[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT;

AND

MAJOR (FALSELY CALLED MILLER) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906.

SYDNEY, *Aug.* 8; *Oct.* 9.

Griffith C.J., Barton and O'Connor JJ.

*Marriage—Prohibited degrees—Nullity—Laws of England introduced into Colony on settlement—*28 *Henry VIII. c.* 7, *sec.* 11.

Practice—Appeals from Supreme Courts—Time for lodging security—Extension—Lapsed appeal—Special leave—Appeal Rules, sec. IV., r. 10.

The marriage laws of England were part of the body of English law introduced into the Colony of New South Wales on its first settlement.

Marriages within the prohibited degrees prescribed in 28 Henry VIII. c. 7 are therefore voidable during the lifetime of the parties by the Supreme Court of that State in its Matrimonial Causes Jurisdiction.

An appellant omitted to lodge security within the time prescribed by the rules, and, after the time had expired, applied to the High Court for extension of time and reduction of the security.

The Court expressed a doubt whether they had power to extend the time owing to the appeal having lapsed, but, having regard to the special circumstances of the case, granted special leave to appeal and reduced the security conditionally upon the appellant setting down the appeal for the current sittings.

Decision of the Supreme Court, *Major* (f.c. *Miller*) v. *Miller*, (1906) 6 S.R. (N.S.W.), 24, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

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The respondent was petitioner in a suit for declaration of nullity of marriage in the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction. The ground of the petition was that the present appellant was the divorced husband of the petitioner's mother, that is to say the stepfather of the petitioner. The petitioner's mother had obtained a divorce from her husband for his adultery with his stepdaughter, the present respondent, who was his wife's daughter by another marriage, and was alleged by the appellant to be illegitimate. After the divorce the stepdaughter and stepfather married. The petition was heard by *Walker* J., from whose judgment the above short statement of the facts is taken. He held that, even if the petitioner was illegitimate, the parties were within the prohibited degrees of affinity, and that the marriage was voidable. He therefore pronounced a decree *nisi* for nullity of marriage returnable in six months, but, by reason of the petitioner's knowledge of her relationship to the appellant at the time of the marriage, made no order as to costs.

From this decision the appellant appealed *in formâ pauperis* to the Full Court (consisting of *Darley* C.J., *Cohen* and *Pring* JJ.), who dismissed the appeal without costs: *Major* (f.c. *Miller*) v. *Miller* (1).

The appellant then within the prescribed time gave notice of appeal *in formâ pauperis*, but failed to lodge security within the time allowed by the rules. On August 1st 1906, after the time for giving security had elapsed, he applied to the High Court to have the security reduced, and the time for giving security extended. Objection was taken by the respondent that, the appellant being out of time, the High Court had no power to extend the time, as by the rules the appeal must be deemed to have been abandoned.

Per Curiam.—A question of status and legitimacy is involved. Even if security had been duly given the appeal could not in any case have come on for hearing before these sittings. If the petitioner is willing to set the appeal down for the present sittings we think that, under the special circumstances of the case, special

(1) (1906) 6 S.R. (N.S.W.), 24.

leave to appeal should be given, but it must not be assumed that an appellant can with safety allow the time for security to lapse. We have grave doubts as to the power of the Court to extend the time for giving security at this stage.

The Court granted special leave to appeal conditionally upon the appellant setting the case down for the present sittings, and reduced the security to £1.

October 9th.

The appellant, in person, read an argument, in the course of which he contended—that the Act 28 Henry VIII. c. 7 was not in force in New South Wales (referring to *Brook* v. *Brook* (1); that the High Court decided that English Acts in force in England in 1828 should be applied in New South Wales only so far as they were capable of enforcement: *Quan Yick* v. *Hinds* (2); and on the settlement of the Colony there was no Court having jurisdiction to avoid marriages within prohibited degrees; that there was no Ecclesiastical Court established in New South Wales by the Charter of Justice, except the Probate Court, to enforce the punishment of incest; that the Imperial Act 28 & 29 Vict. c. 63, would, if 28 Henry VIII. c. 7, were in force, make sec. 18 of the *Marriage Act* 1899 (No. 15) inoperative and void for repugnancy; that marriage with a deceased wife's sister having been legalised by Statute in New South Wales, no prohibition of marriage on the ground of affinity can remain; and that the divorce of the appellant from his former wife severed and determined the relationship that previously existed between the appellant and the respondent.

Windeyer, for the respondent. The "applicability" of the Statute need not be considered, as the marriage laws of England were part of the English law brought to the Colony by the first settlers. They are part of the fundamental law of English communities: *Quan Yick* v. *Hinds* (3). The non-existence of a Matrimonial Causes Court at the date of the foundation of the Colony did not prevent the marriage laws from being in force. It was merely an obstacle in the way of their enforcement. The prohibited marriages were then only valid in the sense that a

(1) 9 H.L.C., 193.
(2) 2 C.L.R., 345.
(3) 2 C.L.R., 345, at p. 355.

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competent Court had not declared them invalid; and as soon as a Court was established to deal with such matters it had power to declare them void. All difficulty is removed by sec. 5 of the *Matrimonial Causes Act* 1899. The principles there referred to include the provisions of 4 & 5 William IV. The doctrine that marriages which were within the prohibited degrees were only voidable, not void, arose from the fact that only Ecclesiastical Courts could declare them invalid, and consequently the Common Law Courts treated them as good until declared to be void by the Ecclesiastical Courts. The Act 28 Henry VIII. c. 7 rendered them void at law in England: *Brook* v. *Brook* (1); *Reg.* v. *Chadwick* (2); *Wing* v. *Taylor* (f.c. *Wing*) (3). The divorce of the appellant from the respondent's mother did not destroy the affinity. Death would not have that effect, and divorce has no greater effect than death. The English law that such marriages are voidable has been assumed to be in force in Queensland and in Victoria: *In re Kreutz, deceased* (4); *In the Will of William Swan* (5); *Wade* v. *Baker* (f.c. *Wade*) (6).

GRIFFITH C.J. There can be no doubt that amongst the laws introduced upon the settlement of the Colony of New South Wales were the marriage laws of England. There can be no doubt, also, that amongst the prohibited degrees prescribed in the Act 28 Henry VIII. c. 7, is the case of a man who marries his wife's daughter. That has always been accepted as the law of Australia, and I see no reason to doubt that it is so. The only doubt that has been thrown upon it now arises from the fact that when Australia was settled there was no Court that could declare such a marriage to be void, and it had some time before the settlement been determined by the English Courts that, as recited in the Act 5 & 6 William IV. c. 54, marriages within the prohibited degree were voidable only by Ecclesiastical Courts in the lifetime of the parties. There are only three possible alternatives:—(1) That such marriages were void in Australia; (2) that they were valid and cannot be impeached at all; and

(1) 9 H.L.C., 193.
(2) 11 Q.B.D., 173, 205.
(3) 2 Sw. & Tr., 278.
(4) 4 Q.L.J., 16.
(5) 2 V.R. (I. E. & M.), 47.
(6) 5 W.W. & áB. (I. E. & M.), 63.

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(3) that they were, as in England, voidable, but, owing to the circumstances of the country, there was no immediate available means open to persons seeking to have such a marriage declared void. The third view is the one that has always been accepted, and, I think, is the sound one.

The fact, therefore, remains that the marriage between these parties was in its inception voidable, and would be void as soon as either party took proceedings in the lifetime of the other to have it declared void. That has been done, and the Supreme Court has made the only decree that it could make.

I do not think it necessary to add anything to the reasons which have been given by *Walker* J. The appeal therefore must be dismissed, but, as it was made *in formâ pauperis*, no costs should be allowed.

BARTON and O'CONNOR JJ. concurred.

Appeal dismissed.

Proctors, for the respondent, *Fisher & Macansh.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

GREAT FINGALL ASSOCIATED GOLD MINING CO. AND ANOTHER . . } APPELLANTS;

AND

HARNESS AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1906.

PERTH, *Nov.* 5, 6.

Griffith C.J., Barton and Higgins JJ.

Voluntary and Compulsory Winding-up — Companies Act 1893 (*W.A.*), (56 *Vict. No.* 8), *secs.* 26, 107, 150, 152—*Right of creditors to demand compulsory winding-up.*

Where a company is in voluntary liquidation the petitioning creditors for a compulsory liquidation must show a *primâ facie* case that they would be prejudiced by a voluntary winding up.