ings, where the government is seeking a judgment based on prediction of future conduct which in turn is based on inference from a whole pattern of past conduct and some matters which can not be classified at all.[70] Furthermore, the use of secret information provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected".[71]

VI. Conclusion

The right to travel is one of the more important constitutional rights we have. Travel itself plays an important role in the life of every citizen, for it is the best form of education for minds encrusted with prejudice. If the right is to be regulated, it has to be reasonable and within the bounds of the Constitution. Cloudy claims for security should not foreclose the exercise by a citizen of his freedom of movement, otherwise we will undermine a basic tenet in our democratic system. It is our declared policy to contain Communism, but let us not sacrifice our civil rights in the process. As our own Supreme Court declared, "individual liberty is too basic, too transcendental and vital in a republican state, like ours, to be denied upon mere general principles and abstract considerations of public policy".[72]

PACIFICO AGABIN *

70 Ibid.

71 Justice Jackson, dissenting in U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 551.

72 People v. Hernandez, G.R. L-8025-26, promulgated July 18, 1956.

* Book Review Editor, Student Editorial Board, PHIL. L. J. 1959-60.

PUBLIC POLICY: AN "UNRULY HORSE" IN REGALA CASE?

> "I, for one, protest... against arguing too strongly upon public policy; — it is a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law."
> — Justice Burrough

Much public interest has been stirred by the decision of the Supreme Court in the case of *Sy Guan and Price Inc. v. Regala*, promulgated on June 30, 1959.[1]

The case touches on the validity of the so-called "ten percent contracts" which can be simply described as agreements in which one party binds himself to procure for another contracts, concessions, licenses, allocations, etc. from the government in consideration of a contingent fee usually based on the value of the contract, allocation, etc. obtained. In the history of this kind of contract, the standard fee has been said to be 10%; hence, the reason for the common denomination. The sudden popularity of these contracts in this country must have resulted from the strict controls imposed by the government in the granting of import and dollar allocations.

The facts of the *Regala* case in a nushell are as follows: Petitioner Sy Guan, then president and general manager of his co-defendant Price Inc., executed in favor of respondent Atty. Pablo Regala a special power of attorney authorizing the latter to prosecute the former's applications for im-

1 G.R. No. L-9500, June 30, 1959.

port licenses with the Import Control Commission.[2] It was orally agreed between them that Regala would receive as compensation for his services 10% of the total value of the amounts approved on the applications. Pursuant to the stated power of attorney, Regala followed up and prosecuted the applications with the different offices of the Import Control Commission. As a result of the efforts of the respondent, the import licenses applied for were issued. Consequently, respondent demanded performance of the oral contract. Petitioner made a partial payment and then refused to pay the rest. Hence, this action to compel complete performance of the contract.

The main and ultimate issue raised by the case is the validity of the parole contract of remuneration between the parties. The petitioners assailed it as contrary to public policy and interest, hence, null and void *ab initio*. Naturally, respondent vigorously contended otherwise.

The Supreme Court, reversing the Court of Appeals, upheld the contention of the petitioners. The Court observed that " the contract in question is what is commonly known as *10% conracts* which the press decries and the public condemns as inimical to public interest. It held that such kind of contract is contrary to the "enunciated government policy that paplications for import and foreign exchange should be considered and acted upon strictly on the basis of merit of each application."

At first blush, the case appears to be as simple as that. And in view of the widespread popularity and general approval the decision has gained, it would seem that an examination of the principles involved is superflous. Popular acclaim, however, is by no means an accurate or a safe criterion of the reasonableness of a court's decision.

The paramount rule in the law of contracts is that " contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."[3] It is true, of course, that this dictum enunciated long ago by a Victorian judge in an age when the doctrine of *laisser fair* was predominant, is no longer axiomatic today. It has, however, never been repudiated and, while the courts today might not express themselves with the same assurance, it still represents one facet of judicial opinion.[4] At least, it shows that the judges start with the assumption that their duty is to implement the reasonable expectations of the parties. But it is obvious that this cannot be done in every case. The interests of the public require that there should be some restrictions on the freedom of persons to enter into contracts. If an agreement tends to the corruption of public offices or otherwise injure the public service, the public would suffer a greater harm from its enforcement than from a refusal to enforce it, and the same is true of agreements tending to prevent or obstruct public justice, or to encourage litigation, or to corrupt the public morals, or to interfere with the freedom or security of marriage, or to impose an unreasonable restraint of trade. All such contracts are held to be illegal as being contrary to public policy.[5]

2 This is now a defunct office. If was created by Republic Act No. 650.

3 Printing and Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462, at 465.

4 CHESHIRE, THE LAW OF CONTRACTS 2780 (1958).

5 CLARO, LAW of Contracts 414 (894).

The foregoing principles have been expressly embodied in Articles 1306 and 1409 of the new Civil Code of the Philippines which provide:

"Art. 1306. The contracting parties may establish such stipulations, claims, terms, and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

"Art. 1409. The following contracts are inexistent and void from the beginning:

1. Those whose cause, object or purpose, is contrary to law, morals, good customs, public order or public policy."

x x x

In the case under consideration, the doctrine of public policy has been invoked as the ground for declaring the contract in question void *ab initio*. At this juncture, the question may be asked: What is public policy?

The term "public policy" has been repeatedly defined as that "principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good — which may be termed the policy of the law or public policy in relation to law."[6] The doctrine by which contracts are held void on the ground of public policy is based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of conrtact on the part of individuals. Thus, contractcs which, as to the consideration or thing to be done, have a tendency to injure the public, or are against the public good, or contravene some established interests of society, or are inconsistent with sound policy and good morals, or tend clearly to undermine the security of individual rights, whether of personal liability or of private property are contrary to public policy.[7]

It can be gleaned that public policy is admittedly a term of indefinite content.[8] Consequently, the doctrine has been the subject of judicial criticisms on many occasions. The public interests which it is designed to protect are so comprehensive and heterogeneous and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions and at times even with the political views of different judges, that it forms a treacherous and unstable ground for judicial decisions;[9] it has been referred to as a "very unruly horse" which may carry its rider he knows not where.[10] A decision, therefore, holding a contract null and void as being contrary to public policy is open to question and requires some careful consideration.

Now, is the contract in the *Regala* case really contrary to public policy? And if so, from what source did the Court derive the policy applied in the case?

The Supreme Court's decision in the case is primarily based on the supposed "government policy that applications for import and foreign ex-

6 Egerton v. Brownlou, 4 H.L. Cas. 1, at 196.

7 17 C.J.S. section 211.

8 GRISMORE, CONTRACTS 500.

9 CHESHIRE op. cit. supra.

10 Richardson v. Mellish, 2 Bing. 220, 252.

change should be considered and acted upon strictly on the basis of merit of each application, without the intervention of intermediaries" which policy is allegedly revealed by sections 15 and 18 of Republic Act 650 which read:

> "Sec. 15. The President may summarily bar firms or individuals from filing applications for import and/or doing business in the Philippines for any of the following acts:
>
> 1. x x x
> 2. x x x
> 3. The *payment to any public official* directly or indirectly, of any fee, premium, or compensation other than those allowed by laws or regulations, in connection with the issuance or granting of quota allocations of licenses.
>
> "Sec. 18. The penalty ... shall be imposed upon persons who may be found guilty of the following acts:
>
> 1. x x x
> 2. x x x
> 3. *The receiving or accepting by any public official or employee* directly or indirectly of fees, permiums, or compensation of any kind other than those allowed by law or by the rules and regulations, for the performance of any act or service connected with the issuance of import license of quota allocation."
>
> (Underscoring supplied.)

From the aforesaid provisions, it is admitted that the evident intention of the law is that the granting of import or quota allocations should depend solely on the merits of each application and the government officials should not be influenced by any other inducement. There is no dispute on this point.

But was the Court justified in concluding from the said provisions that the intervention of intermediaries was prohibited? What is the basis for its statement that " the intervention of intermediaries, such as the respondent, would be unwarranted and uncalled for"?

With due deference to the judgment of the Court, it is doubtful whether such conlusion, that is, the prohibition of intermediaries follows by implication from said sections 15 and 18 of R.A. 650. It is to be noted that what is prohibited is "the payment to any public official directly or indirectly of any fee, premium, or compensation other than those allowed by laws or regulations in connection with the issuance or granting of quota allocations or license." The law imposes a penalty upon the public official who receives or accepts such payment. It is, of course, obvious, that any contract involving what amounts to bribing a public officer is unlawful.[11] Under the cited provisions, the plain intention of the law is to prohibit contracts between private firms or individuals and public officials wherein the latter would be tempted or induced to violate or neglect their official duties. Such contracts which induce or tend to induce a breach or neglect of official duty are clearly illegal, being against public policy.[12]

Nowhere in Republic Act 650 can it be conclusively inferred that the intervention of intermediaries is prohibited. It is generally held that con-

11 GRISMORE op. cit. supra.
12 Ibid.

tracts for the employment of agents to prosecute or procure claims, contracts, concessions, etc. from the government are perfectly lawful.[13] The majority of judicial decisions in the United States sustain the right of all persons to be heard before any officer or department of the government through agents.[14] There is nothing illegal *per se* in the employment of agents for the negotiation of business with the government.

The prevailing rule as shown by judicial decisions in the United States is that if the kind of contract under consideration does not by its terms or by necessary implication require or contemplate the use of corrupt means, and that the parties did not enter into it with reference to actual or supposed influence which the agent had with the public officials through whom the negotiations would have to be made, it is enforceable at law.[15] Thus, if in the contract no corrupt influences were contemplated to be used or were not in fact used, the agent can recover his compensation.[16]

Several decisions in the United States are noteworthy for their liberal treatment of these so-called "ten percent contracts." In one case, *Southard v. Boyd,*[17] it was even held that the fact that the person employed to procure a contract from the government had intimate relations with the government agents, and can probably, therefore, influence their action much more readily than others, does not forbid his employment. In another case, *Lyon v. Mitchell,*[18] the New York court declared that a person who belongs to the same political party as the public official through whom public contracts must be secured which would enable him to make an advantageous presentment of his merchandise, may be lawfully employed. The case of *Old Dominion Trans. Co. v. Hamilton*[19] went further. In that case, the court saw nothing contrary to public policy in the fact that the agent associated himself with a man of national political prominence in an endeavor to secure for his employer a contract through city officials of the same political faith. The fact that the agent employed personal and political influence to secure access to the proper authorities did not preclude him from recovering his compensation if when the final opportunity came he presented his case upon the merits. The case of *Elkhart County Lodge v. Crary*[20] is of the same tenor. There the court held "that if an agreement employing one to act as agent in securing a public contract is on its face valid, the agent will not be deprived of compensation for work done and money expended under the terms

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13 Ibid.

14 U. S. — Allision v. Dodge, C.C.A.N.J., 287 F. 021; Ala. — Anderson v. So. 31, 202 Ala 209; G.A. — Cary v. Neel, 189 S. E. 575, 54 G. A. App. 860; III. — Lewy v. Standard Plunger Elevator Co., 129 N. E. 775, 296 III. App. 306; Mass-Noble v. Mead, 129 N. E. 669, 237 Mass. 5; Mich. — Oliver Machinery Co. v. Grand Rapids Veneer Works, 228 N. W. 690, 249 Mich 204; Reinhard v. Grand Rapids, 178 N. W. 718, 211 Mich. 167, quoting Corpus Juris; N. Y. — Schwartzman v. Pines Rubber Co., 179 N. Y. S. 284, 189 App. Div. 747; Buck v. Banman, 175 N. Y. S. 881, 187 App. Div. 774, reversing 173 N. Y. S. 772, 103 Misc. 584; Va. — Old Dominion Trans. Co. v. Hamilton, 131 S. E. 850, 146 Va. 594, 46 A. L. R. 186.

15 Ibid. See also Lyon v. Mitchell, 36 N. Y. 235; Southard v. Boyd. 51 N. Y. 177; Beal v. Polhemus, 67 Mich. 130; Winpenny v. French, 18 Ohio St. 469; Barry v. Capen 151 Mass. 99, 23 N. E. Rep. 735; Formby v. Pryor, 15 Ga. 258; Moyer v. Cantleny, 41 Minn. 242, 42 N. W. Rep. 1060; Cradwick v. Knox, 31 N. H. 226.

16 Ibid.

17 51 N.Y. 177.

18 36 N.Y. 235.

19 131 S.E. 850, 146 Va. 594, 46 A.L.R. 186.

20 98 Ind. 238, 49 Am. Rep. 746.

of the agreement because in his zeal he expended money outside the fair intent of the agreement in bringing influence to bear upon officials charged with letting the agreement, though had his action been contemplated when the agreement was made, it would have been rendered void."

With the assumption, therefore, that the law involved in the *Regala* case did not prohibit the intervention of intermediaries, the decision is open to question. It is not shown by the facts that the parties made the contract with the intention that undue influences on the government officials concerned were to be employed. In determining whether a contract is void as against public policy, the courts are guided by the intention of the parties rather than by the services rendered.[21] In cases where a contract may be lawful in itself though capable of being exploited for the furtherance of some illegal purpose, the intention of the parties becomes of vital importance.[22] In the *Regala* case, there was no showing that the parties intended some unlawful means to be employed in the prosecution of the application for import licenses; neither was there any evidence to prove that such prohibited means were actually employed which may serve to vitiate the contract. It seems that the Supreme Court has overlooked these significant principles.

There is one more vital oversight on the part of the Supreme Court in the *Regala* case. It relied solely on the case of *Tee v. Tacloban Electric Co.*[23] as precedent. In that case, Tee was approached by agents of the Tacloban Electric Co. for him to secure dollar allocations from the Central Bank for the company upon the payment of the standard fee of 10% of the value of allocations obtained. Tee filed the necessary papers, followed them up for six months, and finally obtained the allocations. Upon failure to collect his 10%, Tee filed the appropriate action with the Court of First Instance of Manila, where defendants moved to dismiss the complaint on the ground that the contract was null and void as against public policy. On appeal, the Supreme Court sustained the dismissal. Upon these facts, the Court would have been completely justified in considering it as an indisputable precedent in the subsequent case of Regala were it not for the presence of one important fact in the *Tee* case which is not found in the former case. In the Tee case, the law involved, Section 8 of Article 14 of the Central Bank Circular No. 44,[24] issued under the authority of Republic Act No. 265,[25] as amended, *expressly prohibited the intervention of intermediaries.* Under the said circular, all applications for foreign exchange were required to be made through authorized agent banks, which are the only parties authorized to deal with the Central Bank. In fact, the Circular declares that "under no circumstances should any applicant, his agent and representative follow up an application with the Central

21 Old Dominion Trans. Co. v. Hamilton, 131 S.E. 850; Cooke v. Embry, 123 So. 27, 219 Ala. 623; Shouse v. Consolidated Flour Mills Co., 277 P. 54, 128 Kan. 174, 64 A.L.R. 600; Frenkel v. Hogan, 125 A. 909 146 Md. 94.

22 WILSON, THE LAW OF CONTRACT 373 (1937).

23 G.R. No. L-11980, February 14, 1959.

24 Section 8 of Article IV of Central Bank Circular No. 44 provides in full:

"Authorized Agent Banks are hereby instructed to inform their clients that under no circumstances should any applicant, his agent or representative, follow up an application with the Central Bank or the Bankers' Committee. All information concerning applications, including actions taken thereon by the Monetary Board, shall be communicated to the applicants by their respective Authorized Agent Banks."

25 The Central Bank Charter. All circulars issued pursuant to it have the force and effect of law.

Bank." On the other hand, in the *Regala* case, there is no such similar law; to reach such a conclusion would be to make a strained interpretation of Republic Act No. 650. The absence or presence of such a provision constitutes a great difference. It is recognized that contracts for the employment of agents to procure contracts or concessions with the government are illegal and void where there is a law or regulation prohibiting the employment of agents therefore.[26] Upon this rule, the decision in *Tee v. Tacloban* was right under the circumstances. It was not, however, a proper precedent in the Regala case.

The next question in order is: Can it be said that the contract in the *Regala* case was illegal *per se*? If so, where then did the "illegality" inhere in the contract? In the contingent fee compensation of 10%? If based on this ground, then the decision again is not supported by most authorities. Contingent fee contracts of the kind under discussion are generally upheld.[27] It is recognized that such contracts, though a contingent compensation is to be paid, are not illegal in themselves; they become so only where corrupt means are to be resorted to.[28] While there is some authority to the contrary, the better rule is that an agreement providing for compensation upon a contingent basis to procure or assist in procuring a public contract is not rendered void as being against public policy by the contingent character of the promise of payment.[29] Thus, Section 563 of the Restatement of the Law reads:

> "Sec. 563. The fact that the compensation fixed in a bargain for efforts to secure a legislation or official action is contingent on success is not conclusive evidence that improper means are contemplated in securing the desired results."

In the light of the foregoing principles, the only remaining basis for the Court's decision is its declaration that "the intervention of intermediaries is unwarranted and uncalled for" and that the contract in question "would serve no other purpose than to influence or possibly corrupt, in unmeritorious cases, the judgment of the public official or officials performing an act or service connected with the issuance of import licenses or quota allocations — an eventuality which the law precisely sought to avoid."

With regard to the declaration that "the intervention of intermediaries is unwarranted and uncalled for," it loses its force as a reason in the face of the principles stated showing that there is nothing inherently wrong in the employment of agents to negotiate business with the government. And as to the second statement "that the contract would serve no other purpose than to influence or possibly corrupt, in unmeritorious cases, the judgment of the public official or officials...", this is not a sufficient ground for declaring

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26 Steffey Inc. v. Budges, 117 A. 887, 140 Md. 429.

27 Ceyne v. Incenerator Co. of Texas, C C.A.N.Y., 80 F2d 844; Cary v. Neel, 189 S E. 575, 54 Ga. App. 860; Lewy v. Standard Plunger Elevator Co., 129 N.E. 775, 290 Ill. 205, affirming 218 Ill. App. 306; Millspaugh v. McKnab, 7 P. 2d 51, 134 Kan. 579; Noble v. Mead-Morrihson Mfg. Co., 129 N.E. 669, 237 Mass. 5; Reinhard v. Grand Rapids School Equipment Co., 178 N.W. 718, 211 Mich. 165; Old Dominion Trans. Co. v. Hamilton, 131 S.E. 850, 146 Va 504, 46 A.L.R. 186.

28 The cases are collected in 46 A.L.R. 1057 and 148 A.L.R. 768.

29 WILLISTON, CONTRACTS, Rev. Ed. section 1729.

the contract in question as void for being contrary to public policy. The fact that an agreement has for its object the obtaining of contracts or concessions through government officials does not give rise to the presumption that corrupt or improper influences are to be resorted to or that the undertaking will injuriously affect or subvert the public interest.[30] Indeed, the rule that presumptions in human affairs are in favor of innocence rather than of guilt applies in testing these agreements.[31]

After the foregoing careful consideration of the principles involved, it is doubtful whether the contract in the *Regala* case could be reasonably declared as contrary to public policy on the supposed test that "for a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present."[32] The judicial precedents cited show that the "potentialities for harm" of the so-called "ten percent contracts" are not so great as to render them inherently unlawful. The modern view is that public policy, as a branch of the law should not be extended for "'judges are more to be trusted as interpreters of the law than as expounders of what is called public policy";[33] that public policy is a "very unstable and dangerous foundation on which to build, until made safe by decisions."[34] Thus, it is said that it is no longer legitimate for the courts to invent a new head of public policy;[35] that judges are not free to speculate what, in their opinion, is for the good of the community, and they must be content to apply either directly or by way of analogy the principles laid down in previous decisions; that they must expound, not expand this particular branch of the law.[36]

The contract in the *Regala* case, at any rate, is not clearly contrary to public policy. And on this point, the following quotations are instructive:

As said by an Iowa Court:

> "So long as the corrupting or impolitic character of the agreement is not so clear as to be readily apparent to the intelligent and impartial mind, the just principles of the law which hold every man to a fair and full performance of his contract ought not be made to yield to any doubtful construction of that somewhat variable and altogether undefined thing which they call public policy. While protecting the interests of the public, the rights and interests of individuals are not to be unnecessarily sacrificed."[37]

As said by a California court:

> "Before a court holds void as against public policy a contract made in good faith and stipulating for nothing *malum in se* or *malum prohibitum*, it should be satisfied that advantage to accrue to the public from its holding is certain and substantial, not theoretical

30 The cases are collected in 46 A.L.R. 201.

31 Houlton v. Nichol, 93 Wis. 393, 67 N.W. 715, 33 L.R.A. 166, 57 Am. St. Rep. 928. See also Old Dominion Trans. Co. v. Hamilton, 146 Va. 594, 131 S.E. 850, 46 A.L.R. 186.

32 12 AM. JUR. p. 664.

33 Re Mirams, Q.B. 594, at p. 595.

34 Janson v. Driefontein Consolidated Mines, Ltd., A.C. 484, at 491.

35 Ibid.

36 CHESHIRE op. cit. supra, at 270.

or problematical and based on certain economical or sociological problems."[38]

And as stated by an English court:

"Even though the contract is one which prima facie falls under one of the recognized heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds... In popular language... *the contract should be given the benefit of the doubt.*"[39] (Underscoring supplied).

ROGELIO A. VINLUAN*

37 Cole v. Brown-Hurley Hardware Co., 139 Iowa 487, 117 N.W. 746, 18 L.R.A. (N.S.) 1161, 16 Am. Cas. 846.

38 Maryland Casualty Co. v. Fidelity and Lasualty Co. of New York, 236 P. 210, 71 Cal. App. 492.

39 Fender v. St. John-Mildmay, A.C. 1, at pp. 12-13 per Lord Atkin.

* Notes and Comments Editor, Student Editorial Board, PHIL. L. J. 1939-60.

PARDON IN DIRECT CONTEMPT OF A SUPERIOR COURT

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law * * * It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to prevent it; but whoever make it useful must have full discretion to exercise it"[1]

Not very long ago Atty. Topacio Nueno, counsel for Leonardo Manecio, was punished for direct contempt of court by the late Judge Primitivo Gonzales of the Court of First Instance of Cavite. It appears that Nueno in the process of a heated discussion on a delicate point of law in the course of the trial nearly came to blows with the prosecutor. Judge Gonzales admonished Nueno to control his temper, but the latter in a blinded fit of anger shouted back at the judge. For this misconduct he was ordered to jail for ten days for direct contempt of court.[2] He then made a memorandum to the President requesting the latter to pardon him and made it clear that he was not leaving jail unless pardoned. In the meantime, the judge rescinded his order, but Nueno refused to leave jail. The President in answer to Nueno's plea told the latter that to pardon him would be academic since the judge already rescinded or withdrew his judgment and he was a free man. So, the President instead sent an emissary and had Nueno fetched out of jail.

1 Ex parte Crossman, 267 U.S. 87.

2 Rules of Court, Rule 64, Sec. 1. It defines direct contempt as one committed by misbehaviour in the presence of or so near a court or judge as to interrupt the administration of justice, including disrespect toward the court or judge, offensive personalities toward others, or refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition when lawfully required so to do***.