Present: Schneider, Garvin, and Dalton JJ.

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DE SILVA *v.* JUAN APPU.

302—D. C. Galle, 24,333.

Contract—Agreement by brother to give sister in marriage—Public policy—Validity.

Per SCHNEIDER AND GARVIN JJ. (DALTON J. *dissentiente*).

A contract by which a brother promises to give his minor sister in marriage before a special date and undertakes absolutely, that if his promise remains unfulfilled by that date, he will pay a sum of money, is invalid.

THE plaintiff sought to recover from the defendant a sum of Rs. 3,000 as damages for breach of an agreement entered into between them which was in the following terms:—

"I, Ambalangodage Juan Appu de Silva, whose signature appears on the 6-cent stamp below, do hereby promise to give in marriage one of my sisters, A. Mapi Nona, to A. Richard de Silva of the same village before the expiration of two years from the date hereof. If this falls through or if for some reason such as any objection raised or being raised by me or any other member of the family this cannot be carried out, then I further bind myself to pay on demand a sum not less than Rs. 3,000 to the said A. Richard Silva either as a fine, compensation, or recompense for any discredit that he may suffer thereby."

The defendant pleaded that the document was of no force or avail in law, and further that his sister refused to marry the plaintiff. The learned District Judge held that the agreement was not enforceable in law and dismissed the plaintiff's action.

H. V. Perera (with *D. E. Wijewardene*), for plaintiff, appellant—The defendant promised to pay the plaintiff the sum of Rs. 3,000 upon his failure to bring about the marriage within two years. The defendant failed to do so. Therefore his liability is an absolute one. The question of public policy does not arise as this contract is one recognized as being good under the Roman-Dutch law. The English law does not govern the case. Under the common law a contract of this nature is valid even when a stranger is a party to it. (*Lee's Introduction to Roman-Dutch Law, 2nd ed., p. 224.*) The case may be decided on the analogy of a marriage brokerage contract. In the case reported in *17 N. L. R. 6* (*Livera v. Gonsalves*) a marriage brokerage contract was held to be unenforceable. However that case only considered the English law but did not go fully into the Roman-Dutch law.

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In *King v. Gray* [1] the South African Courts held in effect that it was not quite clear whether under the Roman-Dutch law a marriage brokerage contract was enforceable. (Kotze's Van Leeuwen *vol. II., p. 633, 1923* ed.)

If a father covenants to bring about a marriage between his daughter and another party under similar circumstances, such a contract is valid (*Abdul Hameed v. Peer Cando* [2]).

This principle can be extended to cover the present case. It is equally a principle of public policy that parties should be held to their contractual obligation.

T. Weeraratne (with *C. V. Ranawake* and *M. C. Abeywardene*). for defendant, respondent.—The mother was alive at the date of the execution of the contract. That being so, even if the principle enunciated in *Abdul Hameed v. Cando* (*supra*) is to apply, it will be the mother who should be the party to be bound. But this contract is contrary to public policy as it fetters the free will of a third person. The law will not allow A to compel B to marry C. To do so would be to impose a restraint upon the freedom of choice.

Counsel cited *Hermann v. Charlesworth*,[3] *Pammoderampillai v. Pangamuttupillai*, [4] *Hendrick Sinno v. Haramanis et al* [5], *Fernando v. Fernando*, [6] *Livera v. Gonsalves*.[7]

In *King v. Gray* (*supra*) the question of public policy in relation to contracts of this nature was fully considered and it was held that they were prejudicial to the public welfare.

Under the English law these contracts are definitely considered to be against public policy (see *Hermann v. Charlesworth* (*supra*)).

May 23, 1928. SCHNEIDER J.—

During one stage of the argument of this appeal I was not convinced that the contract upon which this action is based was one which was not enforceable, but a further consideration of the arguments and a careful study of my brother Garvin's judgment here settled all doubts. I agree entirely with his judgment and that the appeal should be dismissed with costs.

GARVIN J.—

The question which arises upon this appeal is whether the contract set out in the writing of February 10, 1925, and filed of record is valid. The writing is in Sinhalese and the translation filed of record is as follows:—

"I, the under-signed, on a 6-cent stamp, Ambalangodage Juan Appu de Silva of Peraliya, do hereby promise to get married my sister A. Mapi Nona to A. Richard de Silva

[1] *(1907) 24 S. C. 554.*
[2] *15 N. L. R. 91.*
[3] *(1905) 93 L. T. 284.*
[4] *2 S. C. R., p. 51*
[5] *2 S. C. C. 136*
[6] *4 N. L. R. 285*
[7] *27 N. L. R. 6.*

before the expiration of two years from the date hereof or before the 10th day of February, 1927. If such be altered or by obstacles being raised by me or by any of the members of the family, failure to comply with the said promise, then I firmly hold and bind to pay either as a fine, compensation, or for dishonour unto the said Richard de Silva a sum of not less than Rs. 3,000. Accordingly having set my usual signature hereto granted the same at Peraliya on 10th February, 1925."

(Signed illegibly on a 6-cent stamp.)

The translation bears on its face indications that the translator has found it difficult to render the Sinhalese into its idiomatic English equivalent.

This translation is not satisfactory and counsel engaged in the case agreed to accept the following translation made by the Interpreter of this Court:—

"I, Ambalangodage Juwan Appu de Silva, whose signature appears on the 6-cent stamp below, do hereby promise to give in marriage one of my sisters, A. Mapi Nona, to A. Richard de Silva of the same village before the expiration of two years from the date hereof, that is, before the 10th of February, 1927. If this falls through or if for some reason such as any objection raised or being raised by me or any other member of the family this cannot be carried out, then I further bind myself to pay on demand a sum not less than Rs. 3,000 to the said A. Richard de Silva either as a fine, compensation, or recompense for any discredit that he may suffer thereby. Accordingly I have set my signature to this on the 10th day of February, 1925, at Peraliya."

The contract is to give a sister in marriage on or before a specified date, and to pay a sum of Rs. 3,000 should this obligation remain unfulfilled.

The District Judge dismissed the plaintiff's action to recover Rs. 3,000 in terms of this contract and he has appealed.

The position of the plaintiff in regard to this contract is set out in his plaint as follows:—

"(3) The defendant has failed and neglected to carry out his part of the said agreement and now neglects to have the marriage between his sister, who is a minor and under the defendant's custody, and the plaintiff solemnized."

It will not be noticed that there is no allegation—and there certainly is no evidence—of any positive act done by the defendant "or any other member of the family" to prevent the marriage.

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The plaintiff's interpretation of this contract would seem to be that the defendant's liability to pay him damages was absolute and arose if this promise to give the plaintiff his sister in marriage remained unfulfilled at the expiration of the specified period. The question for consideration is whether a contract by which a brother undertakes to give his minor sister in marriage before a specified date and undertakes absolutely that if his promise remains unfulfilled by that date he will pay a sum of money to the other, is valid and enforceable.

The mischievous tendency of a contract whereby a parent promises to bring about a marriage between his daughter and another to whom he is bound under a penalty seems to me obvious. The prospect of having to pay this penalty is an embarrassment upon that absolute freedom to consult the best interests of his child which parents should possess and upon which a daughter is entitled to rely in so important a matter as the question of her marriage. Circumstances may arise subsequent to the making of such a contract where his duty to his child may be at conflict with his own financial interests and with the obligation he has undertaken to compel or at least to induce her marriage with a particular individual. The same considerations apply to a contract by which an elder brother enters into a similar obligation in respect of a minor sister where their father is dead. The law in England rests upon the principle that marriage should be free and without compulsion. (*Key v. Bradshaw.*[1]) "Every temptation to the exercise of an undue influence or a seductive interest in procuring a marriage should be suppressed."

A contract under which a parent or guardian acquires a personal benefit which is given in order to induce him to consent to the marriage of his child or ward or to withdraw his opposition is void, *Hamilton (Duke) v. Mohun (Lord).*[2] And so also presumably a contract by which a parent or guardian binds himself under penalty to give his child or ward in marriage.

Under our law no parent—and *a fortiori* no brother *in loco parentis* in relation to his sister—has the power to dispose of a daughter in marriage independently of her will. No such custom or usage having the force of law—if ever there was such a custom—has to my knowledge been recognized by our Courts. While one cannot but be aware that among the Sinhalese—the parties to this action are low-country Sinhalese—a father wields greater influence over his daughters in the matter of their marriage than is perhaps the case among European peoples, there is no reason for supposing that it is not repugnant to their views that a parent should be bound by contract to influence and if need be to compel his daughter to marry a particular man independently of her own wishes.

[1] *2 Vernon 102.* [2] *1 Peere Williams 118.*

There are instances in our local reports of actions based on promises and argeements which bear a superficial resemblance to the one under consideration. But upon examination it will be seen that in each case it was found possible to give an interpretation to the contract which placed it beyond condemnation.

In *Tottagodegamagey v. Bolagamagey* [1] the action was by the father and the daughter sued together to " get the banns which had taken place cancelled, and to recover £9. 17*s*. 9*d*. with costs being advances made by the 1st plaintiff." When dealing with what was apparently an objection on the ground of misjoinder the following observation was made: " It appears however to have been universal in this Island under every system of law that obtains here to introduce the parents on these occasions, and to render them responsible *in solidum* with the children, whatever their age, to marriage engagements entered into, though verbally, with their consent." This is not such a contract.

In *D. C. Negombo, No. 4,471* [2] the action was against the father and the claim was for damages for not giving his daughter in marriage. The agreement if it was in writing is not set out. But the judgment proceeded upon the footing that the contract was subject " to the implied condition that the daughter should not raise any reasonable objection to its performance " and that " any defence of this nature which would have been available, if the promise had proceeded directly from her, will also be available to the father in an action like the present."

I find it difficult to read such an implied condition into a contract whereby the obligation to pay arises if the contemplated marriage falls through or if it cannot be " carried out " in consequence of " any objection being raised " even by any other member of the family.

The following passage in the judgment is a comment on the policy of enforcing agreements such as the one upon which the present action is based:—

> " Actions against a father for breach of promise to give the daughter in marriage would induce great abuses if the plaintiff could enforce damages against a parent however reasonably reluctant the daughter may be, and thus make it to the father's pecuniary interest to exercise the parental authority harshly or tyrannically."

D. C. Colombo, No. 68,034 [3] was an action by a father " on behalf of his daughter " based on an agreement by and between the plaintiff jointly with his daughter Tangamma of the first part and the 1st defendant of the second part and the 3rd defendant of the

[1] *(1838) Morgan's Digest 206.* [2] *(1871) Vanderstraaten 177.*
[3] *Lorensz 236.*

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third part—that the 1st defendant should marry Tangamma and in default pay Rs. 50,000 by way of liquidated damages the 2nd defendant binding himself as surety for the 1st defendant.

No question of the validity of the agreement was raised or considered in the original Court or in appeal.

The contract in *Hendrick Sinno v. Haramanis Appu and Sirimalhami* [1] was set out as follows: "In consideration that the plaintiff should marry the second defendant, she and the 1st defendant, her father, agreed that she should marry plaintiff." Phear C.J. delivered the judgment of the Court of which Berwick J. was the other member in which he referred to the assumption in the two cases above referred to "that a father had or assumed to have a power of donation in respect of or control over the dependant members of the family which enabled them to contract as principals according to some custom of the country for the marriage taking place." He referred to the case before him as follows: "In the present case this is not so. The daughter is quite old enough and apparently well able to look after herself in the matter of marriage. It does not appear that the father has ever pretended to have authority by usage or otherwise to dispose of her in marriage independently of her own will . . . . ". He referred to the evidence and concluded as follows: "We do not think that we ought on this very narrow foundation to conclude that the 1st defendant (father) undertook either by way of warranty or indirect assertion of a power to dispose of his daughter's person, that the 2nd defendant, his daughter, should marry the plaintiff."

The case decides nothing except the question of fact.

An objection was taken in *Pammodarampillai v. Pangamuttupillai* [2] to the contract alleged on the ground that any custom enabling a mother to dispose of her daughter in marriage was illegal and no contract founded on it could be enforced. Burnside C.J., however, disposed of the case thus:

> "It (the libel) alleges that in consideration that the plaintiff had agreed to marry the defendant's daughter the defendant, her mother, agreed that she should marry him or *in other words, that he would have the defendant's consent to the marriage*. I see nothing immoral or illegal or startling in such an agreement."

The learned Chief Justice then proceeds to whittle down the value, if there is any value in such an agreement, by referring to the breach alleged in the libel "that she had proposed that her daughter should marry another" observing *non-constat* that the young man will marry the young woman or that in that proposal the defendant

[1] *1879 2 S. C. C. 136.* [2] 2 S. C. R. 51.

intended to *withdraw her consent to the marriage with the plaintiff. She might have agreed to consent to the marriage of her daughter with either of the young men and not broken her contract . . . .*"

Fernando v. Fernando [1] was based on an agreement between the father that he would give his daughter in marriage to a young man, who promised and undertook to marry her within a stipulated time—the person in default to pay Rs. 2,000 to the other. The agreement purported to be entered into by the father on behalf of the daughter. The intended bridegroom married another lady. The father and the daughter sued for breach of promise. It was held that the daughter was entitled to adopt a contract made for her benefit. The obligation undertaken by the young man consisted of a promise to marry and was unexceptionable.

The most recent case is that of *Abdul Hameed v. Peer Cando.*[2] The agreement was between a father and the prospective husband. The former agreed that his daughter Sittie Johara should marry the latter, who undertook that he would marry Sittie Johara. In case the defendant' " refused, neglected, failed, or objected to give his daughter in marriage " he was to pay a certain sum of money as liquidated damages.

Middleton J. found it possible to construe it as " a covenant by father of a promise to marry already made by him for and on behalf of his daughter, *to which she apparently assented.*" Later he says: " Nor can I see that the obligation of the father to pay money on the breach of promise to marry by the daughter involves any greater evil or is more contrary to public policy than the obligation of the daughter herself to pay damages for breach of promise." And still later there appears the following passage:—

> " It is argued that it is illegal for a parent to bind himself under a penalty to influence the feelings of his daughter towards a marriage but this is not the case here, as the agreement to marry had been made when the contract was entered into. It is certainly not wrong or illegal for a parent to influence his daughter on the subject of marriage, and the presumption would be that such influence was used for the benefit by a person more experienced than herself, and where an agreement has been made apparently *with the consent of both daughter and parent* that she should marry some one. I can see no evil or illegality in the parent rendering himself responsible in damages if the daughter declines to keep her promise."

In short the father's obligations under the contract appear to have been treated as the same as those of a collateral surety for a promise made by his daughter. In the written contract on which this action is founded there is no mention of any promise by the

[1] *(1899) 4 N. L. R. 285.* [2] *(1911) 15 N. L. R. 91.*

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defendant's sister nor is there anything in the language of the document which suggests that the obligations which the defendant undertook were merely those of a surety for a promise previously or contemporaneously made by his sister. A promise to marry by the young lady was not pleaded nor was any issue raised on the point. The plaintiff did in the course of his evidence assert that she had promised to marry him, but his evidence is unconvincing and has not been accepted by the District Judge.

It is impossible to equiparate the facts of this case with those of any of the cases examined by me, nor is the language of the written agreement susceptible of any one of the different constructions which enabled the Court to treat the agreements in each of the earlier cases as unobjectionable.

An agreement to pay a sum of money whether it be a penalty or by way of liquidated damages should a promise to give a sister in marriage on or before a specified date remain unfulfilled is too definite to admit of any such explanation.

It is conceded that under the Roman-Dutch law contracts which are contrary to law or public policy are invalid, but it was strongly urged that the question of public policy involved in these matters has been definitely settled in a sense different to that of the English law. Strong reliance was placed on the opinion *Bynkershoek (vide Quaest. Juris Privati, lib. II. cap. 6)*. The learned author deals there with the question whether a person, who had been employed to bring about a marriage, can claim a commission or brokerage for his services, and expresses the view that inasmuch as an agency for the purpose of bringing about a marriage is not an agency for an unlawful object there is no reason why a person who has rendered services in " honourably bringing about a marriage " should not be permitted to recover the promised reward or reasonable remuneration for the work he has done, the time he has spent, and the expenses he has *bona fide* incurred.

Bynkershoek acknowledges the existence of a body of opinion in accordance with the opinion which gradually gained strength and is now embodied in the English law that a monetary reward or a financial interest is a temptation to the exercise of compulsion or undue or seductive influences on young and immature persons in procuring ill-advised, improvident, and often fraudulent marriages.

He prefers, however, the view that inasmuch as it is not unlawful to bring about a marriage by fair and proper means a person who has been employed to do so is entitled when he has so brought about a marriage to remuneration for his services.

In *Livera v. Gonsalves* [1] Wood Renton C.J. after a consideration of the opinion of Bynkershoek held that an action by a matrimonial agent for payment of a reward was not maintainable in Ceylon

[1] *(1913) 17 N. L. R. 5.*

observing with reference to Bynkershoek's opinion that the principle has not been accepted in Ceylon. He reinforces his judgment by a reference to the South African case of *King v. Gray* [1] which it must be admitted is open to the comment that DeVilliers C.J., while he refers to Groenewegen makes no reference to Bynkershoek. In the decisions of this Court there are dicta in *Abdul Hameed v. Peer Cando* (*supra*) and many other cases which point strongly in favour of the view taken by Wood Renton C.J., and it is a striking circumstance that with the sole exception of *Livera v. Gonsalves* (*supra*) there has not been discovered a single other instance of an action by a matrimonial agent for the recovery of reward or commission.

There is no indication in the reported cases that any other view was at any time entertained or admitted in our Courts, and for my own part I should hesitate where there admittedly was a difference of opinion even in the period at which he wrote, *i.e.*, about 1,720 to take on the authority of Bynkershoek a view of public policy different to that recognized by the Courts of England and approved and followed by our Courts.

But in the contract under consideration no question of a claim for remuneration for services rendered *bona fide* and without turpitude in bringing about a marriage arises. Whatever view may be taken of that question on his authority there is no indication in Bynkershoek's article nor in the grounds upon which he bases his opinion of the particular case considered by him that he regarded a contract such as the one under consideration as unobjectionable. It clearly transgresses those principles for which his opponents contended and no differentiation is possible on the ground of a right to remuneration for services rendered.

It has been suggested that to hold that this contract is unlawful as being contrary to public policy would be to invent a new head of policy inconsistent with the policy as settled by our common law which is the Roman-Dutch law. I entirely agree that where a principle of public policy is established by law it is not the province of a judge to speculate as to what is best in his opinion for the advantage of the community but to administer the law as he finds it, leaving it to the legislature to amend the law if that be thought desirable. But I have endeavoured to show that the question of policy at least in so far as it relates to a contract such as the one under consideration cannot be regarded as settled by the Roman-Dutch law in a sense favourable to such contracts. In Ceylon there are judgments which indicate that the prevailing view for fifty years and more has been in complete accord with the view approved by the Courts of England.

That the view taken by Wood Renton C.J. in 1913 was entertained as far back as 1872 is evidenced by a judgment of Mr. Berwick in

[1] *24 S. C. 554.*

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D. C. Colombo, No. 60,073, dated 10th June, 1872, where a contract such as this was held to be contrary to public policy. I have already drawn attention to the indications in judgments in the intervening period that this view has been consistently held and to the absence of any case in which a contrary opinion was expressed. The question is open inasmuch as it is not concluded by an authoritative decision of a Full Bench. It is competent for this Court to found its judgment on the prevailing view of what is for the public good especially when that view is manifested in the judgments to which reference has been made. For this the history of the development of the law of England on this very question is a sufficient authority. " There was no objection at Common law till perhaps some hundred years ago, to such contracts ": Collins M.R. in *Hermann v. Charlesworth.*[1] The existing doctrine was engrafted into the Common law by the judgment of the House of Lords in *Hall v. Potter.*[2]

This contract is in my judgment opposed to public policy and the claim based on it unenforceable.

For these reasons I would affirm the decree dismissing the plaintiff's action and dismiss this appeal with costs.

DALTON J.—

The plaintiff seeks to recover in this action the sum of Rs. 3,000 which he alleges to be due to him under the following circumstances. He wished to marry the defendant's minor sister Mapi Nona, defendant also wishing to bring the marriage about. Their father was dead, but their mother was alive, defendant being apparently the eldest male member of the family. It is pleaded that Mapi Nona is under his care and custody. On February 10, 1925, therefore, defendant entered into an agreement with the plaintiff, signing the following document in the presence of two witnesses:—

> " The purport of a promissory agreement caused to be drawn, signed, and granted. I, Ambalangodage Juwan Appu de Silva, whose signature appears on the 6-cent stamp below, do hereby promise to give in marriage one of my sisters, A. Mapi Nona, to A. Richard de Silva of the same village before the expiration of two years from the date hereof, that is, before the 10th of February, 1927. If this falls through or if for some reason such as any objection raised or being raised by me or any other member of the family this cannot be carried out, then I further bind myself to pay on demand a sum not less than Rs. 3,000 to the said A. Richard de Silva either as a fine, compensation, or

[1] *(1905) 2 K. B. 133.*

[2] *Show Parl Case 76.*

recompense for any discredit that he may suffer thereby. Accordingly I have set my signature to this on the 10th day of February, 1925, at Peraliya."

(Signed illegibly on a 6-cent stamp.)

Witnesses:

(Signed) R. K. D. Silva,

(Signed) D. M. G. Aron.

The period of two years elapsed without the marriage being effected, and now plaintiff seeks to recover the sum of Rs. 3,000 agreed upon, as defendant has failed to carry out his part of the agreement, although plaintiff was always ready and willing to marry Mapi Nona. Defendant pleads in answer that the document P 1 is of no force or avail in law, and further that Mapi Nona, who is now living with a maternal aunt, now refuses to marry the plaintiff. There is no allegation or suggestion in the defence that the plaintiff himself has done anything that would justify a person in refusing to marry him.

Two issues were framed by the trial Judge:—

(1) Is the agreement set out in the plaint enforceable in law ?

(2) Damages ?

After plaintiff had given evidence, from which it would appear that the plaintiff and Mapi Nona had agreed to marry each other, no further evidence was led on either side, but it appears to have been argued for the defendant that, inasmuch as there was no valid promise of marriage in writing under section 21 of Ordinance No. 19 of 1907, no action would lie. It is not clear if the trial Judge accepted this argument, but he holds that P 1 is of no force or avail in law, and he adds that no damages have been proved. He accordingly dismissed plaintiff's claim.

The agreement between the parties is one which was deliberately and voluntarily made between them. If then it has a " physical and moral possibility ", if, in other words, it is physically capable of being carried out and is not *contra legem aut bonos mores*, it is a valid contract (*Kotze's Causa in the Roman and Roman-Dutch Law of Contract, p. 39*). It has been urged however for defendant on appeal first, that the agreement is merely a document giving defendant's consent to the marriage and nothing more. In face of the terms of the promise it seems to me impossible to take this view. Secondly it is urged that the agreement is essentially a marriage brokerage contract and is against public policy and so not enforceable.

It is clear, from the terms of the agreement, that this is not an undertaking by a person to procure or bring about a marriage in consideration of some monetary benefit to himself. What are

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termed " marriage brokerage contracts " are as a rule in that form and are invalid in English law, as being deemed to be contrary to public policy. In this case a brother has bound himself under penalty (whether it be liquidated or unliquidated damages) to bring about a marriage between his sister and a suitor. He appears to have been the senior male member of the family alive and so more or less *in loco parentis* and I can certainly see nothing wrong or illegal or contrary to good morals for a brother in such a position to influence his sister on the subject of marriage. The same remarks in my opinion are applicable to such a case as were used by Middleton J. in *Abdul Hameed v. Peer Cando* [1] where a father had covenanted to give his daughter in marriage to the plaintiff within a stipulated time, and in case of default to pay a sum of Rs. 1,000 to plaintiff by way of liquidated damages. In *Fernando v. Fernando* [2] also the Court held that such a contract was not *contra bonos mores*. I am unable to agree that the agreement here was otherwise than enforceable at law. The trial Judge was in my opinion wrong in his conclusion in respect of the first issue.

But even if it be assumed that the contract is a marriage brokerage contract, Mr. Weeraratne has not satisfied me that it is contrary to the public policy of our law. He relies upon *Livera v. Gonsalves* [3] where it is true Wood Renton C.J. held that such contracts are illegal, but it is quite clear that he based his conclusion upon the decision in *King v. Grey*.[4] In following that decision he says we cannot do better than bring the law in Ceylon into line with that of South Africa on this important question. *Livera v. Gonsalves* (*supra*) was decided in 1913. It is obvious from that judgment that at that date the question of the legality of marriage brokerage contracts was considered as being still open. The argument that such contracts have for a long period of time been regarded by the Courts as illegal, so far as I can ascertain, has no sure foundation.

The trial Judge, whose decision was reversed in *Livera v. Gonsalves* (*supra*), had held on the authority of Van der Keessel (*Th. 482*) and *Bynkershoek* (*Quaestiones Juris Privati, lib. II., cap. 6*) that such an agreement is not founded upon an immoral cause and that it could be enforced in an action at law. These authorities were never considered in *King v. Grey* (*supra*). This has been pointed out by Kotze (*Van Leeuwen's Roman-Dutch Law, 2nd ed., vol. II., p. 633*). That learned authority expresses the view that what is stated by Bynkershoek and laid down by the Supreme Court of Holland in the case he cites is still the law in South Africa. De Villiers C.J. in *King v. Grey* (*supra*) followed the English law. The appellant in that case was unfortunately not legally represented, whilst counsel for the respondent relied upon English law. The correctness of the

[1] *15 N. L. R. 91.*
[2] *4 N. L. R. 285.*
[3] *17 N. L. R. 5.*
[4] *24 S. C. (Juta) 554.*

decision in this case has also been questioned by Lee in his *Roman-Dutch Law, p. 224*, whilst it appears to be contrary to the view of Pereira in his *Laws of Ceylon, p. 563.*

From these authorities it would seem to me that there is no doubt that under Roman-Dutch law a contract for marriage brokerage is not contrary to public policy. It has been argued that the Common law of this Island is not the whole body of Roman-Dutch law, and Mr. Weeraratne has referred to decisions which support his contention, but he has failed in my opinion to show that the Roman-Dutch law in respect of these particular contracts at any rate is not the Common law of the Island. The decision of the House of Lords in *Janson v. Driefontein Consolidated Mines, Ltd.*[1] shows that public policy is not a safe or trustworthy ground for legal decision, and it shows further that it is no part of the functions of a Court of law, on the ground of some notion of fancied policy or expediency, to prevent a party from availing himself of an indisputable principle of law, or to invent a new head of public policy. In the words of Lord Halsbury certain things are contrary to public policy because they have been either enacted or assumed by the Common law to be unlawful, and not because a Judge or Court have a right to declare that such and such things are in his or their opinion contrary to public policy. " It is the legislature which alone has the power to decide on the policy or expediency of repealing laws or suffering them to remain in force."

The authorities to which I have referred set out the Common law, which was not the basis for the decision in *Livera v. Gonsalves (supra)*. That Common law has not been repealed and it certainly has not been abrogated by disuse. It therefore governs this contract, if it be a marriage brokerage contract, and declares it to be neither *contra legem* nor *contra bonos mores.*

From the standpoint of local custom it may be added that it seems to be a common custom in Ceylon, both amongst Sinhalese and Tamils, to use the good offices of others for the purposes of arranging marriages. I understand in a large number of cases the daughter has little say in the choice of a husband, as is also the case in various other parts of the world including Europe. That is in no way consistent with a due recognition of " the freedom of marriage ".

The question of damages remains.

On this point the trial Judge merely states the plaintiff has not proved that he has suffered any damage. It is urged on his behalf however that the sum of Rs. 3,000 mentioned in the document P 1 is in the nature of liquidated damages, that is, assessing the damages which the parties contemplated the plaintiff might incur if defendant failed to effect what he promised to do. The plaintiff says he will

[1] *(1902) A. C. 484.*

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pay "either as a fine, compensation, or for dishonour" a sum of "not less than Rs. 3,000". Can it be said that here there is a fixed and definite sum stated to be payable? Is it not open to plaintiff, if he has suffered damages which in money value can be expressed in a greater sum than Rs. 3,000, to prove these damages? It would appear from the terms of the agreement that the parties had fixed upon the sum of Rs. 3,000 at least, as representing the loss to plaintiff if defendant failed in bringing about the marriage. It is urged for him in this Court that the sum is *immanis* and out of all proportion to the injury plaintiff sustained, but he made no attempt to show that, as he might have done, in the lower Court. There are no circumstances before the Court, for instance, with regard to the status of the parties (although plaintiff and defendant's sister are stated to be of the same social position), that would assist one in saying whether or not Rs. 3,000 is out of proportion to what plaintiff has lost, and I am unable to say it is not a genuine pre-estimate of plaintiff's probable or possible interest in the due performance of the marriage (see *Wijewardene v. Noorbhai* [1]). It may be argued however that it cannot be more than a minimum figure at which such interest can be pre-estimated, but that will not help defendant as plaintiff relies upon the amount fixed in the agreement and does not seek to obtain any larger sum.

For these reasons, I am of opinion the plaintiff was entitled to judgment for the amount claimed. I would therefore allow the appeal, set aside the decree in the lower Court, and enter judgment for the plaintiff in the sum of Rs. 3,000 and costs. He is entitled to the costs of this appeal.

Appeal allowed.

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[1] *28 N. L. R., at p. 432.*