terms could bring contribution from the appellant. The further submission is made that the Court's decision on this aspect of the matter, in denying efficacy to the respondent's rateable proportion clause, was erroneous. It is suggested that it clearly follows from the second branch of Gale's case that the proper result of reading together an exclusion proviso in one policy with a rateable proportion clause in the other is that the former becomes inoperative on the ground that only if the other policy (here the respondent's) gives full and complete indemnity can the exclusion proviso be effective - not if, as here, only the partial indemnity afforded by a policy containing a rateable proportion clause exists. The result of construing the rateable proportion clause in the respondent's policy with the exclusion proviso in the appellant's should, accordingly, have been to deny efficacy to the latter.

It is accordingly submitted that the decision of the Court of Appeal is erroneous, and that the appellant and the respondent should properly have been held liable to contribute rateably to the amount of the settlement of the original action.

The situation arising in the present case may commonly be found where an employer is insured under a policy extending cover to his employees for acts and defaults in the course of their employment, and such employees are separately insured. In terms of the present decision, insurers covering either employers or employees whose policies contain only a rateable proportion clause are in danger of bearing the whole loss if faced with a policy covering the other party which contains an exclusion proviso. It appears that the insurers could avoid the risk by themselves including an exclusion proviso: if then faced by another policy in identical terms, the worst that could follow, in the event of their own exclusion proviso being held ineffective, would be that both insurers would be held liable to contribute.

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(1) Shawcross on the Law of Motor Insurance (2nd ed. 1949) passim.

CONTRACTS CONTRARY TO PUBLIC POLICY

SNELL v. POTTER, [1953] N.Z.L.R. 696; [1953] G.L.R. 73.

Perhaps the most perplexing feature of this case, recently decided in the Court of Appeal, is the divergent treatment of the doctrine or rule of public policy with regard to the validity of the contract allegedly entered into by the parties. The rule is expressed in 8 Halsbury's Laws of England (3rd ed.) 153 as follows:

> Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy.

In the application of the rule Fair J. seems to have gone beyond the limits imposed by the House of Lords in Fender v. St. John-Mildmay, [1937] 3 All E.R. 402, while F.B. Adams J. considered that the case did not come within the rule at all. On the other hand, Gresson J., who disagreed with his fellow judges on this question of the validity of the alleged contract, concluded that this agreement was illegal and void, as it contravened the rule of public policy. Apparently this divergence is to a large extent traceable to the absence of clear pronouncements of fact relating to the contract in question in the judgment of the learned trial judge. The result of this omission is that each of the three Appeal Judges examined the evidence available and arrived at a version of the truth which slightly differed from those extracted by the other two. We can, however, briefly summarise the facts of this case as follows:

In September, 1948, Mr Potter, the plaintiff (respondent), became "engaged" to the defendant (appellant) and the engagement was formally announced to friends and relatives. Potter had separated from his wife under a written agreement entered into in September, 1947, and was paying maintenance under a court order. In May, 1949, the plaintiff and the respondent arranged to buy a farm at Taupaki, the title thereto being taken in the name of the defendant who provided so much of the purchase money as had to be paid in cash. The plaintiff worked on this farm, and on another farm at Huapai which was acquired in the defendant's name after the Taupaki farm was sold. In September,

1951, the defendant purported by letter to terminate the plaintiff's "employment". He received only a relatively small payment for his service and had been promised a further award in the shape of a half interest in the property when his divorce went through. The defendant disclaimed any liability to the plaintiff, and the latter commenced an action against her claiming to recover moneys allegedly due, either upon a contract between them, or on a quantum meruit in respect of the services he had rendered. The learned trial judge found in favour of the plaintiff. The defendant appealed. The trial judge's findings of fact, such as they were, were not disputed on appeal.

It was argued, inter alia, by counsel for the appellant that even if the promise regarding the transfer of the half interest in the farm property was independent of the illegal promise to marry, that agreement relating to the land was illegal and unenforceable also.

At this point, mention should be made of the fact that the alleged agreement, being a contract relating to land, was unenforceable by virtue of the Statute of Frauds as it was not embodied in a contract or memorandum in writing and signed by the party to be bound thereby. But in all cases where a party intends to rely on the insufficiency in law of a contract he must specially plead such insufficiency - this is a well established rule (1). In this case the defendant was unable to avail herself of the defence afforded by the statute as it had not been specially pleaded.

The three Appeal Judges were unanimously of the opinion that the important question in this case was whether the contract relating to the farm was void, not as being ancillary or collateral to the promise to marry, but as itself offending against public policy. It was on this point that Gresson J. dissented from the views taken by Fair and F.B. Adams JJ. Gresson J. concluded that independently of any connection with the engagement it was a contract the performance of which was conditional upon the respondent's marriage being dissolved, and as such contravened the rule of public policy, and was in consequence unenforceable. On the other hand, F.B. Adams J. came to no such conclusion; and, before discussing the law on the subject, he emphasized that he considered the question to be not whether all contracts depending on a contingency as to divorce

are void, but only whether a contract of this particular kind is void. After some discussion and examination of authority he concluded that in the present case the Court was being asked to extend the rule of public policy, admittedly applicable to a promise to marry by a spouse, or a promise subject to a condition as to marriage, to a different kind of promise; namely, to a promise to confer proprietary interest contingently on divorce. Bearing in mind the warnings given in Fender v. St. John-Mildmay (supra), he did not think it legitimate to extend the doctrine in that way.

While it is agreed that promises to marry and promises to confer proprietary interests are two different classes of contracts, it is not conceded that the principle of public policy is not applicable both to promises to marry a third person by a spouse and promises to confer proprietary interests contingently upon divorce. In each of these latter cases the contract looks forward to, and is dependent upon, the future severance of the marriage bond, thus contravening the principle which was expressed by Lord Heatherley (then Sir W. Page Wood V.C.) in H. v. W. (1857), 3 K. & J. 382, 387; 69 E.R. 1157, 1159, in these words:

> It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.

In this case the application of the principle of public policy, or the policy of the law as it is so often expressed, had the result of invalidating the grant of a life interest in property to a husband contingent upon a future separation occasioned by the fault of the wife.

The Court of Appeal also considered this principle in Wilson v. Carnley, [1908] 1 K.B. 729 (C.A.) which was a case concerning a promise to marry where Kennedy L.J. said (at 743):

> I think I am right in saying that no Court has ever yet held that a deed providing in futuro for the contingency of separation between husband and wife is in accordance with public policy.

Surely, then, we must infer from this dictum that the principle of public policy is applicable in every case where there is an

agreement - either oral or in writing - which provides in future for the contingency of separation between husband and wife. That is, the principle must be applicable to the cases where there is an agreement to confer a proprietary interest contingently upon divorce. Such agreements must be clearly distinguished from separation agreements which may in certain circumstances by virtue of section 10 (i) of the Divorce and Matrimonial Causes Act 1928 be grounds for a divorce. To be legally effective these agreements must (inter alia) have been in full force for at least three years and in addition separation in fact must have taken place from the commencement of the agreement. The parties must actually cease to reside together - Paterson v. Paterson, [1928] N.Z.L.R. 401. A further distinction to bear in mind is that a separation agreement can only be entered into by a husband and his wife, whereas anyone may be a party to an agreement which is dependent on the future separation of a married couple. For example, in Snell's case the alleged agreement was entered into by the married respondent with a third person, the appellant, and was alleged to have been dependent upon the future divorce of the respondent. It is evident from cases such as Cartwright v. Cartwright (1835), 3 De G.M. & G. 982; 43 E.R. 385 (infra) and H. v. W. (supra), that the necessary results of separation agreements neither follow nor are contemplated where parties enter into an agreement providing for a possible future separation. Thus the rule of public policy cannot apply to invalidate a separation agreement for the same reason that it declares void agreements of the other kind.

Long before Wilson v. Carnley (supra) was decided the Court of Appeal had applied the principle in Cartwright v. Cartwright (supra). In that case by an ante-nuptial settlement the father of the husband conveyed freehold to the use of trustees during the life of the wife, in trust for her separate use, subject to a proviso whereby it was declared that if a separation should take place between the husband and the wife, the rents and profits should from the time of such separation be paid to the husband. Here there was an attempt to confer a proprietary interest contingently upon the future separation of husband and wife, but the proviso concerning this future separation, being in the nature of a condition, was held void as being contrary to public policy.

The rule has also been considered in very similar cases quite recently. In Wacker v. Bullock, [1935] N.Z.L.R. 828, a testatrix directed that her daughter was to be paid the income from a fourth share of her estate but declared that if her daughter "shall survive her present husband or shall obtain a divorce from her present husband" the daughter was to take the fourth share absolutely. Northcroft J. did not apply the rule and concluded, inter alia, that the provision was not against public policy as being contra bonos mores, not being in itself likely to include the mischief aimed at. Similarly in England when Lord Simonds (as Simonds J.) decided the case of In re Caborne, [1943] Ch. 224, he had to consider the validity of a provision in a will that an absolute interest in residue given to a son was to be modified to a life interest so long as the son's present wife should be alive and married to him but should take effect as an absolute gift if the wife should die or the marriage be otherwise terminated. Expressly disclaiming that he set up any new head of public policy by asserting as he did the sanctity of the marriage bond and with it the importance of maintaining the integrity of family life, he denounced and declared void the offending provision as being contrary to public policy. In the course of his judgment, which was based on an examination of the case law, Simonds J. said (at 232):

> So, a husband or wife may lawfully petition for divorce, yet a provision for the contingency of future divorce may be, and as I hold, is, invalid.

The inference to be drawn from this statement is that to every agreement in which there is a provision for the contingency of future divorce or separation, the rule of public policy will apply. In declaring the provision in the will void Simonds J. followed the decision of Farwell J. in a similar case In re Freedman, (Unrep., Dec. 2, 1942) where the validity of a bequest of a weekly sum to a woman during the period of her widowhood or legal separation or divorce from her husband was considered, and it was held that such a bequest was wholly void.

The High Court of Australia, by a majority of three judges to two, in the case of Ramsey v. Trustees Executors and Agency Co. Ltd. (1948), 77 C.L.R. 321, the facts of which were hardly distinguishable from those of In re Caborne (supra), decided not to follow that case. There the High Court decided that the

provision contained nothing which offended against public policy and was therefore wholly valid. What is of especial relevance to the present discussion is the fact that, despite the disagreement as to whether or not the provisions or agreements or conditions were void or otherwise, these cases, and the other cases cited above, were all cases where it was sought to confer a proprietary interest contingently upon divorce or separation, and where the decision in each case, whatever it may have been, was the result of the application of the principle of public policy. It was never doubted by any of the judges that the rule might be applicable; and it was never considered in any case that any new head of public policy was being set up. With respect, it is considered that while endeavouring to distinguish between promises by a spouse to marry a third person and promises to confer a proprietary interest contingently upon divorce, F.B. Adams J. did not sufficiently appreciate that performance in each case is entirely dependent upon the future separation or divorce of the husband and wife. It is this provision for future separation that the policy of the law declares invalid. Therefore, to every agreement in which there is a provision for future separation of husband and wife, whether it is an agreement to marry or an agreement to confer a proprietary interest or any other kind of agreement the rule of public policy will apply; the reason being that in each case it is the severance of the marriage bond which is contemplated, the maintenance of which is of the utmost importance to a society such as ours which is generally described as being Christian and monogamous.

To this alleged contract in Snell's case Fair J. not only unhesitatingly applied the principle of public policy - unlike F.B. Adams J. with whose conclusions he expressed himself to be in agreement - but even purported to follow the distinguishable case of Fender v. St. John-Mildmay (supra). Fair J. went even further than this, for he regarded the rule as being applicable in cases beyond the clear limits imposed by the House of Lords in Fender's case. Fender's case, which gave rise to a pronounced difference of judicial opinions both in the House of Lords and the Court of Appeal, decided that a promise to marry given by a person then married but whose marriage had been the subject of a decree nisi was not contrary to public policy - and the decision went no further than that. But in Snell's case there was no decree nisi, nor was there even a petition for divorce but simply a separation agreement which had been in

force for only eighteen months. Fair J. considered that the difference between the position of a party to a contract made after decree nisi but before decree absolute (as in Fender's case) in a divorce suit and the position of the present respondent under the separation agreement seemed only one of degree, and that having regard to the evidence it appeared to him that the public interest would lie rather in the divorce being granted than in striving to preserve an existing marriage relationship that was such in name only.

The learned judge appeared to base this statement on the mere fact that the condition of the marriage itself where one party has obtained a decree nisi resembles the position where a separation agreement has been in force for some eighteen months insofar as the chances for reconciliation and probability of dissolution of the marriage are concerned. But in not one of the speeches delivered by the majority in the House of Lords in Fender's case is it even suggested that the rule of public policy applicable in such cases should be extended to cases where only a mere separation agreement existed or even where a petition had been presented. The majority considered they were going quite far enough by deciding that in these particular circumstances the promise in question was valid, while the dissenting Law Lords were clearly of opinion that there should be no such exception to the rule at all. Surely if a rule of law is to apply with equal force to parties whose marriage has been the subject of a decree nisi and to those between whom there exists a mere separation agreement it must be shown that the positions in which these two classes of persons are placed bear an extremely close resemblance to each other. The difference was emphasized by Turner L.J. in Hope v. Hope (1857), 8 De G.M. & G. 731; 44 E.R. 572, when he said (at 746):

> . . . there are consequences which attach to a sentence of divorce which do not belong to a separation by agreement merely.

Also, it is very difficult to see how Fair J. could reconcile his statement with the case of Lambert v. Dillon, [1933] N.Z. L.R. 1059, where a married woman who had been deserted by her husband for upwards of twenty years alleged that she and a third person agreed to marry one another as soon as she could

obtain a divorce. Blair J. held that the agreement was wholly void. Surely in Lambert's case there was at least as much reason why the agreement should not have been avoided as there was in Snell's case where the separation agreement had been in force only eighteen months? In the words of Lord Wright in Fender's case, the decisive point is reached by the decree nisi - that is the line of division and demarcation. It is then that the whole position becomes changed and the marriage is ended in all but name. In In re Caborne (supra) Simonds J. showed clearly why the limits to this exception to the rule should not be transgressed when he said (at 230):

> About separation there is nothing final. It may, and not seldom does, lead to a reunion, but to make provision for divorce is, as much for parties who are separated as for those who are living together, an invitation to matrimonial offence, or, at the least, its result may be to bar reconciliation and make irremediable a breach for which time and goodwill might have found a cure.

It should also be observed that before a spouse can petition for a decree nisi on the ground of a separation agreement, that agreement must have been fully in force for at least three years. How then can the exception to the rule of public policy in Fender's case, applicable only in cases where a decree nisi has been granted, be extended to cases where the time, during which a separation agreement must be in force before the petition can be presented, has only half expired? Such an unwarranted extension to the rule can only be regarded as a wedge introduced into the doctrine designed to uphold the sanctity of marriage, which institution, as Lord Russell observed in Fender's case (at 422D), once a holy estate, enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will.

The final question to be considered appeared to Gresson J. to pose itself thus - is it contrary to public policy that a person who is married, but between whom and the other spouse there exists a separation agreement, should contract to receive from a third person a share in a property upon

dissolution of the marriage? the learned judge answered that both on principle and on authority it is contrary to public policy. In his view the contract made between these parties offended because dissolution of the marriage bond between the respondent and his wife was an event or object the condition encouraged. Gresson J. rightly pointed out that in determining whether or not a provision is invalid as being contrary to public policy its tendency is an element of the first importance. And so in Snell's case he concluded that the condition was invalid as one tending to provide an inducement to the respondent to procure a divorce. But Fair and F.B. Adams JJ. considered that as far as this suggested tendency was concerned the possibility of harm was altogether too remote to avoid the contract. Whether or not this decision is correct is dependent upon the so-called "tendency" test being applied to the facts of the case. No adultery was alleged, but tendency to immorality is far from being the only reason, and this tendency certainly does not have to be present either alone or in conjunction with any of the other harmful tendencies in order to render these contracts invalid. For example, the tendency to encourage connivance, deceit and collusion with a view to obtaining a speedy divorce may well be sufficient grounds in certain circumstances for declaring void agreements of this nature. It cannot be denied that in Snell's case some of these tendencies existed in some degree and that the broad principle of public policy had some application, and so, in determining whether these tendencies are too remote an examination of the tendency test is of primary importance.

One of the most important decisions on the question of public policy is the case of Egerton v. Brownlow (Earl) (1853), 4 H.L. Cas. 1; 10 E.R. 359, where it was decided by the House of Lords that a testator's provision to the effect that certain large estates were to vest in a person contingently on that person's acquiring a higher rank in the peerage was void on the grounds of public policy. In this case Lord Lyndhurst said (at 163):

> It is admitted, that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void.

And in the same case Lord Brougham expressed his views on the matter when he said (at 174):

> The tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded.

While Lord Truro remarked (at 196):

> . . . the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition . . . .

Many years later the Court of Appeal in In re Wallace, [1920] 2 Ch. 274 fully discussed Egerton's case and in the judgment of Warrington L.J. (one of the majority) it was asserted (at 278) that this case clearly decided that in determining whether a disposition of property is void as being contrary to public policy its tendency alone is to be considered, and if it has a tendency to bring about some mischief to the commonweal then it will be void, although the mischief may not be the necessary or even the probable effect of the disposition. Also in Lambert's case (supra), Blair J. while discussing the question of public policy, said (at 1063):

> The tendency is the test, and it must be the tendency in the generality of cases and not the tendency or even the actual result in the particular case.

From the abovementioned authorities, then, it appears that the rule of public policy could, before Fender's case, be briefly stated as follows: any tendency to mischief or harm, however slight - unless so slight as to be almost non-existent - is sufficient to invalidate a contract, and the law looks not to the possibility or probability of such harm or mischief occurring in any particular instance, but to the general tendency of the provision.

The Privy Council has said in Evanturel v. Evanturel (1874), L.R. 6 P.C. 1, that the determination of what is contrary to the so-called "policy of the law" necessarily varies from time to time, so that many transactions are upheld now by our own courts which a former generation would have avoided.

The Privy Council then emphasized that the rule remains but that its application varies with the principles which for the time being guide public opinion. How true these remarks are may be clearly shown by the extent to which the House of Lords in Fender's case qualified the rule of public policy as outlined above. Although the facts and the decision in Fender's case are distinguishable from those in Snell's case, as has been pointed out already, the principles of law involved in each case are the same; so that what was said in Fender's case about public policy is very relevant to this case of Snell v. Potter. In the course of his speech in Fender's case Lord Atkin had this to say about public policy (at 407B):

> . . . the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide.

And he added (at 413E):

> I venture to say that the doctrine is unmeaning, unless the impugned contract leads, or is likely to lead, to injurious action . . . .

While Lord Wright said (at 433E):

> It is true that a tendency to a certain result may constitute a matter contrary to public policy but, as I pointed out above, it must be a substantial or serious tendency sufficient to justify so grave a conclusion . . . . A mere remote possibility cannot be weighed against the solid fact of a contract ex facie legal and binding.

In view of this substantial qualification of the rule by the House of Lords and taking into account the facts of Snell's case, it is not difficult to understand why Fair and F.B. Adams JJ. concluded that the harmful tendencies which could be said to be present in this case are the inducement to the respondent to procure the dissolution of the marriage or even perhaps to give the other partner grounds for divorce

in the hope that advantage would be taken of them; the possible prevention of condonation of a ground of divorce which had occurred; the possibility of a collusive divorce; and the fact that the agreement might operate to prevent a reconciliation of the separated spouses. Thus, it is possible to sympathise with the view of Gresson J. that the condition contained in the agreement between the appellant and the respondent offended because of its general tendency irrespective of whether or not in their particular case a dissolution of the marriage would be expedient or desirable. But this view takes no cognizance of the qualification to the rule of public policy in Fender's case as outlined above.

On the view that the harmful tendency, though present, was insubstantial the alleged agreement between the appellant and the respondent is not void on the ground of public policy, but valid. Thus, despite what has been respectfully suggested was an unwarranted extension by Fair J. of the scope of the rule as determined by Fender's case, and what would appear to be an erroneous view of F.B. Adams J. that the case did not come within the rule at all, and finally what has been respectfully submitted was an erroneous conclusion by Gresson J. that the agreement was illegal and void as it contravened the rule of public policy, the appeal as far as the alleged contract was concerned, was rightly dismissed. For there had been anticipatory breach of the contract in question by the appellant, thereby entitling the respondent to recover on a quantum meruit in respect of the services rendered by him.

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(1) Stout and Sim, The Practice of the Supreme Court and Court of Appeal of New Zealand (8th ed. 1940) 141.