.O.U. for the whole debt and afterwards exchanged the I.O.U. for Bills.

The Court held that the I.O.U. was worthless and the

Bills given in place of them equally worthless.

In this case the Vice Chancellor Stuart took a different view with regard to the costs. He said, "In the case of Mare v. Sandford I gave the plaintiff his costs on the ground of public policy, though his conduct entitled him to no indulgence. But I have since thought that public policy will be better maintained by giving a plaintiff who comes forward with such a case no costs."

Wood v. Barker, (1865), L.R. 1 Eq. 139, was a case of a similar kind and was similarly decided by Vice Chancellor Sir J. Stuart.

On the question of costs, however, the learned Vice Chancellor was reminded of his decisions in the cases of Mare v. Sandford and Mare v. Warner. He said, "The defendant having made an untrue statement in his answer ought on the ground of public policy to pay the whole costs of the suit."

It makes no difference in these cases that the extra payment is made by a stranger to the composition.

In the case of Ex Parte Milner (1885), 15 Q.B.D. 605, a deed of arrangement was made by a debtor with some of his creditors to pay a composition of tenshillings in the pound. The deed was not under any Statute and bound only those who signed it. The respondent in this case executed the deed without any fraudulent representations having been made to him, or any unfair or improper conduct on the part of the debtor.

After the execution by the respondent other creditors were induced to execute the deed by additional payments on account of their debts made to them by the debtor's brother.

The Court held that the respondent had the right to treat his execution of the deed as voidable.

d. COMPROMISE OF DIVORCE PROCEEDINGS

A husband and wife may make a binding agreement to abandon divorce proceedings, but it has been held that such an agreement made between the petitioner and co-respondent is contrary to public policy.

This was held in the case of Gipps v. Hume (1861), 2 J. & H. 517.

In that case, the defendant (the co-respondent in the divorce suit) agreed to pay the plaintiff (the petitioner) the sum of £3,000 and to secure a further sum of £4,000 and interest payable at a future date, in consideration of which the plaintiff undertook to withdraw the suit. The agreement was held to be void. Vice Chancellor Sir W. Page-Wood said, "I am clearly of opinion that this contract is void on the ground of its contravening public policy;" He pointed out that the Court had power to settle the whole of the damages if recovered on the children, but that an agreement of this kind took the matter out of the hands of the Court, "and it would not be consistent with the policy of this Court to lend itself to a scheme by which he has sought to pocket the price of his own shame."

In the case of Brown v. Brine (1875) 1 Ex. D. 5, where no proceedings had been commenced it was held that an agreement not to sue on a bond, in consideration that the obligor would not make public the fact that the obligee had committed adultery with the obligor's wife, was illegal and not enforceable.

Cleasby, J., said, "The consideration.....is the benefit derived from the deceased keeping certain events secret and that is the same thing as depriving the public of the knowledge of the truth, and of the opportunity of acting upon it. It is only therefore a benefit to the

plaintiff so far as it would be material to the public to know the circumstances. If that is wholly immaterial then there is no consideration at all; if it is material, then the public ought not to be deprived of it as a matter of bargain which is to be held to confer a legal right."

In the recent case of Upton v. Henderson, 106, L.T. 839, however, an agreement made between the petitioner and co-respondent to compromise divorce proceedings was held to be valid. The plaintiff was the petitioner in a divorce suit in which defendant was named as co-respondent. An agreement was made under which the proceedings were withdrawn, Henderson agreeing not to come within ten miles of Upton's residence for fifteen years, and to deposit £3,000 with a trustee, the income of which was to be paid to him until breach of the agreement occurred, and then the whole sum was to be paid to the plaintiff.

Upon breach of the agreement an action was brought for an injunction and for payment of the £3,000. The Court made an order for both, holding that the agreement was not contrary to public policy.

Eve, J., said that in his opinion the circumstances do not bring the case anywhere near the mischief dealt with in case like Gipps v. Hume.

9. CONTRACTS TENDING TO IMPROPERLY INFLUENCE LEGISLATION

As already stated, a contract made for the purpose of inducing a member of the legislature to act otherwise than impartially in the discharge of his legislative duties is contrary to public policy.

This is on the broad ground that any agreement which tends to prevent a man from performing a public duty is contrary to the welfare of the community.

A member of the legislature owes a duty to the State to consider impartially and in the public interest all matters which come up for the consideration of the legislature, and he must make no bargain which creates private interests that conflict with his public duty. As Lord Lyndhurst stated in Egerton v. Brownlow 4 H.L.C. 1 at 161, "in the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced as far as possible by other considerations, and least of all those of a pecuniary nature."

Any contract which has a tendency to interfere with the proper discharge of the duties of the legislator is, therefore, at variance with the public good and will not be enforced by the Courts.

It has been held in England, however, that where there are existing property rights, this broad principle does not strictly apply. As Kindersley, V.C., put it in the case of Shrewsbury v. North Staffordshire Railway Company (1865) L.R. 1 Eq. 593, 613, "A land owner cannot be restricted of his rights because he happens to be a member of Parliament."

Cases like this and that of Lord Howden v. Simpson 9 Cl. & F. 61 can however, only be regarded as anomalous.

The decisions in these cases are exceptions, and not very laudable exceptions, to the broad rule that interest

shall not be allowed to conflict with public duty.

This question has been much discussed in the American Courts from time to time, and there are many important decisions there which are worthy of notice.

The important case of Clippinger v. Hepbaugh (1843) 40 Amer. Dec. 519, has already been mentioned.

A later case of some importance is Marshall v. Baltimore & Ohio Railway Company (1853) 16 Howard 314, in which the principles governing this class of case were very fully dealt with.

Marshall, a citizen of Virginia, sued the defendant Company to recover fifty thousand dollars which he alleged they owed him under a special contract for his services in obtaining a law from the Legislature of Virginia granting to the Company a right of way through Virginia to the Ohio River.

The correspondence between the parties pointed to the fact that the agency was a secret one, and that "the legislature was to be surrounded with respectable agents whose persuasive arguments might influence members."

The object of the secrecy was stated to be "because an open agency would furnish grounds of suspicion and unmerited invective, and might weaken the impression we might seek to make."

The Court held that Marshall could not recover, as such an agreement is contrary to public policy.

Mr. Justice Gries in delivering the judgment of the Court said, "It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound moral or public policy; or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions ..... Legislators should act from high considerations of public duty; public policy and

sound morality do therefore require that Courts should put the stamp of disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees as well as in Courts of Justice. But where persons act as Counsel or agents or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true character, so that their arguments and representations openly and candidly made may receive their just weight and consideration. A hired advocate assuming to act in a different character is practising fraud on the legislature.....Any attempt to deceive persons intrusted with high functions of legislation by secret combinations, or to create or bring into operation undue influences of any kind have all the injurious effects of a direct fraud on the public.

Legislators should act with a single eye to the true interest of the whole people, and Courts of Justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

In that case the agent was to act secretly and influence the members of the legislature without their knowing it."

It has since been held in the American case of Trist v. Child (1874) 21 Wall. 441, that agreements for "lobbying", even though not done in secret and no corrupt means are used, are contrary to public policy.

In that case N. P. Trist having a claim against the United States for his services rendered in 1848 touching the

treaty of Guadalupe Hidalgo, a claim which the Government had not recognised, resolved to submit his claim to congress. He made an agreement with Lunis Child that the latter should take charge of the claim and prosecute it as his agent and attorney and receive as payment for his services 25 per cent of whatever sum congress might allow. Payment was to be contingent upon success. Child prepared the petition and prosecuted it until his death, when his son, who was his partner, proceeded with it by means of "lobby service". Congress appropriated the sum of 14,559 dollars to pay it, and the son claimed 25 per cent of this sum which Trist declined to pay.

The Court held that the agreement was invalid as being contrary to public policy.

Mr. Justice Swayne who delivered the judgment of the Court said, "The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy." After pointing out the temptation agents of this kind are exposed to, to use improper means to influence the votes of members, the learned Judge continued, "It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and injurious to the public welfare."

The question of improperly influencing members of the legislature cropped up in the comparatively recent English case Amalgamated Society of Railways v. Osborne (1910) A.C. 87.

The rules of the Society provided that the Society should have power to levy contributions on its members for

the purpose of securing parliamentary representation, that all candidates should sign and accept the conditions of the Labour Party and be subject to their Whip, that they should be responsible to and paid by the Society, and that candidates and members must accept this constitution, and agree to abide by the decision of the parliamentary party in carrying out this constitution.

The rules so provided were held to be illegal, by the Earl of Halsbury and Lords MacNaghten, Atkinson, and James of Hereford, on the grounds that they were ultra vires, being outside the objects of the Society, and by Lord Shaw of Dunfermline on grounds of public policy.

The latter pointed out that such a rule subjected the member to the outside influence of the Union and said, "But when the law is appealed to to lend its authority to the recognition and enforcement of a contract to procure subjection of the character described, with the concurrents of money payments and the sanction of fines or forfeitures, the law will decline such recognition or enforcement because the contract appealed to is contrary to sound policy ..... It needs little imagination to figure the peril in which parliamentary government would stand if either by the purchase of single votes or by subsidies for regular support, the public wellbeing were liable to betrayal at the command and for the advantage of particular individuals or classes."

Later in the judgment he said of these rules that they "are all fundamentally illegal because they are in violation of that sound public policy which is essential to the working of representative government." And again, "Still further, in regard to the member of Parliament himself he too is to be free; he is not to be the paid mandatory of any man or organisation of men nor is he entitled to bind himself to subordinate his opinions on public questions to others for wages, or at the peril of pecuniary loss; and

any contract of this character would not be recognised by a Court of Law either for its enforcement or in respect of its breach."

A case under this head recently came before the High Court of Australia, viz., Wilkinson v. Osborne (1915) 21 C. L. R. 89.

This case arose out of an agreement made between two members of the New South Wales Legislature, who were also land agents, whereby they agreed to use their influence to secure the resumption of certain land under the Closer Settlement Amendment Act 1907, (N.S.W.).

This Act provides that every such purchase shall be subject to the approval of both Houses of Parliament. The two members agreed for a pecuniary consideration to put pressure on the Government, of which they were supporters, to complete the purchase, the payment to be made upon the approval of the House of which they were members being given to the purchase.

This agreement was held to be contrary to public policy. The reasons are best stated in the judgment of Isaacs, J. After dealing at some length with the doctrine of public policy in general and with the facts of the case he said, "Paid advocacy of that kind by a member of the Legislature having the duty of supervision and a possible veto is a position in which he allows his interest to conflict with his duty, and, therefore, is a position which the law will not allow. To get back into the atmosphere of impartial criticism was impossible. They had embarrassed their public action; they had for private gain compromised their future determination of the propriety of the purchase," and later in his judgment he added, "It would be disastrous to the community to permit this to be recognised as a legitimate subject of traffic, it would encourage those who are appointed to be sentinels of the

public welfare to become, if I may borrow a phrase from another case, the sappers and miners of the Constitution: And this Court would be doing less than its duty if it hesitated to denounce such traffic in the most positive terms."

These cases sufficiently illustrate the principle, that agreements which have a tendency to induce legislators to depart from an impartial discharge of their public duties will not be enforced in Courts of Law.

10. TRADING WITH AN ENEMY.

Trading with the enemy, so far as the meaning of the expression can be gathered from the early English cases, appears to be a somewhat indefinite term. It apparently covers all commercial intercourse with an enemy. In the earlier cases the term seems to have been confined to actual trading, and as previously pointed out, some judges, particularly Lord Mansfield, were of opinion that trading with an enemy need not of necessity be illegal, since such trading "may be very beneficial." (Henkle v. Royal Exchange Assurance Company (1749) 1 Ves. Sen. 318, 320).

But, after the case of Potts v. Bell, 8 T.R. 549, it must at all events be taken as settled, not only that all actual trading with an enemy is illegal, on the assumption that all such trading may be beneficial to the enemy and so injurious to the public, but that all commercial intercourse is also illegal for the same reason.

No comprehensive definition of trading with the enemy is to be found in these early cases, but it is apparent from the judgment of Lord Alanby, Ch. J. in Furtado v.

Rogers (1802) 3 Bos. & Pul. 191, 199, that all commercial intercourse must be taken to constitute that offence, or at least all such intercourse as may be beneficial to an enemy.

"Since the case of Bell v. Potts," he said, "it has been universally understood that all commercial intercourse with the enemy is considered to be illegal at Common Law (though previous to that case a very learned judge appears to have entertained doubts on that subject). Why are they illegal? Because they are in contravention of His Majesty's object in making War, which is by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce."

It will be noted that here he speaks of 'beneficial intercourse', meaning of course, beneficial to the enemy.

In the American case of 'The Rapid' (1814) 8 Cranch 155, it was laid down that 'intercourse inconsistent with actual hostility is the offence against which the rule is directed.'

There are however dicta in various judgments which indicate that not only is all commercial intercourse which may be beneficial to the enemy illegal, but commercial intercourse of any kind; in fact, some of these dicta are in such general terms as to cover intercourse of any kind with an enemy.

Thus in the case of The Cosmopolite (1801) 4 C.Rob. 8, at p. 10, Sir William Scott (Lord Stowell) laid down the rule in quite general terms as follows:-- "It is perfectly well known, that by war, all communication between subjects of the belligerent countries must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile States but by special licence of their respective governments". There is here no qualification whatever of the term intercourse.

The same learned Judge in The Jonge Pieter (1801) 4 C.

Rob. 79, 83, said, "Without the licence of the Government no communication direct or indirect can be carried on with the enemy."

In the classic case of The Hoop, 1 C. Rob. 196, 200, he limited himself to commercial intercourse. He said, "Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme."

If this is the ground on which commercial intercourse with an enemy is prohibited, it is obvious that the same objection applies to intercourse which is not of a commercial nature; great public inconvenience might in the same way follow any communication or intercourse with an enemy. As in other cases where public policy is concerned it is not the actual consequences, but the consequences which might follow: or in other words the 'tendency' to evil which is the deciding factor.

In the American case, United States v. Lane (1868) 8 Wall. 185, words of similar import were used by Davis, J., in delivering the opinion of the Supreme Court of The United States. He said (at 195):-- "If commercial intercourse were allowable, it would oftentimes be used as a colour for intercourse of an entirely different character, and in such a case the mischievous consequences that would ensue, can be readily foreseen."

The American case of The Rapid (1814) 8 Cranch 155, established the proposition, in the United States Courts, that the commercial intercourse need not be beneficial to the enemy to be illegal. In that case the goods had been bought before the war and deposited on an island which was enemy territory, and the owner merely sent a ship to fetch them. They were nevertheless condemned.

The English case of Esposito v. Bowden (1857) 7 El. & Bl. 763, is an authority for the same proposition. In that case, goods had been bought in Russia before the outbreak of the war and nothing had to be done but load them and bring them away. It was, however, held that the shipowner was justified in refusing to enter the Port of Odessa to load the goods in terms of his contract; as such an act would have been trading with the enemy, and illegal.

In delivering the judgment of the Court, Willas, J., said that the case of Potts v. Bell together with the case of The Hoop, "finally established the rule already mentioned that one of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence between the subjects of the hostile countries except by the permission of their respective sovereigns," and later on in his judgment he added, "further, there is very high authority for saying that the removal of merchandise even though acquired before the war, from the enemy's country, after knowledge of the war, without a royal licence is generally illegal. This was laid down at the Cockpit in 1747, in the case of The St. Philip (referred to and stated by Sir John Nicholl in his learned argument in Potts v. Bell 8 T.R. 556) where the Lords Commissioners of Appeal, present Willas, C.J., refused to give the claimants liberty to prove that their goods were bought before the war. The same law was laid down by Mr. Justice Story in The St. Lawrence (1 Gallison U.S.467), and The Joseph Sargent, (1 Gallison U.S. 545)."

In the case of Kershaw v. Kelsey (1868) 100 Mass. 561, after an exhaustive examination of the cases and text books on the subject, the Supreme Court of Massachussetts came to the conclusion that the offence of trading with the enemy should be confined to "trading or commercial dealing or intercourse." In that case a lease had been made during

the Civil War between two persons on opposite sides, one a citizen and resident in Massachussetts and the other in Mississippi. The lease was held to be valid and rent recoverable under it. Gray, J., expressed the opinion of the Court on the subject of 'enemy trading' in the following terms:-- "The result is, that the law of nations as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the State of war between their countries, and that this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any other act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases, the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the dicta which we have already examined, and in none of them is any other example given than those just mentioned. We are not disposed to declare such contracts unlawful as have not been heretofore adjudgedto be inconsistent with a state of war."

During the present war the question of trading and intercourse with an enemy had been fully considered in several cases and the conclusion arrived at by the Court in Kershaw v. Kelsey has been dissented from.

The recent cases establish the broad proposition that any transaction with an enemy by a British subject which has a tendency to be injurious to his country or beneficial to the enemy is illegal.

The question was fully considered in the case of The Panariellos (1915) 84 L.J.P. 140. The facts in that case are briefly as follows:-- In May 1914, a French Company contracted to sell to a German firm at Frankfurt, a quantity of silver lead free on board, Ergastena, in Greece, and chartered a vessel to carry the lead for delivery at Antwerp and Newcastle to the purchasers from the German firm. Before the loading had been completed war broke out between Germany and Great Britain and her allies, and some days after the outbreak of war the loading was completed and the vessel sailed. The French Company then communicated with the London Agents of the German firm as to the delivery of the lead, but before these negotiations were complete the London Office was closed by the authorities. The French Company diverted the vessel to Swansea where the cargo was seized as prize. The property in the cargo still remained in the French Company at the time of seizure.

It was nevertheless held by Sir Samuel Evans that the French Company had had commercial intercourse with the German firm after the outbreak of war which amounted to "trading with the enemy" and that the cargo was confiscable, the French Company, being subject to an allied state was under the same obligations to Britain as regards intercourse with the enemy as British subjects. The decision was upheld by the Privy Council on Appeal. It is to be noted that in this case the learned President of the Probate Divorce and Admiralty Division, after a careful survey of the more important authorities on the subject, indicated that in his opinion —— the prohibition of intercourse with an enemy is not confined to commercial intercourse, but applies generally to all intercourse. He said, "In various cases intercourse which could not be properly described as commercial or which could not answer the description of trading has been declared illegal; and it would not be difficult to

enumerate instances of such intercourse which ought to be regarded as prohibited - for example, in cases of absolute gifts of property to enemy subjects, of a comforting, useful, or beneficial character."

This view was confirmed in the case of Robson v. Premier Oil and Pipe Line Company Limited (1915), 2 Ch. 124, where it was held that an alien enemy could not vote by proxy in respect of shares held by him in an English Company.

Sargent, J., there pointed out that the President of the Probate, Divorce and Admiralty Division in the case of The Panariellos, after a consideration of the whole law on the subject, had arrived at the conclusion that it is not merely commercial intercourse but all intercourse with an alien enemy that is forbidden at Common Law. And that the description of an alien enemy by Lord Stowell in The Hoop as 'totally exlex' involved the "suspension of an alien enemy for the time being, not merely from his right of audience in Courts of Justice, but also from the exercise of his legal and equitable rights in relation to property in this country."

This judgment of Sargent, J., was upheld by the Court of Appeal where it was argued that the prohibition at Common Law of intercourse with an alien enemy is limited to commercial intercourse or trading.

The judgment of the Court (Lord Cozens-Hardy, M.R., Pickford and Warrington L.J.J.), was delivered by Pickford L.J., who referred to the case of The Panariellos and Kershaw v. Kelsey, 100 Mass. 561, and pointed out that in the latter case it had been held that no intercourse was prohibited except commercial intercourse or trading with the enemy.

With this statement of the case the learned Judge did not agree. He said, "As we have already said, no such limitation is to be found suggested in any English case,

and we cannot agree with it. The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to his country or advantage to the enemy is permissable because it cannot be brought within the definition of a commercial transaction." The learned Judge went on to say that the Court agreed with the judgment of Gray, J., in Kershaw v. Kelsey, when he states that all intercourse between citizens of two belligerents which is inconsistent with the state of war between the countries is prohibited by the law of nations, but added, "we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse."

He then said that the Court did not think it necessary to decide whether the principle extended to intercourse which could not possibly tend to detriment to the country or to advantage of the enemy, and added, "it is enough to say that in our opinion all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the language of the learned Judge beforementioned, inconsistent with the state of war between the two countries and therefore forbidden. That this transaction has such a tendency is clear."

This case then, definitely decides, that all intercourse with an enemy which tends to detriment to this country (or advantage to the enemy, which has the same result) is illegal.

It is so decided on the principle of public policy as laid down in Egerton v. Brownlow, that it is the tendency to public evil, that fixes a transaction with illegality.

11. MONEY PAID UNDER AN ILLEGAL CONTRACT

"The maxim, in pari delicto potior est conditio possidentis," said Keller, J., in Taylor v. Chester (1869) L.R. 4 Q.B. 309, "is as thoroughly settled as any proposition of law can be. It is a maxim of law, established not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back: for the Courts will not assist an illegal transaction in any respect."

This is a statement of a principle which has become well established in our law. It is perhaps there stated too broadly since in some cases money paid over in pursuance of an illegal contract may be recovered back.

This principle is more definitely and correctly stated by Stephen, J., in Wilson v. Strugnell (1881) 7 Q.B.D. 548 at 551, where he says:-- "The principle is, that where money has actually been paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid."

There seems to be no room for doubt as to the correctness of this proposition. But what is the position where the illegal contract has been partly performed? Must the contract be wholly executory to enable one of the parties to repent of his bargain and repudiate it? The law on this point does not appear to be so satisfactorily settled.

It was stated by Stephen, J., that, "where money has been paid to a person in order to effect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected," and a little later he

said, "but I do not think the matter can be said to have been fully completed until the sum has been actually and finally applied to the purpose of repaying him for a loss actually sustained by him." (The case was one in which money had been paid to indemnify bail).

This case was over-ruled by the decision in Herman v. Jeuchner (1885) 15 Q.B.D. 561, the Court there holding, under similar circumstances to those in Wilson v. Strugnell, that the illegal purpose had been carried out and that the money paid could not be recovered.

The Court however, apparently agreed with the law as laid down by Stephen, J., who followed his own decision in Wilson v. Strugnell, for Brett, M.R., said, - "We differ from Stephen, J., only in this; that we think the contract was fully concluded; Stephen, J., thought that the contract was not fully concluded."

In delivering judgment in Taylor v. Bowers, (1876) 1 Q.B D. 291, Mellish, L.J. laid down the proposition as law that "if money is paid over or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out."

In that case the plaintiff was in embarrassed circumstances and in pursuance of an agreement between him and one Alcock, made over all his stock-in-trade to the latter who gave fictitious Bills of Exchange in plaintiff's favour and received possession of the goods. The object of the transaction was to prevent the plaintiff's creditors getting hold of the goods and so being paid in full. Two meetings of the plaintiff's creditors were called but no compromise was effected. Defendant was a creditor of the plaintiff to the extent of £100 and with the alleged purpose of securing this debt Alcock executed a Bill of Sale over the goods to Defendant, but plaintiff was no party to this Bill of Sale nor did

he sanction it or know of it. Plaintiff brought an action against the defendant for the detention of the goods.

The Queen's Bench and Court of Appeal held that he was entitled to repudiate the transaction as the fraudulent purpose had not been effected.

Mellish, L.J., appears to have intended to lay it down, although he did not do so in so many words, that a party to an illegal contract could recover money paid under it at any time before the illegal purpose was completely carried out.

It is apparently in this sense that he was understood by Fry, L.J., who commented adversely on that statement of the law in Kearley v. Thompson (1890) 24 Q.B.D. 742, in which case it was held that where the illegal contract is partly carried out and money paid over pursuant to it, the money so paid cannot be recovered back.

In that case the defendants were Solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the Bankrupt, with the latter's consent, agreed to pay the Solicitors £40 for these costs on their undertaking not to appear at the public examination, and not to oppose his discharge. The money was paid and the defendants did not appear at the public examination. Before the order for discharge was applied for the action was brought with the result that judgment was entered for the defendants.

Referring to the abovementioned statement of Mellish, L.J., in Taylor v. Bowers, Fry, L.J., said -- "It is remarkable that this proposition is, as I believe, to be found in no earlier case than Taylor v. Bowers, which occurred in 1867, and notwithstanding the very high authority of the learned Judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even of the principle it-

self, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal."

"I hold therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back."

To the other exception to the general rule that money paid under an illegal contract cannot be recovered, Fry, L.J., assented. He said in the last mentioned case, -- "In that general rule there are undoubtedly several exceptions, or apparent exceptions. One of these is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of case the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class."

"In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract."

A modern case of the latter class is Barclay v. Pearson (1893) 2 Ch. 154, in which money had been paid by a number of persons taking part in a "missing word" competition.

Stirling, J., expressed the opinion that the competition was a lottery and illegal, but said "I think that that case (Browning v. Morris 2 Cowp. 790) is an authority for holding in the present case that the competitors are a class protected by statute, and that in the absence of special circumstances, each unsuccessful competitor is entitled, notwithstanding that the competition is finished and the prize winners ascertained, to bring an action at law for the re-

covery of what was paid by him to the defendant Pearson, and would be so entitled even if the fund had been distributed."

In the case of Taylor v. Chester (1869) 4 Q.B. 309. Mellor, J., for the purpose of deciding whether parties were in pari delicto, adopted the test laid down in Simpson v. Bliss, 7 Taunt. 246.

"The true test," he said, "for determining whether or not the plaintiff and the defendant were in pari delicto, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party."

This test has since met with approval of the Court of Appeal in the case of Hermann v. Jeuchner, (1885) 15 Q.B.D. 561, by Brett, M.R., and by Baggallay, L.J., and also in the later case of Kearley v. Thompson (1890) 24 Q.B.D. 742, by Fry, L.J., who in his judgment in that case said, "As a general rule, where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed."

12. PROTECTION OF JUDGES AND OTHERS ENGAGED IN JUDICIAL PROCEEDINGS

a. JUDGES.

The protection granted to a judge for acts done or words spoken in the exercise of his judicial office is absolute, even though his motive is malicious and corrupt and the acts are not done or the words spoken in the honest exercise of his functions.

The first important modern case on the subject is Fray v. Blackburn (1863) 3 B.& S. 576, in which an action was brought against the defendant, one of the judges of Her Majesty's Court of Queen's Bench, for refusing to make a rule absolute when no sufficient cause was shown against making the same absolute.

The Court, consisting of Cockburn, C.J., Wightman, Crompton and Keller, J.J., gave judgment for the defendant.

An application for leave to amend by introducing an allegation of malice and corruption was refused.

Crompton, J., said in the course of his judgment, "It is a principle of our law that no action will lie against a judge of one of the Superior Courts for a judicial act though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule which indeed exists for their benefit, and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions."

The next important case was Scott v. Stansfield (1868) L.R. 3 Ex. 220. A county Court Judge during the trial of an action used, with reference to the plaintiff, the words, "You are a harpy preying on the vitals of the poor." The plaintiff instituted an action for slander.

The Court consisting of Kelly, C.B., Martin, B., Bramwell, B., and Channell, B., held unanimously that there must be judgment for the defendant, on the ground that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a Court of Justice."

Kelly, C.B., said in his judgment, "It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the benefit of a malicious or corrupt judge but for the benefit of the people, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of the consequences."

And Channell, B., said, "For the benefit of the public and the due administration of justice the law provides that a judge is to be so far free and unfettered in the exercise of his office, as not to be liable to an action for what he does in the capacity of judge, and so placed under restraint in the discharge of his duty."

Brett, M.R., in Munster v. Lamb (1883) 11 Q.B.D., 588, 603, commenting on the case of Scott v. Stansfield said, "The ground of the decision was that the privilege existed for the public benefit; of course it is not for the public benefit that persons should be slandered without a remedy; but upon striking a balance between conveniences and inconveniences, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequence of anything which he may say in the course of his judicial duty."

In the case of Anderson v. Gorrie (1895) 1 Q.B. 668, an action was brought against three judges of the Supreme Court of Trinidad and Tobago to recover damages for certain acts done by them in the course of certain judicial proceedings. It was alleged that these acts were done

maliciously and without jurisdiction, and with knowledge of the absence of jurisdiction.

The Court of Appeal held that no action would lie even though the judges acted maliciously and to gratify private spleen.

Lord Esher, M.R., quoted with approval the dictum of Crompton, J., in Fray v. Blackburn, and added, "To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office."

And Kay, L.J., said, "I take the law to be clear that for an act done by a judge in his capacity of judge, he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen."

A judge is, however, answerable for such words spoken and acts done if he goes beyond his jurisdiction. It was so held in the case of Houlden v. Smith (1850) 14 Q.B. 841, already mentioned.

Lord Esher, M.R., in his judgment in the case of Anderson v. Gorrie abovementioned, indicated this. He said, "If a judge goes beyond his jurisdiction a different set of conditions arises. The only difference between judges of the Supreme Court and other judges consists in the extent of their respective jurisdiction."

The immunity, however, applies to all judges, and for this purpose a justice of the peace sitting in the course of his judicial duties is a "judge" within the rule and entitled to the same protection.

This was decided in the case of Law v. Llewellyn (1906) 1 K.B. 487, a case in which a justice of the peace was sued for damages for a defamatory statement made by him respecting a prosecutor during the hearing of a criminal charge.

The Court of Appeal, affirming the decision of Channell J., held that the action could not be maintained.

Romer, L.J., said that the matter was settled beyond dispute by the cases of Munster v. Lamb and Hodgson v. Pare; "both these cases are to the same effect and show that a magistrate is a judge within the meaning of the rule, that defamatory observations made by a judge in the course of his judicial duties, that is, when sitting as a judge, are not actionable even though it is alleged or suggested that the observations were made without reasonable or probable cause, and maliciously."

A similar protection is extended to other persons who have judicial or quasi-judicial functions to perform.

An Official Receiver is not liable for observations published by him concerning the affairs of a company in liquidation, to the creditors and contributions of the Company, in performance of his duty under the Companies Acts. The Court will not even inquire whether such publications are malicious or not, the public interest requiring that no such inquiry should be made. This was held in the case of Bottomley v. Brougham (1908) 1 K.B. 584, and also by the Court of Appeal in Burr v. Smith (1909) 2 K.B. 306.

In the former case, Channell, J., stated the principle applicable to such cases as follows: "The real doctrine of what is called absolute privilege is that, in the public interest, it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual, I should call it rather a right of the public, the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not, the reason being that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and, to secure their independence, that their acts and words should not be questioned before tribunals for inquiry into them, merely on the allega-

tion that they are malicious."

In Burr v. Smith the above dictum was quoted with approval by Fletcher Moulton, L.J., who also said, "When an officer of the Court is placed, in the performance of his duty, in the difficult position of having to draw up and circulate such a report as is provided for in s. 3, it appears to me clear that he is entitled to the same amount of protection as is extended to a judge, who, after a judicial inquiry, performs his duty by fearlessly pronouncing his judgment as to the matters brought before him, and therefore his report is absolutely privileged."

The same principle was applied in the case of in re John Tweedie & Company ,Limited, (1910) 2 K.B. 697, where the official receiver, who was the liquidator of the Company, in his report stated that in his opinion the facts set out therein constituted a fraud committed in the formation or promotion of the Company, and also in relation to the Company since its formation. Upon the report the County Court Judge ordered the public examination of certain persons named in the report, among whom was one of the directors, who, after the examination, applied for an order exculpating him from the charge. The order applied for was made with costs against the official receiver personally, there being no assets of the Company available. The Court of Appeal, however, held that there was no jurisdiction to make this order, as the official receiver was discharging a statutory duty of a judicial character.

b. COUNSEL

The law with regard to Counsel appearing in Court is that no action will lie for defamatory words spoken with

reference to and in the course of an inquiry before a judicial tribunal, even though such words are spoken maliciously and without any justification or excuse, and not for the purpose of supporting his client's case, but from personal illwill arising out of a previous cause, and are irrelevant to any issue of fact contested in the case.

This was held in the case of Munster v. Lamb (1883) 11 Q.B.D. 588, which definitely settled the law with regard to the immunity of Counsel.

In that case an action was brought by Mr. Munster, a barrister, against Mr. Lamb, a solicitor. The latter, while acting as advocate before a Court of Petty Sessions during the hearing of a case against one Mrs. Hill for administering drugs to the inmates of Mr. Munster's house for the purpose of facilitating a burglary, had suggested that Mr. Munster kept the drugs at his house for an immoral or criminal purpose.

Brett, M.R., in delivering the judgment of the Court of Appeal said, "for the purposes of my judgment I shall assume that the words complained of were uttered maliciously by the solicitor, that is to say, not with the object of doing something useful towards the defence of his client. I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal illwill and anger arising out of some previously existing cause, and I shall assume that the words were irrelevant to every issue of fact which was contested in the Court where they were uttered, nevertheless, as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been," and after reviewing the cases concerning the protection granted to judges and witnesses he said, "If, upon grounds of public policy and free administration of the law, the privilege be extended to judges and witnesses

although they speak maliciously and without reasonable or probable cause; is it not for the benefit of the administration of the law that Counsel also should have an entirely free mind? Of the three classes - judge, witness and counsel - it seems to me that a counsel has a special need to have his mind clear from all anxiety.....far more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public." And later in his judgment he said, "With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law, If that be so, the case against a counsel must be stopped at once."

This case goes farther than any other with regard to the immunity of counsel, to whom it gives the same absolute immunity that is given to judges of the Supreme Courts. This is given not for the purpose of protecting unscrupulous advocates, but because it is to the interests of the public that counsel should be able to give their best services to litigants without being harassed by the fear of a law suit.

c. PARTIES AND WITNESSES

Parties and witnesses also have absolute immunity from any action for statements, made either viva voce or by affidavit, in the capacity of party or witness in the course of a judicial proceeding, when speaking with reference to the subject matter before the Court.

It was decided in Revis v. Smith (1856) 18 C.B. 126, that no action can be maintained against a party to a suit for statements made by him orally or by affidavit in the

ocurse of a judicial proceeding, and even though the statements are made falsely and maliciously and without reasonable or probable cause, and concerning a person who was not a party, James, C.J., said in that case, "By the general policy of the law the witness is privileged and I see nothing to take the case out of the general rule."

This decision was followed in the similar case of Henderson v. Broomhead (1859) 4 H. & N. 569.

In Leeman v. Hetherclift (1876) 2 C.P.D. 53, an action was brought against a witness who, after the completion of his cross examination and for the purpose of removing an impression made by his answer to a question put for the purpose of impugning his credit, made a slanderous statement as to another matter. The statement was found to have been made by the defendant as a witness and that it was relevant to the enquiry before the Court, and it was held that the witness was protected and that no action could be maintained.

Cockburn, C.J. said, "If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrevelancy of what he says ..... But that beyond all question this unqualified privilege extends to a witness is established by a long series of cases of which the last is Dawkins v. Lord Rokeby, after which to contend the contrary is hopeless. It was there expressed that the evidence of a witness with reference to the inquiry is privileged notwithstanding it may be malicious, and to ask us to decide the contrary is to ask what is beyond our power."

Apparently however, the privilege does not extend to statements made debors the matter in hand, for the learned Chief Justice added, "I am very far from desiring to be considered as laying down as law that what a witness states

altogether out of the character and sphere of a witness, or what he may say debors the matter in hand, is necessarily protected.

I quite agree that what he says before he enters the box or after he has left the witness box is not privileged. Or if a man when in the witness box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another'"

Amplett, J., on the other hand said, "I can see many reasons why a witness should be absolutely protected for anything he said in the witness box. If he did voluntarily make a scandalous attack while giving evidence he would be guilty of a gross contempt and might be committed to prison by the presiding judge." Both of these opinions however are obiter as the question did not arise in the case.

Brett, M.R., in Munster v. Lamb, (1883) 11 Q.B.D. 588, 601, referred the case of Revis v. Smith and Henderson v. Broomhead and said, "The general conclusion is that all witnesses speaking with reference to the matter which is before the Court whether what they say is relevant or irrelevant whether they say what is malicious or not - are exempt from liability to any action in respect of what they state, whether the statement has been made in words, that is, on viva voce examination, or whether it has been made upon affidavit.

The protection of witnesses also extends to statements made to the solicitor or party when taking the proof or preliminary statement of the witness. This was decided, apparently for the first time, in the case of Watson v. McEwan (1905) A.C. 480.

The Earl of Halsbury, L.C., in delivering his judgment in the House of Lords said, "It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice, must as a nec-

essary consequence involve that which is a step towards and is part of the administration of justice - namely the preliminary examination of witnesses to find out what they can prove. It may to some extent impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice because people would be afraid to give their testimony." His Lordship pointed out that the hardship to which he alluded was that in such a case a witness could make false and malicious statements and go unpunished, whereas if the statement were made on oath the witness could be indicted for perjury. But, he added, "What seems to me to be an overwhelming consideration in the determination of this case is that a witness must be protected for his preliminary statement or he has no protection at all."

The common law with regard to these cases was formulated by Brett, M.R., in Munster v. Lamb (1883) 11 Q.B.D. 588, 604. He said, in his judgment in that case, "I will refer to Kennedy v. Hilliard (10 W.C.L.R. at p. 209), and in that case Pigott, C.B., delivered a most learned judgment in the course of which he said, "I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a judge in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a Court of Justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. Into the rule thus stated the word "Counsel" must be introduced and the rule may be taken to be the rule of the common law. That rule is founded upon public policy."

This rule of immunity applies to all Courts of Justice. "It is true," said Lord Esher, M.R., in Royal Aquarium and Summer and Winter Garden Society v. Parkinson (1892) 1 Q.B.

431, 442, "that in respect of statements made in the course of proceedings before a Court of Justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of Justice."

It also applies to tribunals which are not strictly Courts of Justice but which have similar attributes.

In the case of Dawkins v. Lord Rokeby (1873) L.R. 8 Q.B. 255, the same principle was applied to the case of a witness before a Court of Inquiry instituted by the Commander-in-Chief of the army under the Articles of War, to enquire into a complaint made by an officer.

The defendant, Lord Rokeby, also, an officer of rank in the army, was required to attend as a witness and give evidence, which he did viva voce, and also handed in a written paper containing a repetition of his evidence and some additions. An action for libel was brought against him for statements contained in this paper.

The Court held that he was not liable for statements so made.

Kelly, C.B., after reviewing the cases, said, "There is, therefore no sound reason or principle upon which such a witness, called upon to give evidence in such a Court, should not be entitled to the same protection and immunity as any other witness in any of the Courts of Law or Equity in Westminster Hall. He is equally compellable to appear and give evidence, and punishable in case of refusal."

Kelly, C.B., also said in the same case, "Upon all these authorities it may now be taken to be settled law, that no action lies against any witness, upon evidence given before any Court or tribunal constituted according to law."

This case came before the House of Lords (1875) 7 H.L.

744, and the decision of Kelly, C.B., was upheld by the House, after taking the opinions of the judges.

Lord Chancellor Cairns said in his judgment, "Adopting the expressions of the learned judged with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I am certainly of opinion that upon all principles, and certainly upon all considerations of convenience and public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a Court of Inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army."

The abovementioned dictum of Kelly, C.B., was questioned by Fry, L.J., in Royal Aquarium Summer and Winter Garden Society v, Parkinson (1892) 1 Q.B. 431, 446, who said that this was the largest statement and made upon the subject of this immunity, and that he doubted whether the use of the word "tribunal" did not really embarrass the matter because the word has not, like the word "Court," an ascertainable meaning in English Law. With this qualification however, he accepted the statement.

Lord Esher, M.R., in the same case indicated the limitations of the doctrine as follows: -- "In the case of Dawkins v. Lord Rokeby, the doctrine was extended to a military Court of Inquiry. It was so extended on the ground that the case was one of an authorised inquiry before a tribunal acting judicicusly, that is to say, in a manner as nearly as possible to that in which a Court of Justice acts in respect of an inquiry before it. This doctrine has never been extended further than to Courts of Justice and tribunals acting in a manner similar to that in which such Courts act."

The Court held that a meeting of the London County Coun-

cil for granting music and dancing licences is not a "Court" within the meaning of the rule by which defamatory statements made in the course of proceedings before a Court are absolutely privileged.

This case was followed in Attwood v. Chapman (1914) 3 K.B. 275, where it was decided that licensing justices, when dealing with an objection to the renewal of a licence, are not a Court within the meaning of this rule.

13. PROTECTION OF PUBLIC OFFICERS.

The early cases of Gidley v. Lord Palmerston (3 B. & B. 275) and MacBeath v. Haldimand (1 T.R. 172), previously referred to under this head, were followed by the Privy Council in the case of Palmer v. Hutchinson (1881), 6 A.C. 619.

This was an appeal from the Supreme Court of Natal, in which a suit was brought against Her Majesty's Deputy-Commissioner General for the Colony of Natal, to recover the price of the hire of certain waggons and oxen, and certain other goods and damages for certain oxen killed or dead owing to the overdriving and illegal acts of the defendant or his employes, and a further sum for hire of waggons and oxen or damages for their illegal seizure.

The Supreme Court of Natal found in favour of the plaintiff, but this finding was reserved by the Privy Council.

Sir Barnes Peacock, in delivering judgment, adopted the reasons expressed by Dallas, C.J., in the abovementioned case of MacBeath v. Haldimand.

The law as to the protection to public officers was further extended in the modern case of Dunn v. MacDonald (1897) 1 Q.B. 401, in which it was held that even if a servant of the Crown has exceeded his authority and entered into a contract in his official capacity which in reality he was not authorised to do, he cannot be sued for the breach of an implied warranty of authority.

The defendant was Her Majesty's Commissioner and Consul-General in the Niger Protectorate, and acting in his official capacity he engaged the plaintiff to serve under him for a term of three years certain. Before the expiration of the term the plaintiff was dismissed. He attempted by means of a petition of right to obtain damages from the Crown for wrongful dismissal and was unsuccessful. (Dunn v. Reg. (1896) 1 Q.B. 116). He then brought this action, and it was held by Charles, J., that the rule in Collen v. Wright had, on grounds of public policy, no application. The learned judge said, "After a careful consideration of the cases cited during the argument I have come to the conclusion that the doctrine of Collen v. Wright is, upon grounds of public policy, not applicable to persons in the public employment of the Crown. It is true that in Gidley v. Lord Palmerston, which is one of the earlier cases on the subject, it is not said in so many words that an action of this nature will not lie against a public servant: but it is evident that if such an action were maintainable it would be a circuitous mode of getting over the difficulty which always must exist, and ought to exist, where a public servant does an act in the performance, as he conceives, of his duty to his Sovereign," and after quoting from the judgments in MacBeath v. Haldimand he said, "It would of course be going too far to say that because a man is a servant of the Crown he cannot enter into any personal liability: but when he is acting in his public character he cannot in my opinion

be sued upon an engagement into which he enters, because it is against public policy that he should in such a case incur personal responsibility."

Neither can any action succeed which is brought against an Officer of State in respect of anything written by him in his official capacity, even though he has acted maliciously.

This was decided by the Court of Appeal in the case of Chatterton v. Secretary of State for India (1895) 2 Q.B. 189.

The action in this case was for libel alleged to have been contained in a written communication by the defendant to the Under Secretary of State, to the effect that if the Commander-in-Chief of India had, in a despatch, recommended the removal of the plaintiff, a Captain in Her Majesty's Indian Staff Corps, to the half pay list as an officer whose retention on the effective list was in every way undesirable.

The Master had made an order dismissing the action as vexatious. The plaintiff appealed and the Court of Appeal upheld the Master's decision.

"The reason for the law on this subject," said Lord Esher, M.R., "plainly appears from what Lord Ellenborough and many other Judges have said. It is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an Officer of State his freedom of action in a matter concerning the public weal; if an Officer of State were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly

be against the public interest and prejudicial to the independence necessary for the performance of his functions as an official of State. Therefore, the law confers upon him an absolute privilege." He then cited the following passage from Fraser, on the Law of Libel & Slander, Page 95, where he says, "For reasons of public policy, the same protection would no doubt, be given to anything in the nature of an Act of State, e.g., to every communication relating to State matters made by one Minister to another, or to the Crown," and added, "I adopt that paragraph as stating the law correctly."

Judgments were also delivered by Kay, L.J., and A.L. Smith, L.J., upon similar lines.

A similar protection is afforded to Military Officers. No action will lie against such an Officer for an act done in the ordinary course of his duty, as such Officer, even if done maliciously and without reasonable or probable cause.

This was decided in the case of Dawkins v. Lord Paulet, (1869) L.R. 5 Q.B.D. 94.

In that case an action for libel was brought against the defendant, who was the superior Military Officer of the plaintiff. The alleged libel was contained in certain reports in writing made by the defendant in the course of his Military duty to the Adjutant-General, and was alleged to have been made "of actual malice, and without any reasonable, probable or justifiable cause, and not bona fide, or in the bona fide discharge of the defendant's duty as such Superior Officer."

On demurrer it was held by Heller and Lush, J.J., (Cockburn, C.J., dissenting), that no action would lie.

Cockburn, C.J., held that the action would lie if the reports were made of actual malice and without reasonable or probable cause. He said, "Thinking also that it is exceedingly doubtful whether, assuming that as a matter of public policy an action by an inferior against a superior

Officer ought not to be maintained, a Court of Law, in the absence of positive enactment can act upon such an assumption, I cannot but think that if the law is to be thus settled, it should be done by legislative enactment, or at all events by a Court of Error."

The rest of the Court, however, were of opinion that considerations of public policy were strong enough to warrant them in holding a contrary view.

Miller, J., quoted from the judgment of Crompton, J., in Fray v. Blackburn (2 B. & S. at 578), as to the reasons for the immunity of Judges from actions of this sort, and said, "Do not these reasons of public policy and convenience strongly apply to the present case? Can the administrative duties discharged by Officers of the Army in the position of the defendant be liable to be reviewed by a jury in an action at law, without producing the greatest mischief and inconvenience?"

The case of Dawkins v. Lord Paulet was followed in the case of Grant v. The Secretary of State for India, (1877), 2 C.P. 445, in which an action was brought (inter alia) for libel alleged to have been published in the Gazette of Military appointments; but in this case no malice or improper motive was alleged.

14. RIGHT OF CROWN TO DISMISS SERVANTS AT ANY TIME

Notwithstanding any agreement to the contrary a servant of the Crown may be dismissed at any time. It is contrary to public policy that the Crown should be bound to employ a person for a fixed period.

This rule applies both to Military and Civil appoint-

ments and is subject only to certain statutory exceptions, as in the case of Judges of the Supreme Court, where it is for the public good that there should be a fixed tenure of office.

With regard to military appointments the law was so laid down in the unreported case of De Dohse v. Reg. (1886) by the Court of Appeal, and afterwards by the House of Lords. In the Court of Appeal in that case Lord Esher, M.R., said, "It is said that it was lawful to make such an engagement with him (the suppliant) for seven years because the engagement offered and proposed was not an engagement of military service, it being admitted in argument that if the engagement was for military service as a soldier, whether as officer or private, it is contrary to public policy that any such contract should be made. How whether that doctrine with regard to the Crown is confined to military service or not need not be decided to-day, but I do not at all accept the suggestion that it is so confined. All service under the Crown itself is public service, and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown, because all public service under the Crown is for the public benefit."

And Lord Watson in the House of Lords in the same case said, "In the first place it appears to me that no concluded contract is disclosed in the statements contained in this petition of right; and in the second place I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further I am of opinion that if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the

Crown." (See Lord Esher's judgment in Dunn v. The Queen (1896) 1 Q.B. at 118).

The Privy Council in the case of Shenton v. Smith (1895) A.C. 229, decided that no action could be maintained by a medical officer against the Government of Western Australia for dismissing him before the term had expired for which he had been engaged. Lord Hobhouse in delivering the judgment of the Privy Council said, "The difficulty of dismissing servants, whose continuance in office is detrimental to the State, would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service."

In the case of Dunn v. The Queen, abovementioned, the case set up by the suppliant was that Sir Claude McDonald, Her Majesty's Commissioner and Consul-General for the Niger Protectorate in Africa, acting on behalf of the Crown, had engaged him in the service of the Crown as Consular Agent in that region for a period of three years certain; and he claimed damages for dismissal before that period had expired.

The Court of Appeal held that notwithstanding the agreement the service was determinable at the pleasure of the Crown.

Lord Esher, M.R., quoted with approval the abovementioned dicta from De Dohse v. Rex., and referred to the case of Shenton v. Smith which he held to be equally conclusive:-

Lord Herschell said, "So I think that there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure..... It seems to me that it is the public interest which has led to the term which I have mentioned being imported into contracts for employ-

ment in the service of the Crown. The cases cited show that such employment being for the good of the public, it is essential for the good of the public that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restriction should be imposed on the power of the Crown to dismiss its servants".

It should be noted that this rule is subject to statutory exceptions, and statutes exist both in England and the self-governing Colonies which derogate from the power of the Crown to dismiss its servants at will. This is so in the case of the Judges of the Superior Court who hold office quamdiu se bene gesserint.

The case of Gould v. Stuart (1896) A.C. 575 is an illustration of the effect of such a Statute.

In that case the respondent had entered into the service of the New South Wales Government as a Clerk under and in accordance with the provisions of The Civil Service Act 1884. He was dismissed by the Government before the service had been terminated in the manner provided in the Act.

The Privy Council held that the Government had no power to put an end to the service at pleasure.

Sir Richard Couch, in delivering judgment said, "It is the law in New South Wales as well as in this country that in a contract for service under the Crown, civil as well as military there is, except in certain cases where it is otherwise provided by law, imported into the contract a condition that the Crown has power to dismiss at its pleasure;" and after referring to the provisions of the Civil Service Act 1884, he proceeded, "These provisions, which are manifestly intended for the protection of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless,

and delusive. This is, in their Lordship's opinion, an exceptional case in which it has been deemed for the public good that a civil service should be established under certain regulations with some qualifications of the members of it and that some restriction should be imposed on the power of the Crown to dismiss them."

15. EVIDENCE

a. EVIDENCE AS TO THE CHANNELS OF INFORMATION FOR THE DETECTION OF CRIME

The law, as to the inadmissibility of evidence revealing the channels of information leading to a public prosecution was discussed and definitely and clearly stated in the Court of Appeal in the case of Marks v. Beyfus (1890), 25 Q.B.D. 494.

It was there held that the rule that evidence is not, in public prosecutions, to be given as to the channels through which information leading to the prosecution is received, applies in a subsequent civil action between the parties, brought on the ground that the criminal prosecution was maliciously prosecuted; that there is an exception to the rule where the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence; and that except in that case the judge has no discretion as to whether he should tell the witness to answer or not, but should apply the rule as a rule of law and not allow the witness to answer even if he is willing to do so.

An action was in that case brought against several

defendants for maliciously and without reasonable and probable cause conspiring to institute and instituting a prosecution for fraud against the plaintiff, upon the trial of which he was acquitted; alternatively, with conspiring to cause the Director of Public Prosecutions to institute the prosecution.

At the trial the Director of Public Prosecutions was called and stated that he had instituted the prosecution and that a certain statement in writing had been supplied to him, but he declined, on grounds of public policy, to give the name of his informant, or to produce the written statement.

Lord Esher, M.R., referred to the rule as laid down in the judgment of Pollock, C.B. in the case of Attorney General v. Briant, (15 M. & W. 169), and said, "Now, this rule as to public prosecutions was founded on grounds of public policy and if this prosecution was a public prosecution, the rule attaches; I think it was a public prosecution, and that the rule applies. I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says an innocent man is not to be condemned when his innocence can be proved, must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such, should be applied by the judge at the trial who should not treat it as a matter of discretion whether he should tell the witness to answer or not. I may add that the rule as to non-disclosure of informers applies, in my opinion, not only to the trial of the prisoner, but also to a subsequent civil action between the parties, on the ground that the criminal prosecution was maliciously instituted or brought about."

Bowen, L.J., in the same case said, referring to this

rule, "The only exception to such a rule would be upon a criminal trial, when the judge if he saw that the strict enforcement of the rule would be likely to cause a miscarriage of justice, might relax it in favorem innocentiae; if he did not do so, there would be a risk of innocent people being convicted. I entirely agree that such a matter is not one for the exercise of the judge's discretion but for the application of the law; the privilege depends not upon the witness claiming it when asked the question, but the judge should refuse to allow the question, as soon as it is asked."

And Lord Esher, M.R., added, "I desire to say, so that there shall be no possibility of mistake as to my opinion, that even if the Director of Public Prosecutions had been willing to answer the questions put to him, the judge ought not to have allowed him to do so."

b. EVIDENCE AS TO FACTS OR DOCUMENTS PREJUDICIAL TO THE PUBLIC SERVICE OF THE STATE

The law as laid in the earlier cases under this head, has been followed in many more modern cases.

In Wadeer v. East India Company (1856) 8 DeG.M. & G. 182, the rule was held to extend to communications that passed between the East India Company and the "several Governments of India."

Production was sought of certain documents which the defendant Company stated to "contain exclusively, divers political communications, which, in the fulfilment of our public political duty and that of our several Governments in India, have passed between us and our said Governments respectively solely with a view to the good Government of India and for the purpose of enabling us to perform our public

duty in that behalf."

Lord Justice Knight Bruce held that "no reference to any authority, no precedent, is wanted for coming to a conclusion upon a statement of this description. The first principles of jurisprudence and every consideration due to the public interests combine to render it impossible, as it appears to me, for a Court of Justice to interfere for the purpose of compelling the production of documents accurately so described."

And, Turner, L.J., pointed out that the Court had no jurisdiction regarding matters concerning the political relations of States, and added, "but the more important and more general principle is the ground of public policy, and of the prejudice to the interests of the public which would arise by the production of such documents."

The case of Dawkins v. Lord Rokeby (1873) L.R.8 Q.B. 255, has already been mentioned under another head. It was there laid down, following the case of Home v. Bentinck, that the proceedings and minutes of a Military Court of Inquiry are privileged from production as evidence in a Court of Justice.

Kelly, C.B. on this point, quoted from the judgment of Dallas, C.J., in Home v. Bentinck, and added, "Surely this case - the decision of a Court of Error - is a conclusive authority that a Court of Inquiry is a tribunal, authorised, recognised, and sanctioned by law, and that the proceedings of such a Court are privileged against publication, and are inadmissible in the trial of an action like this."

It was held in the case of H.M.S.Bellerophon (1874) 31 L.T. 756, that the report of a collision, made by the Captain of the warship to the Lords of the Admiralty in accordance with the usual practice in such cases, could not be produced for inspection to the opposite party to an action against the Captain of His Majesty's Ship.

An affidavit had been made by the Secretary to the Lords of the Admiralty that the production of the report would be prejudicial to the public service.

Sir Robert Phillimore, said, "It is obvious that if the communication contained in reports of the nature mentioned in this affidavit should be held liable to inspection there would be great danger of producing a result which - to use the words of Lord Lyndhurst in Smith v. The East India Company (1 Phillips) 50, - would be "to restrain the freedom of the communications, and render them more cautious, guarded and reserved," than they otherwise would be between the officers of Her Majesty, and thereby do 'injury to the public interest.'"

In Hennessey v. Wright (1888) 21 Q.B.D. 509, an action for alleged libel was brought against the defendant, the Governor of the Colony of Mauritius. Production was sought of communications which passed between the defendant and the Secretary of State for the Colonies then in the custody of the defendant.

It was held that these documents were privileged and could not be admitted in evidence.

Field, J., stated the reasons against admitting such documents in evidence, as follows:-- "First, the publication of a State document may involve danger to the nation. If the confidential communications made by Servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in the discharge of their duty to the Crown, were liable to be made public in a Court of Justice at the instance of any suitor who thought proper to say 'fiat justitia ruat caelum,' an order for discovery might involve a country in war."

"Secondly, the publication of a State Document may be injurious to servants of the Crown as individuals. There would be an end of all freedom in their official communica-

tions if they knew that any suitor, that, as in this case, any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a Court of Justice."

Similarly, in the case of Wright & Company v. Mills (1890) 62 L.T.N.S. 558, Kekewick, J., refused discovery of documents by the defendant who was Agent-General for the Colony of the Cape of Good Hope, he having objected that the documents, though in his possession, were the property of the Government of that Colony.

The case of Hennessey v. Wright was approved and followed in Ford v. Blest (1890) 6 T.L.R. 295, where a letter written by an officer commanding a battalion, to his subordinate officer, was held to be privileged. The action was for libel said to be contained in a letter written by the defendant to his superior officer. This letter was written, according to the defence, at the request of the superior officer, but the defendant objected, on an application for discovery, to producing a letter written by the superior officer asking him to make the report. The Under Secretary for War, when applied to stated that, "he thought the production of the letter would be objectionable on public grounds," and the Court accepted this statement and refused to order production.

Baron Huddleston said it was "important to take care that, in interlocutory applications, documents of a public nature should not be produced, for otherwise irreparable injury might be done by the disclosure of documents clearly protected."

It appears that the question, as to whether the production of documents connected with affairs of State would be injurious to the public, is a question to be determined not by the Judge, but by the Head of the Department having the custody of the documents.

This rule was laid down in the case of Beatson v. Skene (1860) 5 H.& N. 838. Pollock, C.B. said in that case, "The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service, - an enquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question whether the production of the documents would be injurious to the public service, must be determined, not by the Judge, but by the Head of the Department having the custody of the paper; and if he is in attendance and stated that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it."

He expressed the opinion, however, that if the Head of the Department does not attend personally, but sends the document to be produced or not, as the Judge may think proper, that the case may be different.

The learned Chief Baron stated however, that Martin, J., was of opinion that whenever the Judge is satisfied that the document may be made public without prejudice to the public service, the Judge ought to compel its production notwithstanding the reluctance of the Head of the Department to produce it, and added, "and perhaps cases might arise where the matter would be so clear that the Judge might well ask for it, in spite of some official scruples as to producing it; but this must be considered rather an extreme case, and extreme cases throw very little light on the practical rules of life."

The Court refused, in the case of Kain v. Farrar (1877), 37 L.T.469, to accept the affidavit in a general form of the Secretary of the Board of Trade, objecting to produce documents on the ground of public policy. An action had been

brought against the Secretary for acts done by the Board's Servants and upon an order being made for discovery of documents, the defendant made an affidavit that the Board of Trade had certain documents in its possession and added, "I object on the grounds of public policy to state anything further as to the documents in the possession or power of the Board of Trade."

The affidavit was a test one, and the Court held that it was not sufficient to establish the privilege claimed.

Grove, J., said, "On the ground of public policy, is the vaguest possible term. A Judge, should not, in my opinion, consider that affidavit sufficient; there should be some ground for him to exercise his discretion upon, and to decide that a high officer of State may, without giving any reason why, state that it is against the public interest that a particular document should be produced. I think this affidavit is too general, and, without saying what it should be, I think enough should be given in it, to show that the mind of the Head of the Department had been brought to bear upon the particular question, and that he thinks that it would be against public policy to do what is asked." An order was made for a further affidavit to be filed within a week.

The question of privilege on the ground of public policy was recently raised in the High Court of Australia in the somewhat curious case of Lloyd v. Wallach (1915) 20 C.L.R. 299.

A regulation under the War Precautions Act 1915, provides that where the Minister for Defence "has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the war." Wallach had been detained under this regulation on the warrant of the Minister

and was released on a writ of habeas corpus issued out of the Supreme Court of Victoria, he having stated by affidavit that he was not disaffected or disloyal, and the Minister, who was called as a witness, having refused on the ground of public policy to state the ground of his belief.

On appeal to the High Court it was held that the Minister was entitled to refuse to answer questions as to his belief.

Griffith, C.J., said on this point, "As to the fact of the Minister's belief, I am of opinion that the same principles are applicable as in the case of a claim of privilege against disclosure of documents or facts on the ground that such disclosure would be injurious to the public interests, in which case the statement of the public officer making the claim is conclusive, if the case is within the rule. So in this case the Minister cannot, in my judgment, be called upon to answer any question on the point, nor can any evidence be given to controvert his statement on the face of the warrant."

c. EVIDENCE BY PARENTS OF NON-ACCESS FOR THE PURPOSE OF BASTARDISING THEIR CHILDREN.

Some doubt was expressed in Taylor, on Evidence, Ed. 10 637, n., as to the existence in modern times, of the rule that parents may not give evidence of non-access for the purpose of bastardising their offspring.

It was so argued in the case of Guardians of Nottingham v. Tompkinson (1879) 4 C.P.D. 343, and that the law in this regard had been altered by the Evidence Further Amendment Act 1869, Sec. 3, of which provides that "the parties to any

proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding."

Proceedings in this case had been taken by the Guardians of the Poor, before Justices, against a husband to compel him to maintain a child, born of his wife in wedlock, which he refused to maintain on the ground that he was not the father.

It was held that these proceedings were not "proceedings instituted in consequence of adultery" and that the rule against the admission of evidence of non-access applied.

The question was again raised in the Aylesford Peerage case (1885) 11 A.C., where Lord Bramwell said referring to this rule, "My Lords, I must trouble your Lordships with a few words, because I raised a doubt as to whether the rule of law referred to by Mr. Davey, was still in existence. That doubt is removed, not merely by the authorities cited by Mr. Davey, but also by the reason of the thing as put by him, that is to say, that it is a positive rule of law, and that it is not expressly abrogated by statute.

Lord Selbourne said in the same case, "The authorities which have been referred to I assume to be still in force, that is to say, that you could not put into the witness box Lady Aylesford, or if he were living, Lord Aylesford, for the purpose of proving who the real father of the child was."

It would appear then that the rule still exists, except in so far as it has been "expressly abrogated by statute," as in the case of "proceedings instituted in consequence of adultery."

It was held however, in the Poulett Peerage case, (1903) A.C. 395, that the rule did not prevent a husband from repudiating the parentage of his wife's child born six months after the marriage, and of which she confessed that her husband was not the father, - and to give evidence that he had

had no intercourse with his wife before marriage.

The Earl of Halsbury, L.C. said in that case, "I can only say for my part, as regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be enquired into by any Court of Law, it would be a gross perversion of that principle to say that under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events, and to prove that he had not induced the woman whom he was afterwards to make his wife, to be guilty of the sin of fornication.

d. JUDGES COUNSEL AND JURORS

There appear to be no reported modern cases with respect to the privilege of Judges and Counsel from the liability of being called upon to give evidence as to what has taken place in Court during the conduct of a case, probably owing to the fact that the law in this respect has been too long and too well settled to admit of any doubt.

With regard to Jurors there is one reported case of an attempt made in recent times to obtain the admission of an affidavit by a juryman for the purpose of impeaching the verdict of the jury. This was the case of Nesbitt v. Parret (1902) 18 T.L.R.510. An application was made for a new trial and one of the grounds was stated to be "that the verdict was not the verdict of the jury."

In support of this, an affidavit was tendered by a juryman to the effect that he had not agreed to the amount of £1100 damages, and that when the foreman mentioned the amount in Court he was so staggered at its greatness that he tried to protest, but his feelings so overcame him that it was im-

possible for him to give utterance to a single word."

Lord Justice Matthew refused to admit the affidavit saying that "if that were listened to, then in any case a juryman might raise a difficulty which it would be impossible for the Court to solve."

16. OTHER MODERN CASES

The cases dealt with hereunder illustrate the fact that judges still find it necessary to resort to public policy as a ground for legal decision, even in cases which do not fall conveniently under the recognised 'heads' of public policy.

a. Macintosh v. Dunn

That the welfare of society is still taken into consideration by the Courts and forms the deciding factor in doubtful cases is well illustrated by the case of Macintosh v. Dunn (1908) A.C. 390, which came before the Privy Council on appeal from the High Court of Australia.

A verdict for damages had been obtained in an action for libel against the respondents who carried on in New South Wales the business of a trade protection society.

The damage arose from the communication, confidentially, of information alleged to be libellous concerning the appellants, to subscribers of the agency. The question was whether such communications were privileged.

The High Court of Australia (3 C.L.R. 1134) held that the occasion was privileged.

The judgment of Barton, J., (at p. 1158) indicates

clearly that in considering the case the welfare of the public was regarded as the deciding factor. He said, after referring to the case of Foley v. Hall, 12 N.S.W.L.R., 752, "It might very well be argued that it was Contrary to public policy to hold that in such a case there was a contractual duty to publish to subscribers such particulars of persons who might be utter strangers to them. That is not the present case, it is far removed from it and in respect of the circumstances proved, I adopt the following clear and obviously correct remarks of Pring, J., 'Now it is obvious that it is for the common convenience and welfare of a trading community that a merchant should be able to make inquiries with respect to the financial standing and credit of another with whom his dealing or about to deal, and that the answers to such enquiries if given honestly and bona fide, should not subject the person giving them to an action for defamation. If the law were otherwise, the position of traders would be intolerable, their business would materially suffer, and the whole community would, in its turn, feel the effects of the check thus imposed on trade and commerce."

This was, in the view of the High Court of Australia, the way in which the interests of the public were affected, and on that the Court decided that there the occasion was privileged.

The Privy Council took a different view. But the point to be noticed is, that the doubtful case was decided, both by the High Court and the Privy Council, by reference to the welfare of the community, though decided in different ways, different views being taken as to what constituted that welfare.

Lord McNaghten, who delivered the judgment of the Privy Council, quoted the following passage from Baron Parke's judgment in Toogood v. Spyring, 1 C.M. & R. 181 at 193. "If

fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

He added, "The underlying principle is the common convenience and welfare of society, not the convenience of individuals or the convenience of a class, but, to use the words of Erle, C.J., in Whitley v. Adams (1891) 2 Q.B. 346.'the general interest of Society.'"

Later on in his judgment he added, "Then comes the real question. Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self defence or from a bona fide sense of duty, should be extended to communications made from motives of self interest, who trade for profit in the characters of other people."

The answer he gives to this question is as follows;- "It seems to their Lordships that however convenient it may be to a trader to know all the secrets of his neighbour's position, his 'standing' his 'responsibility' and whatever else may be comprehended under the expression et cetera, yet even so, accuracy of information may be bought too dearly - at least for the good of society in general."

Lord McNaghten pointed out that there was no English authority directly in point, though there were American authorities which were entitled to the highest respect, but that the question must be decided by English law, and added, "In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded."

"And what is that principle? The case was decided, to use the words adopted by Lord McNaghten from Toogood v. Spyring, in the interests of "the common convenience and

welfare of society;" obviously enough, the principle of public policy.

The case illustrates the difference of opinion which may exist in the minds of judges as to what is or is not for the good of the public. The Australian judges took the opposite view to that of the English Judges. But the fact remains that in this case for which there was no English precedent, the judges, both English and Australian, were driven to decide the case on considerations of public policy.

b. In re Beard

At a time when the greatest war in history is being waged, there is no difficulty in determining that any agreement or any condition tending to prevent a man giving his services to his country is contrary to public policy. It was so decided in times of peace by Swinfen Eady, J., in the case of In re Beard (1908) 1 Ch. 383.

In that case a testator devised all his real estate to his wife for life and after her death his Staffordshire estates to his nephew Herbert for life "provided that he does not enter into the naval or military services of the country", with remainder over. But if his nephew Herbert should "enter the naval or military services of the country" then the testator devised the Staffordshire estates to his nephew Francis.

On a summons to determine whether the forfeiture provisions were valid, it was argued that they were contrary to public policy, and this view was adopted by Swinfen Eady J., who said in the course of his judgment, "When questions arise as to conditions or provisions being void as being against public policy, great caution is necessary in considering them; at different times very different views have been entertained as to what is injurious to the public." And after referring to the Nordenfeldt case (1894) A.C. 535,

and Richardson v. Mellish (1824) 2 Bing. 229, he proceeded; "In my opinion however, there can be few if any provisions more against the public good and the welfare of the State than one tending to deter persons from entering the naval or military services of the country; such a provision strikes at the very security of the State; which must depend for its protection against external enemies on the armed forces of the Crown, both naval and military; and the law looks, not at the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition. If conditions imposed be really and in principle against the public good, and clearly and directly opposed to the public welfare, they are certainly void, 'salus republicae suprema lex.' It is manifest that any condition divesting property on a devisee or legatee becoming a member of those forces which Parliament considers necessary for the safety of the kingdom has a tendency to deter persons from entering those forces, and is therefore, against the welfare of and injurious to the community, and absolutely void.'"

c. Tyley v. Bruce

Another case in which the question of the tendency of a contract to interfere with the subjects service of his country is Tyley v. Bruce (1916) 21 C.L.R. 277, decided by the Australian High Court of Appeal.

In that case the appellant defendant Bruce, after the beginning of the war, was about to tender to the military authorities for the collection and removal of kitchen refuse from a Military Camp, and he agreed with Tyley that in the event of his tender being accepted Tyley should, for a money consideration, have the right to collect the refuse from a certain number of men in Camp.

Bruce tendered for the work and his tender was accepted.

Tyley then, by deed, assigned to his wife his interest in the contract with Bruce.

The High Court held that the contract was not enforceable against Bruce, either by Tyley or his wife, on the ground, principally, that Bruce's contract with the Military was a personal one, and could not be assigned; but by Isaacs, J., also on the ground that the contract between Bruce and Tyley was contrary to public policy, apparently because Bruce might be fettered by his contract with Tyley, in properly performing his contract with the Crown. Isaacs, J., said in the course of his judgment, "It needs no elaboration to demonstrate that that principle carries with it the proposition that a bargain between A and B whereby B agrees not to contract with the Crown for public purposes, or, what is the same thing, not to contract on the terms the Crown desires, is contrary to public policy, which requires unfettered freedom on the part of every man to contract for the public service, subject only to such exceptions as the law itself prescribes. A bargain which contemplates prevention, impediment, or embarrassment, of the free will of a subject to serve his country is inherently illegal and the law will not enforce it. Consequently such a predetermination, affixing a pecuniary penalty to a free exercise of contractual will towards the sovereign, is not one which can support the plaintiff's claim as a prior created obligation, now co-existent with a public contract of that nature, whether the latter be made before or after the private bargain."

d. Neville v. Dominion of Canada News Cov., Ltd.

In the case of Neville v. Dominion of Canada News Company, Limited (1915) 3 K.B. 556, at least two judges did not shrink from basing their decisions directly on public policy.

The plaintiff was a director of a Company which was engaged in selling land in Canada, and the defendant Company was the proprietor of a newspaper in which they professed to give honest advice to persons intending to purchase land in Canada.

The defendant Company owed the plaintiff £1,490, and the latter agreed to accept £750 in certain instalments in full satisfaction of his claim. As consideration for this the Newspaper Company agreed not to publish, in any periodical published by them, any comment upon the plaintiff's land Company, its directors, or land, or upon any Company with which the defendant Company had notice that the land Company was connected.

The agreement provided that upon any breach the whole £1,490, less any sums paid on account, should immediately become payable.

A breach was made and the plaintiff brought an action to recover the balance of the whole £1,490.

Atkin, J., in the first instance held that the agreement was unenforceable on two grounds:-

1. That it was in restraint of trade.
2. That it was also contrary to public policy, otherwise than as being in restraint of trade.

After stating his reasons for holding the contract unenforceable by reason of its being in restraint of trade he added, "But in my opinion, without invoking the doctrine of restraint of trade this covenant is unenforceable," and pointed out that in his opinion the contract was contrary to public policy.

In the Court of Appeal Lord Halsbury's dictum in Janson v. Driefontein Consolidated Mines was relied on, and it was argued that "the agreement in question is not contrary to any statute or common law principle, and the Court cannot say arbitrarily that anagreement is against public policy

merely because it does not approve of it." Nevertheless the Court held that the agreement could not be enforced, and Lord Cozens-Hardy, M.R., adopted the ground that it was in restraint of trade.

He added, however, "That being so, it is not strictly necessary for me to consider, but if it were necessary for me to consider it, I should hesitate a good deal before I came to the conclusion that what I regard as a bribe paid by the plaintiff to secure complete absence of comment upon any land near Regina with which the Company was concerned, was a transaction which could be regarded as otherwise than against public policy."

Pickford, L.J., preferred to base his judgment directly on the ground of public policy. "He said, "I cannot put this matter in any better words than those used by Atkin, J., in his judgment; "to my mind for a newspaper to stipulate for a consideration that it will refrain from exercising its right of commenting upon fraudulent schemes is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a Court of Law." With that I entirely agree, and I rather prefer to put my judgment upon this footing, although I do not in the least disagree, in fact I agree, with what the Master of the Rolls has said with regard to restraint of trade."

e. Horwood v. Millar's Timber & Trading Company.

A recent case which illustrates the disinclination of the Court to enforce agreements entered into under stress of circumstances, is Horwood v. Millar's Timber & Trading Company (1916) 2 K.B. 44, and in the Court of Appeal (1917) 1 K.B. 305.

In that case, one Bunyan, in the employ of the defendant Company owed debts to the extent of £42/8/3, which comprised the whole of his liabilities. He arranged a loan for the

purpose of paying of these debts, and agreed to repay it, with interest, by instalments of £2 monthly. To secure this to the lender he assigned a policy of Insurance and the whole of his present and future earnings during the continuance of the security, and covenanted not to leave his present or future employ without the consent of the lender, or do or suffer anything to be done which might cause his dismissal, and not to borrow money on, or sell, pledge or dispose of, or part with his goods and chattels, and not without the consent of the lender to take any other dwelling or remove his goods and chattels, or pledge his credit or buy goods on credit or deferred payment except to the extent of ordinary household accounts. It was alleged that the assignor committed breaches of his covenants and the assignee gave notice of the assignment to the defendant Company, (the employers). They, nevertheless, continued to pay the assignor, and an action was brought. The case was held by the Divisional Court to fall under the head of contracts in restraint of trade, obviously out of respect for Lord Halsbury's dictum in the case of Jansen v. Driefontein Consolidated Mines mentioned below. It is to be noted, that the case is unlike any of the usual cases of this class, since the assignor instead of covenanting not to carry on his trade, covenanted to continue to carry it on and not to leave his employment without the consent of the assignee. The covenant, however, had the effect of restricting his choice of employment and unduly and improperly fettered the free disposal of his labour, and on this ground was held by the Divisional Court to be against public policy.

Lush, J., referred to the dictum of Lord Halsbury in the case of Jansen v. Driefontein Consolidated Mines, where he denies, "that any Court can invent a new head of public policy," and continued, "adopting that view and recognising that we must not create new principles or say that upon some

ground never hitherto recognised, the particular contract is not in accordance with public policy, it will be necessary to look carefully at this deed to ascertain whether it can fairly be said to be against public policy."

"The question is whether this contract can be said to operate, If I may use a comprehensive term, in restraint of trade; whether it is a contract which unduly and improperly fetters the free disposal of the assignor's labour. If it so restricts it, if it applies such fetters upon it, as to make it injurious, not only to the man himself, but injurious to the public interest, we should be justified in holding, and indeed bound to hold, that the contract is one which can be enforced at the suit of the plaintiff," and after examining the various covenants in the deed he added, "If these clauses are indivisible and the deed has to be construed as one entire contract, I can come to no other conclusion than that this contract did so unduly fetter and restrict the disposal of the mortgagor's labour, and so unduly restrict him in his mode of living and in choosing the mode of living best adapted for the purpose he had in view, as to be against public policy."

"It restricts him in his choice as to serving his present employers or taking other employment which might suit him better, for he cannot enter other employment without the lender's sanction."

This decision was upheld by the Court of Appeal (1917) 1 K.B. 305.

Cozens-Hardy, M.R., and Warrington, L.J., apparently based their judgment on public policy apart from any consideration as to restraint of trade, while Scrutton, L.J., considered the case from the latter point of view.

The Master of the Rolls laid stress on the restraint of personal freedom. "It is argued," he said, "that no question of public policy arises in this case, and that if there is consideration for the deed the Court will not

measure the consideration, and the question of public policy has no application. This is a proposition which in this Court in Saxelby's case (1916) 1 A.C. 688, I endeavoured to refute. The view taken in the House of Lords entirely concurred in that. Now what does that mean? It means that considerations of public policy must be had regard to, and that it is no answer to say that an adult man, as to whom undue pressure is not shown to have been exercised, ought to be allowed to enter into any contract he thinks fit affecting his own liberty of action. I think that is not the law. It seems to me that if as a matter of consideration I come to the conclusion that the contract is one which puts the covenantor in the position - I cannot think of a better word at the moment to express my view - of adscriptus glebae, as the villian used to be called in mediaeval times, on the ground of public policy the law will not recognise such a thing. No one has a right to deal with a man's liberty of action as well as his property, and the law says it is contrary to public policy."

After referring to the deed, he continued, "Now can it possibly be doubted that that is a deed which is contrary to public policy? Is it open for a man in consideration of a sum of cash to bind himself not to leave the house where he is, not to sell any of his furniture and effects in the house or in any future house he may move into, which furniture is not the subject of any charge in favour of the mortgagee; is it open to him to say 'whatever property I may have I will not give any kind of security upon it for any sum of money or for any debt which legally or morally I may desire to pay?' Such a covenant would prevent the man from employing a doctor or a surgeon in the case of illness in his family, and would prevent him from raising money for the maintenance of his wife and children, or for the education of the latter. I think this is a deed which the law must recognise as bad on ground

of public policy of the most well established kind."

After referring to a passage in the judgment of Bowen, L.J., in Davis v. Davis (1887) 36 Ch. D. 359, 393, that the law does not allow a man "to attach to his contract of service any servile incidents", and to a remark of his own during the argument that the case seemed to savour of slavery, Cozens-Hardy, L.J., added, "Possibly slavery is too strong a word, but it certainly seems to me to savour of serfdom to say 'you shall not leave the house in which you are living without my consent, you shall not dispose of a chair or a table in your house on which I have no charge without my consent, and if you do the whole of principal and interest will immediately become payable instead of the instalments.' I have no hesitation in saying that in my view this is a deed which is contrary to public policy."

Warrington, L.J., took a similar view and gave similar reasons, while Scrutton, L.J. adopted the tests applied in restraint of trade cases of "reasonableness in the interest of the covenantee, and of the public."

"It seems to me," he said, "that there is far more than is necessary for the protection of the money lender in whose interests it is imposed. Is it reasonable in the interests of the public? I can conceive nothing more dangerous to the interests of the public, than that a system of money-lending like this to small people in offices where they have great temptations, and great opportunities to be dishonest if money pressure is put upon them, should be allowed to exist for a single minute, and, looking at the agreement as a whole, it seems to me quite clear that it goes beyond what is reasonable for the purpose for which it is imposed."