ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

1919. March 31.

SHRINIVASDAS LAKSHMINARAYAN (APPELLANT AND PLAINTIFF) *v.* RAMCHANDRA RAMRATTANDAS (RESPONDANT AND DEFENDANT).*

Indian Contract Act (IX of 1872), section 23—Public policy interpreted according to the dicta of English Judges—Contracts for the sale and purchase of gold sovereigns at bullion rates for forward deliveries—Notifications under the Defence of India Act (IV of 1915).

The plaintiff, a commission agent, entered into contracts on behalf of the defendant his up-country constituent to purchase sovereigns for Vaishakh and Jeth *vaidas* of Samvat year 1974, *i.e.*, May and June 1918 settlements. The defendant failing to make payment on the *vaida* days, the plaintiff sued for damages occasioned by breach of the contracts. The defendant contended *inter alia* that the contracts were opposed to public policy within the meaning of section 23 of the Indian Contract Act and in support of his contention relied upon two Notifications issued under the Defence of India Act (IV of 1915). The first Notification, dated 29th June 1917 and published on 9th July 1917, provided that "no person shall melt, break up, or use otherwise than as currency, any current gold or silver coin." The second Notification which was subsequent to the date of breach of the contracts and issued on the 22nd August 1918 provided that "no person shall sell or purchase, or offer to sell or purchase, any coin for an amount exceeding the face value of such coin, or shall accept or offer to accept any such coin in payment of a debt or otherwise for an amount exceeding its face value." The trial Judge dismissed the plaintiff's suit holding that the trafficking in the gold currency of the country while the great war was in progress tended to defeat and embarrass the whole scheme of the Government finance and was in its very essence opposed to public policy which in India at any rate was defined by and coincided with measures of Government, and that the Notification of August 1918 following that of July 1917 showed that the trafficking in such coins had for sometime theretofore been contrary to public policy. The plaintiff appealed :—

Held, reversing the decision of the trial Judge and decreeing the plaintiff's suit,

(1) that the contracts in suit were not void as opposed to public policy within the meaning of section 23 of the Indian Contract Act inasmuch as no clear general head of public policy could be evolved which would justify the Court in holding them unlawful on that ground;

* O. C. J. Small causes suits nos. 746/27218 and 747/27219 of 1916 : Appeal No. 38 of 1918.

(2) that if the case was to be decided on the Notifications the contracts must be shown to be forbidden by law and would then fall under the first head of section 23 of the Indian Contract Act and any reference to public policy would be irrelevant;

(3) that the contracts were not obnoxious to the Notification of June 1917 and were untouched by the Notification of August 1918.

Per Hayward, J. :—"There was, in my opinion, no substantial justification for holding that those dicta (*i.e.*, the dicta of English Judges on public policy) should be disregarded by Judges in India and that public policy should be interpreted under section 23 of the Indian Contract Act as comprehending all the political policies from time to time of the Government of India."

SUIT for damages on contracts for sale and purchase of sovereigns.

The plaintiff, carrying on business in Bombay as commission agent was employed by the defendant, a merchant of Delhi, to buy and sell gold sovereigns at bullion rates for Vaishakh and Jeth *vaidas*, Samvat year 1974, corresponding to May and June settlements of 1918 A. D. It was agreed that the plaintiff should be paid commission at the rate of Re. 1-0-0 for every 1,000 Rupees worth of sovereigns purchased. The plaintiff was also to be paid brokerage at the rate of 8 annas per every 100 sovereigns purchased on behalf of the defendant. Interest was to be charged at the rate of 6 per cent. per annum on both sides of the account between the parties.

Pursuant to the instructions of the defendant, the plaintiff entered into several contracts for the sale and purchase of gold sovereigns for the Vaishakh and Jeth, *i.e.*, May and June 1918 settlements. For the May settlement a sum of Rs. 3,696-6-0, and for the June settlement a sum of Rs. 5,591-11-6 became due and payable to the plaintiff. The defendant sent hundis in part payment of the amount due and there was due and owing by the defendant to the plaintiff a sum of Rs. 6,755-13-0 including interest up to the 8th of Jeth *vaida* Samvat 1974 corresponding to 1st of July 1918.

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The defendant failing to make payment of the said sum the plaintiff sued to recover the same as damages occasioned by the defendant's breach of contract.

The defendant in his written statement contended *inter alia* that the transactions sued upon were against law and public policy and the plaintiff was not entitled to sue in respect thereof; that in view of the Notification, dated the 29th of June 1917, issued under the Defence of India Act current gold coins ought not to be used as a mercantile commodity and the transactions in respect thereof for forward deliveries were null and void; that the transactions were wagering contracts and there was no intention either on the part of the plaintiff or on the part of the defendant to give or take delivery of the sovereigns, the understanding between the parties being that the said contracts were to be settled by payment of differences only.

At the hearing, the defendant abandoned the plea of wager and was content to rest his defence upon the ground that the contracts were illegal and opposed to public policy as deducible from the Notification of 29th June 1917 followed by a later Notification of 22nd August 1918 rendering sales and purchases of sovereigns at mere bullion rates unlawful. It was urged that the latter Notification though subsequent to the date of the contracts was a mere legislative pronouncement of the previously existing financial policy of the Government of India which in the special circumstances of the case coincided with public policy within the meaning of section 23 of the Indian Contract Act.

The trial Judge, Beaman J., dismissed the plaintiff's suit holding (1) that speculative forward dealings in the gold currency of the country during the progress of the great war were likely to defeat and embarrass the whole scheme of the Government finance, which aimed at

the maintenance of a bimetallic currency system, (2) that in India public policy was defined by and coincided with the measures of Government, (3) that the Notification of June 1917 showed that Government wished to prohibit the use of gold coin except for the purposes of currency and (4) that the Notification of August 1918 expressly invalidating trafficking in gold coin at bullion rates declared the previously existing public policy and speculators should have known that though not transgressing the letter of the Notification of 1917 they were running contrary to its spirit in offering for sovereigns a price higher than the face value as fixed by Indian Enactments.

The following was the judgment of the learned Judge.

BEAMAN, J.:—The single question of importance I have to answer in this suit is whether speculative forward dealings in the gold currency of the country are opposed to public policy. It is a question the answer to which may have very far-reaching, even disturbing, consequences, and if the war is likely to be protracted it would be of the first importance that it should be decided once and for all at the earliest possible moment. Probably other considerations will come into play after the war which will considerably diminish the practical importance of the point now in issue. It has been pointed out by the Hon'ble and learned Advocate General this morning, admittedly a consideration rather outside the strict province of the law, that if I decide this suit against his clients it may cause a very wide-spread disturbance of the money market and entail a great deal of confusion and inconvenience upon many banks and other money distributing agencies. I do not anticipate quite such appalling consequences, but even if I did, I should feel

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myself still bound to decide according to the law as I understand it. In saying that, I am, of course, keenly alive to the peculiar character of the question I have to answer. That has been very fully and very ably argued by the Advocate General in all its strictly legal connections. Everybody knows who has any practical acquaintance with this subject that "public policy" is very elastic. I should certainly be the last to desire to see it made the play-thing of sentiment or prejudice. And did the matter here go no further than that, if the definitions suggested by the Advocate General really exhausted the whole subject, I should have had very little difficulty in disposing of this defence. But I am by no means satisfied that the analogies, for they are little better, imported from the English Courts, are strictly in point, while I am quite certain that the conditions, under which this branch of the law has grown up organically so to speak with the growth of the people in a country like England, do not exist at all in India. Many of the dicta, therefore, of our greatest English Judges, while very informing and appropriate in England, have to be regarded with some caution before they can be adopted in a case of this kind in India. I have felt from the first, and I have said so more than once during the conduct of the trial in order to obtain the utmost assistance I could from the Hon'ble and learned Advocate General on the other side, that this trafficking in one branch of the currency while the great war was in progress was in its very essence opposed to public policy and I am still of the same opinion. It may not be easy to give a convincing, logical, and theoretical reason which will put that conclusion beyond dispute. But when we turn to the decisions of the English Judges, it is very easy to distinguish the grounds of those decisions from any ground that can be taken and felt to be equally secure

in this country. For example, the principle is summed up, and no doubt very correctly summed up, by Lord Halsbury when he says that while the rule is permanent, its application fluctuates and depends upon the principles from time to time guiding public opinion; and again there is a dictum of Baron Alderson confined to a rather narrower aspect of the point under consideration that contracts against public policy do not mean contracts to do that which may legally be possible to be done but which in the opinion of sensible men it is inexpedient to do. A mere consideration of these two dicta will, I think, open up many of the difficulties with which I have been oppressed during this trial. In the first place the history of a country like that of England in which party politics have developed to such an extent that the whole machinery of the Government is practically regulated by the interplay of parties constantly changing place with each other and only that for the time being in power representing public opinion, is a history to which no parallel-whatever can be found in India from the time of our connection with it. For all practical purposes, and taking India as a whole, it is no exaggeration, I think, to say that there is no public opinion at all in the mass and most certainly there is no public opinion one way or the other, about the morality or expediency of such a transaction as that I am considering. Moreover I do not agree that the definition of "public policy" is exhausted by saying that only that can be said in the eye of the law to be against public policy which is either penal or unrecognized by the Statute or Common Law. No doubt that would cover the vast majority of ordinary contracts. But "public policy" is a much wider term and in its turn capable of sudden extensions under abnormal and temporary conditions. I suppose it will

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not seriously be denied that that which might pass well enough as not being contrary or opposed to public policy in times of peace might be as plainly against public policy in times of war. It is very true that exceptional cases of that kind are either of so obvious a character as hardly to give rise to discussion at all, or if more ambiguous are likely to be provided for by special war legislation. Nevertheless a consideration of all these nice distinctions has forced me to the conclusion that the question I have to answer cannot be answered upon the very simple lines to be found in some of the English judgments. In almost all those it seems to me that the learned judges responsible for them had an eye principally to the actual facts of the case before them, and it is plain that trafficking in coinage could hardly have come within the purview of the Courts in this connection in England. It is doubtful whether such a situation as that created by wild gambling on the part of a very small body of purely selfish speculators in Bombay could possibly exist except under a bimetallic system. In India at present it appears that we have a silver and a gold currency between which the Government has endeavoured to fix a definite ratio. But the effect of this gambling in the gold coinage admittedly has been to disturb that ratio and give gold a very much higher relative value to silver than merely as one branch of the currency it ought to have. Again, it seems to me that trafficking in coinage is a question apart from all general contracts of the kind which are usually discussed when they are said to be opposed to public policy. Certainly it would be ridiculous to say that a contract was against public policy if it was both legal and possibly moral because in the opinion of a sensible man it was inexpedient. For if so absurd and lax a proposition was admitted for a moment it would very

soon come to the sensible man being reduced to a single Judge, and any Judge might give rein to his religious or moral fads and whims in interfering with the frequent contractual relations of the public as a whole. No one, I say, could possibly be more reluctant than I to impose any moral view of my own under such conditions upon the moral views of the public so long as they kept within the letter of the law. Nor indeed as it seems to me is this a question of morality at all. I have already said that in dealing with contracts void as being against public policy the Courts in England have condemned a large majority of them on the ground that they contravene public sentiments of religion, morality or social property. That can hardly apply to a case where the decisive factor is one relating to the maintenance at a very critical moment of the efficiency of the Government. If it be conceded that finance is one of the most vitally important factors of an efficient Government in this country during this crisis, and this indeed will be conceded, I think, by every one, then the conduct of private individuals, if again it can be shown that that conduct tends to defeat and embarrass the whole scheme of the Government finance, will have to be admitted to be fundamentally opposed to public policy. This, again, could hardly be denied as an abstract proposition. The Advocate General, arguing the case for the plaintiffs, put it at first upon the most general legal grounds, pointing out that money was only moveable property, but there was nothing either in the Indian Contract Act or the Indian Coinage Act to take it out of that common category, and therefore speculating in money could not possibly be any more opposed to public policy than making a corner in the sale of much needed goods. Now, in the first place, I think that argument is defective because it is very clear that

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money apart from the metal of which it is made is never intended for the purpose of sale. Ordinarily; then, it ought not to be a medium of gambling speculations. I use the word "gambling" here in the widest possible sense, for all commercial forward transactions on a large scale have an element of gambling in them. In England, we know money is expressly excluded from the category of goods. The precious metal from which coins are made is as much a commodity as piece-goods or dyes or any other staple commodity. But once it has been converted into coins and put in circulation, it has a peculiar public function to discharge, and where there is a double coinage of gold and silver with a fixed ratio governing the relation of one of these coins to the other, that function cannot properly be discharged if speculating in one or the other of the branches of the currency materially alters the ratio which the financial operations of the Government require to be made and to continue permanent. It was also urged that no one could possibly say that there was anything illegal in the sense of being either punishable by law or unrecognized by law, in buying sovereigns before the Government Notification of August 1918. Again, I merely point to the abnormal conditions which exist during the progress of a great war. In a country like India particularly, the Government of which is carried on under conditions without a parallel, as far as I know, in the world's history, its responsibilities have been enormous, and not the least amongst them has been financing great war operations as well as the internal administration of the country. In order to do this, rightly or wrongly, a point with which I have no concern and upon which I am not competent to speak, a very considerable mass of gold currency was thrown into circulation. What immediately happened showed that the insatiable

desire of the people of this country to obtain gold, not for currency purposes at all but for adornment or hoarding, was withdrawing the whole of this gold currency from circulation and so defeating the Government's object. Now, in ordinary times, possibly in view of what was then happening, probably what will always happen in a country like India, habituated to silver currency and probably the masses of the whole country regarding that as the only real currency, the attempt to maintain a bimetallic currency would have been abandoned. It will probably be found, no matter what penalties are imposed, no matter what impediments are thrown in the way of purchasing gold for other than currency uses, that this country will absorb any amount of gold currency set in circulation much as a sponge absorbs water. But at any rate in periods of emergency and crisis the Government has a right to expect that the mere greed and selfishness of gamblers in money shall not be given free play so as to disorganise its carefully conceived financial policy. Now, it is very clear that keeping our eye upon the transactions with which I am dealing, there is no real question of public policy in the sense of wide-spread public opinion one way or the other. Speculators in the gold currency are for the most part, I suppose, that small body of extremely wealthy men who are gathered together in our great cities and have no other than their own selfish interests of making money in any and every way they can. It would be absurd to suppose that the millions and millions of people, many of whom have never seen a gold coin in their lives, could possibly have any opinion one way or the other on the policy of such conduct as this and even if it really affected them most injuriously, as doubtless by frustrating *pro tanto* the Government's intentions and defeating its financial scheme it would

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do, they would still be quite ignorant of the true cause. The plain truth is that in India public policy at any rate for the present is defined by and coincides with the measures of the Government which we must assume, and which I do most cheerfully assume, are conceived in the broadest and most enlightened spirit and desire to carry on the Government as efficiently and beneficially as possible in the interest of the entire population. So probably in a very peculiar case of this kind it would be difficult to get a clearer indication of what is or what is *not* opposed to public policy than the Government declaration on the subject. Policy might of course be mistaken, policy might be unwise, but it being common ground that no ascription of improper motives is within the scope of the argument, that which is undertaken by a responsible Government as part of its policy and which cannot be criticised by the vast majority of those directly or indirectly affected by it, must, I suppose, in all our municipal Courts, be regarded as for the time being public policy, and acts declared by the Government as likely to frustrate the beneficial maintenance or operations of that policy would ordinarily be taken to fall with the general category of acts contrary to public policy.

Now, in 1917 we get a very clear indication of the dangers which the Government apprehended if the gold currency were left wholly unprotected. That Notification prohibited breaking up gold coin, melting it down or using it for any other purposes than currency, but that of course would not extend to contracts for buying or selling gold coins regardless of what was going to be done with them after they had been bought or sold. Thus between the issue of that Notification at the end of June 1917 and the Notification of August 1918 there was an enormous amount of speculation forward in gold sovereigns, and the particular transactions

with which I am dealing ended before the peremptory prohibitions of August 1918. It was frankly conceded that after that Notification no transactions of this kind could possibly be recognised in any municipal Court. But it was said that that was because they were made contrary to public policy, made indeed actually penal for the first time in August 1918. I think that this is not quite a correct statement. If what the Government finds it necessary to penalise because it was contrary to public policy in August 1918 was from that moment contrary to public policy, it is difficult to see how it could have been other than contrary to public policy a month or two earlier. The truth is that such Notifications do not make a thing to be contrary to public policy. They merely declare what was long felt, that it was contrary to public policy, and if it was contrary to public policy in August 1918 it is difficult to see how it could help having been so in June. Nothing had occurred in the meantime to give it an entirely new character and complexion, and the general tenor of the Notification showed clearly that in the opinion of the Government any trafficking in gold coinage, any use whatever of gold coin for any other purposes than currency, was opposed to the general interests of the country. So that the speculators in gold in the intervening period may very well have known that although they were within the letter of the Notification of 1917 they were running counter to its spirit. But what is the result of all this? We find a small ring of Bombay speculators greedily Bulling and Bearing the gold market, some selling and some buying with no other object than either to depress or to raise the value of the sovereign relatively to the rupee. The Bulls appear to have had it all their own way with the result that the sovereign rose in value to something over Rs. 19. Some three or four million sovereigns at

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least appear to have been nominally bought and sold between these Bulls and Bears. Of course there are many cases in which buying a large quantity of sovereigns may be perfectly legitimate and even necessary in the interests of trade, but dealings of the kind I have before me certainly had no other object in view than changing the relative values of the rupee and sovereign either to the appreciation or depreciation of the sovereign according as the Bulls or the Bears proved successful. Obviously, then, gold sovereigns, whose relative value had been forced up from Rs. 15 to over Rs. 19, would, to all intents and purposes, be put out of circulation altogether. And that is precisely what the financial policy of the Government felt to be the danger against which the Government had endeavoured to protect itself. How then can it be said that this kind of transaction, a transaction for which there is no conceivable need, the only motive for which is pure greed of selfish speculators, the results of which must inevitably be a complete dislocation of the coinage, is not against public policy in the only sense in which that term can have practical meaning to-day in this country ?

It seems to me that this question can only be answered in one way. No one pretends that these buyers wanted these sovereigns for currency. No one pretends that if they were bought at all they would be put into ordinary circulation at the Mint rate one sovereign for Rs. 15. What then is the true underlying meaning of all this reckless speculation and what have been its consequences ? I think the answers are obvious, so obvious that I need not give them. And it appears to me that for the reasons I have endeavoured to set forth, no sentimental reasons at all involving as far as I can see no question of morality in the ordinary sense but referable only to one criterion, whether Government

have a right to insist upon its financial policy being left undisturbed thereby maintaining that policy for its contemplated purposes at a height of efficiency, these transactions do stand self-condemned as opposed to public policy. In my opinion they must clearly do so, and it is upon that ground alone that I propose to dismiss the plaintiff's suit.

I need only add that if my view is wrong and if these transactions were not against public policy, there is no other substantial defence. The plaintiffs would, if the first question were answered in their favour, in my judgment, be entitled at once to a decree for the full amount they claim. As it is, however, holding so strongly the opinion I do, I must declare the transactions void on the ground of being opposed to public policy and so dismiss the plaintiff's suit.

Each party must bear his own costs.

The plaintiff appealed.

Kanga and *R. D. N. Wadia*, for the appellant.

Jayakar and *Makanji Mehta*, for the respondents.

SCOTT, C. J. :—This is an appeal from a judgment of Mr. Justice Beaman dismissing the plaintiff's suit.

The plaintiff sues for damages occasioned by his up-country constituent failing to perform contracts for the purchase of sovereigns entered into for him by the plaintiff for the Vaishakh and Jeth *vaidas* of 1918.

The damages claimed were assessed as of the 1st of July 1918 and no objection is taken to this date.

On the 22nd of August 1918 a Notification under the Defence of India Act (IV of 1915) was issued as follows:—

"No person shall sell or purchase, or offer to sell or purchase, any coin for an amount exceeding the face value of such coin, or shall accept or offer to accept any such coin in payment of a debt or otherwise for an amount exceeding its face value".

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By the same Notification 'coin' was defined as coin which is legal tender under any Enactment for the time being in force in British India.

Under the Indian Coinage Act, 1906, a sovereign is legal tender for Rs. 15. The Explanation to the Notification says that for the purposes of the rule the face value of the sovereign shall be deemed to be 15 rupees.

The contract having come to an end by the defendant's breach which is not disputed, the subsequent Notification does not operate so as to make it an illegal contract under the rule stated in *Brewster* v. *Kitchell*[a] "that if H covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed."

It is, however, contended that the contracts were illegal in their inception under a previous Notification of the 9th July 1917 in the following terms :—"No person shall melt, break up, or use otherwise than as currency, any current gold or silver coin." But a contract to purchase sovereigns is not in itself a user of the coins to be purchased, nor is there any evidence to establish that the ultimate buyer would use the sovereigns purchased otherwise than as a store of currency to be available in the event of the silver or paper token currency losing its purchasing power.

There remains, therefore, for the defence the main contention on which the lower Court held against the plaintiff, viz., that the contracts for breach of which damages are claimed were contrary to public policy.

It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down in section 23 of the

[a] (1698) 1 Salk. 198.

Indian Contract Act and in India therefore it cannot be affirmed as a matter of law as was affirmed by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Limited*[1] that no Court can invent a new head of public policy, but the dictum of Lord Davey in the same case that "public policy is always an unsafe and treacherous ground for legal decision" may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned Judge for his decision.

The following is, I think, a fair analysis of the reasons given by the learned Judge in the form of numbered propositions :—

1. The definition of "public policy" is not exhausted by saying that only that can be said in the eye of the law to be against public policy which is either penal or unrecognised by Statute or Common Law.

2. Public policy is a much wider term and in its turn capable of sudden extensions under abnormal and temporary conditions.

3. It is doubtful whether such a situation as that created by wild gambling on the part of a very small body of purely selfish speculators in Bombay could possibly exist except under a bimetallic system.

4. In India we have a silver and a gold currency between which the Government has endeavoured to fix a definite ratio.

5. The effect of gambling in the gold coinage has been to disturb that ratio and give gold a very much higher relative value to silver than merely as one branch of the currency it ought to have.

6. It is not a question of morality as have been the majority of cases where in England public policy has been the *ratio decidendi*.

[1] [1902] A. C. 484 at p. 491.

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7. Morality cannot apply to a case where the decisive factor is the maintenance at a very critical moment of the efficiency of the Government.

8. Conduct of private individuals tending to defeat and embarrass the whole scheme of Government finance must be opposed to public policy.

9. Money apart from the metal of which it is made is never intended for purposes of sale.

10. Therefore it ought not to be a medium of gambling speculation.

11. Under a bimetallic system its public function cannot properly be discharged if speculating in one or other of the branches of the currency materially alters the ratio which the financial operations of the Government require to be made permanent.

12. In order to finance great war operations and for internal administration a very considerable mass of gold currency was thrown into circulation.

13. What immediately happened showed that the desire for gold not for currency but for adornment or hoarding was withdrawing the whole of this gold currency from circulation and so defeating the Government's object.

14. In periods of emergency and crisis Government has the right to expect that the greed of gamblers shall not be given free play so as to disorganise financial policy.

15. In India public policy is at present defined by and coincides with the measures of Government.

16. Therefore in a peculiar case like this it would be difficult to get a clearer indication of what is opposed to public policy than the Government notification on the subject.

17. It is not correct to say the transactions in sovereigns at a price above the face value was made contrary to public policy in August 1918.

18. They must have been contrary to public policy already. The Notification merely declares what was long felt, that it was contrary to public policy.

19. If contrary in August it must have been so in June.

20. The general tenor of the Notification of June 1917 showed that in the opinion of Government any trafficking in gold coinage was opposed to the general interest of the country. So the speculators may very well have known that though within the letter of the 1917 Notification they were running counter to its spirit.

21. In many cases buying a large quantity of sovereigns may be legitimate and even necessary but dealings of the kind in suit certainly had no other object in view than changing the relative values of rupee and sovereign as the Bulls or Bears proved successful.

Substantially the judgment comes to this:

A. Courts in India are not to be limited by English decisions in deciding what is and what is not contrary to public policy, for public policy is capable of sudden extensions under abnormal and temporary conditions.

B. The question of the maintenance of a bimetallic currency system is one which does not arise in England. Speculators are able to disturb the equilibrium of such a system and this is contrary to the public interest here in times of crisis such as the recent war.

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C. In India public policy is defined by and coincides with the measures of Government. The Notification of July 1917 showed Government wished to prohibit the use of gold coins except for the purpose of currency. The Notification of August 1918 shows that trafficking in such coins had for sometime theretofore been contrary to public policy and speculators should have known that though not transgressing the letter of the Notification of 1917 they were running contrary to its spirit in offering for sovereigns a price higher than the face value as fixed by Indian Enactments.

The objection to accepting such a proposition as A is forcibly stated in the passage from Marshall on Insurance cited by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Limited*[a] at p. 491:

"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

[a] [1902] A. C. 484 at p. 491.

he has himself established to-day; or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate."

The remarks which I have grouped together under the head B are general observations on a technical and very intricate matter which has been considered in 1913-1914 by the Royal Commission on Indian Finance and Currency. In their Report, dated the 24th of February 1914, the Commissioners say:

"The system actually in operation has...never been deliberately adopted as a consistent whole, nor do the authorities themselves appear always to have had a clear idea of the final object to be attained. To a great extent this system is the result of a series of experiments.

In paragraphs 67 and 68 the Commissioners express the following opinion:

"67. With the argument that India should be encouraged to absorb gold for the benefit of the world in general we do not propose to deal. The extent to which India should use gold must, in our opinion, be decided solely in accordance with India's own needs and wishes, and it appears to us to be as unjust to force gold coins into circulation in India on the ground that such action will benefit the gold using countries of the rest of the world as it would be to attempt to refuse to India facilities for obtaining gold in order to prevent what adherents of the opposite school have called the drain of gold to India. In any case these arguments (which it will be noted are mutually destructive) are irrelevant to the inquiry which we were directed to make and to the terms of reference, which confine us to a report on what is 'conducive to the interests of India.' They raise vast controversies upon subjects which are beyond our scope, while giving no reason for the adoption of either policy in India's own interest.

68. We conclude, therefore, that it would not be to India's advantage to encourage an increased use of gold in the internal circulation."

So much for general considerations connected with the currency system. They did not apparently demand before the outbreak of the war the continuance of sovereigns as part of the Indian Currency.

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The learned Judge refers (para. 12 *supra*) to a very considerable mass of gold currency being thrown into circulation during the war. I can find no reference to this in the recorded evidence. The learned Judge probably refers to the issue of gold for the financing of wheat stated by the Finance Minister to have been

	Rs.
1917-1918	...9,21,77,040
1918-1919	...1,83,85,740

(see proceedings of the Legislative Council of the Governor-General of the 26th February 1919). It is referred to in the narrative of the Finance Minister introducing the Financial Statement for 1919-1920 (clause 15) in connection with the silver crisis of 1918 in these words: "Our thin line of rupees had been precariously supplemented by an issue of sovereigns in parts of India where gold is freely taken in payment for the crops; but the benefit of this expedient was transient and its continuance unjustifiable;" also in clause 14 it is said: "To coin and issue our relatively small stock of gold would have been wasteful to a degree; the premium upon the metal would have driven, and did in fact drive, any coined gold out of circulation immediately; it was an emergency ration rather than a currency medium" (see Proceedings of the Legislative Council of the Governor-General for 1st March 1919). This narrative introducing the Financial Statement was referred to in the argument of this appeal and I propose to refer to it again as a public document containing an authoritative statement of the financial position of the Government in 1918 when the Notification of August was issued from which inferences may be drawn as to the policy of the Government in issuing it.

In clause 21 I find that from the beginning of 1916 silver rose greatly in value and the rupee slowly followed it: "It would be impossible for us to face a position in which we (Government) should be turning out rupees at a loss and placing a permanent premium on the export of its silver currency. It thus became necessary to fix a sterling exchange value for the rupee which would ensure that our coinage would not be liable to be smuggled out of India in indefinite quantities. Accordingly, with effect from the 12th April, the rate for Council drafts was fixed on a basis of 1*s.* 6*d.* per rupee for immediate telegraphic transfers...There is evidence of a considerable accumulation of funds (in India) seeking temporary investment in India for various reasons—taxation was heavier in England than here: hopes had been entertained of a further rise in exchange; money was being kept handy for *post-bellum* developments: and there was always the uncertainty about being able to recall spare money from England with the same promptitude as in former years."

I think it is fairly obvious that with exchange rising substantially above 1s. 4*d.* per rupee it was to one's advantage, other things being equal, to buy sovereigns, for the holder of sovereigns could still convert each sovereign for 15 rupees, which would be worth for foreign remittances much more than 1s 4*d.* each. Other things, however, were not equal, for the prohibition of the import of gold, for which there is always a strong demand in India, had driven that metal to a premium and drove coined gold out of circulation immediately. One effect of the Notification of August 1918, if it was effective, would be practically to prohibit the sale of sovereigns and give their possessors the benefit of the rise of the rupee only upon exchange of sovereigns for rupees at the treasuries: thus the gold which

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disappeared from circulation after the wheat purchases of 1917-1918 might be brought back to the treasuries. This seems to me a possible explanation of the Notification.

The evidence in the case in my judgment throws no light on the question of public policy raised for the defence.

There is evidence of a number of contracts for the sale of sovereigns held by Banks in China and Japan in 1916 and 1917, not of sovereigns in circulation in India. Such contracts were anterior to the prohibition of gold imports.

The proved contracts of 1918 were for small amounts which were all closed by cross contracts before the *vaida* days.

In the judgment of the lower Court it is said: "We find a small ring of Bombay speculators greedily bulling and bearing the gold market, some selling and some buying with no other object than either to depress or to raise the value of the sovereign relatively to the rupee—some three or four million sovereigns at least appear to have been nominally bought and sold between these Bulls and Bears. Of course there are many cases in which buying a large quantity of sovereigns may be perfectly legitimate and even necessary in the interests of trade, but dealings of the kind I have before me certainly had no other object in view than changing the relative values of the rupee and sovereign according as the Bulls or Bears proved successful." I do not find anything to support these conclusions in the recorded evidence. Out of four witnesses examined Ramdas the plaintiff in answer to the question "Instead of buying gold people used to buy sovereigns and melt them down into ornaments?" said "I do not know, I cannot say. They certainly hoarded sovereigns just like gold

and other precious stones and metals. The piece goods merchants made large profits as they bought sovereigns and stored them."

Chhotalal when asked "What did your master want all these sovereigns for?" (*i.e.*, those imported from China and Japan) said: "The people in the bazaar wanted them so we bought and sold to them. How can I say for what the people in the bazaar wanted them? I have never seen any sovereigns broken up and melted".

Narandas to the question "people buy them, break them up or melt them?" said "How can I possibly know that?"

P. M. Dalal, while admitting that some sovereigns were broken up and melted said purchased sovereigns were also used for hoarding. They needed gold after the prohibition of import and got it by buying sovereigns. The premium on gold did not affect the purchasing value of the rupee or any note. The exchange value of the rupee had in fact gone up considerably.

The conclusion must, I think, be that no clear general head of public policy can be evolved which would justify the Court in holding the contracts in suit unlawful on that ground.

This is apparently the conclusion to which the learned Judge himself is driven when he falls back in the last part of his judgment on the Notifications of June 1917 and August 1918 as *indicia* of what is contrary to public policy in connection with the gold currency.

But if the case is to be decided on the notifications the contracts must be shown to be forbidden by law

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and would then fall under the first head of section 23 of the Indian Contract Act and any reference to public policy would be irrelvant.

I have already stated why, in my opinion the contracts are not obnoxious to the Notification of June 1917 and why they are untouched by the Notification of August 1918.

These Notifications were, so far as I can judge, emergency measures: the first aimed at the prevention of melting or other misuse of current gold coins; the second was perhaps devised to tempt back hoarded gold coins to the treasuries.

We set aside the decree and pass a decree for the plaintiffs for Rs. 6,755-13-0 with interest from the 1st July 1918 to this date. Costs and interest on judgment at 6 per cent.

HAYWARD, J.:—I concur, but desire to add some remarks on the general proposition.

The Coinage Act, III of 1906, made gold coins legal tender at the rate of fifteen rupees to the sovereign. But it did not prohibit their use otherwise than as currency. The Defence of India Act Notification of the 29th June 1917 prohibited their use otherwise than as currency. The parties to these proceedings entered into transactions for the sale and purchase of gold sovereigns not at currency but at bullion rates for deliveries in May and June 1918. The Defence of India Act Notification of the 22nd August 1918 prohibited sales and purchases of sovereigns at mere bullion rates. The substantial dispute between the parties was whether their transactions were thus void as contrary to law and public policy within the meaning of section 23 of the Indian Contract Act.

It was conceded by the learned Judge at the trial that the transactions were not void as contrary to law as the evidence did not establish any intention to use the sovereigns otherwise than as currency contrary to the Notification of the 29th June 1917 and as they took place before the Notification of the 22nd August 1918 making the sales and purchases of sovereigns at mere bullion rates unlawful. But it was held that the transactions were void as contrary to public policy as deducible from the subsequent Notification of the 22nd August 1918, which, it was held, rendered unlawful "this trafficking in one branch of the currency during the great war." It was conceded by the learned Judge that the transactions would not have been void as contrary to public policy in the sense of the principles guiding public opinion as understood by English Judges and that it would be difficult "to give a convincing, logical and theoretical reason" for holding them opposed to public policy; but he did nevertheless so hold them and observed, "that keeping our eye on the transactions with which I am dealing there is no question of real public policy in the sense of widespread public opinion one way or the other...It would be absurd to suppose that the millions and millions of people, many of whom have never seen a gold coin in their lives, could possibly have any opinion one way or the other as to the policy of such conduct...so probably in a very peculiar case of this kind it would be difficult to get a clearer indication of what is or what is not opposed to public policy than the Government declaration on the subject. Policy might of course be mistaken, policy might be unwise, but... that which is undertaken by a responsible Government as part of its policy and which cannot be criticised by the vast majority of those directly or indirectly affected by it must...be regarded as for the time being

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public policy and acts declared by the Government as likely to frustrate the beneficial maintenance or operations of that policy would ordinarily be taken to fall within the general category of acts contrary to public policy...The plain truth is that in India public policy at any rate for the present is defined by and coincides with the measures of Government." It has been urged before us on this appeal that the learned Judge ought to have been guided by the dicta of the English Judges and not to have extended the law of public policy under section 23 of the Indian Contract Act so as to comprehend all the political policies from time to time of the Government in India.

It behoves us, therefore, to examine in some detail the dicta of the English Judges. It is true that assertions of the wide discretion vested in the judiciary to determine public policy were made by Pollock C. B. in the leading case of *Egerton* v. *Earl Brownlow*[1]. But distinctions between the public good and political policies were drawn by Alderson and Parke BB. who expressed the preference for leaving extensions of the law in the matter of public policy to the Legislature. This case has been considered in detail by Sir Frederick Pollock at pp. 315 to 318 of the 7th Edition of his Principles of Contract and he came to the conclusion that the final decision of the House of Lords depended not upon any extension of the law but upon the ground that the particular limitations in the will of the Earl of Bridgewater had a manifest tendency to the prejudice of good Government and the administration of public affairs and that this tendency had already been perfectly well recognised as contrary to public policy as understood by the Courts. It was said by Sir James Colvile in the case of *Evanturel* v. *Evanturel*[2] "that

[1] (1853) 4 H. L. C. 1. [2] (1874) L. R. 6 P. C. 1 at p. 29.

the determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time...that the rule remains, but its application varies with the principles which for the time being guide public opinion" but Jessel M. R. observed in the case of *Printing and Numerical Registering Company* v. *Sampson*[1] that "you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that.....contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice." It was also said by Lord Bramwell that "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy" in his remarks against the extension of this branch of the law in *Mogul Steamship Company* v. *McGregor, Gow & Co.*[2]; and Lord Halsbury stated that "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...that is, a principle of public policy recognised by the law" when denying that a new head of public policy could be invented by a Court in the case of *Janson* v. *Driefontein Consolidated Mines, Limited*[3]. There is finally the dictum of Farwell L. J. in the case of *Hyams* v. *Stuart King*[4] that "the doctrine of public policy is regarded nowadays as one rather for the Legislature than the Courts." It seems to me that those dicta apply with peculiar force here. The present transactions were not immoral and were not manifestly opposed to the public good or to good Government. They were not proscribed by public opinion for there was no public opinion. They

(1) (1875) L. R. 19 Eq. 462 at p. 465.
(2) [1892] A. C. 25 at p. 45.
(3) [1902] A. C. 484 at p. 492.
(4) [1908] 2 K. B. 696 at p. 727.

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were at the time permitted by the Government. It was indeed impossible to give any "convincing, logical or theoretical reason" for holding them opposed to public policy. It was however felt that they amounted to "trafficking in one branch of the currency during the great war" and that they, therefore, must have been opposed to the public financial policy, which "might be mistaken or might be unwise" and wherein experts notoriously differ, because that trafficking was subsequently prohibited by the Government. These were surely strong reasons for applying the dicta of the English Judges and for leaving the exposition and protection of the public financial policy to the Executive Government and the Legislature. There was, in my opinion, no substantial justification for holding that those dicta should be disregarded by Judges in India and that public policy should be interpreted under section 23 of the Indian Contract Act as comprehending all the political policies from time to time of the Government of India.

Solicitor for appellants : Mr. *N. C. Dalal.*

Solicitor for respondents : Mr. *G. B. Pandya.*

Appeal allowed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

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June 16.

CHOLAPPA BIN GATTINHA SAUNA AND OTHERS (ORIGINAL DEFENDANT AND OPPONENTS), APPELLANTS, *v.* RAMCHANDRA ANNA PAI (ORIGINAL PLAINTIFF AND APPLICANT), RESPONDENT*.

Civil Procedure Code (Act V of 1908), section 145—Execution of decree—Sureties of judgment-debtors—Application to enforce liability against

* Second Appeal No. 1014 of 1916.