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FOREIGN MARRIAGE — VALIDITY — ALIENS — EXCLUSION. — *United States ex rel. Devine et al.* v. *Rodgers, Commissioner of Immigration et al.*, 109 Federal, 886 (District Court, E. D. Pennsylvania, June 26, 1901). To question a foreign marriage is such a grave matter, to declare it void is in general so undesirable, that he, who reads the headnote to this case, will naturally stop to look into the particular reasons for the decision.

A continuous flow of immigration makes the question of the validity of foreign marriages one of especial concern in this country. The present case illustrates this. "The relator is a naturalized citizen of the United States and is the husband of Rosa Devine and father of her idiot son, William. Rosa and William are Russian Jews, whom the Commissioner of Immigration has ordered to be deported on the ground that both are aliens, that William is an idiot and Rosa is a pauper, that is likely to become a public charge." The alienage of both is denied upon the ground, that Rosa is the lawful wife of the relator according to the laws of Russia, where the marriage ceremony took place; wherefrom it would follow that when the husband became a

citizen of the United States his wife and child ceased to be aliens. The point to be decided then is whether Rosa, who is her husband's niece, is also his lawful wife under the laws of the State of Pennsylvania, which declare a marriage between uncle and niece void and subject the parties to a fine, not exceeding $500, and an imprisonment not exceeding three years. The court was satisfied with the proof submitted to show that a marriage between uncle and niece was valid in Russia, "and being valid there, the general rule is that the marriage should be regarded everywhere as valid. But there is this exception at least: if the relation entered into elsewhere, though lawful in a foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this state to recognize the foreign marriage as valid. . . . So far as concerns the material conditions of the contract of marriage, we must distinguish between such hindrances as would have impeded marriage but cannot dissolve it when already concluded, and such as would actually dissolve a marriage if celebrated in the face of them. . . . A matrimonial relation that in the last sense is prohibited by our laws cannot be tolerated. . . . A continuance of that relation would expose the parties to indictment in the criminal courts. Whatever may be the standard of conduct in another country, the moral sense of this community would be shocked by the spectacle of an uncle and his niece living together as husband and wife. I am of course bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public."

The court clearly holds that the facts of this case justify a plain exception to the general rule: "that a marriage good where celebrated is good everywhere." The validity of the exception may perhaps be best tested in the light of the reasons for the general rule. One of these reasons is mentioned in the decision: the comity of nations, which prompts one state to recognize a marriage lawfully solemnized in another. But it would seem to us that the fundamental reason for the rule is still more firmly built. There is here a cause stronger than the one which calls for the exercise of international comity in a suit on a foreign contract. It is based upon a man's natural right to marry whenever and wherever he pleases. When he exercises that right by marrying in a foreign state, there can be but one proof of the mutual consent—the essence—of the marriage, and that is by record at the time, and according to the law of the place of ceremony. That this marriage should then be considered valid everywhere is vital to the integrity of society, and the rights and honor of the parties concerned. It is not then merely the observance of an especial courtesy due to the laws of one nation by another, but a broad ground of public policy, which prompts the recognition of a foreign marriage.

The wisdom of this general rule is so well recognized, that to consider an exception is to inquire into a case where it was practically impossible to avoid a conflict of laws.

"International law protects marriage as practiced in Christian countries but not polygamy," and, therefore, polygamous relations which are often mentioned as the first and evident exception are really not in conflict with the rule, since they do not fall within its application.

Nor does the law of nations protect marriages contrary to the law of nature, for in doing so it would protect that which all Christendom condemns. The marriage considered in the present case is not contrary to such general laws of nature, universally recognized, for we have seen that it is sanctioned in Russia. "Whatever may be the scruples as to connections between relatives further removed than brother and sister in the collateral line of consanguinity, the better opinion does not hold them incestuous by natural law." Indeed this is the only consistent view to take, for otherwise we would be making natural law something dependent on the jurisdiction (or sectional, as are the laws prohibiting the mingling of black blood and white). Even in the same state the so-called natural law would change with the enactment of different statutes. An example is to be found in Kentucky, where marriage with an uncle's widow is enumerated among the unlawful marriages in the act of 1798, but is omitted in the Revised Statutes of 1852 (R. S. of Ky., p. 384). Additional proof of the fact that there is no universal law of nature prohibiting marriage between the remoter degrees of collateral kindred is to be found curiously enough in the present case, which cites *Medway* v. *Needham* (16 Mass. 157, 1819) to show the *invalidity* of a marriage between uncle and niece, while a later Massachusetts case, *Sutton* v. *Warren* (10 Met. 451, 1845), cites the very same case in *confirming* a foreign marriage between nephew and aunt. The dictum referred to in both decisions merely states without further definition that marriages against the law of nature will not be tolerated.

Let us therefore consider the statutes conflicting with the general rule recognizing foreign marriages, aside from questions of universal natural law, since "each state is the conservator of its own morals," and adapts its marriage laws to its own peculiar social conditions; adding by way of qualification Mr. Bishop's statement (in his book on "Marriage and Divorce," § 373) that a strong implication in the statutes, combined with a strong and well-known public opinion, should be accepted by the tribunals as a legislative direction to them, *Dupre* v. *Boulard* (10 La. An. 411, 1855).

It will be remembered that the present case is decided on a statute prohibiting marriage between uncle and niece: Act of 1860, § 39 (P. L. 393). Laws with the same provision may

found in the great majority of the states (Arkansas, Mansf. Dig. 4908; Kansas Comp. Laws, chap. lxi, § 2; New York Gen. Laws, chap. xlviii, § 2; Tennessee Mill and V. Code, 3291; Vermont R. S. 2628).

Wherever a statute regulating marriage is peculiar to a particular state, it conflicts with the general rule upholding the validity of foreign marriages. One or the other must yield. The question then resolves itself into one of the construction of the force and intent of the statute.

There are many statutory provisions that yield without question. They appertain to the ceremony of marriage, the license, the authority of the person officiating, etc. On this point the law of England and of the States is in accord. *Sottomayer* v. *De Barros* (3 P. D. 5, 1877). It will be recalled for example that the "Gretna Green marriages" were formerly good, although without consent of the parents."

The case under consideration distinguishes matters of ceremony from faults that go to the capacity of the parties because the latter survive the ceremony, and continue to exist as long as the marriage exists. Such faults it will not tolerate in a foreign marriage. Therein it follows the English cases *Brook* v. *Brook* (9 H. L. Cases, 193, 1861) and *Warrenden* v. *Warrenden* (2 Cl. and F. 531, 1835; wherein see a dictum on the identical point of this case).

The reasons for the position of the court in upholding the laws of the State, where a foreign marriage is concerned, are very strong. If the statute were not enforced in the case of foreigners, they would be permitted to live openly, and perhaps happily, in plain contradiction to the law, which forbids the relation that they hold to all the citizens within its jurisdiction. Whatever reasons of public policy and public health the state may have for making this law are equally defeated. The indirect results are quite as serious, for experience has shown that the toleration of a foreign marriage, prohibited under the local law, is immediately followed by a flocking into other states for the solemnization of the forbidden marriage and a consequent return home under protection of said toleration. That fritters away the strength and dignity of the law, for what is a statute worth if it may be avoided by stepping into a neighboring state?

But in upholding the sovereignty of the state we sacrifice much—in this case we sacrifice all that the law generally encourages, and the relator holds most dear, with not the slightest wrong on his part, wittingly or unwittingly. For here the invalidity of the marriage means the deportation of wife and child—a separation from husband and father; a breaking of all the family ties and rights. Nor is this case even a full example, for here the unfortunate wife is an immigrant, who is deported when she threatens to become a public burden. Let us eliminate this spe-

cial element from the case, and we have her left among us without a vestige of all those marital rights which she acquired under a marriage good and valid when it was made in Russia; while her son, legitimate when born, suddenly becomes illegitimate (unless a statute provides otherwise, which in the case of incestuous marriages it generally does not). In accord with the present case are *In re Stull's Estate* (183 Pa. 625, 1897); *State* v. *Brown* (47 Ohio, 102, 1890); *Marshall* v. *Marshall* (N. Y. 4 Thomp. & C. 449, 1874); *State* v. *Kennedy* (N. C. 22 Am. Rep. 683, 1877).

We are forced to conclude, that a great exigency alone can justify the invalidation of foreign marriages and its result. It may lie in the reason for the statute, or in the necessity for preserving through it the dignity of the law. Whatever the moving cause may be, there is authority for saying that it is not sufficient, "and if it may be deemed a contempt upon the sovereign authority of the state for its own citizens to withdraw momentarily from her own territory for the purpose of assuming and bringing back a relation prohibited by the laws, it would still be worthy of consideration by the legislator, whether the principles upon which the state assumes to regulate marriage would not be better subserved by permitting even in such a case, unless the admitted law of nature be violated, the operation of the general rule which refers the validity to the *lex loci contractus,* than by avoiding it in order to vindicate the sovereign authority of the state." *Stevenson* v. *Gray* (17 B. Monr. 197, 1856, this being the case of a marriage between a nephew and his uncle's widow performed in Tennessee and held valid in Kentucky, where it violated the statute).

The case of *Sutton* v. *Warren* (10 Met. 451, 1845) seems strongly in point. In that case a marriage between a nephew and aunt (of the same degree of consanguinity as an uncle and niece) was held good in Massachusetts although void by the statute of that state; and this in spite of the fact, that it was voidable in England, where it was performed, and that its minimum criminal punishment in Massachusetts is equivalent to the maximum in Pennsylvania. The marriage there confirmed, is clearly not as deserving of recognition as is the marriage under consideration, which was good in Russia,—and was nevertheless held invalid. The Massachusetts case evidently holds that the good policy of affirming marriages, or rather of not disaffirming them, overrules the evil influence of the shocking "spectacle of uncle and niece living together as man and wife." Nor did the results seemingly cause a regret of the decision, for the case was affirmed in *Com.* v. *Lane* (113 Mass. 458, 1873. See the review herein of *Brook* v. *Brook*), also *Sponsford* v. *Johnson* (2 Blatch. U. S. 51, 1847).

Massachusetts and other states have passed laws declaring void

marriages in which the parties leave the state merely to avoid its statutes (Mass. Rev. St., chap. lxxv, § 6), thus preventing that evasion of the law which otherwise forms the strongest objection to the view of toleration taken in those states.

We have seen then that the present case represents the seeming result of the cases in England and some of our states, and that the Massachusetts view is flatly contrary; that the former interprets the statute forbidding marriages within certain degrees of relationship as an exception to the general rule that marriages if valid where made are valid everywhere, while the latter construes the same statute to yield to the desirability of confirming said marriages under the said general rule.

We have found further that each position has its own reason and strength, which is at the same time the weakness of the other. Whichever position may be the most expedient and just, this much is certain, that it is deplorable there should be not only so great a diversity in the marriage laws of the United States, but also so great a difference in their interpretation. In the present state of the law it would be possible for the parties here concerned to land in Boston, where, under the cases cited, their marriage would be valid; if they traveled to Ohio their marriage would be void; if they continued their journey to Kentucky they would be recognized as husband and wife, and if after twenty years of married life they came to Pennsylvania their marriage with all its accompanying rights would be void.

In one state a man is married, has children and property rights; in the neighboring state he is under the same circumstances committing incest, subject to criminal action and imprisonment, has lost all marital property rights and his children are illegitimate. Surely this vital question which goes to the very fundament of his own happiness and the state's strength should not be dependent upon the jurisdiction. If the marriage laws of the United States were uniform, one state would not, as here, be forced to sacrifice its sovereignty in order to affirm a marriage performed in another state. A marriage should be subject —and subject alone—to certain plain and broad laws, unmistakable to foreigners, and impressing on all citizens the solemnity of its rights and liabilities.

W. L.

MINES AND MINING—SUBJACENT SUPPORT—STATUTE OF LIMITATIONS.—*Noonan* v. *Pardee,* 200 Pa. 474 (Pennsylvania, April 12, 1900.)

It is a matter of some doubt in many jurisdictions when, in contemplation of law, a cause of action arises for a failure to afford subjacent support to surface lands.

It has been determined in several jurisdictions that the cause

of action arises the moment at which the mining supports—the ribs and pillars—are weakened to that point at which subsidence will occur. In other jurisdictions, the conclusion has been reached that the cause of action arises only when there has been an actual subsidence.

At what point of time a mining company becomes liable in action of trespass for damages arising from a "cave in" is one of the questions of law passed upon in the case of *Noonan* v. *Pardee*, 200 Pa. 474. There the Supreme Court of Pennsylvania announced the Pennsylvania rule in these words: "When the coal was removed without leaving sufficient pillars, or without supplying sufficient artificial props, was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above. And from that time dates the cause of action."

"Unless, when the coal was mined, the miner left no pillars, or too few, . . . there was no cause of action.

"In the case of mining operations, which are a trespass, the statute runs from the trespass, though the party may have been ignorant of the act done."

There expressed is the conclusion of law and the reason therefor. It is unquestioned law that the right to subjacent support is a right incident to ownership of surface land. But because it is one of a class of rights *jure naturæ*, it is not necessarily true that a cause of action arises for the breach thereof without the occurrence of actual damage.

As a general principle of law, nothing could be truer than that every breach of an absolute right gives rise to an action therefor, irrespective of the occurrence or absence of actual damage. But the breach of the right to subjacent support is necessarily accompanied by actual damage. This "absolute and natural" right cannot be violated by a trespass,—from which says the court dates the cause of action,—without actual damage in the way of a subsidence.

The right of support means strictly what the words import: a right to *support*. If support is not afforded the right thereto is violated. However if the cause of action dates from the time at which the mine supports are rendered so insufficient that a subsidence *might possibly* occur, it seems apparent that the so-called "right of support" is nothing more than a right against the *possibility* or *probability* of a failure to support. A right to support is a right to have the surface land supported. It is not a right to have the subjacent owner furnish those means of support, which a dozen of experts deem to be adequate, in all probability, to support the surface land.

There is always first a digging and secondly the neglecting *afterwards* to afford support. Byles, J., in the case of *Bonomi* v. *Backhouse*, 1 E. B. & E. 630, makes this remark: "Take the case of a man allowing trees to be on his land which, if they are allowed to grow for a certain time, will injure the land of his

neighbor; can the neighbor maintain an action as soon as an acorn is put in, and before the trees have grown so as to be injurious?"

In a like manner, how can it be properly said that a cause of action accrues when digging in subjacent strata renders a failure of support possible?

The Supreme Court of Pennsylvania, it is submitted, reached the conclusion in *Noonan* v. *Pardee,* through the failure to distinguish between that class of rights, *jure naturæ,* the breach of which may or may not be accompanied by actual damage, and that class whereof a breach and actual damage necessarily concur.

The right of support is violated when there is no support and the land subsides.

If the Supreme Court of Pennsylvania is correct in its conclusion that the right of action accrues at that point of time when the "ribs and pillars" are rendered insufficient to support the land, how, with consistency, can they conclude that the present owner in possession, notwithstanding a series of mesne conveyances, is alone entitled to recover for the actual damage resulting from a subsidence? "When the right to sufficient support has been violated, the cause of action, it is true, arises, but the owner in possession when the consequences follow, is the one who suffers." "If the *cause* of the injury was within six years, although at the date of the deed [to the present owners] the damage was not susceptible of computation, yet afterwards became so by the subsidence of the surface, their [the present owners'] right to sue was then fixed, *a right which, from the nature of the case, could not have had more than a doubtful existence before the actual damage occurred.*"

"It is certainly true that the purchaser of an estate cannot claim damages for an injury done to it before his purchase. Such a claim is a chose in action which remains in the hands of the vendor. The vendee is presumed to pay less for his estate on account of the injury, and has therefore no claim to recover damages for it." Per Justice Lewis in 22 Pa. 32.

In answer to this the Pennsylvania Supreme Court states that the learned Justice was speaking there of damages arising from the exercise of eminent domain by railroad companies. "In all such cases the injury is palpable. There is no reason why the grantee of the land, in the interval between the appropriation and the completion of the work, should be compensated in damages, when he has probably gained a reduction in price, because of the damage, equal to the amount of damage."

But in the case at bar the owner in possession alone is entitled to damages because he bought in ignorance of the insufficient support. *"Until they actually occur, no one can tell when they will occur, or that they ever will."*

It is submitted that if the last statement is true as respects the right of the present owner to recover for the "cave in," it is

equally true likewise as to the point of time at which the Statute of Limitations begins to run. If the injury is not so apparent as to deter a prospective purchaser from paying full price for the surface land, why is not the injury so obscure that the Statute of Limitations is barred from running? *Contra non valentam agere nulla currit præscriptio.*

It will not be seriously questioned in any jurisdiction that the measure of damages, in a recovery for the breach of the right to support, must embrace all the injurious consequences of the original act, unknown as well as known, which shall arise thereafter as well as those which have arisen. A right of action is satisfied by one recovery. *Nemo debet bis vexari pro una et eadem causa.* What then will the Supreme Court do, after a recovery is had by the original owner for present and prospective damage arising from a breach of the right (but unaccompanied by a subsidence) when a suit is brought by the owner in possession for actual damage arising from a subsidence? "The owner in possession, when the consequences follow, is the one who suffers." P. 485.

In *Bonomi* v. *Backhouse,* Willis, J., says: "If the defendant is right these consequences follow: whenever a mine or quarry is worked, the worker may be subjected to actions by all the surrounding owners; nay, they would in self-defence be compelled to bring them, if there was any reasonable *ground to suppose that the working would in time produce damage to their property.* It would be in vain that the worker would say: "You will not be injured; the workings are not injurious; if they turn out likely to be so, I will take means to prevent it; at all events, wait till you are injured." Vexatious and oppressive actions might be brought, on the one hand, and, on the other, an unjust immunity obtained for secret workings of the most mischievous character, but the result of which did not appear within six years."

"We should be unwilling," said the Court of Exchequer, as quoted above, "to rest our judgment upon mere grounds of policy; but we cannot but observe that a rule of law, or rather the construction of a Statute of Limitations, which would deprive a man of redress after the expiration of six years, when the act causing the damage was unknown to him, and when in many instances he would be in inevitable ignorance of it, would be harsh and contrary to the ordinary principles of law."

An action unquestionably will lie for the infringement of an absolute right; but the right here was to have land supported, and as long as it was supported the right was not infringed. The conclusion of the Supreme Court of Pennsylvania is wholly inconsistent with the right of the defendant to use his property as he pleases, provided he does not injure that of his neighbor. In the light of this conclusion the maxim, *Sic utere tuo ut alienum non lædas,* should be read without the *non.*

C. S. W.