CONTRACTS RELATING TO MARRIAGE

INTRODUCTION

The purpose of this paper is to make a study of the Malaysian cases on certain contracts relating to marriage: marriage brocage, restraint of marriage and promises by married persons to marry another. A common feature of the contracts under study is that they are rendered void under the common law. The reason attributed for so rendering it void is that such contracts are against public policy. It is proposed in this paper to make a comparative study of these three types of contracts both under the common law and under Malaysian law. A study will also be made to determine whether the reasons for not enforcing these contracts under the common law are also applicable in Malaysia. The paper will be divided into two parts: Part I deals with marriage brocage agreements, whilst Part II deals with restraint of marriage and promises made by married persons. The consequences of such agreements will also be dealt with in Part II.

PART I

MARRIAGE BROCAGE AGREEMENTS[1]

Introduction

A marriage brocage agreement has commonly been defined to mean an agreement for reward for the procurement of a marriage. The typical form of such an agreement is where A enters into an agreement with B, promising B a sum of money if B procures a marriage for A with a specified person T. However, a study of the cases both in England and in India reveals that the Courts have given an extended meaning to this definition and have held any agreement where a sum of money is to be paid in the event of a marriage to be a marriage brocage agreement. Therefore, a marriage brocage agreement may take a

[1] 'Brocage' and 'brokage' are both accepted form of spelling.

number of different forms. Five main types of such agreements can be identified and these are considered in detail in this paper.

Situation I: A enters into an agreement with B that if B arranges a marriage between A and a specified person, T, A will pay B a sum of money.

Situation II: A enters into an agreement with B to procure a marriage for A. No specified person is stipulated. A promises B that in the event of the marriage A will pay B a sum of money.

Situation III: A contracts with B, the parent or guardian of C, that if B agrees to A marrying C, A will pay B a sum of money.

Situation IV: A, the parent or guardian of C enters into an agreement with B the parent or guardian of D, to procure a marriage between C and D.

Situation V: A enters into an agreement with a professional matrimonial agent, B, that in the event of a marriage between A and any person brought about through an introduction by B, A will pay B a sum of money.

Without delving into the merits and demerits of such agreements, it may be pertinent, for the present, to state that the attitude of English Courts as well as the Courts in India and Malaysia has generally been one of hostility towards such agreements. Most English books on the law of contract classify marriage brocage agreements under agreements which are void as being opposed to public policy.[2] The modern authority commonly cited for this proposition is the case of *Hermann v. Charlesworth.*[3] In this case, Collins M.R. stated:

> Contracts of this class are against public interest . . . the root of the question of the illegality of a marriage brokage contract is the introduction of the consideration of a money payment into that which should be free from any such taint.

[2] Anson's Law of Contract, 24th Ed. (1975) at page 344, Cheshire and Fitfoots' Law of *Contract*, 9th Ed. (1976) at page 367; *Chitty on Contract*, Volume I, General Principles, 24th Ed. (1977), para. 1046 and Treitel, *The Law of Contract*, 4th Ed. (1975) at page 290.

[3] [1905] 2 K.B. 123.

[4] At page 130.

Indian and Malaysian Courts have also cited similar reasons for invalidating such agreements under section 24 of the Contracts Act.[5]

Before a detailed study is made of the five different forms, a brief account of the origins of marriage agreements would be in order. It is also proposed to examine the changes, if any, of the attitude of the Courts towards such agreements over the years. This exercise is not wholly academic as it is hoped that this may reveal the attitude which the Courts may take towards the now prevalent marriage bureaux in England, Malaysia and Singapore. Would the reasons given about two centuries ago still be acceptable in the twentieth century. Or as Atiyah puts it, "Would the changes in moral values of our society make some older decisions look very unreasonable today".[6]

Professor Powell, in his enlightening article[7] on marriage brocage agreements has dealt with the development under English law with regard to marriage brocage agreements. He traces the position both under the common law and under equity. But the position may be summed up in the words of Cozens – Hardy L.J. when he stated:

> In cases that came before the Courts in the seventeenth century and the beginning of the eighteenth centuries there was a great deal of discussion as to the validity of marriage bonds, and it was held that they were not invalid at law; but the Courts of Equity exercised their original jurisdiction and gave relief against such bonds. As late as 1735 Talbot L.C. in *Law* v. *Law* (1735) 3 P. Wms. 391, expressly said that marriage brocage bonds were good at law."[8]

And since the House of Lords decision in *Hall and Keene* v. *Potter*[9] in 1695, it has been firmly established that the Courts will not recognise marriage brocage agreements.

[5]Section 24(e) of the Contracts Act provides as follows: 'The consideration or object of an agreement is lawful, unless . . . (e) the Court regard it as immoral, or opposed to public policy.'

[6]Atiyah, *Introduction to the Law of Contract*, 2nd Ed. (1971) at page 219.

[7][1953] Current Legal Problems 254. Two aspects relating to marriage brocage not dealt with by Powell is discussed in this Paper:

[8]*Hermann* v. *Charlesworth* [1905] 2 K.B. 123, 137. See also the judgment of Collin M.R.

[9](1695) e Lev. 411; 83 E.R. 756. For a fuller report see I E.R. 52.

Situation I: A enters into an agreement with B that if B arranges a marriage between A and a specified person, T, A will pay a sum of money.

Most of the cases in English law dealing with marriage brocage agreements take this form. In these cases, A is desirous of marrying a particular person who is usually of 'good fortune' or 'of considerable wealth'. A, then enters into an agreement with B that if B arranges a marriage between A and the specified person, A will reward B for his efforts. Motivated by this reward, B then exerts his influence to bring about the desired marriage. It should also be noted that in most of these cases, B is often in a position to use some influence over the said person to agree to the marriage.

In the case of *Drury* v. *Hooke*[10] the plaintiff 'being about sixty years of age and having seven children gave a bond to the defendant that if the defendant was to procure a marriage between the plaintiff and one A.S. who was a young gentlewoman and had £2,000 portion', he would pay the defendant a sum of money. The defendant succeeded in bring about the said marriage. The Lord Chancellor held that the bond should be put aside as 'such bonds are of very ill consequences'. The defendant relied upon an earlier case, *Cressey* v. *Crooke*[11] in which a bond for procuring a marriage with a rich widow was enforced. But the Lord Chancellor refused to be bound by this case saying, that there was a 'great difference of a widow of forty-five years of age, and a young maiden that has no friends to advise her."

Similarly in *Hall and Keene* v. *Potter*,[12] a bond was executed whereby it was promised that should Potter procure a marriage between Thomas Thinne who executed the bond and 'the Lady Ogle, a widow of great fortune and honour, being the daughter and heir of the last Earl of Northcumberland' a sum of £1,000 would be paid to Potter. It was argued by counsel for Potter that there was 'no fraud, circumvention, or ill-practice used in

[10] (1686) 2 Cas. in Ch. 176; 22 E.R. 900.

[11] Unreported but cited in *Drury* v. *Hooke*, 22 E.R. 900.

[12] Supra.

this case, but only advice' and furthermore, the 'marriage was suitable in respect of their estate, for though the lady was heiress to a very great estate . . . and he a gentleman of a great family.'[13] Counsel for the plaintiff argued that

> such bonds to matchmakers and procurers of marriage are of dangerous consequences, and lend to the betraying and oftentimes to the ruin of persons of quality and fortune . . . and may prove the occasion of many unhappy marriages . . .'[14]

Counsel further argued that

> marriages ought to be procured and promoted by the mediation of friends and relations, and not of hirelings. That the not vacating such bonds, when questioned in a Court of Equity, would be of evil example to executors, trustees, guardians, servants, and other people having the care of children'.[15]

Presumably, accepting argument by Counsel for the plaintiff, all the Law Lords in the House of Lord with three or four dissenting held that 'all such contracts concerning marriages are of dangerous consequences and not to be allowed.'[16] Likewise in *Scribblehill* v. *Brett*,[17] a lease granted in consideration of the procurement of the same marriage as in the case of *Hall and Keene* v. *Potter* was also set aside.[18]

There are, however, two cases in which the agreements were held to be invalid even though the consideration of the agreement was the procurement of marriage to a specified person. In *Glanville* v. *Jennings*[19] the defendant told the plaintiff that he

[13] 83 E.R. 756.

[14] 1 E.R. 52, 53.

[15] Ibid.

[16] 1 E.R. 756. See also *Goldsmith* v. *Bruning* (1700) 1 Eq. Cas. Abr. 90; 21 E.R. 901, where a bond given to a maid for influencing a young lady of 15 and who was entitled to a good fortune to marry the plaintiff was put aside even though the maid's husband had insisted that he had married the maid in prospect of the bond and had considered it as part of her fortune; *Smith* v. *Bruning* (1700) 2 Vern. 392, 23 E.R. 852 (the facts of the case does not appear in the report).

[17] (1703) 4 Bro. P.C. 144; 2 E.R. 97.

[18] The case is reported under the heading of Fraud and even the headnotes to the case indicate that the consideration of procuring a marriage was fraudulent.

[19] (1669) 3 Rep. in Ch. 31; 21 E.R. 720.

would procure a marriage for the plaintiff with a woman who 'was of good fortune' and that the plaintiff 'must give him something for his pain'. The plaintiff gave the defendant a bond for £400. The defendant obtained a similar bond from the woman assuring her that the plaintiff too had a good fortune. The suit was brought to set aside both the bonds. However, since "the defendant had proved that the plaintiff had £1,200 with his wife and therefore the bond given by him was good; but the woman being cheated for that her husband had no estate, but was a broker merchant, her bond was ordered to be delivered up and cancelled'. In *Smith* v. *Aykwell,*[20] the Court of Equity refused to grant an injunction to restrain the defendant from proceeding at law to enforce a note for £2,000 which was given by the plaintiff to the defendant for the undertaking to procure a marriage between the plaintiff and a lady.

It is difficult to rationalise the Court's decision in these two cases. They appear to be contrary to the general attitude of the Courts towards marriage brocage agreements of the type considered under this heading. It may be pointed out that *Glanville* v. *Jennings* was decided before the House of Lords firmly established in *Hall and Keene* v. *Potter* that such marriage brocage would not be enforced.[21] In *Smith* v. *Aykwell*, the action was brought for an injunction and the validity of the bond was not considered.

Situation II: A enters into an agreement with B to procure a marriage for A. No specified person is stipulated. A promises B that in the event of the marriage, A will pay B a sum of money.

It was generally thought that such an agreement did not fall within the definition of a marriage brocage agreement as it was not an agreement to procure a marriage with any specified person. Counsel for the defendant in *Hermann* v. *Charlesworth*[22] argued strenuously that this category of agreements

[20](1747) 3 Atk. 566; 26 E.R. 1126.

[21]*Quaere*: would the case be decided otherwise after *Hall and Keene* v. *Potter*. See also *Cressey* v. *Crooke, supra.*

[22]*Supra.*

should be distinguished from those where the agreement was to procure a marriage with a specified person. It was contended that the Courts had held contracts as discussed in *Situation I* above, to be void on the ground that the 'person procuring the marriage was a guardian or confidential servant, or some other person standing in a fiduciary position to the person who was to be procured in marriage.'[23]

This argument of the learned Counsel found favour with the Divisional Court. Kennedy J. in accepting this argument held:

> . . . We are of opinion that the transaction was not illegal. It will be found on referring to the authorities which were cited to us by counsel in the course of the argument, and which are collected in the notes to Story's Equity Jurisprudence, 10th ed. ss. 260–264, that the illegal marriage brocage contract is a bargain for pecuniary reward to procure for another in marriage, as husband or wife, a certain specified person. Such an agreement, says Story, s. 261, citing the judgment in *Drury v. Hooke* (1686) 1 Vern. 412, 'has been not inaptly called a sort of kidnapping into a state of conjugal servitude. The business here appears to be essentially different . . . However distasteful to most persons introduced by a paid advertising agent, and however foolish and reckless the agent may appear to be if he promises a lady that her search shall be successful (and the facts cannot be put more favourably for the plaintiff than this) the transaction is, in our judgment, not one of marriage brocage, and is not really open to the particular suggestions of mischief upon which Story descants so eloquently in the passage to which we have already referred. We are not prepared to extend the application of the doctrine of the illegality of marriage brocage contracts, as it has been established in the reported decisions, to the circumstances of the present case.[24]

On appeal, this decision was reversed. The Court of Appeal[25] held that such agreements were also against public interest on the ground that there was no distinction in this respect between a contract relating to one particular person and a contract that

[23] [1905] 1 K.B. 24, 25 (Divisional Court) and [1905] 2 K.B. 123, 127 (Court of Appeal).

[24] Ibid at pages 28–29.

[25] [1905] 2 K.B. 123.

relates to a whole class.[26] Following this decision, it is now settled that under English law such agreements come within the description of marriage brocage agreements and are hence void.

There appears to be no Indian decisions where the validity of such agreements had been considered. However, in view of the tendendy of the Indian Courts to follow English decisions on this aspect, it would not be difficult to predict the attitude which the Indian Courts will take. The complete acceptance by the Indian Courts of English decisions can be illustrated in *Pitamber Ratansi* v. *Jagjivan Hansraj.*[27] In this case the agreement was not to procure a marriage with a specified person but with persons of a specified caste. The Court, following English decisions, held such contracts to be void under section 23 of the Indian Contract Act.

A similar view has also been taken by the Courts in the United States:

> With regard to the question under discussion no distinction is made, either in this country or in England, between a contract to procure for another in marriage, as husband or wife, a certain specified person, and a contract to introduce a person to others of the opposite sex with a view to marriage, or or to bring about the marriage of a person with someone not particularly specified.[28]

As the nature of these type of agreements are similar to those discussed under *Situation V* below, the comments on the attitude of the Court towards these agreements will be dealt with in detail under *Situation V*. It must, however, be emphasised that the Courts appear to provide further reasons for holding marriage brocage agreements to be void. Unlike *Situation I*, where the fears of the Courts have been that the person procuring the marriage may exert undue pressure on the party over whom he has certain power or control, here in these types of agreement the reason for invalidating such agreements is the 'introduction of the consideration of money payment into that which should be free from any such taint.'[29]

[26] Ibid at page 130.

[27] (1884) I.L.R. 13 Bom. 131.

[28] Annotation, 72 A.L.R. 1109, 1117. See also *Hurwitz* v. *Taylor* [1926] Sou. Afr. L.R. 81 and a note on the case in 27 Col. L.R. 322.

[29] Per Collins M.R. in *Hermann* v. *Charlesworth* [1905] 2 K.B. 123, 130.

Situation III: A contracts with B, the parent or guardian of C that if B agrees to A marrying C, A will pay B a sum of money.

At first sight, the situation postulated above would not appear to constitute a marriage brocage agreement. In this situation, A has freely chosen C to be his wife: the proposed marriage has not been brought about through the efforts of a third party. Therefore, the common reasons for holding marriage brocage agreements to be void may not be applicable to such a situation. But the study of the cases show differently. The Courts have held such agreements to be void either because they are held to be marriage brocage agreements or agreements similar to marriage brocage. What then are the objections of the Courts to such agreements: It appears that the Courts have merely held such agreements to be against public policy without stating exactly how such agreements offend the general public. Some reasons may be found in *Treatise of Equity*[30] where it is said:

> whenever a mother, or father, or guardian, insist upon a private gain, or security for it, and obtains it of the intended husband, it shall be set aside; for the power of a parent or guardian ought not to be use of to such purpose. And these contracts with the father, etc. seem to be of same nature with brocage bonds, etc. but of more mischievous consequences, as that which would happen more frequently; and it is now a settled rule, that if the father, on the marriage of his son, takes a bond of the son to pay him so much, etc. it is void, being done by coercion while he is under the awe of his father.

In the case of *Keat* v. *Allen*[31] the plaintiff gave a bond to his wife's father in order to obtain his consent to the marriage of his daughter to the plaintiff. Under the bond the plaintiff was obliged to pay the defendant £200 on condition 'that the plaintiff's wife died without issue if female, died before the age of eighteen or marriage; or if male, ... before the age of twenty-one' The wife had earlier received £1,200 as a marriage portion from her aunt. The Court held that the bond was 'in the

[30] Edited in 1793 with Fonblanque's notes, referred in the case of *Scribblebill* v. *Brett* (1703) 4 Bro. Parl. Cas. 144; 2 E.R. 97.

[31] (1707) 2 Vern. 588; 23 E.R. 983.

nature of a brocage bond' and should be cancelled. No further reasons were given.

In *Hamilton (Duke)* v. *Mohun (Lord),*[32] Hamilton on his marriage covenanted with his wife's mother that in the penalty of £10,000 he would give her within a specified time a release in respect of all the mesne profit of the estate. Lord Chancellor Cowper held that the agreement 'seemed to be extorted from the Duke by one who had a power over the young lady courted by him. . . that it was as if the mother should say, you shall not have my daughter, unless you will release all accounts.'[33] The Lord Chancellor then gave the reasons for so holding such promises to be invalid:

> "This agreement was within the same reason as a marriage brocage agreement, which had been so often condemned in equity. A bond to give money if such a marriage could be obtained was ill. . . That the case of a mother or guardian insisting upon gain for consenting to a marriage, must be a much more frequent mischief, and in all probability often happen, than an agreement of this nature with a third person . . . to tolerate such an agreement, would be paving a way to guardians to sell infants under their wardship; and the greater the fortune was, the greater would be the temptation to treat in this manner with the guardian, in order to such a marriage."

His Lordship then stated that if the promise had been made after the marriage, then it might have been good because 'it must be presumed to be given freely'. In the present case the 'covenant could not be supposed to be made freely, in regard the Duke might reasonably apprehend, he must have lost the young lady, if he had refused the covenant.'

It can therefore be concluded that there are at least two main reasons for not enforcing agreements of the nature discussed under this part. Firstly, that the consent to the agreement may not have been freely given and secondly to give effect to such agreements would be to allow parents or guardians to receive certain benefits for allowing their child to be married. Whether these reasons are convincing and whether they are valid in the

[32] (1710) 1 P. Wms. 118; 24 E.R. 319.

[33] Ibid at page 320.

twentieth century would be discussed fully in the latter part of this paper.

The American Courts have shown a greater degree of hostility towards such agreements. The rule against such agreements are so strictly adhered to that even if the intended marriage was between parties of equal rank, fortune or age, such agreements have been held to be void. The propriety and expediency of the marriage, or even if the purpose is to hasten an intended marriage between persons already engaged, are completely disregarded by the American Courts when confronted with an agreement of this nature. In the case of *Braum* v. *Potter Title & T. Co.*[34] it was held that an agreement not to foreclose a mortgage on the lands of the mortgagor, parents of the young woman of fifteen sought in marriage, during the life of either of them, in order to obtain the consent of the parents to the marriage of their daughter with the mortgagee, a gentleman of seventy-one, was a marriage brocage agreement and hence it was unenforceable. In the incisive judgment of the Pennsylvania Supreme Court, Simpson, J. commented:

> Among many savage peoples it always has been and still is the custom for a father to bargain for the sale of his female child, the highest bidder becoming the successful suitor. This is also the custom among the ignorant inhabitants of other and less advanced lands, and we are told that the emigrants from those countries while resident in this state, to some extent still wrong fully follow that custom, though it is illegal here.[35]

The Court then emphasised the importance of marriage and the interest which the State placed on it. His Lordship said:

> In relation to her citizens, it is impossible to think of anything more vital to the commonwealth than proper consideration being given before marriages are solemnized. The happiness of the parties, the continuity of the relation thus created, the sanctity of the home, and the healthfulness and happiness of offspring, all depend on the fitness of the marriage. This being so, it is clear that the consent, required to be obtained before the marriage of a minor can be solemnised, must be given solely from a consideration of the advantage thereof to the minor, untainted by selfish motives on the

[34] 72 A.L.R. 1109 (Pennsylvania Supreme Court).

[35] Ibid at page 1110.

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> part of the consenting parents, guardians, or court appointees, and uninfluenced by anything of value given or promised to be given to them. All such gifts and promises are made expressly for the purpose of inducing the recipient to look favourably upon the desire of the giver, rather than upon the welfare of the minor; and it is equally true that they usually have that effect. From such a possibility there is no safety for the helpless minor, save by absolutely removing all hope of gain by the consenting parent, guardian, or court appointee, and this the common law does, as we have already shown by declaring that every such promise shall be wholly void.[36]

An examination of the Indian cases indicates that Indian Courts are inclined to adopt the English attitude toward agreements falling under this head. It would have been thought that because of the special customs and traditions prevailing in India with regard to marriages, the Indian Courts would have taken a different and more sympathetic view of such agreements. It must be noted that most marriages in India, during the period when these cases were decided, were arranged marriages. Furthermore, the consent of the parent or guardian was essential since in most of the cases the parties to the marriage were very young persons. It was also the tradition that some form of payment should be made to the parents of the party.

In one of the earliest cases from India, *Dulari* v. *Vallabda's Pragji*[37] where the validity of such agreement was considered, the Court held agreements of this kind to be immoral and against public policy and thus void under section 23 of the Indian Contract Act. The Court followed the reasoning of Scott J in *Pitamber Ratansi* v. *Jagjivan Hansrai*,[38] a case dealing with an agreement of a different nature and not of the type under consideration. Jardine J. held that 'the present case cannot be distinguished in principle (from *Pitamber's* case) and concur in the reasoning . . . and I think I ought to follow it in this matter.'[39] The English case of *Duke of Hamilton* v. *Lord Mohun* was also referred to by the Judge.[40]

[36] Ibid at page 1112.

[37] (1889) I.L.R. 13 Bom. 126.

[38] (1888) I.L.R. 12 Bom. 131.

[39] Ibid.

[40] The Judge also referred to Fonblanque's *Treatise of Equity*, Vol. I (5th Ed.) and quoted the passage as referred to earlier, together with a sentence which does not

In *Venkata Kristnayya* v. *Kalavagunta Lakshmi,*[41] the following reference was made to the Full Bench of the Madras Court:

> Is a contract to make payment to a father in consideration of his giving his daughter in marriage to be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act.

The Full Bench answered this question in the affirmative. The Court pointed out that though the *Asura* form of marriage (purchase of a wife from her father) when actually performed is valid, yet an agreement to pay money to the father in consideration of such a marriage is not valid. The Court did not give any reasons for so holding such an agreement to be void. The Court followed the earlier case of *Dholidas* v. *Fulchand.*[42] It should be emphasised the reference was in general terms and the decision so arrived at is wide enough to invalidate those agreements which will be discussed under the next head.

From these cases alone it is difficult to arrive at any definitive conclusions as to the attitude of the Indian Courts towards these agreements. In no case was such an agreement considered in detail: the Courts either applied English principles indiscriminately or did not consider whether such agreements may strictly be termed as marriage brocage agreements. In *Ventaka's* case the Full Bench indicated that these agreements would be void under section 23 as being immoral or opposed to public policy. Presumably, following English cases, they must have regarded these agreements as being marriage brocage agreements, otherwise, it is difficult to ascertain under which other head of public policy such an agreement fell within.[43]

In the Malaysian case of *Khem Singh v. Anokh Singh,*[44] the courts had to determine the validity of an agreement in the

appear in the quoted passage: 'you shall not have my daughter, unless you do so and so, is to sell children and matches'.

[41](1909) I.L.R. 32 Mad. 185.

[42](1898) I.L.R. 22 Bom. 658.

[43]But see Beverley J's judgment in *Ram Chand Sen* v. *Audaito Sen* (1884) 10 I.L.R. 1054.

[44][1933] M.L.J. 288; 7 F.M.S.L.R. 199. The facts of this case are fully discussed under Recovery of Money.

nature of the type under discussion. Elphinstone C.J. applying a number of English and Indian cases dealing with agreements which were not similar to that under discussion, held the agreement to be a marriage brocage and consequently void under section 24 of the Contracts Act. The Court did not touch on or comment on the particular type of agreement being discussed. The Court was more concerned with the question of whether money paid under such an agreement could be recovered under section 66 of the Contracts Act.

It is submitted that agreements falling within this head should not be regarded as marriage brocage agreements nor should they be set aside on the grounds of public policy. The fears of the Courts as regards such agreements, both in India and England, is that undue pressure may be exerted on the party to enter into the agreement. If this is the underlying reason, the Courts may exercise their discretion, depending on the facts of the case and set aside these agreements on the ground of coercion or undue influence.[45]

Similarly, if the Courts feel that the parents of the party had intended to make a profit from the transaction, they could equally use their discretion and set aside the agreement.[46] Dissatisfactions with the Court's general attitude towards such agreements may be more acutely felt in countries where such a practice is recognised by custom. In such circumstances the Courts should be slow in refusing to recognise these customs. It would be best left to the Legislature to make the necessary changes.

Situation IV: A, the parent or guardian of C enters into an agreement with B, the parent or guardian of D, to procure a marriage between C and D.

The main difference between this type of an agreement to the three types considered above is that the parties to the agreement are different. In the three situations considered above, one of the parties to the agreement has been the person who is desirous of marrying. However, in the situation under consider-

[45] See discussion below on Lack of Free Consent.

[46] C.F. *Baldeo Sahai* v. *Jumna Kunwar* (1901) I.L.R. 23 All. 495.

ation, the agreement is entered into between the parents of the children who are to be married. Usually the parent of the girl would promise the parent of the groom a sum of money if a marriage is brought about between their respective children.

Such agreements are rare amongst the English and hence there has been no reported English case. In contrast to this dearth of cases under English law, there are a numberof cases in India and Malaysia where the validity of such agreements have been considered. It must, however, be pointed out that not all such agreements which have come before the Indian Courts have been similar in content. There are a number of variations to these types of agreement. To understand fully the nature of these agreements, it would be necessary to give a brief account of the customs and traditions which are followed by certain communities in India and Malaysia. According to Hindu custom,[47] marriages are usually arranged by the parent of the children. The children usually do not have any say in the choice of their future spouse. In the case of *Purshotamdas* v. *Purshotamdas*,[48] the Court stated:

> The marriage of Hindu children is a contract made by their parents, and the children themselves exercise no volitioon . . . The Hindu law vests the girl absolutely in her parents and guardians. . .[49]

Before the turn of the century, most marriages in India were arranged when the children were between twelve and fifteen years old. Naturally, therefore, it was their parents who chose their spouses for them. It was not uncommon for a parent to agree to a betrothal soon after the child was born.

Among the other customs related to such agreements is that of 'bride purchase' and also the dowry system observed in some communities. It was also not uncommon, in certain communities, for the bridegroom to make some kind of payment to the father of the bride: the rationale for the latter practice being a token of appreciation for having looked after the welfare of the

[47] For a account of a traditional Indian family structure, see Nimkoff, *Comparative Family System*, Boston, Miflin (1965).

[48] (1896) I.L.R. 21 Bom 23.

[49] Ibid at page 30.

bride. Some of these customs were recognised by the personal laws of the parties, for example under Hindu law.

The general attitude of the Indian and Malaysian Courts has been to hold agreements entered into by parents for the marriage of their children to be void if there is any evidence to indicate that the intention of the parents had been to obtain some benefit. In *Devarayan* v. *Muthuraman,*[50] an agreement was entered into between the parents that their children should be married at a future date. Both the parents agreed that if either of their children refused to marry the other, the defaulting parent should pay the sum of Rs. 5,000. Considering the validity of this agreement, the court held:

> If an agreement between A and B that B's daughter shall marry A's son on payment of a sum of money by A to B is contrary to public policy, it seems difficult on principle to say that an agreement between A and B that B's daughter shall marry A's son and that if she fails to do so, B shall pay a sum of money to A, is not equally contrary to public policy. In each case B has a pecuniary interest in bringing about the marriage. In one case if the event takes place, he receives money. In the other case, if the event does not take place, he has to pay money.[51]

The Court then spelt out the reasons for holding such contract to be against public policy:

> A contract to marry between parties who are each *sui generis* of course stands upon a different footing; but here the contract is between third parties. The effect of the contract, as I have said, is to give the parties a pecuniary interest in the marriage taking place. The contract as my learned brother puts it in the course of the argument, is a trafficking in marriages. There appears to be no case, English or Indian, where a contract like this has been held to be void; but as it seems to me to fall within the mischief of the rule, I am prepared to hold that the contract is not enforceable and I think the rule applies none the less in a state of society where the marriage of children is a contract made by their parents and the children themselves have no volition in the matter.[52]

Similarly in the case of *Srinivasa Ayyar* v. *Sesha Ayyar,*[53] the Court held that there was 'no doubt that the agreement was

[50](1914) I.L.R. 37 Mad. 393.

[51]Ibid at page 395.

[52]Ibid at page 395.

[53](1918) I.L.R. 41. Mad. 197. The facts of the case are fully discussed under

unlawful and therefore void'. No reasons were given by the court for so holding. This may have been for the reason that the action was brought for recovery of money paid and that counsels for both the parties had agreed that such an agreement was unlawful.

There, however, have been certain other decisions where the Indian Courts have held such agreements not to be unlawful. In *Visuvanathan* v. *Saminathan,*[54] the Madras Court did recognise a contract of the type under consideration. Wilkinson, J. in accepting such contracts held that considering the customs prevailing in India, these contracts were neither immoral nor against public policy:

> No doubt it has been long held in England that all contracts or agreements for promoting marriages for reward (usually termed marriage brocage contracts) are utterly void. The principle on which the decisions have proceeded is that every contract relating to marriage ought to be free and open, whereas marriage brokage contracts necessarily tend to a deceit on one party to the marriage, or on the parents and friends, and to the promotion of marriage by hirelings, instead of by the mediation of friends and relatives. Now I very much doubt whether these principles can be made applicable to this case. In this country marriages take place while the contracting parties are infants, incapable of making any choice of their own, and the consideration may often be received by the father for the use and benefit of the child. That, as remarked by the Subordinate Judge, marriages in the *asura* form are widely prevalent in Southern India was observed by *Strange* so long ago as 1839 and is not denied at the Bar. The paucity of decisions is in favour of the contention that the moral consciousness of the people is not opposed to the practice. In consideration of the father of a girl giving his consent to the betrothal of his daughter, a sum of money is paid by the relatives of the would-be bridegroom to the father. Is this immoral or opposed to public policy. Under all circumstances I see no reason for so holding. Where the wife is immature, as is the case in nearly every marriage in this country, it is the custom that she should reside with her parents, and they maintain her as a matter of affection, but not of obligation. If the father is poor and the relatives of

Recovery of Money Paid. The case of *Devarayan* v. *Muthuraman, supra* was referred to. It should, however be noted that the nature of the agreement in these two cases were in a different form.

[54] (1889) I.L.R. 13 Mad. 83.

> the husband well to do, what immorality can there be in the latter giving to the former a sum of money for the maintenance of the girl-bride. It is true that in the passage quoted by the Subordinate Judge, *Manu* prohibits a father from receiving a gratuity for giving his daughter in marriage, but the prohibition appears to be based on the necessity which then existed of commanding fathers not to sell their offspring. In the present case there is no question of sale, and there is nothing to show that the plaintiff 'through avarice' accepted the money in order to spend it on himself only. In the present state of society, I am not prepared to hold that the receipt by a Hindu father of money in consideration of his giving his dauther in marriage is in every case without distinction immoral or contrary to public policy.[55]

This reasoning appears to be attractive but however, it has not been followed in most of the subsequent cases. *Visuvanathan's* case has been distinguished on the grounds that it should be restricted to the *asura* form of marriages. However, on a closer reading of the case it is difficult to appreciate the validity of this distinction. There is no doubt that in *Visuvanathan* the marriage was in the *asura* form, but it would appear that Wilkinson J.'s observations were not restricted to the *asura* form of marriages alone.

In fact, in the earlier case of *Ram Chand Sen* v. *Audaito Sen,*[56] the Court allowed the recovery of a sum of money which had been paid under a marriage brocage agreement. Garth C.J. did not decide on the validity of a marriage brocage agreement. Beverley J., however, stated:

> There is nothing immoral in the contract so far as I can see. No doubt the purchase or hire of a minor girl for purposes of prostitution; or concubinage, is an immoral act, but where a legal marriage is in contemplation, the payment of money as a consideration is in accordance with the customs of the country, and therefore, in my opinion, not opposed to public policy.[57]

From this study of Indian cases, it is apparent that the Indian Courts have had mixed reactions towards the recognition of such agreements. They appear to be confronted by a dilemma:

[55] See also judgment of Parker J.

[56] (1884) I.L.R. 10 Cal. 1054.

[57] Ibid at page 1056.

on the one hand, their general reluctance to recognise marriage brocage agreement and on the other the awareness not to cause any social injustice by refusing to recognise the customs and traditions of the various communities. Naturally, different judges have placed different emphasis on either of these conflicting considerations and hence there is difficulty in reconciling some of these decisions. There is merit in both these approaches. The danger which the Courts attempt to avoid in refusing to recognise such agreements is to prevent the abuse by parents who enter into these agreements purely for monetary gains and thereby disregarding the suitability of the marriage. It is submitted that the approach taken by Wilkinson J., in *Visuvanathan* v. *Saminathan* is a better approach. As has been pointed out in the passage quoted above, no great injustice would be caused by recognising such agreements, especially in a community where the giving of a sum of money to the father of the bride is an accepted practice. The learned Judge did caution that he was not giving blanket recognition to such agreements. He did emphasise that 'each case must be decided on its own merits.'[58] If the Courts do take such an approach, they may, when the circumstances of the case so merits, set the agreement aside. Such an approach therefore tends towards greater flexibility rather than adopting as a general rule that all such agreements are void. In at least one case, *Baldeo Sahai* v. *Jumna Kunwar*,[59] the Court though recognising such agreements as being valid did set aside the agreement in question as the parent of the girl had caused her to enter into an utterly unsuitable marriage. The Court held:

> We are not prepared to hold that the rule of English Law upon which it is founded should be applied without discrimination to every case in this country in which some payment is agreed to be made to the parents of the bride or the bridegroom, as the case may be. We agree with the learned Judges of the Madras High Court who decided the case of *Visuvanathan* v. *Saminathan* that each case must be judged by its own circumstances. Where the parents of the girl are not seeking her

[58] (1889) I.L.R. 13 Mad. 83, 85.

[59] (1901) I.L.R. 23 All. 495.

> welfare, but give her to a husband, otherwise ineligible, in consideration of a benefit secured to themselves, an agreement by which such benefit is secured is, in our opinion, opposed to public policy and ought not to be enforced. The present case is a case of that description.[60]

In the instant case, the plaintiff admitted that 'she made the marriage of her daughter as a source of gain to herself, and had no regard for the happiness and welfare of the girl. An agreement executed under such circumstances is, we think, opposed to public policy.'

There are three reported decisions from Malaysia where agreements of the nature under discussion were considered by the local courts: *Karpen Tandil* v. *Karpen;*[61] *Alang Kangkong* v. *Pandak*[62] and *Rajeswary* v. *Balakrishnan.*[63] The case of Karpen Tandil was decided before the application of the Contracts Act to Penang. During this period English law applied. Hence, the law applicable then was different to that when the latter two cases were decided. It would therefore need special consideration.

In *Alang Kangkong* v. *Pandak Brahim,* the agreement on which the plaintiff sued for recovery of $200 for damages for breach of contract was that the defendant promised to give his daughter in marriage to the plaintiff's son in consideration of the plaintiff's promise to pay the defendant a sum of $100 on the celebration of the marriage. It was alleged by the plaintiff that the defendant agreed to pay him $200 as damages in the event of the marriage not taking place.

The learned Judge, in a brief judgment dismissed the action by stating:

> The contract on which this suit is founded is an agreement to pay money to the parent of a minor, in consideration of his consenting to give the minor in marriage. It is void as being contrary to public policy. An action for its breach will not lie.[64]

[60] Ibid at page 496.

[61] (1895) 3 S.S.L.R. 58.

[62] [1934] M.L.J. 65; (1933–34) F.M.S. L.R. 166.

[63] (1958) 3 M.C. 178

[64] [1934] M.L.J. 65, 66.

The learned Judge made no distinction between an agreement entered into of the type discussed in Situation III and the type under consideration. He appears to have considered the law applicable in both these Situations to be similar. To this extent the proposition of law stated above has to be applied with caution when considering the validity of an agreement in the nature of *Situation IV*. As stated, the proposition may equally apply to *Situation III* above.

In *Rajeswary and Anor.* v. *Balakrishnan and Ors.*,[65] the question of marriage brocage was also raised. The facts of the case are briefly as follows: The parties to this action were Ceylonese Hindus. The second defendant, father of the first defendant, through a 'go between' approached the second plaintiff, father of the first plaintiff in order to arrange a marriage between the second defendant's son (the first defendant) and the second plaintiff's daughter (the first plaintiff). A written agreement was entered into which provided, *inter alia* that a dowry of $3,000 would be paid by the plaintiffs and if there was a breach of the agreement a sum of $5,000 would be paid (known as penalty clause). The defendant repudiated the contract and the plaintiffs claimed for *inter alia*, breach of promise of marriage. One of the arguments urged by counsel for the defendants was that the contract was void as against public policy under Section 24(e) of the Contracts Act being a contract in the nature of a marriage brocage agreement. The cases of *Venkata Krishtnayya,*[66] *Dholidas* v. *Fulchand,*[67] *Hermann* v. *Charlesworth,*[68] Devarayan v. *Muthuraman*[69] and *Alang Kangkong*[70] were all cited in support of the proposition by the learned counsel.

[65] *Supra.*

[66] (1909) I.L.R. 32 Mad. 185.

[67] (1897) I.L.R. 22 Bom. 658.

[68] [1905] 2 K.B. 120.

[69] (1914) I.L.R. 37 Mad. 393.

[70] *Supra.*

Good J. in refusing to accept this argument of counsel held:

> There is a fundamental distinction between these cases and the present case in that none in them was an action for damages for breach of promise of marriage. They were cases in which an action was brought for the recovery of a sum of money, and the actions were not brought by a party to be a betrothal which had been broken off but a person having a financial interest either in the marriage taking place or in the failure of the marriage to take place, and nowhere in any of the authorities to which counsel for the defendants referred me to was it held that contract to marry was rendered void by the addition of a penalty caluse to come into operation in the event of the failure of either party to fulfil the promise to marry. It was the contract to pay money upon the happening or non-happending of the marriage that was held to be void, and the position in the present case (though I am not called upon to decide it) might well have been different if the second plaintiff was suing the first defendant or his father, the second defendant, on the penalty clause in the agreement for the agreed damages or penalty (whichever it may be) of $5,000. This, however, is not the case.[71]

It is submitted that the Judge was correct in holding that the agreement in *Rajeswary's* case was not in the nature of a marriage brocage. The action brought did not have any of the trappings of a brocage agreement. However, as pointed out by the learned Judge, if the action was brought by the father of plaintiff against the defendant or his father for agreeing to give his daughter in marriage then it may be termed as a brocage agreement. As it was, the action was brought by the plaintiff against the defendant for breach of promise of marriage.

In contrast to the case of *Alang Kangkong,* the Court in *Karpen Tandil* v. *Karpen,*[72] taking into consideration Hindu customs and traditions, gave effect to an agreement whereby the defendant in consideration of $70 paid to him by the plaintiff agreed to give the defendant's two daughters in marriage to the plaintiff's two sons.

Though English law was applicable to Penang at the time the case was decided, Cox C.J. refused to give effect to the strict

[71] (1958) 3 M.C. 178, 196.

[72] (1895) 3 S.S.L.R. 58.

application of the English law. His Lordship held that the law of England, as applicable was subject to modification by local customs.

The learned Chief Justice said:

> The strict application of English law to this case would work unjustly and expressively, and I see no reason why the Hindoo custom and usage disclosed in this case should not be recognised.[73]

This approach by Cox C.J. is certainly a laudable one. Though English law was applicable to the case in issue, his Lordship was sensitive to local customs and usages and took these into consideration rather than apply the English law indiscriminately.

Situation V: A enters into an agreement with a professional matrimonial agent, B, that in the event of a marriage between A and any person brought about through the introduction by B, A would pay B a sum of money.

Contrary to popular belief, matrimonial agencies, or as they are now commonly called marriage bureaux, are not a recent development. These matrimonial agencies have been in existence for well over a hundred and fifty years. Among the earlier cases in which the validity of an agreement entered into with such an agency was considered is the case of *King* v. *Burr* (1810).[74] The plaintiff advertised in the newspapers as follows:

> LADIES — The delicate and restrained condition which custom imposes on females, subjects them to great disadvantages. — Mrs. Morris offers to remove them. Ladies or Gentlemen who have formed predilections, may be assisted in obtaining the objects of their affections; and those who are unengaged may be immediately introduced to suitable persons; but she will not assist applications in any marriage, if their characters are not irreproachable, and their fortunes considerable and independent. Apply, or address (post paid) at the bow-window next to Margaret Chapel, Margaret-Street, Cavendish-square. Ladies, who require it, may be waited upon at their own houses.[75]

The defendant desirous to enter into a marriage applied to Mrs. Morris for her assistance. The defendant agreed to pay the

[73] At page 61.

[74] (1810) 3 Mer. 693; 36 E.R. 266.

[75] Extracted from (1910) 26 L.Q.R. 308.

retaining fee of £20 and also £3,000 in the event of his marriage to a woman introduced to him by Mrs. Morris. Mrs. Morris made arrangement with the plaintiff to arrange a meeting between a lady and the defendant. The plaintiff then sued the defendant for the expenses incurred in making the necessary arrangement. Lord Eldon upon dismissing the action, remarked:

> Surely, Mr. Hart, (counsel for the plaintiff) you would not have a Court of Equity lend itself to such a transaction as this, to assist the Plaintiff in giving ostentatious entertainments to females, for the purpose of introducing the Defendant to a marriage. He may bring his action in a Court of Law against this Defendant — this General — and he may sustain it if he can; but he shall have no assistance from me. Bill dismissed.[76]

It should be noted that the action was not brought by the broker, Mrs. Morris, and the validity of that agreement itself was not determined: even if it had been, judging from the reaction of Lord Eldon, the decision would have been obvious.

However, in the case of *Hermann* v. *Charlesworth*,[77] the validity of such an agreement was considered in detail. The facts of the case are as folows: The defendant was the proprietor of a paper known as The Matrimonial Post and Fashionable Marriage Advertiser. The plaintiff, in consequence of an advertisement, entered into an agreement with the defendant that in consideration of the defendant introducing to the plaintiff a gentleman with a view to marriage, she should pay £52 as service fees of which £47 would be refunded if no marriage took place within 9 months; and in the event of a marriage, she would pay a further sum of £250. The plaintiff paid the £52 and she was introduced to several gentlemen but no marriage took place. Four months later, the plaintiff brought an action to recover back the £52. The county court judge held that the contract was a marriage brocage contract and consequently illegal and void but since the parties were not *in pari delicto* and since the plaintiff had repudiated the contract before the illegal

[76] See (1910) 26 L.Q.R. 308, 310. The report in 36 E.R. 266 is rather brief, but a fuller report was published by The Times, August 11, 1810.

[77] [1905] 1 K.B. 24 (Divisional Court), [1905] 2 K.B. 123 (Court of Appeal).

purpose was carried into effect, she was entitled to recover the money paid. On appeal to the Divisional Court by the defendant, Kennedy J., held that the agreement was not illegal. He held that this agreement was not a marriage brocage agreement as there was no promise to procure for the plaintiff any particular person as her husband. Accordingly judgment was given to the defendant.

The Court of Appeal, reversed this finding and held that the agreement was a marriage brocage agreement, irrespective of the fact that the promise was not to procure a marriage with a specified person. The Court then held that though the contract was illegal, money paid under the contract could be recovered back by the person who paid it although the other party had incurred expenses.[78]

Therefore *Hermann* v. *Charlesworth* finally established the rule that an agreement with a marriage bureau is a marriage brocage agreement and is therefore illegal. A similar view has also been adopted by the courts in the United States.[79] However, there has been no decision by the Indian nor the Malaysian Courts with respect to this particular type of marriage brocage.

The Courts, therefore have stated a number of reasons for invalidating marriage brocage agreements. Some of these reasons would now be examined in detail.

(a) Lack of Free Consent

The Courts have often said that there should be a free choice in marriage and that the involvement of a broker necessarily implied that the consent of the parties had not been freely given.[80] Though it may be true that in certain cases, the broker has been in a position to exert some influence over one of the parties and that in such cases there may be traces of lack of free consent, one cannot fully appreciate the reasoning of the Courts that in every case there is a lack of free consent. Rather than

[78]The aspect dealing with recovety of money would be dealt with in detail in Part II of this paper.

[79]See *Duval* v. *Wellman* (1891) 124 N.Y. 156, noted in 72 A.L.R. 1118.

[80]See *Hamilton* v. *Lord Mohun, Supra.*

classify all such agreements to be lacking free consent, it would be more appropriate for the courts to decide each case on its merits and decide whether undue influence, coercion or fraud had been employed. The Courts have the power to set aside agreements in which free consent is lacking. Section 14 of the Contracts Act spells out the circumstances under which a consent is deemed not to be free. Other provisions of the Act set out the effect of such agreements. Merely to presume that there is a lack of free consent would amount to prejudging the issue.

The reasoning of the Courts in some of the earlier decisions may be explained by the attitude taken by the judges in these cases towards marriages generally. The judges in these cases with an ecclesiatical background have perceived marriage from a Christian view point. The Christian concept of marriage being a 'voluntary union of a man and woman' appears to have played a great influencing role. But this view is in fact no longer completely acceptable in a more secular community. In any case, in communities where the personal law are not based on Christian values but on other religiuos beliefs, for example in communities where the personal law is Hindu law or Muslim law such reasoning cannot apply.

Furthermore, during the Victorian era in England and in India and Malaysia, it was a common practice for most marriages to be arranged. Parents were under a social duty to arrange a suitable marriage for their children. In India and Malaysia, it was the accepted norm amongst certain communities that all marriages should be arranged. In fact, any marriage entered into without the approval of the parents or which was not arranged by the parents resulted in a social stigma being attached to such 'romantic' marriages. As pointed out by the Court in *Purshotamdas* v. *Purshotamdas*,[81] marriages of Hindu children were regarded as 'unacceptable' amongst the immediate community. Furthermore, contracts were made by parents, and the children had no say in them. Parents agreed to the marriage of their children only if a suitable marriage was brought about.

[81] (1896) I.L.R. 21 Bom. 23.

The social standing, education, caste and character of the prospective spouse was often scrutinised by the parents. It was always felt that they were the best judges for a suitable marriage rather than the children themselves. It was only in extremely rare cases that parents are motivated by their own personal gain from the marriage.

It was the failure of the Courts to appreciate these local customs and traditions which had led them to be hostile towards such marriages, especially amongst communities which adhered to these traditions. A typical example of the insensitivity of the judges is highlighted by the attitude taken by the *Pennyslavania Supreme Court in Braum* v. *Potter Title & T. Co.*[82] Simpson J., influenced by western values castigated such communities which practised such customs as 'savage peoples' or 'ignorant habitants of other less advanced lands'.

It is unfortunate that most judges in India and Malaysia have also been insensitive to such local customs and values. In India, inspite of a great deal of resistance, the Indian Courts appear to have been greatly influenced by the English courts and have applied in a number of Indian cases English standards of morality and have held such agreements to be against public policy and therefore void.[83] The soundness of some of these decisions appears to be doubtful. It would appear that the Indian judges have been too biased towards the English standard of values and have felt that in spite of basic differences between the two countries, English rules should apply. Some of these decisions are rather astonishing especially when the courts have correctly pointed out the difference between the two jurisdictions and have yet insisted upon applying the English rules. One such case is *Pitamber Ratansi* v. *Jagjuian Hansraj*,[84] when Scott J. observed:

> Although custom and local law in this country may be defective in the matter of marriage, that is no good reason why an additional evil should be engrafted upon them.[85]

[82] 301 Pa. 365; 72 A.L.R. 1109.

[83] See cases discussed above.

[84] (1888) I.L.R. 13 Bom. 131.

[85] Ibid at page 137.

Again in the case of *Vaithyanathan* v. *Gangarazu*,[86] Justice Muthusani Jyer said:

> It is true that there are child marriages in India, but the prevalence of such marriages appears to me to require, rather than exclude the operation of the rule designed to prevent the possibility of deceit on parents, as well as to either party to the marriage . . . I see no good reason why an *additional evil* should be engrafted on this country by ignoring the rule of public policy.[87]

The observations of these two judges are typical of many other Indian judges. This approach of the Indian courts is yet another illustration of strait-jacket application of the rules of the 'motherland' without a proper understanding of the differences in the social pattern of the two countries. Though it is true that the Contract Act of India was largely based on the English common law, it does not necessarily follow that the seeds of the common law of England were imported via the Contract Act and sowed on the Indian soil to grow into an identical species to that in England. The Contract Act is a hybrid which was specially nurtured to suit the special climate and environment of India. Such was the intention of the drafters of the Indian Contract Act. If this were not so, it may well have been an easier task for the drafters to have transplanted the whole of the common law of England to India instead of cultivating a special hybrid in the nature of the Indian Contract Act.

In any case, even in countries where arranged marriages are still practised, the nature of such a practice is dissimilar: the parents approach the broker to arrange the marriage for their children. When a suitable partner is found, the prospective parties are informed and an introduction is brought about. If neither of the parties agrees to the choice, he or she as the case may be, may refuse to go on with the marriage. There is no pressure placed on either party to go on with the marriage. Therefore, it is untrue to say that parties to an arranged marriage do not give their free consent. It is only in certain extreme cases that parties do not have an introduction and

[86](1893) I.L.R. 13 Bom. 131.

[87]Ibid at page 10. Emphasis added.

agree to marry any person whom the parents consider to be a suitable choice. The attitude of such parties is that they would for 'better or worse' go through the marriage which in their parents' judgment would be a suitable one.

(b) Unhappy Marriages

The Courts have also said a marriage brought about through the assistance of a broker may lead to many unhappy marriages.[88] However, it is submitted that the basis of this reasoning of the Courts is quite unfounded. In the absence of any evidence to establish such a finding, the courts should not conjecture such a proposition. In fact, a random survey carried out by the writer indicates that the number of unhappy marriages were negligible compared to those which have resulted in a happy union. The number of divorces amongst parties to an arranged marriage were no higher than those by parties to a romantic marriage. Even sociologists admit that there are no evidence to support the suggestion that romantic marriages are superior to arranged marriages. The success or otherwise of any marriage often depends on the attitude of the parties to the marriage. As pointed out by certain sociologists 'the desirability of an arranged marriage depends on some degree on the opinion of the individual regarding the purpose of the marriage.[89]

Therefore in the absence of any conclusive proof, this hypothesis of the Courts is unacceptable.

(c) Protection of Women

There have been major changes in the legal status of women in the twentieth century. The wife's position has improved greatly since Blackstone described the common law as merging the legal personalities of husband and wife into one which was the husband. Restrictions on the wife's ability to contract and to sue have been removed and she has been given control of her own property. Thus the danger envisaged by the seventeeth and

[88] See *Hall v. Potter, supra.*

[89] Slater and Woodside, *Patterns of Marriage,* referred to in Powell, 1953 Current Legal Problems.

eighteenth century courts of marriages arranged between wealthy wives and fortune-hunting husbands no longer exist.[90] present.[90]

(d) Public Policy

The Courts, have saddled on the 'unruly horse' of public policy to strike at marriage brocage agreements. This has been the most potent reason for invalidating these agreements. The reasons examined above are merely elaborations of this main reason. Though some of the early English cases do justify the interference of the Courts, yet some of these reasons given by the Courts for so interfering are no longer convincing.

The Indian and Malaysian decisions indicate that the Judges in these countries have not been able to hold firmly to the reins and have allowed the 'unruly horse' to ride them over their legitimate boundaries across the Continents. The Judges have not been able to unblink the unruly horse to allow them to appreciate the local customs and traditions in these communities. Time and again it has been emphasised that public policy should not be invoked readily unless 'the harm to the public is substantially incontestable"[91] The decisions of the Indian and the Malaysian Courts have been to follow the concept of public policy and understood under English law without taking into consideration the different conditions prevailing in these countries. Though the practice of arranged marriages may appear to be distasteful, it has always been generally accepted in these countries. Therefore, to apply the standard of public policy to local conditions is not desirable. The words of Sir Benson Maxwell in the case of *Choa Choon Neoh* v. *Spottiswoode*,[92] appears to be a timely reminder of the consequences of following the English rules:

> ... in questions of marriage and divorce it would be impossible to

[90] See Blackstone, *Commentaries on the Laws of England*, 7th Ed. Oxford, 1775 Book 1 at page 445; R.H. Graveson and F.R. Crane (Editors), *A Century of Family Law*, London, Sweet & Maxwell, 1957 and the Married Women's Property Acts 1870–1882 which began the process of legal emancipation of married women.

[91] *Fender v. St. John-Midmay* [1938] A.C. 1, 12.

[92] (1869) 1 Ky. 216.

> apply our law to Mohamedans, Hindoo and the Buddhists, without the most absurd and intolerable consequences . . .[93]

Modern Marriage Bureaux

In recent years, there has been a growth of marriage bureaux in England, Malaysia and Singapore. Hundreds of persons have resorted to these bureaux to seek their assistance in finding a suitable partner in marriage. The types of persons who resort to such assistance are varied. The proprietress of a leading marriage bureau in London revealed that applicants come from all walks of life:

> They have been of all ages, ranging from eighteen to eighty-six, they come from all classes and all professions, varying from plumbers to peers, from charladies to film stars. My clients include four members of Parliament, five grocers, two ploughmen, three shoemakers, two opera singers, thirty-six lawyers, eleven midwives, fifteen surgeons, scores of retired colonels, dozens of hospital nurses, six bus drivers, dentists, policewomen, doctors, clergymen, headmasters and headmistresses and owners of schools, several well-known ex-debs, and a few gentlemen, of leisure able to live on a private income. I've had an ex-nun, a professional footballer, a lady undertaker, one of our most famous actresses, a prominent diplomat, several hundred business women who are directors of their own firms, explorers and kennel maids.[94]

Various reasons may be attributed to the popularity of such agencies. One of the reasons is that 'the lack of opportunities to make friends, the smallness of their social circles, and the shyness to take the initiative. . .'[95] Furthermore, sociologists agree that opportunities to meet people in a congenial atmosphere in large cities is rather remote since people in such urban environment tend to be more impersonal.

> It seems that the higher the social level the more difficult to find a marriage partner. There is so little home-entertaining and no longer the big families with the brothers and sisters and cousins to provide the nucleus of a wide social circle. . . It is largely due to this great disruption in social life that people come to the bureau. Men come to

[93] Ibid at page 221.

[94] Ms. Heather Jenner of Marriage Bureau (Heather Jenner) Ltd., 124 New Bond Street, London. See also Jenner, *Marriage Is My Business*, 2nd Ed. (1954) Kimber, London.

[95] Tan Chung Lee 'The Matchmakers', The Malay Mail, February 22, 1973.

use because, although they are always out and about, they have not the opportunity of meeting the sort of woman they want to marry. However popular and socially successful a person may be, he may still feel bitterly lonely without the right marriage partner.[96]

The pressure society puts upon unmarried and divorced persons also makes them resort to such agencies for assistance.[97]

Can a case be made out in the modern context for the recognition of these bureaux by the Courts. Should not the Courts reconsider their earlier views on the validity of marriage brocage agreements.

It is submitted that a case may be made in favour of recognising agreements made with marriage bureaux. The Courts' distaste for marriage brocage has been stated on various grounds. Though it is generally said that such agreements are against public policy, the precise aspect of the policy which is being impugned by such agreements have not been spelt out by the Courts. The reasons given by the Courts have been that there should be a free choice of marriage and that the interference of a broker necessarily implies that the consent by one of the parties to the agreement had not been freely given. The Courts have also taken upon themselves the duty to protect women of wealth from suitors who were fortune hunters or from wiles of the matchmaker. The Courts have also stated that the main mischief which they have always sought to strike at is the pecuniary interest of the broker in bringing about the marriage rather than the suitability of the partners. The Courts have always regarded the broker as a 'harmful intruder' to any marriage. It should also be pointed out that in certain other cases where the promise made to the broker had been held to be unenforceable, the Courts have been influenced by certain other factors of the case and had not invalidiated the agreement on the sole ground that it was a marriage brocage agreement.[98]

[96] Jenner at page 58.

[97] See generally Goode, W.J., *Women in Divorce,* (The Free Press, 1965) and Hart, N. *When Marriage Ends: A Study in Status Passage,* (Tavistock, 1976).

[98] For example on the grounds of Fraud or misrepresentation or on the ground that the marriage arranged was an unsuitable marriage.

As pointed out earlier, one cannot fully agree with these reasonings. The modern marriage bureau does not undertake to find a spouse of 'good fortune' or of 'considerable fortune' but merely undertake to find a 'suitable partner' who is compatible with the applicant. Most bureaux have personel who through their experience have become experts in the field of matching people with suitable qualities. This in turn leads to a successful marriage. To quote Powell again, 'there may be evidence for the possibility that selective mating leads to the best marriage.'[99] He then goes on to give an illustration:

> Suppose that Jack requires in his life qualities *p*, *q*, *r* and *s*. He can, of course, take a chance that the wife he finds may have these qualities. But it is just as possible that she will have qualities *p*, *q*, *t* and *y*, and *t* and *y* may be the qualities which Jack dislikes most in his Jill. It would seem to be not unreasonable that Jack should be able to pay someone who is an expert in classifying the qualities of his clients and who would be able to supply a number of Jills with the right qualities for Jack to make his selection.[100]

It must be emphasised that modern bureaux do not vouch for all the qualities in a particular person. They merely recommend that in their opinion a particular person has most of the qualities that the applicant is seeking. After the introduction, it is for the applicant to determine whether he finds the person suitable to him. In other words, the onus is on the applicant to determine the qualities of the person introduced. In such a case there would be no fear of the broker exaggerating the qualities of any of the parties or of the broker practising any deception or fraud.

With regard to the attitude of the Courts towards protection of women of wealth and young women, it is true that in some early cases it was common for the applicant to approach a broker and seek his assistance in arranging a marriage between the applicant and a particular woman 'of large fortune' or 'of considerable wealth'. The broker was then promised a large fee if he succeeded in bringing about the marriage. It was then the

[99](1953) 13 C.L.P. 254, 273. See also Jenner at page 11: 'I Have arranged just over 5,000 marriages, and as far as we know, only three of them have resulted in divorce'.

[100]*Ibid.*

common practice of the broker to use all possible means, even to the extent of practising fraud or deception on the other party to agree to the match. In fact, such was the position in *Drury* v. *Hooke*,[101] and in *Cressey* v. *Crooke*.[102] In this latter case, the plaintiff agreed with the defendant, a broker, that if he could get him access to a certain woman who was a rich widow he would give him a certain sum of money if he married her. Again in the Scottish case of *Buchen (Earl)* v. *Cowan*,[102] the Earl promised the broker $1,000 for his assistance in procuring for the Earl a rich English lady in marriage. It was therefore, not surprising that the courts in these cases refused to enforce such agreements. As pointed out earlier, whenever there was any element of fraud, deception or coercion, the courts have refused to enforce such agreements.

But this practice is uncommon nowadays since an applicant who approaches the marriage bureaux for assistance does not request the procurement of a marriage to a specified wealthy person. As stated above, the applicant merely requests introduction to a 'suitable' partner. As for the third reason stated by the courts, that is the pecuniary interest of the broker in bringing about the marriage rather than the suitability of the partners, it may be argued that this reason is no longer convincing: — though a study of the early cases would certainly reveal that this fear of the courts was not entirely baseless. The brokers in most of the cases did in fact charge very high fees for their services. In *Goldsmiths* v. *Bruning*,[103] the broker's fee was a hundred guineas, and in *Glanvill* vv. *Jennings*,[104] a bond for the sum of four hundred pounds was promised, whereas in the leading case of *Hall and Keene* v. *Potter*,[105] an exorbitant fee to the value of one thousand pounds was promised. It is therefore, not surprising that the courts in these cases should have been cautious in enforcing the agreements: it was certainly against

[101] (1686) 22 E.R. 900.

[102] *Supra.*

[103] *Supra.*

[104] (1669) 21 E.R. 807.

[105] (1695) 83 E.R. 756; 1 E.R. 52.

public policy for persons to enter into marriage brocage agreements with brokers who exploited the parties and who charged unrealistic fees for their services. However, in sharp contrast to such a practice, the practice of the modern marriage bureaux is different. The primary interest of most of the marriage bureaux in existence today is not solely pecuniary but rather to provide a service to the general public who may seek their assistance in bringing about a marriage. Marriage bureaux now only charge nominal fees for their services. The leading bureau in London charges seventeen pounds fifty for registration and thirty-five pounds in the event of marriage. If one takes into consideration the administrative cost of running a bureau together with the overhead charges, these charges represent a reasonable sum for the services provided. It would therefore appear, in the light of these facts that the fear which the courts had always harboured concerning the broker is hardly justifiable now.

CONCLUSION

In view of the difference between a modern marriage bureaux and the one which were in existence over a hundred years ago, it is submitted that there is a strong case for the recognition of marriage bureaux. The reasons which the Courts have stated in these earlier cases appear to be no longer convincing in present times. In fact, it may even be argued from the sociological view point that the modern marriage bureaux provide some beneficial service to the general public and that public interest is not really being affected. In fact, on the contrary, public interest may require the existence of these bureau.

It may also be pointed out that by recognising marriage bureaux, the Courts may be able to keep an effective check on the brokers. In cases where the Courts consider that excessive fees have been charged or that an unsuitable marriage had been arranged through fraud, misrepresentation or undue influence, they should be able to set aside the agreement or to allow a claim for a reasonable sum only. The continued non-recognition of these agencies would only encourage malpractices by the agents without granting any protection to the public. Leading writers on the law of contract have also recently argued that marriage brocage agreements should not he held to be invalid in

every case.' Treitel points out that 'the harmful tendencies of such contract are by no means self-evident.' Atiyah in his book "An Introduction to the Law of Contract", makes the following comments:

> Marriage-brokage contracts have long been held to be void, but as it is hard to see what is wrong with these in modern times it is a little difficult to know where to classify them. They are generally placed under the head of contracts 'prejudicial to the marriage status', but one must confess that this seems very artificial today. Indeed, many of these contracts as made by perfectly respectable marriage bureaux whose object, albeit for gain, is to introduce suitable persons to one another with a view to matrimony. Although such a method of meeting one's life partner may not appeal to the majority of the population, it seems somewhat unnecessary to condemn all such contacts as void.[106]

(To be continued in the next issue)

Visu Sinnadurai*

[106] 2nd Ed. (1971) at page 205

*Associate Professor, Faculty of Law, University of Malaya.

LEGAL EDUCATION AND SOCIAL JUSTICE*

In Malaysia, as in most evolving democracies, a massive effort at social engineering is underway. Law and legal institutions are being used not only to redefine relations, reorient expectations, redistribute wealth and opportunities, they are also being employed vigorously to control and dissipate the inevitable tensions and conflicts that result in any effort to bring about change or to force the pace of change.

In the background of a Malaysian society in a state of flux, what shoud be the aims of legal education in this country?

No simple answer to this question is possible because the goals of legal education are as broad and diverse as the aims of education itself- and those are to produce mature and responsible students who are imbibed with a desire for the adventure of ideas and who are receptive to beauty and humane feeling[1]. In addition to this general goal, legal education has some specific aims which can be outlined as follows:

Firstly, the traditional aim of producing legal scholars who are just as much "legal technicians"[2] — those who have a qualification which is academic as well as professional.

Secondly, to prepare students who are acquainted with basic procedural and substantive aspects of the law while having an equal appreciation of the impact of law on society and society on law.

Thirdly, to develop the law students' ability to think clearly, precisely and logically and to communicate thought effectively.

*Adapted from a speech at a Colloquium on 'Legal Education and Human Development' at he Faculty of Law, University of Malaya, 11th December 1979.

[1] Adapted from Alfred North Whitehead, *Aims of Education*, Macmillan, New York, 1949, p. 1.

[2] The term is borrowed from Lee Hon Phun, "The Law Student In His Legal Environment". *NERACA*, 1972/73 vol. 1, p. 27.