[HIGH COURT OF AUSTRALIA.]

WILKINSON . . . . . APPELLANT;

AND

OSBORNE AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 9, 10, 16.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Contract—Illegality—Public policy—Member of Parliament carrying on business as land agent—Agreement to use influence in regard to proposed resumption of land by Crown—Resumption subject to approval of Parliament—Bankruptcy notice founded on judgment—Constitutional law—Closer Settlement (Amendment) Act 1907 (*N.S.W.*) (*No.* 12 *of* 1907), *sec.* 4.

Sec. 4 of the *Closer Settlement* (*Amendment*) *Act* 1907 (*N.S.W.*) provides that "(1) Where an advisory board reports that any land is suitable to be acquired for closer settlement, the Governor may, (*a*) subject to this Act, purchase it by agreement with the owner; . . . (2) Every purchase . . . shall be subject to approval by resolutions of both Houses of Parliament."

The purchase of certain land by the Crown under the provisions of sec. 4 of the *Closer Settlement* (*Amendment*) *Act* 1907 (N.S.W.) had been recommended by an advisory board. A, the agent for the owners of the land, who was negotiating on their behalf in regard to the purchase, entered into an agreement with B and C, who were members of the State Parliament and carried on business in partnership as land agents, under which, as the High Court found, B and C for pecuniary consideration undertook to put pressure upon the Government, of which they were supporters, to agree to purchase the land, the completion of the purchase and the earning of the reward being contingent upon the approval of the House of which they were members, so that the completion was or might be dependent upon their votes.

Held, that the agreement was contrary to public policy and void.

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Per Isaacs J.—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 recognize and enforce. The Court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists.

Osborne v. *Wilkinson*, 14 S.R. (N.S.W.), 309, overruled.

Held, further, that a judgment obtained by B and C against A for the amount of the consideration could not be relied upon as a foundation of bankruptcy proceedings by B and C against A.

Decision of the Supreme Court of New South Wales (*Street* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by John Percy Osborne and George Alfred Jones in the Supreme Court against William Boyce Wilkinson they had obtained judgment against him for the sum of £311 18s. 6d., being the amount of the verdict and costs: See *Osborne* v. *Wilkinson* (1). Upon that judgment Osborne and Jones obtained the issue of a bankruptcy notice against Wilkinson, who moved to set aside the notice on the grounds (1) that he had claims of £500 each against Osborne and Jones in respect of penalties under sec. 14 (2) of the *Constitution Act* 1902 which he could not have set up in their action against him, and in respect of which he had issued writs against each of them; and (2) that the verdict and judgment recovered by Osborne and Jones were bad in law for the reason that they were under a liability for entering into an illegal contract with him and others under the above mentioned Act.

The motion was heard by *Street* J., who dismissed it.

From that decision Wilkinson now, by special leave, appealed to the High Court.

The material facts are stated in the judgments hereunder.

C. E. Weigall, for the appellant. There is no valid petitioning creditor's debt. The judgment on which a bankruptcy notice is founded can be impeached on a motion to set aside the notice: *Halsbury's Laws of England*, vol. II., p. 56. The contract upon

(1) 14 S.R. (N.S.W.), 309.

which the judgment is founded is illegal. The contrary was held by the Full Court of New South Wales in *Osborne* v. *Wilkinson* (1), and this is virtually an appeal against that judgment. Under sec. 4 of the *Closer Settlement (Amendment) Act* 1907 a resumption of land is subject to the approval of Parliament expressed by a resolution of both Houses, so that each of the respondents might vote on the matter and the earning of the commission might depend upon their votes. Where a contract is altogether gratuitous and the parties have no interest in the matter except such as arises from the contract itself, the fact that the contract has a tendency to influence the vote of the party who is a member of Parliament renders the contract illegal and void as being contrary to public policy: *Egerton* v. *Earl Brownlow* (2); *Amalgamated Society of Railway Servants* v. *Osborne* (3). On the evidence the commission was to be paid to the respondents in order to induce them as members of Parliament to exert pressure upon the Ministers, and the earning of the commission was dependent upon the purchase being approved of by Parliament.

Rolin K.C. (with him *Boyce*), for the respondents. In the original action the issue of illegality was not raised, and therefore no evidence was directed by the respondents to that question. Although the question of illegality was considered, every presumption should be made in favour of the legality of the transaction: *The Tasmania*, (4). The evidence is consistent with the fact that the work which the respondents contracted to do was simply that of land agents. As the resumption had to come before the Cabinet for decision, an ordinary land agent might properly interview all the Ministers. The mere fact that the land agent is a member of Parliament does not make such action on his part improper.

[ISAACS J. referred to *Lord Howden* v. *Simpson* (5).]

There is no evidence that the respondents were employed for any other purpose than that of land agents, or that they did anything that could not have been done by land agents. [Counsel referred to

(1) 14 S.R. (N.S.W.), 309.
(2) 4 H.L.C., 1, at pp. 148, 161, 182, 201.
(3) (1910) A.C., 87, at p. 115.
(4) 15 App. Cas., 223.
(5) 10 A. & E., 793; 9 Cl. & F., 61.

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Earl of Shrewsbury v. *North Staffordshire Railway* (1); *Earl of Caithness* v. *Sinclair* (2).

Weigall, in reply.

Cur. adv. vult.

Dec. 16.

The following judgments were read :—

GRIFFITH C.J. The bankruptcy notice in this case was founded upon a judgment recovered in the Supreme Court of New South Wales by the respondents against the appellant. The facts are set out in the case of *Osborne* v. *Wilkinson*, reported in 14 S.R. (N.S.W.), 309. The report was by consent of the parties accepted by the learned Judge whose decision is appealed from as containing a sufficiently full and accurate statement of the relevant facts.

The action was brought to recover commission agreed to be paid by the appellant to the respondents for services to be rendered to him in connection with a proposed contract for the sale of a large tract of land called " Boorabil " by private persons to the Government of New South Wales under the Closer Settlement Acts. The relevant provisions of these Acts are contained in sec. 4 of the Act No. 12 of 1907, and sec. 4 of the Act No. 74 of 1912.

Those sections provide, in effect, that when an advisory board reports that any land is suitable to be acquired for closer settlement the Governor may, subject to the Act, purchase it from the owner, and that every such purchase shall be subject to approval by resolutions of both Houses of Parliament.

The owners of " Boorabil " had put the property under offer to the Government at the price of £30,000, and had employed the appellant to carry on the negotiations on their behalf. His commission, which was dependent on success, was to be £1,000. The advisory board had recommended the purchase, but the matter was hanging fire, and the vendors threatened to withdraw their offer. The appellant, fearing that his efforts would be insufficient, and that he would so lose his commission, then approached the respondents, who were members of the Legislative Assembly carrying on the business of land agents, and asked them to take up the work on his

(1) L.R. 1 Eq., 593.

(2) (1912) S.C., 79.

behalf, for which he agreed to give them a fee of £100, afterwards raised to £250. The respondent Osborne thus describes the services to be rendered :—"We were to try and urge the Government to close the deal at the earliest possible moment so as to avoid the owners withdrawing the property and losing him" (the defendant) "his commission . . . We went on with the work, which consisted in interviewing the Minister for Lands, the Under Secretary for Lands, and hastening the Government's acceptance of the proposal. Our work consisted in seeing the Department was brought up to the scratch and that they did close the matter before the owners withdrew the property . . . The sale had been approved of. My work consisted of laying before the Cabinet the necessity of dealing with the matter at the earliest possible moment—it was a Cabinet matter—it was not a matter simply for the Minister." The respondent Jones said in answer to the learned Chief Justice, who presided at the trial :—"That work was the work of urging the Department and the Government to take up this closer settlement proposition. The work we were doing was that we were endeavouring to expedite departmental action and to impress upon the Cabinet the necessity of putting this proposal through Parliament before it was too late in the session in view of the fact that Mr. Niall" (the representative of the owners) "was becoming very impatient and would withdraw unless the Government clinched it early in the session."

The learned Judges in the Supreme Court spoke of the work to be done by the plaintiffs as "advice." I should prefer to call it exerting political influence or pressure upon the Government.

Put baldly, the contract was one by which the respondents, members of the Legislative Assembly, agreed for a pecuniary consideration to put pressure upon the Government, of which they were supporters, to agree to expend the public funds in the purchase of the land of private persons, the completion of the purchase and earning of the reward being contingent upon the approval of the House of which they were members, so that the completion was or might be dependent on their votes. There cannot be a plainer case of a man attempting to serve two masters. They owed to their employer, the appellant, the duty to press forward the contract regardless of the interests of the public, and as members of the

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Legislature it was their duty to consider the matter impartially before voting upon it.

It would be deplorable that any doubt should be allowed to exist as to whether such a bargain is tolerated by the civil—I say nothing of the criminal—law.

If the matter were one in which they had a personal interest in the subject matter of the contract with the Government, irrespective of the interest created by the bargain impeached, the case might, perhaps, be different : See *Earl of Shrewsbury* v. *North Staffordshire Railway Co.* (1). The difference is thus expressed by *Pollock* C.B. in his opinion delivered to the House of Lords in the case of *Egerton* v. *Brownlow* (2) :—" 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." In the same case Lord *Lyndhurst* pointed out (3) that it is the duty of a legislator (in that case a Peer) to act as such " according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature." He added that " it follows that any application or disposition of property which has a tendency to interfere with the proper discharge of these duties must be at variance with the public good, and consequently illegal and void."

Even if the completion of the particular contract of sale had not been dependent upon the approval of Parliament, I am not prepared to say that the respondents' contract would have been lawful. The substantial services which they were to render in order to earn the £250 consisted of the exertion of personal pressure upon Ministers by parliamentary supporters. The law cannot supervise the conduct of members of Parliament as to the pressure they may bring to bear on Ministers, but if they sell the pressure the bargain is, in my opinion, void as against public policy.

The contract upon which the judgment was obtained was, therefore, void as against public policy, and cannot be made the foundation of proceedings in bankruptcy. The learned Judge, very

(1) L.R. 1 Eq., 593.

(2) 4 H.L.C., 1, at p. 148.

(3) 4 H.L.C., at pp. 161-162.

naturally, and I think very properly, thought that he ought to follow the opinion of the majority of the Supreme Court, and expressed no opinion on the point.

For the reasons I have given the appeal should be allowed.

ISAACS J. This case has very great importance, and has given rise to considerable discussion of the principles that should control its decision. That is owing to the rarity in Australia of such circumstances as have been shown to exist in the present instance.

The course very properly taken by counsel during the argument has presented the substantial question for decision without further delay or expense. In addition to the materials formally contained in the transcript, it was ultimately admitted that *Street* J., from whom this appeal comes, had before him the judgment of the Full Court in *Osborne* v. *Wilkinson* (1), and that the report of that case was treated by both parties as representing the facts, and is to be regarded now as containing all the facts material to the question of the validity of the agreement. The objection to the agreement taken before *Street* J. was that, by reason of its unlawfulness, penalties had accrued which the present appellant claimed he had a right to recover, and therefore to set off against the amount of the judgment. It was therefore admitted that it was argued before the learned Judge, as the foundation of that contention, that the agreement upon which the judgment rested was unlawful.

It is clear that so far as the appellant's contention rested on the ground of set-off it was unsustainable; but if a defence after discarding what is untenable still contains sufficient to repel the claim, that is enough. Many cases establish this principle and notably the latest and most authoritative of all: *Nocton* v. *Ashburton* (2). It was further admitted at the Bar that if, as shown, the point of invalidity of the agreement were raised on the motion to set aside the bankruptcy notice and now, the Court, notwithstanding all that has taken place, could go behind the judgment in the action on which the bankruptcy notice was based.

All that remains, therefore, is to inquire as to the lawfulness or unlawfulness of the bargain between the appellant and the respondents which formed the basis of the judgment.

(1) 14 S.R. (N.S.W.), 309. (2) (1914) A.C., 932.

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The case practically resolves itself into a question of the accuracy of the Full Court's reported judgment (1), accepting the evidence as set out in the report of the case as properly representing the transaction. *Sly* J. and *Harvey* J. thought the agreement lawful, and *Gordon* J. took the contrary view. *Street* J., from whom this appeal comes, was, of course, right in accepting that judgment as controlling him. The matter involves a consideration of the meaning and application of the doctrine of "public policy" in a Court of law. The agreement is challenged by the appellant as being against public policy, and for this *Egerton* v. *Brownlow* (2) is relied on. The respondents rely on *Shrewsbury* v. *North Staffordshire Railway* (3). The concluding observations of *Tindal* C.J. in *Lord Howden* v. *Simpson* (4) are perhaps the strongest on the side of the respondents.

What is the test of "public policy" which a Judge is entitled and bound to apply to an agreement, the validity of which is impeached on that ground?

It is not easy to collect or to reconcile all the observations on the subject of "public policy." But the judgment of Lord *Halsbury* L.C. in *Janson* v. *Driefontein Consolidated Mines Ltd.* (5) makes it clear that a Court has not a roving commission to declare contracts bad as being against public policy according to its own conception of what is expedient for or would be beneficial or conducive to the welfare of the State. A Court, says the Lord Chancellor, cannot invent a new head of public policy, and he enumerates some instances of undoubtedly unlawful things. Then says the learned Lord:—"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. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a Judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe—that is, a principle of public policy, recognized by the law, which the suggested contract is infringing, or is supposed to infringe." He quotes with approval

(1) 14 S.R. (N.S.W.), 309.
(2) 4 H.L.C., 1.
(3) L.R. 1 Eq., 593.
(4) 10 A. & E., 793, at pp. 820-821.
(5) (1902) A.C., 484, at pp. 490 *et seqq.*

the words of *Parke* B. in *Egerton* v. *Brownlow* (1) to the same effect. And this confirms my own reading of that case, that the House did not necessarily reject all the fundamental principles enunciated by the majority of the Judges.

In *Janson's Case* (2) Lord *Robertson* adopts the same reasoning, and the general tenor of the judgments of Lord *Macnaghten* and Lord *Lindley* is confirmatory of the same view.

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 recognize and enforce. The Court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists.

The rule of law as to contracts against public policy is constant—namely, that 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," and the State by its tribunals refuses to enforce it.

But, as was said by the Judicial Committee in *Evanturel* v. *Evanturel* (3), "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."

So in the *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (4) the observations of Lord *Watson* (5) and Lord *Macnaghten* (6) run upon the same lines. 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. Some are not the subject of actual law—such as sexual morality and the promotion of marriage. Others are recognized as fundamental principles of the common

(1) 4 H.L.C., 1, at p. 123.
(2) (1902) A.C., at pp. 504-505.
(3) L.R. 6 P.C., 1, at p. 29.
(4) (1894) A.C., 535.
(5) (1894) A.C., at pp. 553-554.
(6) (1894) A.C., at p. 565.

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law—as the protection of the public revenue, the administration of justice, the freedom and inherent duty of the Legislature and Executive. Others, again, arise by Statute directly or indirectly, for whatever a Statute enacts is beyond all question, to that extent, the policy of the country. Whatever tends to defeat an enactment is necessarily against public policy.

I apprehend, therefore, the duty of this Court is confined to inquiring whether there is at the present moment any governing principle existing in New South Wales, whether as a recognized essential part of the corporate life of the community or as part of the common or Statute law of the State, which is infringed by the bargain between the appellant and the respondents by reason of its express terms or the tendency of its operation.

The Courts must, to quote Lord *Watson's* words in the *Nordenfelt Case* (1), "ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community."

The Courts refuse to give effect to such a bargain, not for the sake of the defendant, not to protect any interest of his—indeed, they do not fail to notice that his failure to abide by his agreement sometimes adds dishonesty to illegality—but they refuse to enforce the bargain for the sake of the community, who would be prejudiced if such a bargain were countenanced.

The existence and nature of the principle or rule here rests upon the effect of the law of the State Constitution read by the light of the doctrine of responsible government, and the further specific effect of the closer settlement legislation.

As to the first, the duty of a member of the Legislature is unquestionable. As Lord *Lyndhurst* said in *Egerton* v. *Brownlow* (2): "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 by those of a pecuniary nature."

And I may add that the same obligation exists in relation to

(1) (1894) A.C., at p. 554.

(2) 4 H.L.C., 1, at p. 161.

his duty in watching on behalf of the public all the acts of the Executive. Without that, responsible government would be but a name.

But Parliament has found that the public interests require, in relation to the possibilities attendant upon the policy of closer settlement, a special and still more stringent guardianship on the part of the Legislature than the general course of the Constitution provides.

The Executive has, in relation to that question, been entrusted with great responsibilities, but the public purse has been surrounded by law with certain specific and additional safeguards specially devised for its protection. And the main question, to my mind, is whether or not such an agreement as we have now to consider does not go far to destroy the protection which it is the clear object of the law to afford the community. Let us first see what the Statute law itself says. By sec. 4 of the Act No. 12 of 1907, after the advisory board has reported favourably as to the suitability of any land, the Governor, that is, the Governor in Council, may "subject to this Act" purchase it from the owner by agreement. If no agreement is come to, the Government may, subject to certain restrictions not material here, "resume" the land, and have the price ascertained in manner fixed by the Act. But, says sub-sec. 2, "Every purchase or resumption shall be subject to approval by resolutions of both Houses of Parliament."

Sec. 16 enacts that the foregoing provisions of the Act are in addition to, and not in substitution for, any other provisions in the earlier Acts. The only earlier Act that is relevant, is what is called in the Act of 1907 the "Principal Act," by which is meant No. 37 of 1904. One of the provisions in the Act of 1904 which, by sec. 16 of the later Act, are to be considered additional is found in sec. 5 of the Principal Act. That section says that any owner of private land may, by writing addressed to the Minister, offer to surrender his land to His Majesty at a stated price. Once made, the offer cannot be withdrawn for nine months except with the Minister's consent in writing. Certain provisions follow as to how the offer may be dealt with, including report, and submission to Parliament, and then sec. 8 says the Minister with the sanction of the Governor

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(that is, the Governor in Council) and the approval of both Houses may make a contract to purchase.

The later Act of 1907 takes up the matter from the receipt of the offer, and, while making no alteration as to the inability of the owner to withdraw for nine months, provides a new method of purchasing, which I have already described as contained in sec. 4 of that Act.

The result is that the agreement under that section, which apparently was the one acted on, may be made in the first instance by the Governor in Council, but it is not binding unless and until the members of the two Houses have approved of it. The Ministry may sign the contract, but it requires the seal of the Legislature to make it effective.

The approval is not given by legislation in the strict sense. There is not a Bill, there are not three readings, there are no committee stages, and there is no concurrence by one House with what the other does. But there is to be a deliberate consideration by each House of the agreement tentatively made, and an affirmative decision must be made, and members are required to consider the matter independently and from the one standpoint of the public welfare precisely in the same way as if they were engaged in the regular work of legislation. They are to stand between the public on the one hand, and the possible errors and mistakes of Ministers and their advisers on the other; they are to investigate, and on their own responsibility endorse, or reject, the proposed bargain between the private individual and the State. As a business proposition the purchase made in the best of faith and with the highest intentions may be all wrong. The land may be entirely unsuitable notwithstanding the opinion of the advisory board, the demand for closer settlement in the neighbourhood may not warrant the expenditure, the character of the land may not justify the price; the cost may be such that settlors could not afford to take it up, and so on.

It is all important that this open check should not be impaired or fettered in any way.

Now, that being the relevant law, what was the nature of the bargain?

The owners of a property called "Boorabil" had offered their property to the Government for £30,000. The advisory board had reported favourably as to suitability. The owners employed as their land agent the appellant Wilkinson who failed to persuade the Government to agree to the price the owners had asked. They were, by sec. 5, debarred from withdrawing for nine months, but Wilkinson, finding his own efforts unavailing and fearing lest his principals should withdraw their offer—which would mean the loss of his commission—cast round for some means of obtaining the necessary binding acceptance before his clients could withdraw.

In thus pushing the matter forward, he had in view entirely his own interests. This has importance. His employment of Osborne and Jones was not as land agents in the true and ordinary sense. They were not employed as auxiliary agents of the owners, but they were employed, as they knew and have always insisted, as agents for Wilkinson himself—not to place a business proposition on behalf of the owners of the land, on its merits, before the Minister, not to address themselves as vendors' agents to the reason and understanding of the Minister and leave him without pressure to come to his own conclusion in his own time. But, as Osborne says, "our work consisted in seeing the Department was brought up to the scratch, and that they closed the matter before the owners withdrew the property." Bringing the Department up "to the scratch" means something more than merely standing on the opposite side of the counter; it means driving the opposite party into a bargain. Jones says:—"The work we were doing was that we were endeavouring to expedite departmental action, and to impress upon the Cabinet the necessity of putting this proposal through Parliament before it was too late in the session in view of the facts that Mr. Nial (the representative of the owners) was becoming very impatient and would withdraw unless the Government clinched it early in the session." By "clinching" it "Jones obviously meant "putting it through Parliament." Now, remembering it was Wilkinson they were working for—not the owners—they were rather trying to thwart a probable withdrawal by the owners, and, remembering that what they were trying to do for Wilkinson was to secure him his commission, which he apparently could not

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get unless the matter were "clinched,' it seems to me impossible to contend that the respondents' work stopped short of seeing that the Government did put the thing "through Parliament" that session. Having here to draw inferences of fact, I have no hesitation in arriving at the conclusion that the respondents were to get not merely an agreement from the Government, but a promise to put the thing through Parliament, and were to see so far as they could that that promise was kept. When Mr. Jones says their work included this, "to impress upon the Cabinet the necessity of putting this proposal through Parliament before it was too late in the session," he states no limit of effort to create that impression or maintain it.

These gentlemen at first undertook to do all this for £100; but so great was the difficulty that Wilkinson voluntarily raised it to £150, and then to £200, and at last in July to £250. Shortly after this, success crowned their efforts. What were the efforts on their part that proved so manifestly exhausting as to induce Mr. Wilkinson voluntarily to supply this constantly increasing stimulus?

We do not know the details; but of this I am quite convinced, that they left the respondents altogether unfit to undertake the calm, judicial and impartial investigation of the bargain, which the law of the country requires of members of the Legislature.

Men who place themselves in the position of forcing through the zone of ministerial approbation a project that awakens such resistance as the evidence discloses, must have been very ardent advocates of its adoption. 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; they had placed themselves in a position where, even if their own bargain in strict terms stopped with the primary acceptance of the purchase by the Executive, still the respondents' Parliamentary opposition to a motion of approval

would have looked uncommonly like ingratitude to Wilkinson on one side, and misleading the Government on the other.

And this would be enough to invalidate the contract, because to some extent at least interest would have conflicted with duty, and the law does not measure the extent of such conflict. As Lord *Shaw* observed in the *Thames and Mersey Marine Insurance Co. Case* (1) :—" The law does not attempt the task ; the penalty against such a conflict between interest and duty is the invalidation of the bargain."

And so I put this case primarily on that principle, that it is one in which the bargain raises a conflict between interest and the duty of considering whether the purchase should be finally approved, and is therefore against public policy. There is a case of high authority in which that principle was stated. In *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull* (2) Lord *Campbell*, speaking for the Judicial Committee in reference to a wager, put the test in these words :—" Whether the wager gave either party an interest which is to be considered injurious to individuals or to the Government." One reason why it was held valid was that " it did not interfere with the performance of any duty." So in *Egerton* v. *Brownlow* (3) Lord *Lyndhurst*, after stating the duties of a Peer, went upon the ground that the attempted disposition of the property having " a tendency to interfere with the proper and faithful discharge of these duties must be at variance with the public good, and consequently illegal and void." Further on, he expressed the opinion as decisive that the same disposition had a tendency to " affect that free agency which it is a duty, as far as possible, to keep unimpaired." And His Lordship added that any such tendency, however slight, was fatal. The same principle of inconsistency with duty is stated by Lord *Truro* (4).

The £250 bargained for here, and the balance of which, £200, the respondents asked the Bankruptcy Court to enforce, created an interest injurious to the Government, because it was only to be earned when the respondents got the matter " clinched," and they could not do that without incapacitating themselves, at least to some

(1) (1911) A.C., 529, at p. 544.
(2) 6 Moo. P.C.C., 300, at p. 311.
(3) 4 H.L.C., 1, at p. 162.
(4) 4 H.L.C., at p. 198.

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extent, from the due performance of the high and responsible duty imposed upon them as guardians of the public revenue, and of the public scheme of land development and settlement of the population that they were specially commanded to protect. I should say a word about the two cases of *Lord Howden* v. *Simpson* (1) and *Shrewsbury* v. *North Staffordshire Railway Co* (2), which are relied on as an answer. Those cases only establish what is to be regarded as an exception to the rule that interest and duty must not conflict. A man is not called upon, merely because he is a legislator, to permit private individuals to take away his property or lessen its value. That principle has been carried by the cases cited so far that he can even bargain with respect to compensation contingently on the passing of a private Act into which his public duty enters. *Kindersley* V.C., in the *Shrewsbury Case* (3), says :—" A landowner cannot be restricted of his rights because he happens to be a member of Parliament." Sir *Frederick Pollock* (*Contracts*, 8th ed., p. 342) observes, however :—" This may seem anomalous : but it must be remembered that in practice there is little chance of a conflict between duty and interest, as the Legislature generally informs itself on these matters by means of committees proceeding in a quasi-judicial manner. Of course " (adds the learned writer) " it would be improper for a member personally interested to sit on such a committee." This last observation is not without relevance to the special function of considering the propriety of approving the purchase.

There are at least two other circumstances which distinguish the two English cases cited from the present. In the first place, the interest there was to maintain existing property or rights ; and, if the bargain were *bonâ fide*, the money represented a mere change of form. Next, the Acts of Parliament were what are called " private Acts," and had not the same public general character as the Closer Settlement Acts. I cannot help thinking that private bill procedure was in Lord *Campbell's* mind in the House of Lords in *Howden's Case* (4). Further, it must be observed that in *Howden's Case* the House of Lords confined their decision within rather

(1) 10 A. & E., 793 ; affirmed 9 Cl. & F., 61.
(2) L.R. 1 Eq., 593.
(3) L.R. 1 Eq., at p. 613.
(4) 9 Cl. & F., 61.

narrow limits, and it cannot be regarded as definitely affirming the larger proposition on the question of the legality that is found in the judgment of *Tindal* L.C.J.

In any case those cases are anomalous, are very special exceptions to the broad wholesome rule that interest cannot be allowed to conflict with duty, and I am not disposed in any event to extend the anomaly or widen the exception beyond the precise circumstances of those cases.

I have said that primarily I rest upon the special provisions of the *Closer Settlement Act*.

But on the facts of this case I entertain no doubt that the respondents were bargaining with Wilkinson to use the weight and influence they possessed by virtue of their positions as members of Parliament. How they came to be selected, the nature of the work they performed, the manner in which they performed it, all point unmistakably to the conclusion that it was not their business experience or ability that was wanted by Wilkinson or utilized by them, but their opportunities and ability of influencing the Executive to advance the business proposal that hung fire.

It would be disastrous to the community to permit this to be recognized 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 own duty if it hesitated to denounce such traffic in the most positive terms.

Quacunque viâ, on the facts of this case the respondents placed their interest in conflict with their duty; and the bargain cannot stand.

There is, therefore, behind the judgment nothing which the law can recognize as a legal foundation, and consequently there is no debt which can form the basis of a bankruptcy notice. The appellant's objection must prevail; and he must succeed, not because he has merits but because the respondents have none.

GAVAN DUFFY J. I agree. I have had the advantage of reading the judgments which have been read by the Chief Justice and

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my brother *Isaacs*, and I do not think that I can usefully add anything to them.

Appeal allowed. Order appealed from discharged.

By consent the hearing of an appeal by the appellant from an adjudication of bankruptcy which had followed upon the bankruptcy notice was ordered to be expedited and to be heard *instanter*.

PER CURIAM. The appeal will be allowed.

Appeal allowed. Adjudication set aside.

Solicitor for the appellant, *J. M. Proctor.*
Solicitor for the respondents, *E. W. Warren.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CARNARVON ELECTRIC LIGHT AND POWER CO. LTD. . . . . } APPLICANTS;
DEFENDANTS,

AND

BOOR . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1915.

PERTH, *October* 21.

Griffith C.J., Gavan Duffy and Rich JJ.

Practice—High Court—Appeal from Supreme Court of a State—Special leave—Supply of Electricity—Implied Contract—Breach—Electric Lighting Act 1892 (*W.A.*) (55 *Vict. No.* 33), *secs.* 2, 29.

Sec. 29 of the *Electric Lighting Act* 1892 (W.A.) provides that "Where a supply of electricity is provided in any locality for private purposes, all persons within such locality shall on application be entitled to a supply on