indorsement, is now in a worse position than if he had been a transferor by delivery. Section 5 (2) of the Act, preserving in relation to bills of exchange, &c., the Common Law rules, save in so far as they are inconsistent with the Act, may be noticed in passing.

In a sale by description of goods (which in the "Goods Act 1915" does not include things in action) there is an implied condition that the goods shall correspond with the description, and, in the absence of special circumstances, an implied condition that the seller has a right to sell—"Goods Act 1915," secs. 18 and 17. Before the enactment of either the "Bills of Exchange Act" or the "Sale of Goods Act" in England the rule relating to commercial paper sold without indorsement or without express assumption of liability on the paper itself, is stated in *Meyer v. Richards*, 163 U.S. at p. 405 *et seq.*, where the English authorities are conveniently collected and examined. It is "that the contract of sale and the obligations "which arise from it as between vendor and vendee "are prescribed by the Common Law relating to the "sale of goods and chattels;" and it is stated that in such a sale "the obligation of the vendor is not "restricted to the mere question of forgery *vel non*, "but whether he has delivered the thing which he "contracted to sell, the rule being designated in "England as a condition of the principal contract." The rules on the subject are now expressed in the "Bills of Exchange Act," in the provision relating to a transfer by delivery without indorsement, but in no other case. Before the Act there seems to have been some doubt whether a transfer by delivery should be taken to warrant title—see Byles on *Bills* (11th ed.) (1874), p. 161; but the Act has now settled the question. There is in ordinary circumstances no need to extend the rule further, because in the case of full negotiability an indorser, or even a transferor by delivery, is able to give his transferee a title, which can be enforced in appropriate circumstances by an action on the bill, and if he wishes further remedies he must provide for them. But what is to happen when the Legislature enacts that no better title can be given, as in the case of not negotiable crossed cheques? It would seem that in such a case there should be implied obligations similar to those applicable to a sale of ordinary goods; or, to put it in other words, that there should now be implied a warranty that the bill is what it purports to be, and that the transferor, though he is also an indorser, has the right to transfer it, or at least the latter. The need of warranty as to the right to transfer is really greater than in the case of a transfer by delivery of a bill fully negotiable.

Now, in this case, the bill was neither what it purported to be, since it did not bear F. Daldy's indorsement, though, being a non-existing person, this might not be important, nor had the defendant any right to transfer it. It seems to me, that as in *Burchfield v. Moore*, 23 L.J. Q.B. 261, the plaintiff has a remedy against the defendant, and a similar remedy may be resorted to by one person after another, till the party guilty of the fraud is reached. Any other conclusion would, I think, be against common justice. The kind of warranty that should be implied in a case like the present may be said to be settled by experience so as to have become, in the absence of special circumstances, almost a rule of law; but if I had to go first hand to the facts I think the same warranty should be implied on the basis that if the precise question now arising had been raised at the time, both parties would have inevitably agreed that there would be such a warranty or else the cheque would not be cashed. It follows, therefore, that the bank is entitled to recover on the breach of the warranty the amount paid by it to James Moore and Co. Limited. The action is for money received, and it happens in this case that the face value of the cheque, the amount received by defendant, and the amount paid by plaintiff to settle an unanswerable claim, are one and the same. But this might not always be so, and I think in this case, that though possibly an action for money received might be sustained, the action may be more safely grounded on a breach of warranty, and that as all the facts are set out I should give the appropriate relief, which makes merely the difference that the claim for interest is excluded. I am not prepared to say there was a total failure of consideration so as to justify a claim on that ground for money received. The plaintiff had the defendant's signature, which might have formed the basis of an action on the bill if the cheque had not been honoured.

Judgment for the plaintiff for £362 8s. 7d., with costs, including pleadings and interrogatories. Stay of proceedings for fourteen days.

Judgment for the plaintiff for the amount of the cheques.

[Solicitors—For the plaintiff, Smith and Emmerton; for the defendant, Arthur Phillips, Pearce and Just.]

J. W. S. V.

High Court of Australia.

FULL COURT — (Knox, C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke, JJ.) (Sydney.) — Nov. 13, 14, 15, 16; Dec. 10, 1923.

THE KING v. BOSTON and Others.

Criminal law — Criminal conspiracy — Member of Parliament—Payment to and receipt of money by —Use of official position to influence Minister— Public mischief — "Closer Settlement Promotion Act 1910" *(N.S.W.), secs.* 4, 7, 23—"*The Constitution Act* 1902" *(N.S.W.), secs.* 3, 5 *and* 32.

The payment of money to and the receipt of money by a member of Parliament to induce him to use his

official position, whether inside or outside Parliament, for the purpose of influencing or putting pressure on a Minister or other officer of the Crown to enter into or carry out a transaction involving payment of money out of public funds, are acts tending to the public mischief, and an agreement or combination to do such acts amounts to a criminal offence.

B, *H* and *M* were charged by criminal information in the Supreme Court of New South Wales with conspiracy, the conspiracy alleged consisting of an agreement between the defendants and other persons that money should be corruptly paid by the defendants *H* and *M* to the defendant *B* in his official capacity as a member of the Legislative Assembly of New South Wales, and corruptly accepted by the defendant *B* in that capacity, as an inducement to the defendant *B*, in violation of his official duty, to use his position as such member (*a*) to secure the acquisition by the Government of New South Wales of certain estates and the payment for such estates out of the public funds of the said State; and (*b*) to put pressure on the Minister for Lands and other officers of the Crown to acquire and pay for such estates. The defendants demurred *ore tenus* to the information, and judgment was given for them.—

Held (Gavan Duffy and Starke, JJ., *dissentientibus*), that the acts charged constituted a criminal conspiracy, and the defendants must answer over to the charge.

Judgment of the Supreme Court of New South Wales (Ferguson, J.) discharged.

MOTION for special leave to appeal, and appeal from the Supreme Court of New South Wales.

This was an application by the Attorney-General for New South Wales for special leave to appeal against the judgment of the Supreme Court of New South Wales (Ferguson, J.), upholding a demurrer *ore tenus* by the defendants to the second count of a criminal information filed against them by the said Attorney-General. On the first count of the information defendants were acquitted, by direction of the said Justice. The second count is fully set out in the judgment of Knox, C.J. The Court heard argument on the application by the Attorney-General upon the whole matter as if special leave to appeal had been given, reserving to the defendants their right to argue that the case was not one in which special leave should be given.

In his judgment Ferguson, J., said (*inter alia*)—

"The case for the Crown, broadly stated, is that a member of Parliament has no right to accept money to induce him to use his position as such member to put pressure upon the Government, and that any agreement between him and other people that money should be given him for that purpose is a criminal conspiracy. . . It is admitted that if the defendant Boston had been a public officer in the ordinary sense of the term, that is to say, if he had been a Minister of the Crown, a member of the judiciary, or a member of the civil service, then any payment of money to him to influence him in the discharge of his official duties would have been bribery, a criminal offence, and any agreement to do it would have been criminal conspiracy. I do not think it is denied that if money had been given to him, and accepted by him with the object of influencing his vote in Parliament, that, too, would have been a criminal offence. It is no offence for any person to endeavour to induce a Minister of the Crown to exercise his discretion in any matter which comes before him; it is no offence for a member of Parliament to do so. In fact, I think it might be inferred from some of the authorities that a member of Parliament has something in the nature of a duty to endeavour, outside of Parliament as well as inside, to keep the Executive on the right track, and to induce them to do what he thinks it is their duty to do. But if a member of Parliament agrees to accept money to influence him in the discharge of that duty, or quasi duty, then, on the authority of the decision of the High Court in *Wilkinson v. Osborne*, the agreement is void and unenforceable, and that for reasons which are very clearly set out in that case, and which appeal very strongly to one's intelligence. The evil that may follow from conduct of that kind is very obvious. If a member of Parliament may accept money to put pressure upon Ministers, it is a very short step from that to accepting money to influence his vote in the House when he is exercising his legislative functions, and one thing might very easily be a cloak for the other. . . But it is a long step from saying that a contract is void to saying it is a criminal conspiracy. I have sought in vain to find in the cases some test by which one could decide when the dividing line has been passed, when that which was not a crime yesterday has become a crime to-day, and what other element than its mischievous tendency must be present in order to make it a crime. . . I do not think that the Court, sitting to determine whether or not facts constitute a criminal conspiracy at Common Law, apart from any Statute, should adopt any looser rule than that. It cannot hold that an act constitutes an offence unless it is quite clear that it is an offence, and perhaps there is no class of case in which the duty of careful scrutiny is more important than in cases of conspiracy.

"The learned author of Kenny's *Outline of Criminal Law*, p. 291, speaking of the vagueness of the definition of one class of conspiracy, that is, conspiracy to do acts which are not in themselves breaches of the law, but are in some way extremely injurious to the public, says 'this vagueness renders it possible for Judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes by declaring this purpose to be unlawful.' Owing to this elasticity in the definition of the crime, and also to the unusually wide range of evidence by which indictments for it may be supported, there is much justification for the language used by Fitzgerald, J., in reference to it in the Irish State trials in 1867—'The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits.' For, in the prudent words of the greatest of American Judges—'It is more safe

that punishment should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate, than that it should be inflicted under the influence of those passions which a trial seldom fails to excite, and which a flexible definition of the crime, or the construction that would render it flexible, might bring into operation.'

"The difficulty I have felt in coming to a decision has been enhanced by the very strong feeling I have that, if what is charged here is not an offence, it should be an offence, but it seems to me that it is not for me to declare it to be an offence unless the law quite clearly makes it so.

"There will be judgment on the first count for the Crown, and on the second count for the defendants."

Bavin (Attorney-General for New South Wales), *Blacket, K.C.*, and *Hutchinson* for the appellant.

Shand, K.C., S. A. Thompson and *E. M. Mitchell* for the respondent Mitchelmore.

Mack, K.C., and *McTiernan* for the respondents Boston and Harrison.

The following cases were referred to during argument:—*Henly v. Mayor of Lyme*, 5 Bing. 107; *St. Ives Case*, 2 Doug. El. Cas. at 400; *R. v. Vaughan*, 4 Bur. 2494 at 2500; *R. v. Pitt*, 3 Bur. 1335 at 1338; *R. v. Plympton*, 2 Ld. Raym. 1377; *R. v. White*, 13 S.C.R. (N.S.W.) 322; *R. v. Whitaker*, (1914) 3 K.B. 1283 at 1296, 1899; *Wilkinson v. Osborne*, 22 A.L.R. 57 at 62; *Horne and Barber*, 26 A.L.R. 114; *Wood v. Little*, 27 A.L.R. 400; *Osborne v. Amalgamated Society of Railway Servants*, (1909) 1 Ch. 163, at 186, 196, (1910) A.C. 87 at 114; *Hovenden v. Millhoff*, 83 L.T. 41; *R. v. Brailsford*, (1905) 2 K.B. 730; *R. v. Porter*, (1910) 1 K.B. 369; *R. v. Parnell*, 14 Cox. C.C. 508 at 513, 519; *R. v. Rowlands*, 17 Q.B. 671 at 686; *Montefiore v. Menday Motor Components Co.*, (1918) 2 K.B. 241; *Attorney-General for Australia v. Adelaide Steamship Co.*, (1913) A.C. 781 at 797.

Cur. adv. vult.

The following judgments were given:—

KNOX, C.J.—A criminal information against W. J. Boston, J. A. Harrison and H. E. Mitchelmore was filed by the Attorney-General of New South Wales in the Supreme Court of that State. The second count of the information is in the words following, viz.:—
"And the said Attorney-General of our said Lord the "King, who prosecutes as aforesaid, further gives the "Court here to understand and be informed that the "said W. J. Boston, J. A. Harrison and H. E. Mitchel-"more, between the 1st day of January, 1914, and the "31st day of January, 1916, on divers days and at "divers times in the State of New South Wales, did "unlawfully conspire together and with persons whose "names are to the Attorney-General unknown, that "certain large sums of money should be corruptly "given by the said J. A. Harrison and H. E. Mitchel-"more and certain other persons, to the said W. J. "Boston in his official capacity, the said W. J. Boston "then being a public officer, to wit a member of the "Legislative Assembly of New South Wales, and that "the said sums of money should be corruptly accepted "by the said W. J. Boston in his said official capacity "as inducement to the said W. J. Boston, in violation "of his official duty, to do or omit to do certain acts, "to wit to use his position as such member to secure "the inspection of, acquisition and the payment in "cash for certain estates by the Government of the "State of New South Wales, and which said estates "were to be paid for out of the public funds of the "said State, and to put pressure upon the Minister "for Lands and other officers of the Crown to inspect, "acquire and to pay cash for certain estates, the said "payment to the said W. J. Boston being to the public "mischief of the subjects of our said Lord the King "in the State, and against the peace of our Sovereign "Lord the King, His Crown and Dignity."

Before the defendants were required to plead, their Counsel demurred *ore tenus* to the information, and, after argument, Ferguson, J., gave judgment in favour of the defendants on the second count. An application having been made by the Attorney-General for special leave to appeal against that judgment, the Court heard argument upon the whole matter as if special leave to appeal had been given reserving to the defendant their right to argue that the case was not one in which special leave should be given.

The conspiracy alleged consists of an agreement between the defendants and other persons, that money should be corruptly paid by the defendants Harrison and Mitchelmore to the defendant Boston in his official capacity as a member of the Legislative Assembly of New South Wales, and corruptly accepted by the defendant Boston in that capacity, as an inducement to the defendant Boston, in violation of his official duty, to use his position as such member (*a*) to secure the acquisition by the Government of New South Wales of certain estates, and the payment for such estates out of the public funds of the said State; and (*b*) to put pressure on the Minister for Lands and other officers of the Crown to acquire and pay for such estates.

It is not open to doubt, indeed it is admitted, that such an agreement as that alleged would be void and unenforceable as contrary to public policy—see *Wilkinson v. Osborne*, 22 A.L.R. 57 at pp. 60, 64. Nor is it disputed that an agreement to pay money to a member of Parliament in order to influence his vote in Parliament would amount to a criminal offence—*Reg. v. White*, 13 S.C.R. 322. But it is said that, consistently with the allegations in the information, the agreement between the defendants might have been to pay money to Boston to induce him to use his position exclusively outside Parliament, and not by vote or speech in the Assembly, and that the transaction in connection with which he was to use his position to put pressure on the Minister might, consistently with

the information, be one which would never come before Parliament, and which, in his opinion, and in the opinion of those who paid him, was highly beneficial to the State; that such an agreement would not amount to a criminal offence, and that consequently the information is bad. Assuming, without deciding, that the construction put on the words of the information is correct, I do not agree that an agreement such as that indicated would not amount to a criminal offence. It is settled law that an agreement or combination to do an act which tends to produce a public mischief, amounts to a criminal conspiracy. In such a case the tendency of the agreement is a conclusion of law, and there is no necessity for a finding by the jury of intent—*R. v. Porter*, (1910) 1 K.B. 369. It is for the Court to direct the jury whether the act agreed to be done may tend to the public mischief, and that is not in such a case an issue of fact on which evidence may be given—*R. v. Brailsford*, (1905) 2 K.B. at p. 747.

In my opinion, the payment of money to and the receipt of money by a member of Parliament to induce him to use his official position, whether inside or outside Parliament, for the purpose of influencing or putting pressure on a Minister or other officer of the Crown to enter into or carry out a transaction involving payment of money out of the public funds, are acts tending to the public mischief, and an agreement or combination to do such acts amounts to a criminal offence. From the point of view of tendency to public mischief I can see no substantial difference between paying money to a member to induce him to use his vote in Parliament in a particular direction, and paying him money to induce him to use his position as a member outside Parliament for the purpose of influencing or putting pressure on Ministers. A member of Parliament cannot divest his position of the right which it confers to take part in the proceedings of Parliament—he cannot "use his position as a "member of Parliament" stripped of its principal attribute. The influence which his position as a member of Parliament enables him to exert on a Minister has its source in his right to sit and vote in Parliament, and it would be idle to pretend that in discussions and negotiations between a Minister and a member that right or the power it confers on a member can be disregarded or ignored. The tenure of office of the Minister and his colleagues may be dependent on the vote or on the abstention from voting of an individual member, or even on his words or his silence in Parliament.

Payment of money to a member of Parliament to induce him to persuade, or influence, or put pressure on a Minister to carry out a particular transaction, tends to the public mischief in many ways, irrespective of whether the pressure is to be exercised by conduct inside or outside Parliament. It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve. It impairs his capacity to exercise a disinterested judgment on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him, instead of a representative of the people. In the words of Shearman, J., in *Montefiore v. Menday Motor Components Co.*, (1918) 2 K.B. at p. 246, it tends "to corrupt the "public service, and to bring into existence a class of "persons somewhat like those who in ancient times of "corrupt politics were described as 'carryers,' men "who undertook for money to get titles and honours "for those who agreed to pay them for their in-"fluence." It puts him in a position in which his private interests and his duty to his employer are or may be brought into conflict with his public duty, especially if the transaction involves payment of money out of the public funds, for it can hardly be suggested that he would regard himself as free to criticise or condemn in Parliament a transaction which he had agreed for valuable consideration to promote by using his influence with Ministers or public officers, even though he had been careful to stipulate that his agreement should not extend to his conduct in Parliament.

In the view I take of the matter, the question whether the transaction is in fact, or in the opinion of either or both of the parties to the agreement, beneficial to the public, is wholly immaterial; the only question being whether payment of money to a member of Parliament for the purpose alleged in the information is an act which tends to the public mischief, the tendency of such payment must be judged irrespective of the merits of the transaction intended to be promoted. It is, I think, also immaterial to consider whether the transaction which the member is paid to promote is one which will or will not necessarily or probably come before Parliament. Every transaction entered into by the Executive Government is open to criticism, and, if need be, to censure by appropriate action in Parliament, even if the Government has power to carry through the transaction without express Parliamentary authority. Especially is this the case where the transaction involves a payment out of the public funds.

It is clear from the judgment of the Court in *R. v. Porter* that there is a distinction between agreements which are merely unenforceable on the ground that they are contrary to public policy, and agreements which tend to produce a public mischief, and therefore amount to a criminal conspiracy. It may be that the line of demarcation between the two classes is difficult to define, and apparently it has never been judicially defined. But, however that may be, I can see no such difference between an agreement to buy a member's vote and an agreement to buy his influence with a Minister as would justify the conclusion that the line should be drawn between them. Admittedly

the one amounts to a criminal offence, and in my opinion so also does the other.

In my opinion, this is a case in which special leave to appeal should be given, and on special leave being given the appeal should be allowed, and the judgment of Ferguson, J., on the demurrer on the second count of the information should be discharged.

There should be judgment that the defendants answer over to the charge contained in that count.

ISAACS and RICH, JJ.—The question raised is not one of mere draftsmanship. That would be too trivial to occupy our attention. Nor is it whether the words of the second count are upon ordinary methods of construction where no criminality is involved, to be read as naturally including a promise by Boston contingently or otherwise to use his Parliamentary power for the benefit of Harrison and Mitchelmore. Nor is it even whether, if the words were to be so read, there would be sufficient to charge criminal liability. In that case, as Mr. Shand rightly said, there would be no controversy, since he did not challenge the principle of *R. v. White*, 13 S.C.R. (N.S.W.), p. 322, though he did not accede to all the reasoning there.

What the respondents contend in effect is, that in the absence of an express promise to exercise Parliamentary action, the words ought not to be construed to include such a promise by implication, and that being so, no offence is disclosed, since a member's legal duties are legislative and Parliamentary only.

The real question, and that which has been fully argued for the Court's decision, touches very closely the political safety of the community. It is, how far a member of the Legislative Assembly of New South Wales (and the same may be asked as to any member of Parliament in Australia) can, without incurring any real personal responsibility—that is, other than political rejection—make his public position the subject of profitable traffic by engaging in departmental intervention on behalf of individuals in return for private pecuniary consideration to himself.

The second count, it was held, disclosed no offence. It alleges that for money corruptly given to and corruptly accepted by him, Boston, then a public officer, viz., a member of the Legislative Assembly, agreed with Harrison and Mitchelmore that he would use his position as such member to do two things, viz.—(*a*) To secure the inspection and acquisition of and the payment out of the public funds for certain estates by the Government of New South Wales; and (*b*) to put pressure upon the Minister for Lands and other officers of the Crown to inspect, acquire and pay for those estates. The defendants demurred generally at the trial. The demurrer was upheld, on the ground briefly stated that the matters alleged did not include a promise respecting voting in Parliament. There is one elementary principle in relation to the demurrer which at first sight it might appear pedantic to mention, but which a great part of the discussion makes it very desirable to recall. It is that the demurrer admits—of course for the immediate purpose only, in view of sec. 363 of the "Crimes Act"—that all the statements in the count are true, and it maintains that even admitting their truth, they are not sufficient in law to make the accused guilty of a crime, and therefore he is not bound to answer them.

Such a demurrer has no concern with mere matters of form or manner of expression, or even of duplicity —see *R. v. Lockett*, (1914) 2 K.B. 720. It challenges the substantial matters alleged as not constituting any crime at all. The offence charged is criminal conspiracy. Willes, J., in delivering to the House of Lords in *Mulcahy v. The Queen*, L.R. 3 H.L. at p. 317, the opinion of the Judges, said—"A conspiracy consists not merely in the intention of two or more, but "in the agreement of two or more to do an unlawful "act, or to do a lawful act by unlawful means." The House of Lords accepted and acted on the opinion, and it has been adopted by the Privy Council—*Adelaide Steamship Company's Case*, (1913) A.C., p. 797. It is not necessary to define the exact limits of the word "unlawful" in that connection, because it is beyond doubt that at all events they include the case where a member of Parliament agrees for pecuniary remuneration to violate the law regulating his duty in that capacity. Such violation may be positive or negative, it may consist of improper action or improper inaction. It is wholly independent of the merits of the matter in respect of which it takes place. A Judge who agrees for personal advantage to decide a cause in one prescribed way commits a crime, notwithstanding that as between the parties that decision might be just. A public Ministerial officer who for private gain prefers one applicant to another is guilty of a crime, even though such preference would be otherwise fully justifiable. And equally, if a member of Parliament agrees for private advantage to act contrary to law in relation to his duty with respect to the public acquisition of land, it is utterly immaterial that the land has not been over-valued, or that, apart from the illicit agreement, the same result might or even would have followed. The instances of misfeasance referred to in May's *Parliamentary Government* (12th ed.), pp. 85 and 86, exemplify this.

It is apparent, for instance, that the acquisition of a particular estate by the Government for a given purpose may be controlled by many considerations. If it is for closer settlement the Minister may have to consider the comparative benefits to be attained by selecting land in other portions of the State, proximity to railways, other opportunities of settlers to acquire lands privately, the nature of the products likely to result, the state of the finances, the relative needs of settlers, the equitable distribution of settlement over the country, and so on. It is obvious that it is impossible to seize on any one feature, such, for instance,

as intrinsic value, once the acquisition were lawfully determined on as affecting the criminality or non-criminality of the agreement complained of. That agreement must be judged of by its nature at the instant it is made, and becomes what, if it were lawful, would be an enforceable contract.

The question then is, accepting the admission that the agreement was made as charged, would there be, if it was carried out, a violation of Boston's legal duty as member of Parliament? No doubt the first thing is to construe the words of the information with a view to ascertaining whether they should be read so as to include Parliamentary action contingently or otherwise. But at the threshold of this inquiry we are faced with a great principle of construction. There is no such express inclusion. Should that be implied? If a contract is capable of receiving an innocent meaning and also a criminal meaning, which is to be preferred? Unquestionably the former. If the words in an agreement be susceptible of two senses, one agreeable to and the other against law, the former sense shall be adopted, for *magis de bono quam de malo lex intendit*—Co. Litt., 42*a* and 78*b*; *Mills v. Dunham*, (1891) 1 Ch. at p. 590; *Lewis v. Davison*, 4 M. & W. 654. Where not merely unlawfulness, but criminality, is the alternative, the duty of the Court is to observe the rule even the more strictly.

The words here are certainly susceptible of either construction, however the probability of one construction would ordinarily outweigh that of the other. The question, therefore, distinctly presents itself: Is the promise to do the acts described in the second count outside Parliament, that is, in the departments necessarily or naturally attended with consequences that either in fact or law involve Parliamentary action or the use direct or indirect of Parliamentary power, or otherwise involve the violation of the member's Parliamentary duty? The respondents have urged that the question must be judged of by reference to the provisions of the "Closer Settlement Promotion Act 1910," as amended by Act No. 7 of 1914, sec. 21. The Crown did not contest this. The Act referred to is not directly mentioned in the information, and therefore the accused are entitled to rely on the most favourable view of the law applicable. Mr. Shand was asked whether this legislation was, in his opinion, as favourable to his client as any other law, and he replied in the affirmative. Admissions of law, particularly in criminal matters, do not absolve the Court from deciding independently according to what it holds to be the law. But it appears learned Counsel was amply justified in this position. Other Acts, when examined, show they are either irrelevant, as for instance, providing for acquisition by a contracting authority, or they involve the necessity of Parliamentary appropriation requiring some positive vote, or they contain as the Act referred to contains, provisions requiring subsequent reports to Parliament.

The advantage to the respondents, as they claim, under the "Closer Settlement Promotion Act," is that no prior Parliamentary action on the part of the member is necessary or possible with regard to the acquisition of and payment for the land. The respondents' case was in effect built on this—that Boston's activities were shown by reference to the Statute, to be necessarily entirely outside Parliament. But that is unsustainable. In the first place, sec. 23 of the Act prescribes as follows:—"The Minister shall from "time to time cause to be laid before both Houses of "Parliament statements of the lands brought under "the provisions of this Act." That means in effect statements of acquisitions under the Act. The Act enables advances under the Act to be made amounting to £1,000,000 a year.

It needs no second thought to perceive how important a duty is laid upon members of both Houses to consider the statements of lands acquired, and whatever circumstances are narrated; and, if there be any special degree of such duty, then it rests upon the Assembly, as controlling in the main the expenditure of public money. It is only subject to that liability to subsequent examination that the prior power to deal so extensively with the public funds is conferred on the Government. What then is the member's duty? That depends, to begin with, on the general position of a member of Parliament, and next on the special provisions of any relevant law. The general position of a member of Parliament is not doubtful. We are so accustomed to regard its dignity, its authority, and its power, that its duties, and the inherent nature of the reason that imposes those duties, are frequently lost sight of. The ancient position of a member of Parliament has been modified, both by written constitutions and other Statutes, and by the development of unwritten constitutional practice, more particularly by the evolution of responsible government. But in Australia the conception has its roots in the Common Law, which through all the phases of modification of Parliamentary practice and control, has preserved the fundamental character of the position. Evolutionary modifications have certainly not diminished the obligations of members of the Legislature to the community.

In the theory of our Government, the Sovereign is the source of all authority—legislative, executive and judicial. The British Constitution requires that practically in all cases the Sovereign's authority shall be exercised in the prescribed manner, with the prescribed advice and consent, and by the prescribed agents. Broadly speaking, the Sovereign in historical times acted in each branch of sovereignty with the aid of councils, which in various forms survive to-day. For the purposes of legislation, his council has become the body now represented by Parliament, whose advice and consent are essential—see *Middleton v. Crofts*, 2 Atk. at p. 654—with increased practical powers, but with theoretic relations to the Crown un-

changed. The fundamental obligation of a member in relation to the Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation which is the key to this case is the duty to serve, and in serving to act with fidelity and with a single-mindedness for the welfare of the community. It was, says Dr. Hearn, in his *Government of England* (2nd ed.), p. 532, "a part of our ancient constitution "that every person duly elected to serve in Parliament was bound so to serve. Service in Parliament, "as indeed the very term implies, was a duty cast in "certain circumstances upon every person not expressly disqualified. This duty no person was permitted to decline or evade." That establishes the personal duty. The next passage indicates that the duty was for the protection of the people. It says—"Nor was it even competent for the Crown to exempt "any person from its obligation."

Instances are given at the place cited of the strictness with which attendance was enforced. A quotation from Coke's *Fourth Institute* 49 is important. It runs thus—"The King cannot grant a charter of "exemption to any man to be freed from election of "knight citizen or burgess of the Parliament (as he "may do of some inferior offices and places), because "the election of them ought to be free, and his attendance is for the service of the whole realm and for "the benefit of the King and his people, and the whole "Commonwealth hath an interest therein." Acts were passed to enforce attendance; no resignation was permitted. In England acceptance of office under the Crown—the Chiltern Hundreds—affords a means of release. In our modern constitutions permission is given to resign, but that is only confirmatory of the obligation that would otherwise exist. The case of *Morris v. Burdett*, 6 M. & S. p. 361, is instructive. There it was held that the defendant, who without being a candidate or in any way holding himself out or consenting to candidature, had been elected to Parliament for Westminster, was bound to serve. Lord Ellenborough, C.J., said (p. 218)—"Every person who "is returned to Parliament is bound by the law of "the land to serve." Le Blanc, J. (at p. 220) said—"It is the duty of every person who happens to be "returned, and who is under no disabilities, and can "conscientiously take the necessary oaths, to submit "to such election and take the seat and contribute to "the public exigencies by giving his assistance at the "Grand Council of the Nation." Bayley, J., said—"It was his bounden duty to take upon himself this "public function." Dampier, J., said that taking the seat was "a great public duty."

When the New South Wales Constitution is examined these fundamental features are found to remain. For instance, in sec. 3, "the Legislature" means "His Majesty the King with the advice and "consent of the Legislative Council and Legislative "Assembly." Section 28 prescribes the allowance to each member of the Legislative Assembly for expenses incurred "in the discharge of his Parliamentary "duties." Section 30 uses the ancient word "serve" in relation to a member of the assembly. In the "Parliamentary Electorates and Elections Act 1902" we find in sec. 15 reference to "members to be elected "to serve." So in various other sections, as 110, 123, 125, and so on; see, also, *Barton v. Taylor*, 11 A.C. p. 197. It is thus clear to demonstration that every member of the Assembly elected fills a position created in which he is to "serve" as member in the sense in which that expression has always been understood, and to which the duties of service are inseparably attached. Those duties are of a transcendent nature, and involve the greatest responsibility, for they include the supreme power of moulding the laws to meet the necessities of the people, and the function of vigilantly controlling and faithfully guarding the public finances. In *Horne v. Barber*, 26 A.L.R. at p. 116, it was said by Isaacs, J.—"When a man becomes "a member of Parliament he undertakes high public "duties. Those duties are inseparable from the position; he cannot retain the honour and divest himself of the duties. One of the duties is that of "watching on behalf of the general community the "conduct of the Executive, of criticising it, and, if "necessary, of calling it to account in the constitutional way by censure from his place in Parliament "—censure which, if sufficiently supported, means removal from office. That is the whole essence of "responsible government, which is the keystone of "our political system, and is the main constitutional "safeguard the community possesses. The effective "discharge of that duty is necessarily left to the "member's conscience and the judgment of his electors, but the law will not sanction or support the "creation of any position of a member of Parliament where his own personal interest may lead him "to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of "due watchfulness, criticism, and censure of the "administration." At p. 117 of the same case Rich, J., referred to the greater force of the doctrines of the law respecting unlawful contracts when applied "to public affairs and the obligations and the responsibility of the trust towards the public implied by "the position of representatives of the people."

A member of Parliament is therefore in the highest sense a servant of the State; his duties are those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recognised place in the constitutional machinery of government. Why then does he not hold an "office?" In *R. v. White*, 13 S.C.R. (N.S.W.), p. 322, it was held, as a matter of course, that he does. That decision is sound. "Office" is defined in the *Oxford Dictionary* as including—"4. A position or place to which cer"tain duties are attached, especially one of a more

"or less public character, a position of trust, autho-"rity, a service under constituted authority." And "officer" is defined (*inter alia*) as—"2. One who "holds an office, post or place (*a*) one who holds a "public, civil or ecclesiastical office . . . a person "authoritatively appointed or elected to exercise some "function pertaining to public life." Clearly a member of Parliament is a "public officer" in a very real sense, for he has, in the words of Williams, J., in *Faulkner v. Boddington Overseers*, 3 C.B. N.S. 413 at p. 420, "duties to perform which would constitute in "law an office."

In these circumstances, does the second count sufficiently charge an agreement to violate the duty of a member of Parliament? It is quite true, as urged on behalf of the respondents, that a member's legal duty does not extend beyond his Parliamentary action, including in that whatever he is lawfully deputed by Parliament to do, and therefore it does not extend to visiting departments and advising Ministers or interviewing subordinate officers. It is an every-day experience that members of Parliament can, and do in many legitimate ways, materially and honourably aid the administration by assistance and advice outside the walls of Parliament. This unofficial aid to the conduct of public business is in effect a recognised adjunct to his Parliamentary position, and ceases with it. But if intervention by a public representative be impelled by motives of personal gain, if it be the outcome of an agreement based on some pecuniary or what is equivalent to a pecuniary consideration, and constituting the member a special agent of some individual whose interests he has agreed to secure, interests that are necessarily opposed *pro tanto* to those of the community, the whole situation is changed. To apply some words in *Wilkinson v. Osborne*, 22 A.L.R. at p. 64, in the judgment of Isaacs, J., he who has been appointed to be a sentinel of the public welfare becomes a "sapper and miner" of the Constitution. The power, the influence, the opportunity, the distinction with which his position invests him for the advantage of the public, are turned against those for whose protection and welfare they come into existence. He can never afterwards properly discharge in relation to that matter, his duties of public service, the Parliamentary duty of honest, unbiassed and impartial examination, and inquiry and criticism which must arise, and he has therefore essentially violated his legal duty to the State. It is impossible to sever the voluntarily assumed intervention departmentally from the legislative position to which by custom it is recognised as incidental. A member so intervening speaks as member and is dealt with as member, and not as a private individual. His ulterior power of action, though not intruded into observation, is always existent and is always known to exist. It is scarcely even camouflaged. The importance of even one Parliamentary vote on a critical occasion is not entirely unknown.

But the immediately important consideration in this case is the effect of the intervention for private pay on the member himself. It is quite immaterial whether he has expressly or impliedly agreed to add to his extra-Parliamentary services for his private principals further action in Parliament, should that prove necessary, as a reserved force (a state of things which would attract the basic principle of *R. v. White*, 13 S.C.R. (N.S.W.) 322), or whether he has even expressly limited his contractual obligation to use his position as member in the Minister's departmental office. For in the former case he has expressly abandoned, and in the latter case he has effectually impaired in circumstances which the law regards as intentional impairment—*Attorney-General v. Adelaide Steamship Co.*, (1913) A.C. at p. 799—his official liberty in return for personal reward; he has even in the latter case placed himself in a situation embarrassing and inconsistent with that independence to criticise or censure which he is bound to preserve; he has fastened upon himself golden fetters which preclude him from freedom of action. The natural fear of exposure or reproach, or the sense of personal obligation, must inevitably operate to dissuade him from fearlessly pursuing the path of true service, and when the test comes it might well be found that "his honour rooted "in dishonour stood, and faith unfaithful kept him "falsely true." That the law definitely stamps such a bargain as a "violation of duty" is not only clear in principle, but has been so judicially determined—*Card v. Hope*, 4 B. & C. at pp. 674-675.

We had recent occasion to refer to the passage in *Attorney-General v. Adelaide Steamship Co.* (*supra*) above adverted to, and also to some observations in the judgment of Lord Westbury in *Carter v. McLaren*, L.R. 2 Sc. App. at p. 126. They should be repeated here. In the first passage Lord Parker, for the Judicial Committee, in speaking of the necessary "intention" with which a contract or a combination is entered into, says—"In a Court of law every man "is taken to intend the natural or necessary con-"sequences of his action." In the latter, Lord Westbury says—"There are two maxims which must never "be weakened; one is that you must ascribe to every "subject a knowledge of the law—more especially in "cases where it prescribes a rule of civil conduct. "The other maxim is that you must ascribe to every "man a knowledge of that which is a necessary and "inevitable result of an act deliberately done by him." Judged by these standards, the respondent, Boston, on the assumption made by the demurrer, deliberately did that which he knew would necessarily and inevitably impede him in the discharge of the high public duty he was by law bound to discharge. By the agreement into which he entered he became guilty of a breach of high public trust. And the defendants, judged by the same standards, were equally guilty. Therefore, whether what has in argument been termed the broad construction of the charge applies, namely,

that which includes Parliamentary action in the promise which, apart from criminality, would be the natural and proper construction of the words; or whether the narrower construction is upon recognised principles of interpretation established in the circumstances, namely, confining the actual promise to extra-Parliamentary efforts, the law is as Ferguson, J., rightly said it should be, and the demurrer fails.

The appeal ought therefore to be allowed, and the judgment should be that the accused "answer over" to the charge.

HIGGINS, J.—The question raised by this demurrer to the second count of this information is whether the count is "sufficient in law"—does it disclose on its face an indictable offence, so that the defendants should answer it.

An application has been made for special leave to appeal to this Court from the judgment of the Supreme Court (Ferguson, J.), allowing the demurrer; and we have permitted the question to be fully argued as if special leave had been given, but without prejudice to the right of the defendants to urge that special leave should not be given.

The first difficulty is as to the meaning of the language of the count; the second is whether that language, when properly interpreted, discloses an indictable offence.

The allegations of the count, so far as material, are that the defendants, Boston, Harrison and Mitchelmore, conspired together that certain moneys should be corruptly given by Harrison, Michelmore and others to Boston in his official capacity, Boston being then a public officer, to wit a member of the Legislative Assembly, and that the money should be corruptly accepted in his said official capacity, as inducement to Boston, in violation of his official duty, to use his position as such member to secure the acquisition of certain estates by the Government, which estates were to be paid for out of public funds, and to put pressure upon the Minister for Lands and other officers of the Crown to acquire the estates, the payment to Boston being to the public mischief of the King's subjects in New South Wales.

The clumsy succession of infinitives in this count gives some ground for the suggestion that the words "to put pressure upon the Minister" are directly dependent on the word "inducement," and not on the words "to use his position as such member." In my opinion, the natural meaning is that Boston was to use his position as member (*a*) to secure the acquisition, and (*b*) to put pressure upon the Minister to acquire. But, on the view which I take of the duty of a member, the question becomes immaterial.

It has also been strenuously urged for the defendants that the count does not point to steps taken by Boston in the Assembly, but only to steps taken by him outside. The words "to use his position as such "member" are not expressly limited to steps taken outside the House, and I cannot see why any such limitation is to be necessarily implied. Nor is there any such express or implied limitation to the words "to put pressure upon the Minister." The Courts take judicial notice, without evidence, of the political constitution of the Government, the essential and regular political operations and actions—Best, *Evidence* (9th ed.), 232; Taylor, *Evidence* (11th ed.), 20; Phipson, *Evidence* (3rd ed.), 17—and, in particular, in my opinion, of the existence of responsible Government with its distinctive reactions. It is obvious that a member might harass the Minister with questions in the House as to the transaction, or make speeches in the House as well as on platforms with regard to it, or vote against the Government on a motion of want of confidence. Under the New South Wales Constitution (1902), questions are decided by the majority of votes (sec. 32), and a Government's majority may depend on one member's vote or on the votes of such other members as may be influenced by one member, whether inside or outside the House. The argument for the defendants that the count relates only to steps taken by the member outside is probably due to the fact, which the Attorney-General admits, that he said in the Court below that he did not expect to produce evidence of any vote actually given or step actually taken in the House in pursuance of the agreement of conspiracy. But we are not now considering anything but the alleged agreement—does the agreement in itself constitute an indictable offence, apart from anything that has been done under it?

Taking, then, the agreement alleged as being an agreement to give money to a member on the understanding that he is to use his position as a member, to exercise his influence as a member whether inside or outside of the House, so as to get the Government to acquire certain land for payment, does this agreement constitute a criminal conspiracy? Now, "the "essence of a criminal conspiracy is a contract or "combination to do something unlawful, or something "lawful by unlawful means"—*Attorney-General for Australia v. Adelaide Steamship Co.*, (1913) App. Cas. 781, 797; and see *R. v. Brailsford*, (1905) 2 K.B. 730, 746. "When an officer has to discharge a public duty "in which the public is interested, to bribe that officer "to act contrary to his duty is a criminal act. To "induce him to show favour or abstain from showing "disfavour where an impartial discharge of his duty "demands that he should show no favour . . . is "to induce him to act contrary to his duty; where this "is done corruptly it is an indictable misdemeanour "at common law. . . ."—*R. v. Whitaker*, (1914) 3 K.B. 1283, 1297. The count, therefore, discloses a contract, a conspiracy to do something unlawful, even criminally unlawful. It is true that in *Whitaker's Case* the word "officer" is used. It was a case of a colonel of a regiment receiving bribes from a contractor for canteens, but the same principle applies

to all persons "accepting an office of trust concerning "the public"—*per* Lord Mansfield, *R. v. Bembridge*, 3 Doug. K.B. 327.

Comment has been made on the peculiar fact that there are so very few cases bearing directly on the bribery of members of Parliament. Unfortunately, it cannot be said that this is a testimony to the virtue of members; for, according to Hallam, *Constitutional History*, p. 733, bribery of members was often exercised, and especially by King William III., out of secret service funds. But the rarity of cases on the subject seems to be owing to the practice of the House of Commons to deal with its members by expulsion or by impeachment. In the legal process of impeachment the Commons is the prosecutor, and the King and the House of Lords constitute the tribunal. Cases of bribery of members rarely, if ever, come before the ordinary law courts. In New South Wales, however, the matter has been tested before the Supreme Court, in a case in which the late Martin, C.J., Hargrave and Faucett, JJ., applied the principle in convincing judgments—*Reg. v. White*, 13 S.R. 322. In that case the defendant offered to a member of the Legislative Assembly £20 for a vote in favour of a claim for compensation for damage done by goldminers to land and cattle, and the conviction of the defendant was affirmed. As Martin, C.J., said, bribery of a member was criminal. Hargrave, J., said that prohibition against bribery extends "to all persons "whatever holding offices of public trust and con- "fidence." Faucett, J., said that—"Any person who "holds a public office or public employment of trust, "if he accepts a bribe to abuse his trust . . . is "guilty of an offence at common law." The same learned Judge said, also, it "cannot be doubted that "a member of Parliament holds a public office. . . . "Parliament exists for the sake of public govern- "ments, and every member elected by the people "undertakes, and has imposed on him, a public duty "and a public trust."

I cannot, on reading the judgment of the learned primary Judge, find that this aspect of the transaction was presented to his mind—that the agreement is for bribery, that bribery is a criminal offence, and that the agreement, the conspiracy, is therefore a criminal offence. Personally I have great sympathy with his reluctance to treat an agreement as an offence, where the act to be done under the agreement is not in itself a breach of the law, and the Judge is asked to say, on his view of the public interest, that a certain agreement is injurious to the public. It is for the Legislature to say what acts are to be treated as criminal, and the Court has not a roving commission to declare contracts criminal, or bad as being against public policy, according to its own conception of what is expedient for or would be beneficial or conducive to the welfare of the State—*per* Lord Halsbury, *Janson v. Driefontein Co.*, (1902) App. Cas. 484, 490. But there is no need for us to act as if under such a roving commission where it is clear that the act agreed to be done is bribery; for bribery of a person holding an office in which the public are concerned, so as to get him to act in violation of his duty to use his office for the public, not for his private interest, is a criminal offence.

No one has urged that a member of Parliament has not to discharge a duty in which the public is interested. It may be unnecessary to refer to the "Constitution Act 1902," which, in sec. 5, gives power to the Legislature to make laws for the peace, welfare and good government of New South Wales; and in sec. 3 enacts that "the Legislature" means the King with the advice and consent of the Legislative Council and Legislative Assembly. The member, therefore, is one of those who have to advise the King as to the laws to be made for New South Wales, and if he advise the King, not according to his view of what is right and proper, but in the manner that some person who gives him money dictates, he violates a duty in which the public is interested. By agreeing to take the money he puts himself in a position in which his interest and his duty conflict. It does not matter for this purpose whether the acquisition of the particular land by the Crown is in fact a good thing for the public or not; it is enough that the member by his agreement incapacitates himself from performing his duty to exercise his true judgment.

To do justice to Mr. Shand's able argument, however, he does not, as I understand him, dispute that if the agreement here were that the member should use his votes or his action in the House to secure the acquisition of the land, the agreement would be a criminal conspiracy. As I have intimated, I cannot read the count as confining the agreement to action of the member outside the House; the words "to use his "position as such member" primarily refer to action in the House, and they can only refer to action outside so far as action outside is based on potential action inside. The Minister knows what the member can and may do in the House, and is naturally inclined to placate him. Mr. Shand tells us that the proposed acquisition was acquisition under the "Closer Settlement Promotion Act 1910," and the amending Act of 1914. These Acts are not referred to in the count, and in my opinion the count must rest for validity on any and every Act under which the Crown can acquire lands. But if these Closer Settlement Acts are to be considered at all they demonstrate the influence which a member may exert. Under sec. 4 of the Act of 1910 the Minister has to be satisfied of certain facts; and, if satisfied, he may cause a valuation to be made; and under sec. 7 it is on the Minister's approval that the vendor is to surrender the land to the Crown. Under sec. 23 the Minister has from time to time to cause to be laid before the House statements of the lands brought under the provisions of the Act. Under sec. 2 of the Act of 1914 the Minister

may, with the vendor's consent, purchase the land without going through the process of the Act of 1910, at a price not exceeding that recommended. So the Minister's mind is the pivot on which the whole transaction turns, not the King's mind or the Governor's. Then, under sec. 23 of the Act of 1910, the House has an opportunity of ascertaining what the Minister has done. The case of *R. v. Vaughan*, 4 Burr. 2494, is conclusive to the effect that a mere attempt to bribe a Minister to procure a Crown appointment is an indictable offence. As Lord Mansfield said—"A Minister trusted by the King to re-"commend fit persons to offices would betray that "trust and disappoint that confidence if he should "secretly take a bribe for the recommendation." The same principle applies, in my opinion, to a member trusted by the people to advise the King as to the making of laws, and to watch the doings of Ministers on whom the Legislature confers powers for public purposes. A member is the watch-dog of the public, and Cerberus must not be seduced from vigilance by a sop. I see no reason to doubt that, even if the count were confined to an agreement as to the action of the member outside the House—action in which the member used his position as member—the agreement would be an indictable conspiracy; but that point it is not necessary at present to decide.

All the relevant cases rest on the violation of a public trust. "The nature of the office is immaterial "as long as it is for the public good"—*R. v. Lancaster*, 16 Cox C.C. 737. An agreement between a trustee and an estate agent to share commission on a sale is void, and the trustee has to account to the beneficiaries for his share. But it is not an indictable matter, as it is not a public trust, a trust "concerning "the public"—*R. v. Bembridge* (*ubi sup.*); and see *R. v. Porter*, (1910) 1 K.B. 369, 372. Bribery of electors for Parliament is a crime at Common Law—*R. v. Pitt*, 1 Wm. Blackstone 380; *Hughes v. Marshall*, 2 C. & J. 121; so is bribery of one who can vote at an election for aldermen—*R. v. Steward*, 2 B. & Ald. 12; so is bribery of a clerk to the agent of French prisoners of war, to procure exchange of some out of their time—*R. v. Beale*, cited in note to *R. v. Whitaker*, (1914) 3 K.B. 1300; so is a promise to bribe a municipal councillor as to the election of mayor—*R. v. Plympton*, 2 Ld. Raymond 1377; bribery of electors for assistant overseer of a parish—*R. v. Joliffe*, cited in *R. v. Waddington*, 1 East. 154; *R. v. Lancaster* (*ubi sup.*). So that the application of the principle is not confined to public servants in the narrow sense, under the direct orders of the Crown.

The cases of *Montefiore v. Menday Motor Co.*, (1918) 2 K.B. 241; and *Wilkinson v. Osborne*, 22 A.L.R 57, do not relate to criminal responsibility; but, as said in the former case, "it is contrary to public policy "that a person should be hired for money or valuable "consideration when he has access to persons of in-"fluence to use his position and interest to obtain a "benefit from the Government." The case of *Osborne v. Amalgamated Society of Railway Servants*, (1909) 1 Ch. 163, (1910) App. Cas. 87, also, is not a case as to criminal responsibility; but the position of members of Parliament is powerfully put in the judgments of those Judges who dealt with the constitutional point. As Lord Shaw of Dunfermline expresses it (p. 115)—"Parliament is summoned by the "Sovereign to advise His Majesty freely. By the "nature of the case it is implied that coercion, con-"straint, or a money payment, which is the price of "voting at the bidding of others, destroys or imperils "that function of freedom of advice which is funda-"mental in the very constitution of Parliament."

Some difficulty arose in my mind from the position of contracts in restraint of trade. Contracts in unreasonable restraint of trade are void and unenforceable, because they are treated as being against public policy; and yet they are not criminal offences under the Common Law. But, apart from the effect of the Trade Union Acts 1871 and 1875, which have been adopted in New South Wales and other States, the Judicial Committee of the Privy Council has excluded contracts in restraint of trade from the category of indictable offences. Such contracts are against public policy in the sense that it is deemed impolitic to enforce them, not because every such contract must necessarily operate to the public injury—*Attorney-General for Australia v. Adelaide Steamship Co.*, (1913) App. Cas. 781, 794, 800.

This count alleges that the defendant Boston is a "public officer, to wit a member of the Legislative "Assembly," and some discussion has taken place on the question: Is he a public officer? He certainly is not a public officer within the Public Service Acts; nor is he to obey the commands of the King or of the departmental heads. In *R. v. White* (*ubi sup.*) Faucett, J., says confidently that a member of Parliament holds a public office; and in *Henby v. Mayor, &c., of Lyme*, 5 Bing. 91, 147, Best, C.J., says that "every one who is appointed to discharge a public "duty and receives a compensation in whatever shape, "whether from the Crown or otherwise, is constituted "a public officer." But, without deciding that the allowance paid to a member of Parliament for his expenses is to be treated as compensation for his public duty, it seems to me immaterial whether the member is to be treated as a public officer or not. He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough. The position seems to be summed up (as to those holding such a relation) by Lord Glenbervie, 2 Douglas, *Election Cases*, 399, in his note on bribery—"Wherever a "person is bound by law to act without any view to "his own private emolument, and another, by a "corrupt contract, engages such person on condition "of the payment or promise of money or other lucra-"tive consideration, to act in a manner which he shall

"prescribe, both parties are by such contract guilty "of bribery."

In my opinion, special leave to appeal should be given. The appeal must be allowed, and the demurrer to the second count overruled.

GAVAN DUFFY and STARKE, JJ.—The count submitted for our consideration in this case charges a conspiracy in the shape of an agreement "that "certain large sums of money should be corruptly "given by the defendants, John Andrew Harrison "and Henry Ernest Michelmore, and certain other "persons, to the defendant, Walter Thomas Boston, "in his official capacity, the said Walter Thomas "Boston then being a public officer, to wit a mem- "ber of the Legislative Assembly of New South "Wales, and that the said sum of money should be "corruptly accepted by the said Walter Thomas "Boston in his said official capacity as inducement "to the said Walter Thomas Boston in violation of "his official duty to do or omit to do certain acts, "viz., to use his position as such member to secure "the inspection of, acquisition and the payment in "cash for certain estates by the Government of the "State of New South Wales, and which said estates "were to be paid for out of the public funds of the "said State, and to put pressure upon the Minister "for Lands and other officers of the Crown to "inspect, acquire and to pay cash for certain estates, "the said payment to the said Walter Thomas "Boston being to the public mischief of the subjects "of our said Lord the King in the said State and "against the peace of our Sovereign Lord the King, "his Crown and Dignity."

The form of words used is adopted from the indictment in the case of *R. v. Whittaker*, (1914) 3 K.B. 1284, and is appropriate only to a case of conspiracy to induce malversation by a public officer in his public office. In our opinion, a member of the Legislative Assembly of New South Wales is not the holder of a public office within the meaning of the Common Law, and, even if he could be regarded as the holder of such an office, the acts charged as intended to be done by the defendant Boston, however improper they may be, would not be malversation in his office, or acts done in his office, unless they were done in the discharge of his legislative function. But it was argued before the learned Judge who presided at the trial, and before us, that the real question here was not whether there was an agreement to induce malversation in a public office, but whether there was an agreement to induce a member of the Legislative Assembly of New South Wales to act outside that function, in a way that was inconsistent with his duty to preserve an independent mind, not only in the discharge of that function, but in all his dealings with the Executive. It cannot be denied that a member of Parliament taking money or agreeing to take money to influence his vote in Parliament is guilty of a high crime and misdemeanour, and that an agreement to bring about such a state of things constitutes a criminal conspiracy; nor can it be denied that an agreement which has the effect of fettering Parliamentary or Executive action may sometimes be as dangerous to the community as the direct purchase of a member's vote; and it may be that, under the words used in the count which we are considering, facts might be proved which would constitute a criminal conspiracy. But that is not enough to establish the validity of the count unless it can also be shown that every set of facts which would satisfy its terms would constitute such a conspiracy. A defendant cannot be called on to plead to a charge which is so framed that its terms may be satisfied by proof of facts which constitute a crime, and also by proof of facts which do not constitute a crime.

The important question to be considered in this case is the meaning of the words covered by the *videlicet*. If an agreement to do the acts there described does not constitute a criminal conspiracy, or if it may or may not constitute such a conspiracy because the words would be satisfied by either a criminal or an innocent agreement, the count is bad, and the demurrer should be allowed. The epithet "corruptly," which is applied elsewhere in the count to the intended giving and accepting of the money, cannot be prayed in aid of the words covered by the *videlicet* which constitute the description of the acts intended to be procured by the agreement. The giving and taking would be corrupt in law and in violation of the duty of the defendant Boston, if the intention evinced by the words covered by the *videlicet* make them so, and not otherwise. The charge as formulated leaves us utterly in the dark as to the nature of the acquisition of estates by the Government of the State of New South Wales which the defendant Boston was to attempt to bring about, and as to whether any question in relation to the acquisition ever would or could come before Parliament for consideration. The terms of the charge would be satisfied if it were shown that he was to be employed to forward a transaction which he believed to be, and which in fact was, entirely beneficial to the purchasers and desirable in the interests of the community, and which had never been and could never be the subject of Parliamentary enactment or discussion. It is, perhaps, desirable that members of Parliament should under no circumstances accept money to induce them to urge any course of action on the Executive Government, but it cannot be said that an agreement to do so must in every case constitute a criminal conspiracy by the member and those employing him.

All that we have said has reference only to the form in which the charge against the defendants is made, and would leave for further consideration the question as to their liability in any proceeding in

which the "indictment" sufficiently set out the case intended to be made against them.

In our opinion, the judgment appealed against is right, and the appeal should be dismissed.

Special leave to appeal granted. Appeal allowed. Judgment of Ferguson, J., discharged. Judgment that the defendants answer over to the charge contained in the second count of the information.

[Solicitors—For the appellant, Crown Solicitor for New South Wales; for the respondents Boston and Harrison, R. H. Levien; for the respondent Mitchelmore, Linn Rolin.] H. V. E.

Supreme Court.

Before Weigall, A.J. May 26.

In the Matter of a BY-LAW OF THE CITY OF ESSENDON.

STEWART v. CITY OF ESSENDON.

Local Government — By-law prescribing a residential area—Delimitation of area — Prohibition of use of buildings for the purposes of classes of trade, &c., specified — Specification of such classes of trades— Ultra vires — "Local Government Act 1915" *(No.* 2686), *sec.* 197—"*Local Government Act* 1921" *(No.* 3167), *sec.* 10.

Section 10 of the "Local Government Act 1921" empowers municipalities to make by-laws "prescribing areas within the municipal district as residential "areas, and prohibiting or regulating within the "whole or any part of any such residential area "the erection (including adaptation for use) or the "use of any building for the purposes of such classes "of trades, industries, manufactures, businesses or "public amusements as are specified in the by-law."

Purporting to act under this power, a municipality made a by-law in the following terms:—"Clause 1. "The areas within the municipal district herein "specified shall be and are hereby prescribed as "residential areas—that is to say, all the properties "situate in or having frontages to the several streets "named in the schedule hereto. Clause 2. The erec"tion (including adaptation for use) or the use of "any building for the purposes of all classes of "trades, industries, manufactures, businesses or public "amusements within such residential areas shall be "and is hereby prohibited." A schedule to the by-law set out a list of streets within the several wards of the municipality, referring to the whole length of some of the streets, but to portions only of others.—

Held, that the by-law was invalid, inasmuch as it did not prescribe "areas within the municipal dis"trict" in any real, definite and apt manner, or contain any sufficient description of the classes of trades, industries, manufactories, &c., for the purposes of which the use of buildings, &c., was prohibited.

STEWART v. CITY OF ESSENDON.

RULE *NISI*.

This was the hearing of a rule *nisi* to quash a municipal by-law (By-law No. 46 of the City of Essendon). The applicant was Charlotte Ann Stewart, a ratepayer of the City of Essendon.

By-law No. 46 of the City of Essendon was made under the provisions of the "Local Government Act 1915" and the "Local Government Act 1921," for prescribing areas within the municipal district as residential areas, and prohibiting or regulating within the whole of such residential areas the erection (including the adaptation for use) or the use of any building for the purposes of such classes of trades, industries, manufactures, businesses or public amusements. Clauses 1 and 2 of the by-law provided as follow:—

1. The areas within the municipal district herein specified shall be, and are hereby prescribed as residential areas, that is to say, all the properties situate in or having frontages to the several streets named in the Schedule hereto.

2. The erection (including adaptation for use) or the use of any building for the purposes of all classes of trades, industries, manufactures, businesses or public amusements within such residential areas shall be and is hereby prohibited.

The schedule contained a list of streets within the several wards of the city, and referred for the most part to the whole of such streets, though occasionally portions only of such streets, within certain limits, were referred to.

Eager to move the rule absolute.—It will be attempted to support this by-law under the "Local Government Act 1921," sec. 10. The by-law does not prescribe an area with sufficient definiteness, or at all. The word "properties" is vague and indefinite. Does the by-law relate to the property of a specific owner? Do the properties referred to in the by-law change with changes in the ownership or occupation? "Situate in" and "having frontages to" the scheduled streets are very indefinite and uncertain. A ratepayer cannot tell from time to time whether he is within or without the by-law. The by-law does not "specify" the class of trades, industries, &c., which are to be prohibited within the residential area. A mere general prohibition is insufficient. The by-law is unreasonable in its incidents, and uncertain in its meaning and application.

Owen Dixon, K.C., and *Martin* to show cause.—The Council has thought fit to delimit the area by mention of streets, and by reference to the actual occupation of the properties therein. It identifies the area by the actual and present occupation (or fitness for occupation) of the properties in the streets mentioned in the schedule. It would be quite easy to identify the properties referred to. Any difficulty in determining whether or not a particular piece of land is within the by-law or not arises, not from a fault in the description, but from the particular facts