CONTRACTS IN RESTRAINT OF MARRIAGE.

The case of *The Minister for Education v. Oxwell and Moreschini*[1] was concerned with the validity of the standard form of contract which is prescribed by the Education Department in cases where it undertakes to train and subsidise female students with a view to their qualification as teachers. The first defendant, then an infant, entered into an agreement with the plaintiff under which the plaintiff agreed to provide the first defendant with a two year course of teacher training, and the first defendant agreed that if her course was terminated after its commencement for any reason other than death, disease or accident she would repay to the plaintiff the money received by her as bursar and student: the second defendant, her father, was guarantor. One of the terms of the agreement was that if the student married during the course of her training her course would be terminated and she would be liable to repay the allowances which she had received. During the course of her training she became pregnant. She was anxious to marry the child's father immediately, but also wished to continue and complete her course. She was informed by the acting principal of the training college that although she could continue and complete her course notwithstanding her pregnancy, if she got married she would have to resign. She therefore resigned, and the plaintiff sued for the return of the money received by the first defendant as student and bursar. The defendants resisted the claim on the grounds of the infancy of the first defendant and that the agreement was void as against public policy, being in restraint of marriage.

Virtue J. held for the plaintiff on both counts. He held that the defendants could not plead the infancy of the first defendant as the contract was for her benefit, and that the contract was not void as against public policy. On the question of infancy Virtue J. was clearly right; on the question of public policy, however, his decision is open to criticism.

Virtue J. held that not all contracts in restraint of marriage are void, that the agreement before him constituted only a partial restraint on marriage, that the restraint was not unreasonable in the circumstances, and that therefore the contract was valid. In support of his contention that contracts in partial restraint of marriage are only void if the restraint is unreasonable Virtue J. cited *Hartley v. Rice*,[2] and said of that case:—

1 Not yet reported. The writer is indebted to Mr. G. D. Clarkson Q.C., of the Bar of Western Australia, for a copy of the judgment.

2 (1808) 10 East. 22, 103 E.R. 683.

". . . in an action to recover on a wagering contract in which the contingency was the marriage or otherwise of the plaintiff within six years, though the Court refused to enforce the contract as being in restraint of marriage, three of the four Judges who participated in the decision indicated in their reasons that they did so on the ground that the restraint had not been shown to be reasonable in the particular instance."

It is submitted with respect that Virtue J. has read too much into the judgments in *Hartley v. Rice*. In that case Lord Ellenborough C.J. said:—[3]

"On the face of the contract its immediate tendency is, as far as it goes, to discourage marriage; and we have no scale to weigh the degree of effect it would have on the human mind. It is said, however, that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to shew that the restraint was reasonable; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract. Wagers in general are seldom indifferent in their tendency, and this certainly is not so."

Grose J. said:—[4]

"Every contract in restraint of marriage is illegal, as was said by Lord Hardwicke. But this is endeavoured to be distinguished from former cases, as not being a total and indefinite restraint of marriage: that however must depend upon the duration of the party's life. If good for six years, why not for a longer period."

Le Blanc J. said:—[5]

"The case is presented to us stripped of all particular circumstances, and therefore must be determined by the general rule of law. Now it is impossible to say that such a contract might not have an effect on the mind of the party to deter him from marrying during the six years; but a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law: and nothing is stated here to shew it to be otherwise in the particular instance."

Bayley J. said:—[6]

"The wager is calculated to operate against marriage, and no

3 (1808) 10 East. 22, at 24, 103 E.R. 683, at 684.
4 *Ibid.*
5 *Ibid.*
6 *Ibid.*

prudential reasons are shewn to have conduced to it in this instance; therefore it falls within the general rule, that being a contract in restraint of marriage generally, it is void."

It is submitted that all the judgments in *Hartley v. Rice* amount to is: "The contract is void as being in restraint of marriage. It has been argued that a partial restraint on marriage is enforceable if it is reasonable: even if this is so this restraint has not been shown to be reasonable." This is a weak foundation for what is, it is submitted, a novel doctrine in the law of contract; that the validity of a contract in restraint of marriage depends upon its reasonableness. And even if *Hartley v. Rice* does lay down that a partial restraint on marriage is enforceable if it is reasonable, it can hardly be said to support the decision of Virtue J. in *Minister for Education v. Oxwell and Moreschini.* In *Hartley v. Rice* the Court held a six year restraint on marriage to be unreasonable; Virtue J. held a five year[7] restraint to be reasonable.

Virtue J. pointed out in his judgment that the State incurs a considerable outlay in the training of teachers, and held that it was not unreasonable to require that the student should serve the State for a reasonable period as a teacher and make some repayment of benefits if she should fail to do so. This is undeniable. The blame in these cases, however, lies with the Education Department and its policy of not employing married women: and even here it is not consistent. Under the terms of the agreement, if the student marries during her first year of service as a teacher she may not have any subsequent service counted towards the fulfilment of her agreement, but if she marries other than during the first year of teaching while still indebted to the department for allowances received and is offered and accepts employment in the department she may count any service within a period of five years of her marriage as service towards repayment of allowances. Moreover, the first defendant in this case was informed by the acting principal of the training college that she could continue and complete her course, notwithstanding her pregnancy, provided that she did not marry. The agreement, therefore, not only restrains marriage, but positively encourages immorality and illegitimacy.

In holding that the restraint was not unreasonable, Virtue J. pointed out that the effect of the agreement was only to restrain a

[7] Under the terms of the agreement, the trainee teacher binds herself not to marry during her two year training course, and also for a further three years of teaching after she has qualified.

young woman from marrying until she was in her early twenties. It is respectfully submitted that His Honour has taken a most cold-blooded and unromantic view of marriage. The agreement may not prevent a young woman from marrying until her early twenties, but it may well prevent her from marrying the man of her choice. Here too, it is submitted, the agreement encourages immorality. Suppose a newly qualified young woman wishes to get married. Neither she nor her fiancé can afford to repay the bond, and both find the idea of a three years engagement distasteful if not intolerable: the temptation to live together without being married may well prove irresistible.

Virtue J. further held that even if the agreement was contrary to public policy, it would still be enforced because the Minister has power under the Education Act to prescribe by regulation the form of contract to be entered into by trainee teachers. It is submitted that this is clearly wrong. In the construction of statutes it is presumed that the legislature did not intend to make any alteration in the law other than what it declared by express terms or necessary implication,[8] and if the legislature had intended to give the Minister power to make contracts contrary to public policy it would have said so.

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8 See MAXWELL ON STATUTES (10th ed.) 81-82; Potter v. Minahan, (1908) 7 C.L.R. 277, at 304 *per* O'Connor J.; R. v. Snow (1915) 20 C.L.R. 315, at 322 *per* Griffith C.J.; Ex parte Grinham; Re Sneddon, (1961) 78 W.N. (N.S.W.) 203, at 211 *per* Walsh J.