IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

In the Matter of the Application

—of—

RICHARD PERRY LOVING and MILDRED DELORES JETER LOVING

JURISDICTIONAL STATEMENT

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34 LW 3171

INDEX

PAGE

TABLE OF AUTHORITIES:

Cases:

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OCTOBER TERM, 1966

No. .....

RICHARD PERRY LOVING and MILDRED DELORES JETER LOVING,

Appellants,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Appeals of Virginia of March 7, 1966, affirming the decision of the Circuit Court of Caroline County entered on January 22, 1965, which denied the appellants' Motion to Vacate Judgment and Set Aside Sentence and affirmed the judgment of conviction originally entered by the Circuit Court of Caroline County on January 6, 1959. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial federal questions are presented.

Citation to Opinion Below

The Judgment Order entered by the Circuit Court of Caroline County, Virginia on January 22, 1965, was accompanied by a written opinion (R-8). That opinion, which is not officially reported, is set out in the Appendix, *infra,* pp. 33-42. The opinion of the Supreme Court of Appeals of Virginia is reported at 206 Va. 924, 147 S. E. 2d 78 (1966) (R-19) and is set out in the Appendix, *infra,* pp. 21-30.

Jurisdiction

Appellants were convicted in the Circuit Court of Caroline County, Virginia, on January 6, 1959, of violating Virginia's anti-miscegenation statutes. Va. Code §§ 20-50 through 20-60 (1950). While neither the informations nor grand jury indictments refer to specific sections of the Virginia Code they incorporate language from Va. Code § 20-58 which is entitled "Leaving State to evade law." Appellants filed a Motion to Vacate Judgment and Set Aside Sentence on November 6, 1963 (R-6). The Circuit Court of Caroline County issued its written opinion and order on January 22, 1965 (R-8).

Appellants filed their Notice of Appeal and Assignments of Error on March 2, 1965 (R-15) and their Petition for a Writ of Error and Supersedeas in the Supreme Court of Appeals of Virginia on May 17, 1965. The Writ of Error and Supersedeas was granted by the Supreme Court of Appeals of Virginia, at Richmond, on June 11, 1965 (R-1). On March 7, 1966 the Supreme Court of Appeals of Virginia affirmed the convictions of the appellants, set aside their

sentences, and remanded for further sentencing not inconsistent with the opinion (R-33). On March 28, 1966, the Supreme Court of Appeals of Virginia issued an Order staying execution of its judgment of March 7, 1966, in order that the appellants "may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this Court" (R-36).

The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Appeals of Virginia on May 31, 1966 (R-37).

Jurisdiction of this Court on appeal rests upon 28 U. S. C. § 1257 (2). *Williams* v. *Bruffy,* 96 U. S. 176 (1877); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating Va. Code § 20-58 (1950) (Vol. 4, p. 491), which provides:

> § 20-58. Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage. (Code 1919, §§ 4540, 5089.)

2. The case also specifically involves Va. Code § 20-54 (1950) (Vol. 4, p. 489), which provides:

> § 20-54. Intermarriage prohibited; meaning of term 'white persons.'—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

3. The case also specifically involves Va. Code § 20-59 (1950) (Vol. 4, p. 492), which provides:

> § 20-59. Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years. (Code 1919, § 4546; 1932, p. 68.)

4. The case also specifically involves Va. Code § 1-14 (Supp. 1964) (Vol. 1, p. 12), which provides:

> § 1-14. Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth

> or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians. (Code 1919, § 67; 1930, p. 97; 1954, c. 702.)

5. This case also involves the First and Ninth Amendments, the first section of the Fourteenth Amendment to the Constitution of the United States, and 42 U. S. C. 1981, which provides:

> § 1981. Equal rights under the law.—All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. R. S. § 1977.

Questions Presented

1. Do the Virginia anti-miscegenation laws (Va. Code §§ 20-50 et seq. (1950) and Va. Code § 1-14 (Supp. 1964)) violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Does a state statute which proscribes marriage between members of different races violate the constitutional right of privacy?

3. Does a state statute which proscribes marriage between members of different races violate a constitutional right of freedom to marry?

4. Is a state law valid under our Constitution which makes the color of a person's skin the test of whether his marriage constitutes a criminal offense?

5. Do the Virginia anti-miscegenation statutes deprive the appellants of the civil rights guaranteed by Title 42 U. S. C. § 1981?

Statement of the Case

On or about the 2nd day of June, 1958, Mildred Jeter, a "colored person," and Richard Perry Loving, a "white person," were lawfully married in the District of Columbia, pursuant to the laws of the District. Shortly after their marriage appellants returned to Virginia and established their marital abode. On the 11th day of July, 1958, warrants were issued charging appellants with attempting to evade the Virginia ban on interracial marriages. Va. Code § 20-58 (1950) (R-2). During the 1958 October Term of the Grand Jury of Caroline County, they were indicted for this offense and on January 6th, 1959, they entered a plea of guilty. The following sentence was imposed:

> The court doth accept the pleas of 'guilty' and fix the punishment of both accused at one year each in jail. The court does suspend said sentence for a period of twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years (R-6).

During the period from the time of their conviction until approximately the summer of 1963, the Lovings took up residence in the District of Columbia. Shortly thereafter they retained counsel who, on the 6th day of November, 1963, filed a motion in the Circuit Court of Caroline County to vacate the judgment and set aside the sentence (R-6). On October 28, 1964, a class action was filed by the appellants in the United States District Court for the Eastern District of Virginia, requesting that a three-judge

federal court be convened to declare Va. Code §§ 20-50 through 20-60 unconstitutional and to enjoin the state officials from enforcing the appellants' prior convictions. On January 22nd, 1965, Judge Bazile of the Circuit Court of Caroline County entered an Order denying appellants' prior Motion to Vacate Judgment and Set Aside the Sentence. On February 11, 1965 the three-judge federal court (Judges Bryan, Butzner and Lewis) entered an interlocutory order continuing the matter so that the appellants herein might have a reasonable time to "submit [the] issue [therein] to the state courts for final determination." Since the summer of 1963 and during the pendency of all court proceedings since that time, the Lovings have continued to reside in Virginia, safe from further arrest and prosecution only because the three-judge federal court's interlocutory order stated that:

> . . . in the event the plaintiffs [Lovings] are taken into custody in the enforcement of the said judgment and sentence, this court, under the provisions of title 28, section 1651, United States Code should grant the plaintiffs bail in a reasonable amount during the pendency of the State proceedings in the State Courts and in the Supreme Court of the United States, if and when the case should be carried there. . . .

How the Federal Questions Were Raised and Decided

No federal questions were raised at the time the appellants were originally brought to trial in 1959. However, on November 6, 1963, counsel for appellants filed a Motion to Vacate Judgment and Set Aside Sentence in the trial court (R-6). Under Virginia law a suspended sentence remains within the jurisdiction of the trial court during the period of suspension. *Richardson* v. *Commonwealth,* 131 Va. 802, 109 S. E. 460 (1921). Such a motion was therefore timely and part of the trial court proceedings.

The following specific federal questions were raised in that motion:

> Said sentence constitutes banishment and is thus a violation of constitutional due process of law.
>
> Said sentence is improper because it is based on a statute which is unconstitutional on its face, in that it denies the defendants the equal protection of the laws and denies the right of marriage which is a fundamental right of free men, in violation of § 1 of the Virginia Constitution and the Fourteenth Amendment of the Federal Constitution.
>
> Said statute and said sentence are unconstitutional burdens upon interstate commerce (R-7).

The written opinion of the trial court dealt specifically with each of the points raised in the Motion. The trial court said, "It is next contended that these statutes are unconstitutional in violation of § 1 of the Virginia Constitution and the Fourteenth Amendment of the United States

Constitution." The Court held that "there is nothing in . . . the Fourteenth Amendment which has anything to do with this subject here under consideration" (R-11). The trial court further held that "Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contention is without merit" (R-13).

On January 22, 1965, the trial Judge entered an Order denying the Motion to Vacate Judgment and Set Aside the Sentence, for reasons stated in the written opinion quoted above (R-8).

On appeal, the assignments of error alleged that the Court erred in holding that the anti-miscegenation statutes did not violate the due process and equal protection clauses of the Fourteenth Amendment to the federal Constitution. Further error was alleged in holding that the sentence and suspension was not a violation of due process of law.

In affirming the conviction, the Supreme Court of Appeals of Virginia squarely considered the constitutionality of the anti-miscegenation statutes. The Court stated:

> The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law. *Loving* v. *Commonwealth,* 206 Va. 924, 926, 147 S. E. 2d 78, 80 (1966) (R-21).

The Court went on to hold that "That portion of the order appealed from upholding the constitutionality of Code,

§§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed . . . " (R-32).

Appellants' brief in the Supreme Court of Appeals of Virginia argued that the anti-miscegenation statutes were unconstitutional in that they denied the appellants equal protection of the laws and due process of the laws. The State's brief argued that the law was not violative of the Fourteenth Amendment.

The Questions Presented Are Substantial

This case presents the important constitutional question of the application of the due process and equal protection clauses of the Fourteenth Amendment to anti-miscegenation statutes.

I.

The statutes involved are racially discriminatory and deny the appellants as individuals, and Negroes and whites as groups, the equal protection of the laws.

There can be no doubt that the conviction of the Lovings was based on race. But for the fact that Mildred Jeter was a "colored person" under Va. Code § 1-14 and Richard Loving a "white person" under Va. Code § 20-54, no crime would have been committed. Except for the difference of color, the state never raised any objection to the marriage. If both had been white or both had been other than white, the marriage would be valid. The gravamen of the appellants' claim, that the anti-miscegenation statutes violate the due process and equal protection clauses of the Fourteenth Amendment, is that it is the color of their skin

which makes their marriage criminal. Indeed, Va. Code § 20-59 makes the act a felony punishable by confinement in the penitentiary for not less than one nor more than five years.

The legislative history of the laws involved leave no doubt that their purpose is racial discrimination. The Virginia anti-miscegenation laws date back to a 1691 resolution of the Colonial Assembly entitled "An act for the suppression of outlying slaves." Act XVI, May 19, 1691; 3 Stat. at Large, p. 86 (Henning's 1823). The substance of this legislation was re-enacted with each revision of the Code, and supplemented in 1924 by the requirement that persons register with the state for pedigrees. "An act for the preservation of racial integrity," Va. Acts of Assembly, Ch. 377, p. 534 (1924) (now Va. Code § 20-50).

To this day the State of Virginia insists on enforcing the archaic principle of "separate but equal" which has been totally rejected since *Brown* v. *Board of Education,* 347 U. S. 483 (1954). Indeed, the court below ruled that "separate but equal" is a living principle which has been limited in only a few specific instances. It believes that *Brown* "cannot support a claim for the intermarriage of the races or that such intermarriage is a right which must be made available to all on equal terms." *Loving* v. *Commonwealth,* 206 Va. 924, 926, 147 S. E. 2d 78, 80 (1966) (R-24). The Virginia Supreme Court of Appeals justified its decision on the basis of *Pace* v. *Alabama,* 106 U. S. 583 (1883); *Plessy* v. *Ferguson,* 193 U. S. 537 (1896); *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, remanded 350 U. S. 891, aff'd 197 Va. 734, 90 S. E. 2d 849, appeal dismissed 350 U. S. 985 (1955).

Where an individual is denied a right permitted to others solely on the basis of race, the equal protection clause of the Fourteenth Amendment is violated. Though racially discriminatory laws withstood early legal tests on the ground that they applied equally to persons of both races, *Pace* v. *Alabama, supra,* that theory no longer applies:

> "In this situation, *Pace* v. *Alabama, supra,* is relied upon as controlling authority. In our view, however, *Pace* represents a limited view of the Equal Protection clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* v. *Florida,* 379 U. S. 184, 188 (1964).

In *McLaughlin, supra,* this Court held Florida's racially discriminatory fornication statute unconstitutional. In a concurring opinion, Mr. Justice Stewart, joined by Mr. Justice Douglas, indicated that he would find any state criminal statute unconstitutional which "makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin, supra* at 198.

This Court has supported that view in numerous other cases. In *Dorsey* v. *State Athletic Commission,* 359 U. S. 533 (1959), the Court affirmed *per curiam* a lower court ruling [168 F. Supp. 149 (E. D. La. 1958)] that a Louisiana statute outlawing inter-racial boxing was a denial of equal protection. The statute theoretically applied to both white and Negro boxers. In *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948), a statute which denied commercial fishing licenses to aliens ineligible for citizenship was held unconstitutional. In terms pertinent to the case at bar, the Court held in *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942):

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Any statute which bases the criminality of an act on race alone is a gross abuse of equal protection. As early as 1896, this Court said that criminal justice must be administered "without reference to considerations of race." *Gibson* v. *Mississippi,* 162 U. S. 565, 591 (1896). From *Buchanan* v. *Warley,* 245 U. S. 60 (1917) to *McLaughlin* v. *Florida,* 379 U. S. 184 (1964), the Court has repeatedly struck down laws imposing criminal penalties on the basis of race.

It is clearly unequal treatment and therefore a denial of equal protection to permit "white persons" to marry only "white persons," but to permit "colored persons" to marry anyone except "white persons." A person of Japanese ancestry, for example, is not included within the definition of "colored persons" [Va. Code § 1-14], or "white persons" [Va. Code § 20-54]. Thus the marriage of a Japanese person and a "white person" would be unlawful under Va. Code § 20-54 but not subject to criminal prosecution under Va. Code § 20-59, which punishes only marriages between "colored persons" and "white persons." A marriage between a Japanese person and a "colored person" would be neither unlawful nor subject to prosecution. Certainly this is not equal protection and the Virginia legislature, in passing an "Act for the Preservation of Racial Integrity," *supra,* was not concerned with the equal protection of the "integrity" of the Negro race. That being true,

the statutes are unconstitutional devices which stamp one group of citizens inferior. These statutes are relics of slavery which deny equality under the law. Cf. *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Goss* v. *Board of Education,* 373 U. S. 683 (1963); *Johnson* v. *Virginia,* 373 U. S. 61 (1963).

II.

Appellants were denied due process of law.

"If the right to marry is a fundamental right, then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one's liberty." *Perez* v. *Sharp,* 32 Cal. 2d 711; 198 P. 2d 17, 31 (1948) (*sub nom. Perez* v. *Lippold*). Appellants maintain that marriage is such a basic, fundamental and natural right and that the choice of a mate must be left to one's own desires and conscience. These desires cannot be infringed by the state setting standards which unreasonably and arbitrarily apply racial criteria. This principle is supported by *McLaughlin, supra* at 192.

> Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by the white person and a Negro, but not otherwise.

The traditional test for the reasonableness of a "police powers" statute is given in *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934). "[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have

a real and substantial relation to the object sought to be attained."

Given the decisions by this Court in *Brown* v. *Board of Education, supra,* and its progeny, a statute which makes legal distinctions solely on the basis of race are presumptively unconstitutional. See e.g., *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E. D. Va.), aff'd *per curiam* 379 U. S. 19 (1964); *Dorsey* v. *State Athletic Commission,* 359 U. S. 533 (1959); *Oyama* v. *California,* 332 U. S. 633 (1948); *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (1948); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

It is now unquestionable that the sacraments of marriage are beyond the arbitrary grasp of the state. *Meyer* v. *Nebraska,* 262 U. S. 390 (1922); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). In *Meyer* this Court, speaking of liberty under the Fourteenth Amendment, said that "without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children. . . ."

The First and Ninth Amendments as applied to the states through the Fourteenth Amendment further guarantee an inherent right of freedom in marriage.

> [T]he First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" . . . [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the first

amendment is one. . . . *Griswold* v. *Connecticut,* 381 U. S. 479, 483-484 (1965).

To hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments . . . or elsewhere in the Constitution would violate the Ninth Amendment. *Griswold, supra* at 491 (concurring opinion).

III.

The statutes involved violate 42 U. S. C. § 1981.

In addition to the equal protection rights individually denied to the appellant, Mildred Jeter Loving, she has been denied the civil rights guaranteed by § 1981 of Title 42 of the United States Code.

She has been denied the right "to make and enforce contracts" in the same manner as a white citizen. She has been denied "the full and equal benefit of all laws and proceedings" as is enjoyed by white citizens. Section 20-53 of the Virginia Code violates 42 U. S. C. § 1981 by denying to Mildred Jeter Loving, a "colored person," a license that would be granted to a "white person" applying to marry another "white person." Similarly, Richard Perry Loving has been denied the right to marry a "colored person," a license that would be granted to an Indian, an oriental, or any other person not white. Conviction by the State of Virginia under the challenged sections of the Virginia Code has subjected appellants to "punishments, pains, penalties and exactions" which would not have visited upon a "white person" marrying another "white person," or a "colored person" marrying another "colored person."

Mr. Justice White took notice of this in *McLaughlin, supra* at 192:

> We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure 'the full and equal benefit of all laws and proceedings for the security of persons and property' and to subject all persons 'to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' 42 U. S. C. § 1981 (1958), R. S. Sec. 1977.

IV.

The effects of the statutes.

The anti-miscegenation statutes deny appellants and numerous others similarly situated in Virginia and 17 other states many rights and benefits contingent upon the marital relationship. They are prohibited from establishing a family abode and raising their children in places where they and their family have often been long established and where many blood relatives still reside. Their children live under the stigma of bastardy. Victims of these statutes are prejudiced in their right to certain tax, insurance, social security, and workman's compensation benefits; to bequeath or inherit property; to certain criminal defenses, and other benefits and privileges too numerous to mention.

Under 42 U. S. C. § 416(h)(1) the determination of the eligibility of an applicant for Social Security benefits is governed by the ". . . devolution of intestate personal prop-

erty by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such individual is dead, by the courts of the State in which he was domiciled at the time of his death. . . ."

Under Va. Code § 64-7, "The issue of marriages deemed null in law or dissolved by a court shall nevertheless be legitimate." However, the offspring of miscegenous marriages are specifically excluded from the terms of this statute. *Greenhow* v. *James,* 80 Va. 636 (1885). Therefore, the children of miscegenous marriages are prejudiced from taking their rightful and deserved share of estates according to Virginia law of devolution of intestate property, and live under the stigma of bastardy.

Under Va. Code § 18.1-45, marriage to the victim is deemed a defense or factor in mitigation of punishment for statutory rape. The anti-miscegenation laws of Virginia prejudice Negroes and whites, as groups, from the benefits of this statute. Furthermore, there is no right not to testify against a spouse for persons subject to these statutes.

Under the anti-miscegenation statutes, appellants are precluded from sharing in benefits under workman's compensation, that are contingent upon a marital relationship. *Toler* v. *Oakwood Smokeless Coal Corp.,* 173 Va. 425, 4 S. E. 2d 364 (1939). The appellants, as individuals, and whites and Negroes, as groups, are also prejudiced from taking advantage of the benefits of joint income tax returns. Furthermore, appellants are also denied and prejudiced from taking advantage of the rights and benefits of private insurance and social welfare benefits that are contingent upon the marital relationship.

All persons who enter into miscegenous marriages and either live in *or move into* Virginia are similarly situated. (See *Calma* v. *Calma,* 203 Va. 880, 128 S. E. 2d 440 (1962).)

CONCLUSION

It is submitted that the decision of the Supreme Court of Appeals of Virginia erroneously upheld the constitutionality of the statutes involved; that the questions presented are so substantial as to require plenary consideration for their resolution, and upon consideration thereof the Court should reverse the judgment below.

Respectfully submitted,

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July 1966

APPENDIX

APPENDIX

Opinion of the Supreme Court of Appeals for Virginia

Present: All the Justices

OPINION BY JUSTICE HARRY L. CARRICO

Richmond, Virginia, March 7, 1966

FROM THE CIRCUIT COURT OF CAROLINE COUNTY

Leon M. Bazile, *Judge*

Record No. 6163

RICHARD PERRY LOVING, et al.

—v.—

COMMONWEALTH OF VIRGINIA

On January 6, 1959, Richard Perry Loving and Mildred Jeter Loving, the defendants, were convicted, upon their pleas of guilty, under an indictment charging that "the said Richard Perry Loving being a White person and the said Mildred Delores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife." (Code, § 20-58.)[1]

[1] "§ 20-58. *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married

The trial court fixed "the punishment of both accused at one year each in jail." (Code, § 20-59.)[2] The court suspended the sentences "for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

On November 6, 1963, the defendants filed a "Motion to Vacate Judgment and Set Aside Sentence" alleging that they had complied with the terms of their suspended sentences but asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid.

The court denied the motion by an order entered on January 22, 1965, and to that order the defendants were granted this writ of error.

There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment, violated the provisions of Code, § 20-58.

The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative

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out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

[2] "§ 20-59. *Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law.

The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, remanded 350 U. S. 891, 100 L. ed. 784, 76 S. Ct. 151, affd. 197 Va. 734, 90 S. E. 2d 849, app. dism. 350 U. S. 985, 100 L. ed. 852, 76 S. Ct. 472.

In the *Naim* case, the Virginia statutes relating to miscegenation marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The lone exception, it was noted, was the California Supreme Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).

The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us. They urge us, however, to reverse our decision in that case, contending that the decision is wrong because the judicial authority upon which it was based no longer has any validity. Our inquiry must be, therefore, whether a change in the *Naim* decision is required.

The defendants say that the *Naim* opinion relied upon *Plessy* v. *Ferguson,* 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, but argue that the United States Supreme Court reversed the *Plessy* decision in *Brown* v. *Board of Education,* 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686.

The *Plessy* case, decided in 1896, involved an attack upon the constitutionality of a Louisiana statute requiring separate railway carriages for the white and colored races. The statute was upheld by the Supreme Court under the "separate but equal" doctrine there enunciated by the court.

In the *Brown* case, decided in 1954, the Supreme Court ruled "that in the field of public education the doctrine of 'separate but equal' has no place" and that "Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected" 98 L. ed., at p. 881.

The *Plessy* case was cited in the *Naim* opinion to show that the United States Supreme Court had made no decision at variance with an earlier holding by the Tenth Circuit Court of Appeals in *Stevens* v. *United States,* 146 F. 2d 120, that "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

The *Naim* opinion contained a quotation from the *Plessy* case that "Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state." Nothing was said in the *Brown* case which detracted in any way from the effect of the language quoted from the *Plessy* opinion. As Mr. Justice Buchanan pointed out in the *Naim* opinion, the holding in the *Brown* case, that the opportunity to acquire an education "is a right which must be made available to all on equal terms," cannot support a claim for the intermarriage of

the races or that such intermarriage is a "right which must be made available to all on equal terms."

The United States Supreme Court itself has indicated that the *Brown* decision does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant "her constitutional right and privilege of intermarrying with a white male person," and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State,* 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U. S. 888, 99 L. ed. 698, 75 S. Ct. 210.

The defendants also say that the *Naim* opinion relied upon *Pace* v. *Alabama,* 106 U. S. 583, 27 L. ed. 207, 1 S. Ct. 637, but contend that the United States Supreme Court overruled the *Pace* decision in *McLaughlin* v. *Florida,* 379 U. S. 184, 13 L. ed. 2d 222, 85 S. Ct. 283.

The *Pace* case, decided in 1883, involved an attack upon the constitutionality of an Alabama statute imposing a penalty for adultery or fornication between a white person and a Negro. Another statute provided a lesser penalty "If any man and woman live together in adultery or fornication." A white woman and Pace, a Negro, were convicted and sentenced under the first statute "for living together in a state of adultery or fornication." Pace appealed, claiming that the statute under which he had been convicted was violative of the Fourteenth Amendment. The court rejected this claim, holding that "Whatever discrimination is made in the punishment prescribed in the two sections is directed

against the offense designated and not against the person of any particular color or race." 27 L. ed., at p. 208.

In the *McLaughlin* case, decided in 1964, the Supreme Court had under review a Florida statute which made it unlawful for a white person and a Negro, "not married to each other," to "habitually live in and occupy in the night time the same room." The statute in dispute provided for a different burden of proof and a different penalty than were provided by other statutes relating to adultery and fornication generally. Florida sought to sustain the validity of the statute under the holding in *Pace* v. *Alabama.* The court, however, ruled the Florida statute invalid, saying of *Pace* v. *Alabama* that it "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." 13 L. ed. 2d, at p. 226.

The *Pace* case, like the *Plessy* case, was cited in the *Naim* opinion to show that the United States Supreme Court had made no decision at variance with the rule that a state may validly forbid interracial marriages. The *McLaughlin* decision detracted not one bit from the position asserted in the *Naim* opinion.

Both parties to the *McLaughlin* controversy cited Florida's miscegenation statute, making it unlawful for a white person to marry a Negro. McLaughlin contended that the miscegenation statute was unconstitutional because it prevented him from asserting, against the cohabitation charge, the defense of common law marriage. Florida argued that it was necessary that its cohabitation statute be upheld so as to carry out the purposes of its miscegenation statute which, it contended, was "immmune from attack under the Equal Protection Clause." The court ruled that it was unnecessary to consider McLaughlin's contention in this respect because the court was holding in his favor on the

cohabitation statute. As for Florida's contention, the court said that, for purposes of argument, the constitutionality of the miscegenation statute would be assumed and that it was deciding the case "without reaching the question of the validity of the State's prohibition against interracial marriage." 13 L. ed. 2d, at p. 230.

The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.

We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage. None of these decisions takes away from what was said by the United States Supreme Court in *Maynard* v. *Hill,* 125 U. S. 190, 31 L. ed. 654, 657, 8 S. Ct. 723:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."

The defendants also refer as to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.

A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term.

Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.

Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which it is entitled under the doctrine of *stare decisis,* we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States.

We turn now to the other contention of the defendants—that the sentences imposed upon them are unreasonable and void.

It will be recalled that the trial court suspended the sentences of the defendants for a period of twenty-five years upon the condition that they leave the county and state "at once and do not return together or at the same time to said county and state for a period of twenty-five years."

The defendants first say that the effect of the sentences was to banish them from the state. They refer us to the case of *State* v. *Doughtie,* 237 N. C. 368, 74 S. E. 2d 922, where it was held that "banishment . . . is impliedly prohibited by public policy . . . A sentence of banishment is undoubtedly void."

Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because they were permitted to return to the state, provided they did not return together or at the same time.

Thus, we do not agree with the defendants' contention that the sentences are void because they constitute banishment. We do agree with their further contention, however, that the conditions of the suspensions are so unreasonable as to render the sentences void.

The trial court acted under the authority of Code, § 53-272 in suspending the sentences of the defendants. The purpose of this statute is to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society. *Marshall* v. *Commonwealth,* 202 Va. 217, 219, 116 S. E. 2d 270; *Slayton* v. *Commonwealth,* 185 Va. 357, 365-366, 38 S. E. 2d 479; *Wilborn* v. *Saunders,* 170 Va. 153, 160-161, 195 S. E. 723.

To effect this statutory purpose, the courts are authorized to impose conditions upon the suspension of execution or imposition of sentence. But such conditions must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances. *Dyke* v. *Commonwealth,* 193 Va. 478, 484, 69 S. E. 2d 483.

Here, the real gravamen of the offense charged against the defendants, under Code, § 20-58, was their cohabitation as man and wife in this state, following their departure from the state to evade Virginia law, their marriage in another jurisdiction and their return to Virginia. Without such cohabitation, there would have been no offense for which they could have been tried, notwithstanding their other actions.

When the defendants' sentences were suspended, the purpose which the trial court should reasonably have sought to serve was that the defendants not continue to violate Code, § 20-58. The condition reasonably necessary to achieve that purpose was that the defendants not again cohabit as man and wife in this state. There is nothing in the record concerning the defendants' backgrounds or the circumstances of the case to indicate that anything more was necessary to secure the defendants' rehabilitation and to accomplish the purposes envisioned by Code, § 53-272.

It was, therefore, unreasonable to require that the defendants leave the state and not return thereafter together or at the same time. Such unreasonableness renders the sentences void and they will, accordingly, be vacated and set aside. The case will be remanded to the trial court with directions to re-sentence the defendants in accordance with Code, § 20-59, attaching to the suspended sentences, to be imposed upon the defendants, conditions not inconsistent with the views expressed in this opinion.

In this connection, although it has not been alluded to by either side to this controversy, it should be noted that Code, § 20-59 provides for a sentence in the penitentiary, and not in jail, as called for in the sentencing order of the trial court.

That portion of the order appealed from upholding the constitutionally of Code, §§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed upon the defendants is reversed, and the case is remanded for further proceedings.

Affirmed in part, reversed in part and remanded.

Order of the Supreme Court of Appeals for Virginia

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 7th day of March, 1966.

Record No. 6163

RICHARD PERRY LOVING and MILDRED JETER LOVING,

Plaintiffs in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Caroline County on the 22nd day of January, 1965.

This day came as well the plaintiffs in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in part in the judgment complained of. It is therefore adjudged and ordered that the said judgment, in so far as it upholds the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the plaintiffs in error thereunder, be, and the same is hereby, affirmed; and in so far as it upholds the

validity of the sentences imposed upon the plaintiffs in error, be, and the same is hereby, reversed and set aside, and the case is remanded to the said circuit court for further proceedings in accordance with the views expressed in the said written opinion of this court.

Which is ordered to be forthwith certified to the said circuit court.

A Copy,

Teste:

/s/ (Illegible)
Clerk

Opinion of the Circuit Court of Caroline County

COMMONWEALTH v. RICHARD PERRY LOVING and MILDRED DELORES JETER

BERNARD S. COHEN, for the Petitioner
PEYTON FARMER, Commonwealth Attorney

The Petitioners here were indicted in this Court at the October term, 1958, the indictment charging that on the 2nd day of June, 1958, "that Richard Perry Loving being a white man and the said Mildred Delores Jeter being a colored person did unlawfully go out of the State of Virginia for the purpose of being married and with the intention of returning to the State of Virginia, and were married out of the State of Virginia, to-wit in the District of Columbia on the 28th day of June, 1958 and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

On the 6th day of January, 1959, the accused were arraigned and after pleading not guilty withdrew said plea and pleaded guilty; thereupon the Court fixed their punishment at one year in jail; and then suspended said sentence for twenty-five years "upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years." After they paid the costs they were released from custody and further recognizance.

The Court file contains his birth certificate which shows that he is white and her birth certificate which shows that she is colored.

On the 6th day of November, 1963, they filed a motion to vacate the judgment and set aside the sentence.

1st It is contended the said sentence constitutes a cruel and unusual punishment within Section 9 of the Constitution of Virginia.

Section 9 of George Mason's Bill of Rights made a part of the Constitution of 1776 is in the identical same words as Section 9 of the Bill of Rights to the present Constitution (9 Henrys Statutes 111; Code of 1950, page 443).

In *Hart* v. *Commonwealth,* 131 Va., 726, 741, 109 S. E. 582, the Court said: "It has been uniformly held by this Court that the provisions in question which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the right to determine and prescribe by statute the quantum of punishment deemed adequate by the legislature. That the only limitation so imposed is upon the mode of punishments, such punishments only being prohibited by such constitutional provision as were regarded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death, such as are inhumane and barbarous, as for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. *Aldridge's case,* 2 Va. Cas. 447, 449-450; *Wyatt's Case,* 6 Rand (27 Va.) 694; *Bracey's Case,* 119 Va. 867, 862, 89 S. E. 144.

See also *Buck* v. *Bell,* 143 Va. 310, 319, 130 S. E. 516 (1925).

In *Aldridge's Case* (2 Va. Case 447, 448) (1824) a free person of color was convicted of the larceny of bank notes. He was sentenced to be whipped, sold and transported

beyond the bounds of the United States. The Court said "as to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case."

In *Wyatt's Case* (6 Rand 694) (1825), the law provided "that when any person was convicted of any crime or offense now punishable by imprisonment in the penitentiary the Court could sentence such person to be imprisoned not exceeding two years in the jail of the County or Corporation where such conviction shall have taken place, for a period not exceeding six months, nor less than one month and he shall be punished by stripes at the discretion of the Court to be inflicted at one time provided the same do not exceed thirty-nine at any one time."

"The Court said the punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

The Court said 6 Rand 763 "This Court is of the opinion and doth decide that the motion in arrest of judgment and also the motion for a new trial ought to be overruled and the judgment should be rendered against the defendant of imprisonment and stripes according to law."

In *Buck* v. *Bell,* 143 Va. 310, 130 S. E. 516 (1925) a case in which it had been ordered that Buck be sterilized, it was contended that it violated the Federal Constitution and Sections 9, 11 of the Virginia Constitution and the 11th Amendment to the Federal Constitution. The Court held that the Sterilization Act did not violate any section of the Constitution of Virginia or any sections of the Federal Constitution.

In Re Kemmler, 136 U. S. 436, 34 *Fed.* 519 (1889) it was held that punishments are cruel when they involve torture or a lingering death but the punishment of death is not within the meaning of that word in the Constitution.

The Court said that cruel and unusual punishments are "such as burning at the stake, crucifixion, breaking on the wheel or the like." (34 Fed. 524)

And the Supreme Court of the United States has held in *Onell* v. *Vermont* that whether a punishment is cruel and unusual within the provisions of a State Constitution does not present a Federal question.

In U. S. Supreme Court Enc. of U. S. Supreme Court Volume 4 p. 513, it is said "The provision of the 8th Amendment that excessive fines shall not be imposed nor cruel and unusual punishment inflicted applies to National and not to State legislation.

It is next said that the sentence exceeds a reasonable period of suspension within the meaning of Section 53-273 of the Code of 1950.

The Court has examined this Section with care and it sees nothing in this statute which limits the time that the person may be put on probation.

It is said that the sentence constitutes banishment and thus is a violation of due process of law.

Section 20-58 provides that "If any white person and colored person shall go out of this state for the purpose of being married and with the intention of returning and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of this cohabitation here as man and wife shall be evidence of their marriage."

Intermarriage between white and colored persons is prohibited by Section 20-54 of the Code.

Section 20-57 of the Code provides "all marriages between a white person and a colored person shall be abso-

lutely void without any decree of divorce or other legal process."

And Section 20-58 of the Code provides "If any white person and colored person shall go out of this State for the purpose of being married and with the intention of returning and be married out of it, and shall afterwards return to reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-20 and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

These laws were held valid in *Kinney* v. *Commonwealth,* 30 Gratt, 858 (1878) Judge Christian who wrote the opinion said 30 Gratt 870): "If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or Country where the laws recognizes the validity of such marriages."

Their marriage being absolutely void in Virginia they cannot cohabit in Virginia without incurring repeated prosecutions for that cohabitation.

It is next contended that these statutes are unconstitutional in violation of Section 1 of the Virginia Constitution and the 14th Amendment of the U. S. Constitution.

There is nothing in Section 1 of the Constitution of Virginia which relates to this matter, nor is there anything in the 14th Amendment which has anything to do with this subject here under consideration.

Marriage is a subject which belongs to the exclusive control of the States.

In *State* v. *Gibson,* 16 Ind. 180, 10 Am. Rep. 42 a statute prohibiting the intermarriage of negroes and white persons was held not to violate any provisions of the 14th Amendment or Civil Right Laws in the course of a well-

reasoned and well-supported discussion of the powers retained by and inherent in the States under the Constitution said:

> ". . . In this State marriage is treated as a civil contract, but it is more than a mere civil contract, it is a public institution established by God himself, is recognized in all Christian and Civilized nations and is essential to the peace, happiness, and well being of society. . . ."
>
> ". . . The right in the States to control, to guard, protect and preserve this God-giving, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal Government can determine who may marry in a State, there is no limit to its power. . . ." (36 Ind. at p. 402-3)

In *Naim* v. *Naim,* 197 Va. 80, 87 S. E. (2nd) 749 (1953) the Court of Appeals in a well considered opinion held that the Virginia statutes were constitutional and concluded its opinion as follows: "Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

In *Pace* v. *Alabama,* 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207, a prosecution for a white person marrying a colored person was upheld. Pace, the negro, contended that

the Statute violated the Equal Protection of the 14th Amendment.

In *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, as the party had been convicted under the miscegenation statute, the conviction was affirmed against the contentions that the right and privilege of marrying a white person violated the Due Process and Equal Protection clauses of the 14th Amendment the Supreme Court of the United States denied a writ of certiorari (1954).

In *Greenhow & Als* v. *James' Executor,* 80 Va. 636 (1885) the Court held that the children of a marriage contracted in the District of Columbia between a white person and a colored person could take under a will of a relative.

Such on marriage the Court said (80 Va. 61) ". . . Yet that it can have application to a marriage contract entered into in a foreign country in contravention of the public statutes of the country of their domicile which pronounces a marriage between them not only absolutely void but criminal. In the very nature of things every sovereign state must have the power to prescribe what incapacities for contracting marriage shall be established as the law among her own citizens, and it follows therefore that when the state has once pronounced an incapacity on the part of any of its citizens to enter into the marriage relationship with each other that such incapacity attaches itself to the person or parties and although it may not be enforceable during the absence of the parties, it at once revives with all its prohibitive power upon their return to place of domicile. . . . "

In *Toler* v. *Oakwood Smokeless Coal Corporation,* 173 Va. 425, 430 the Court speaking through Mr. Justice Spratley said:

> "One state, however, cannot force its own marriage laws, or other laws, on any other state, and no state is bound by comity to give effect in its Courts to the marriage laws of another state, repugnant to its own laws and policy. Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders. Such effect as may be given by a state to a law of another state is merely because of comity, or because justice and policy may demand recognition of such law. Such recognition is not a matter of obligation. Minor on conflict laws Sec. 4, 5, 6 and 126."

In 6 *Am Eng Enc. of Law* 2nd Ed P. 967 it is said "The right to marry is not such a privilege and immunity but a social institution of great importance subject to state regulation and a statute prohibiting intermarriage between white person and negroes is not a discrimination or unequal law contrary to the terms of the constitutional provisions."

It is next said that the sentence and the statute are unconstitutional as burdens on interstate commerce.

Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contentive is without merit.

It is next said such sentence has involved undue hardships upon the defendants by preventing them from together visiting their families from time to time as may be necessary to promote domestice tranquility.

This complaint relates to the terms of the suspension of this sentence, which is as follows:

> "And the Court doth suspend said sentence for twenty-five years upon the provision that both accused

leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

The Court knew that if they come to Caroline County or to the State of Virginia together that they would be subject to prosecution for unlawful cohabitation and therefore permitted each are to separately visit his or her people, but not together. If it works a hardship on them not to visit their people together it is the law that they cannot cohabit together in Virginia. Each one of them can come to Caroline separately to visit his or her people as often as they please.

Section 53-272 of the Code of Virginia provides in part: "In any case wherein the Court is authorized to suspend the imposition or execution of sentence, such Court may fix the period of suspension for a reasonable time having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced."

The parties were guilty of a most serious crime. As said by the Court in *Kinney's Case* 30 Gratt 865: "It was a marriage prohibited and declared absolutely void. It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a Century, and one upon which social order, public morality and the best interests of both races depend. This unmistakable policy of the legislature founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted

to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line bid defiance to the law by immediately returning and insisting that the marriage celebrated in another state or county should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void."

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The awfulness of the offense is shown by Section 20-57 which declares: "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

Then Section 20-59 of the Code makes the contracting of a marriage between a white person and any colored person a felony.

Conviction of a felony is a serious matter. You lose your political rights; and only the government has the power to restore them (Constitution, Sec. 73). And as long as you live you will be known as a felon.

"The moving finger writes and moves on
and having writ
Nor all your piety nor all your wit
Can change one line of it."

—Leon M. Bazile, *Judge*

Order of the Circuit Court of Caroline County

This day came the defendants, by counsel, and moved the Court to vacate the judgment and set aside the sentence heretofore entered in this cause.

Upon consideration thereof, for reasons stated in an opinion heretofore filed, it is ADJUDGED and ORDERED that the said motion is hereby denied.

It is further ordered that the Clerk of this Court send an attested copy of this order to Bernard S. Cohen, Lainof, Cohen & Cohen, Attorneys at Law, 1513 King Street, Alexandria, Virginia, and J. Peyton Farmer, Commonwealth's Attorney of Caroline County.

Enter 22 January 1965.

LEON M. BAZILE, Judge.

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