1889

The Conflict of the Marriage Laws in the United States

Frank Lovell Freeman

Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

Part of the Law Commons

Recommended Citation

THE CONFLICT OF THE MARRIAGE LAWS

IN THE UNITED STATES.

---

THESIS.

---

BY FRANK LOVEWELL FREEMAN

1889.

---
INTRODUCTORY—THE CONFLICT.

MARRIAGE.

I. What is marriage?

II. Marriage among the ancients.

III. What constitutes a valid marriage in the different states of the United States?

IV. The pre-requisites of a marriage not void, voidable, or capable of dissolution by what, in some of the states, is termed "divorce" although granted for causes existing at the time of marriage.

V. The solemnization of marriage, and how evidenced.

VI. In what states are illegitimate children made legitimate by future intermarriage of their parents.

VII. The principal points upon which the marriage laws of the several states come in conflict, and when the law of the place of contract is held to govern.

REMEDY.
INTRODUCTORY—THE CONFLICT.

The conflict of laws, or private international law, is a branch of the law that was in a great measure unknown to antiquity, and is the slow growth of modern times under the combined influence of Christianity and Commerce.

There is no record of any system of private international law existing during the time of the Romans. Questions of this nature were decided by the analogies of the municipal code, or were abandoned to their fate as belonging to that large class of imperfect rights which rested wholly on personal confidence, and was left without any appeal to remedial justice. After the conquest of Rome by the Northern tribes, and their settlement in its territories, there gradually grew up a system of rules which governed the subjects of those states in their intercourse with each other. This growth was very slow at first; but the increase of commerce, the discovery of America, and the increase of the facilities for the intercourse of the citizens of the different countries caused its rapid development. There was, however, at the time of the adoption of the constitution of the United States, no work in the English language which treated, even incidentally, of this subject. But little was known of the fine arguments and abstract distinctions of Continental jurists. Perhaps to
These facts is due, in part, the lack of constitutional provisions to obviate the inconveniences and difficulties sure to arise from the conflict of the different systems of State laws in such a union as the United States. But even if the framers of the Constitution had realized the importance of the conflict of State laws and the evils likely to arise therefrom they might not have been able to provide a uniform law, owing to the great dread of centralizing forces.

Judge Story published the first work in our language upon this important subject of the conflict of laws, in 1834. He had at the time but few works upon the subject that could help him; nevertheless, he covered it quite thoroughly, and deserves, as he has received, a great deal of credit for his work. In it he has laid down certain maxims which constitute the basis, upon which all reasonings upon the subject must necessarily rest, and which might be proper to give here, so as to lead to a proper understanding of the subject.

"Maxim 1. Every nation possesses an exclusive sovereignty and jurisdiction within its own territory."

"Maxim 2. No state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others."
"Maxim 3. Whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent". (1) Story's Conflict of Laws, Sec. 18
(2). Story's C. of L. 3rd Ed. Sec. 20
(3). Story's C. of L. 3rd Ed. Sec. 23.

It would be well to keep these maxims in view when we come to the discussion of the marriage laws of the different states.

Since the time of Judge Story, the subject of the conflict of laws has greatly increased in importance, and several eminent writers have written treatises on the subject. Mr. Wharton published his work in 1872. It is a large book, and covers quite thoroughly the changes that have taken place since the first publication of Judge Story's work.

Upon certain definitely prescribed subjects, the Constitution of the United States has provided against any conflict of state laws, by giving to Congress the exclusive right to legislate upon those subjects. But if this is true of certain laws, it is certainly not true of the laws of marriage. In this case the States are sovereign.

As a result of this fact, there is a lamentable conflict of State laws upon this important branch of our jurisprudence.
I say important branch, because all writers on private international laws give a prominent place to the discussion of the laws of marriage. Judge Story devotes one hundred and three pages of his work to the discussion of those laws; and Mr. Wharton gives them nearly as many. The evils that grow out of such a conflict were great enough in Judge Story's time, but what must they be now, when the number of states has increased from 25 to 38, and the number of inhabitants have more than doubled. Together with this increase of the number of states, and of their inhabitants, has gone the increase of facilities for intercommunication, and the ease with which parties, forbidden to marry by the laws of their own states, can go into another state and contract a valid marriage. Thus the cases in which the marriage laws of the different states come in conflict are multiplied several times. So now, if a citizen of Massachusetts traveled from Boston to Baltimore with his wife, in the space of twelve hours, he would pass through a half dozen states in which as many different systems of law would govern the marriage relation.

It is impossible to overlook the evil that must, in a country like ours, result from the conflict of the laws which govern a relation of such vital importance to society and the
state as marriage.

Having spoken of the origin and growth of the subject of the conflict of laws, the importance of marriage as a topic considered under that head, and of the ever-increasing evils that result from such a conflict, it will now be the object of the writer to give, in a brief way, a comparative view of the marriage laws of the thirty eight states, showing where they come in conflict, and at the end to offer a few suggestions as to the remedy.
MARRIAGE.

While realizing the fact that the discussion of what marriage is, the nature of the relation, and the way in which it was entered into by the Hebrews, Greeks, and Romans, is foreign to the nature and purpose of this thesis, still, it may not be improper to touch these points briefly as leading to a better understanding of the subject.

I. Marriage is generally defined as a contract, which like other contracts, requires, first, that the parties be willing to contract; second, able to contract; and third, do contract in the proper forms, as required by the law of the place where the contract is entered into. But two of these three are different in the case of marriage from what they are in any other contract. To be able to contract, the parties must be of the opposite sex. This is a requirement not essential to any other contract. If either of the parties suffer from certain legal or physical disabilities, they cannot contract a valid marriage. As a general rule, marriage requires more formalities in entering into the relation, than are required by other contracts. Then again, while mutual consent will dissolve any other contract, if the parties have entered into a valid marriage, nothing but death or the law will free them from it.
On the whole, marriage must be considered as an institution of society, commencing with the race and attending man in all periods and in all countries of his existence. It is the most important of all human transactions, and goes to the very basis of the whole fabric of civilized society. By the one term marriage is meant both the contract by which the parties enter into the relation, and afterwards, the relation itself.

Having spoken of what is meant by marriage, we will now, in a brief way, give an account of it as it existed among the Hebrews, Greeks, and Romans; those three nations to one or another of which we owe our religion and most of the leading elements of our civilization.

II. (A) Marriage, or at least the ideal of it, as found in the first records of the Hebrews, is a peculiarly beautiful one. "For this cause shall a man leave his father and mother and cleave unto his wife, and they twain shall be of one flesh". The union in this case, is that of one man with one woman, and polygamy, in this case, is inconceivable. It was also probably a union for life; for how could anything but death separate two persons so closely united? But as the Jews increased in numbers and wealth, divorces grew more frequent, and in some cases, even polygamy was permitted.
among the wealthier classes.

Marriage began with the betrothal; but no covenant or formality is known to have existed. It was probably quite informal and primitive; but yet permeated with a religious spirit, and placed under the especial protection of a covenant-keeping God.

(B). Marriage among the Greeks was simple and severe at first but it became degraded as they advanced to the acme of refinement. Betrothal was universal in legitimate marriages, both in Sparta and in Athens. In Sparta, after betrothal, marriage was usually consummated by a kind of a mock robbery. In both States a dower regularly, but not necessarily, went with the bride.

The Greeks, in the palmy days of Athens, placed a very low estimate upon marriage. It was reputable, and customary for men to give over their wives to their friends; while in Athens the “Metaora” took the place of the wife.

So much for marriage as it existed among the Greeks.

(C). The Romans started with the same elevated views of marriage as were at first held by the Hebrews and Greeks. Having much of the moral and religious in their character, they maintained these views for a long time. But toward the end of the Republic, the respect for the marriage tie had
reached a very low ebb, and society ceased to frown upon concubinage and adultery.

The earliest forms of the Roman marriage was for the wife a passing out of her natural family into the family of her husband, whose control was nearly the same as that of her father or grand-father. She was then said to be in his hand, and the marital power was known as the manus.

There were three forms known, in early Roman times, by which the manus was acquired by the husband. The oldest of them, confarreation, which was exclusively patrician, was celebrated with special formalities by public priests in some sacred place, before witnesses, and the manus was acquired by the solemnization.

The two others arose in plebian life. Of these, uses was probably the earlier, a kind of prescription in which, when the bride after the betrothal and nuptials had cohabited with her husband a year, without absence of three successive nights, the manus, or marital power was fully secured.

The remaining form, Coemption, was a kind of fictitious sale, much like that used in adoption and emancipation; and in this case the daughter's consent was necessary. At an early date a free kind of marriage came into vogue. It was preceded by betrothal and nuptials with religious ceremony.
In this case there was no manus; the husband had no rights over the wife except her dower. Eventually, this last form of marriage became the most popular.

We will next consider what constitutes a valid marriage in the several States.

III. (A). Marriage, according to the common law of the United States, is a civil contract which only requires the present consent of the parties. This was for a long time doubted; and in an early case, the Supreme Court was equally divided upon the subject(1). But since then, the same court has decided that in the absence of statutory provisions containing express words of nullity, a marriage by mere consent is valid(2). The courts of England have held, however, that such a contract of mere consent will not constitute a valid marriage(3). It is not surprising that there should be a conflict of State laws upon the effect of a mere present consent to marry, considering the great diversity of opinion that has existed upon the subject. Probably the best way of showing this difference would be to give a comparative view of the statutes of the different states upon this point.

(2). Meister vs. Moore, 96 U.S., 76.
(3). Regina vs. Miller, 10 Cl. & F. 634.
citing such cases as are at hand.

(a). In at least fifteen states, all that is required to make a contract of marriage binding, when there is a mere present consent of the parties, is that they shall be capable in law of contracting(1).

In the states mentioned under note (1), there are express statutory provisions holding that a contract of present consent to marry, constitutes a valid marriage. In other states the same has been decided by the courts, while again, in some states, it is impossible to tell what is the rule; but where there is doubt, the decision in Meister vs. Moore will probably prevail. By the statutes of some of the states there are either express statutory provisions holding such marriages invalid, or their courts require a conformance with their directory statutes, though no words of nullity may be therein contained.

(b). The courts of five states have decided that a marriage to be valid, must be solemnized by a minister or magistrate, or in some society authorized by law to perform the ceremony. If the contracting parties belong to some particular or peculiar sect, then the marriage must be solemnized in accordance with the rules of that sect.

(c). Eight of the states seem to be in doubt whether to follow the common law rule or not. In Texas, the civil law will probably govern the case and decide between the parties, a mere contract, a marriage if such was their intention. Florida, Virginia, South Carolina, and New Hampshire, and Rhode Island seem to hold a contract made under the same conditions as those stated in the Texas rule to be a marriage.

(d). We now come to the last class, where a marriage is not valid unless entered into in accordance with the express law of each state.

(1) Ala. Campbell vs. Gulatt, 43 Ala 57; Ga., Askew vs. Dupree, 30 Ga. 173; Ill. Port vs. Port, 70 Ill. 484; Miss. Floyd vs. Calvert, 53 Miss. 37; Ohio, Carmichael vs. The State 12 Ohio St., 553.

(2) Londonderry vs. Chester 2 N.H. 268; Dumbarton vs. Franklin, 19 N.H. 257; Peck vs. Peck, 12 R.I. 485; S.C. 2 S.F. 130 While Vermont and New Jersey probably hold the other way.

(3) Northfield vs. Plymouth, 20 Vt. 582; Pearson vs. Howey, 6 Hals 12.


Remainder of note on next page.
So much for the effect of a mere present consent to marry; but before leaving this subject it might be well to refer to the fact, that in some states, and for a particular class of persons, acts have been passed recognizing as valid, marriages constituted by mere "agreement to cohabit and occupy the relation of husband and wife".

At the close of the Civil war, the statutes in many of the Southern States were changed, so as to make valid certain void marriages of colored people. It will not be best to speak of those statutes here but citations to them may be found in Stimson's American Statute Law, p. 662.

Marriages in many of the states are held valid even though they are not solemnized in accordance with the statutory provision upon the subject, but the parties are punished by a fine for marrying contrary to law; or the minister or magistrate is punished in a like manner for officiating. A question that also arises in this connection is as to marriage "per verba de futuro cum copula". While such marriages are generally sustained, where those of "per verba de presenti" would be sustained still, the point necessary to

sustain such a marriage is proof of present consent. Those marriages, together with those which require proof of cohabitation for a certain length of time, and an intention to form a marriage contract, come properly under the department of evidence, and will not be discussed here.

IV. (A) Passing to the next topic, the first pre-requisite of a valid marriage is that the parties shall be of sufficient age to give their consent. Marriages, when one or both the parties are under age, are divided into two classes: first, those that are void; second, those that are voidable only.

In some states, it is impossible to tell from the wording of the statutes whether such marriages are void or voidable. The statutes of Minnesota, North Carolina, Kentucky, Michigan, Virginia and Massachusetts in one place say that marriages contracted before the one or both the parties reach a sufficient age of consent are void without process; or, words to that effect; while in another place they provide for the way in which these marriages can be avoided. In North Carolina, Arkansas, and Texas, where the parties are under the age of consent, marriages appear to be null and void. (1)

Texas R.S. sec. 2839; Ark. M's Dig. S. sec. 4591
In the remainder of the states, it seems to be the law that such marriages are voidable. In some states this rule is especially provided for by statute, in others it is derived from the common law. But in most of them, if the parties cohabit as man and wife after they are of sufficient age, what was before a voidable marriage, will then be held to be a valid one.

(a). The common law rule as to the age of consent is expressed by statute in five states. In many others, there are no statutes on the subject; and the same rule prevails. Viz: 14 years of age in males and 12 years in females.

(b) Three other states make the age of consent 16 in the male and 14 in the female. While again in four states, the age required is 17 in the male and 14 in the female.

(c). Four more states make the ages 18 and 15.

(d). In New York the age of consent is 18 in the male and 16 in the female.

In Nevada, males under twenty one, and females under eighteen, must first obtain the consent of their fathers, mothers, or guardians. The same rule holds good for females under sixteen in Maryland. In Stimson's A.S.L. secs. 6132 and 6134, references will be found to statutes in many states forbidding the clerk or magistrate to issue a certificate to a male or female under age, or for a minister or magistrate to marry parties without first ascertaining whether they are of sufficient age, and capable of contracting a marriage.

(B) The next requisite of a valid marriage, is that the parties should not be within a forbidden degree of consanguinity, and in some cases of affinity.

There is a serious conflict of the laws of the different states upon this subject, which we will discuss when we come to the effect of the "lex loci contractus". Although it is often hard to tell from reading the statutes of the several states whether an intended marriage entered into by parties within a forbidden degree of relationship is void or voidable, still, it is reasonably certain that the common law rule, making such marriages voidable, has been adopted in seven states(1).

The statutes of four more states hold such marriages void only if they are solemnized in the state(1). Massachusetts holds the marriage void if contracted within the state, but voidable if the parties have been married in another state(2). In the other states, such marriages are probably void, no matter where contracted, but the statutes of Maryland and Mississippi seem to make some provision for annulling them, although in another place they declare marriages between parties too closely related to be absolutely void(3). The great trouble in many states in that they rarely draw the distinction properly between void marriages (those which are absolutely void, ab initio, at all times and as between any parties,) and voidable marriages (those which can be annulled by the parties, but which may be valid until annulled).

Having spoken of the fact that in nearly all the states marriages between near relations are either void or voidable, we will now give a comparative view of the statutes of the several states, and show, between what degrees of relationship, such marriages are prohibited in them.

(1) Md., Code Art. 51 sec. 12; Miss., Code, 1766.  
(3) Md., Code Art. 51 sec. 12; Miss., Code, 1766.
(a). In New York, all marriages between persons lineally connected, brothers and sisters, either of the half or whole blood, legitimate, or illicitimate, are prohibited and declared by the statutes to be absolutely null and void(1). New York is the only state that permits a valid marriage between an uncle and a niece, or an aunt and nephew, to be solemnized within its jurisdiction.

(b). Twenty two states hold that all marriages between blood relatives, not lineally connected, or not connected as brother and sister, uncle and niece, or aunt and nephew shall be valid(1). But sixteen of them, in some cases, prohibit marriage where the parties are related by affinity. In Connecticut, a man may not marry his father's widow, nor a woman her mother's husband; and inversely, a man may not marry his wife's daughter, nor a woman, her husband's son(2). In the other fifteen states, the rule is extended so as to include grand-parents and grand-children(3).

N.Y., R.S. 7 Ed. p/ 2 chap. 8 Tit. 1 sec. 3.

(1). Mass., R.S. Chap. 180, secs. 1&2; Me., R.S. chap. 59 sec. 1; Vt., Rev. Laws secs. 2306 and 7; R.I., Pub. L. chap. 163, secs. 1 and 2; Ct., G.S. Title 14, chap. 1, sec. 1; N.J., R.S Marriages, sec. 1; Pa., B.P. Dig. sec. 54; Mich. C.L. secs. 6211 & 6212; Io., Code sec. 4030; Neb. C.L. Part 1 chap. 52, sec. 3; Md., R.C. Art. 51, secs. 1&2; Va., Code, chap. 104, secs. 9&10; W. Va., R.S. chap. 121, secs. 9&10; Tenn., M.&V's Code sec. 3290; Mo. R.S. sec. 3265; Tex., P.C. secs. 330&11; Cal. Code, secs. 5059; Col. G.L. sec. 2248; S.C., G.S. sec. 2026; Ala., Code secs. 2670-1; Miss., cide secs. 1145-6. Citations two and three con next page.
In New Hampshire, the law on affinity is the same as in Connecticut; while in Georgia and Kentucky it is the same as in the fifteen states cited under three. In all those states except Connecticut and Texas a man may not marry his son's widow, nor a woman her daughter's husband; nor inversely, a woman her husband's father, or a man his mother-in-law. This provision is extended so as to include grandparents and grand-children in most of the states.

(c). In two states, a man cannot marry the daughter, or a woman the son, of a brother's or sister's child(1)

(d). In seven states, marriages between first cousins are prohibited(2). Three of those states, Ohio, Indiana, and Nevada holding all marriages between persons nearer of kin than second cousin invalid.

(e). Marriages, in four more states, cannot be contracted by parties nearer related than first cousins(3).

(2) Conn. C.L. Title 14, chap. 1

(1). Del. R.C. chap. 74 sec. 1; Ky., G.S. chap. 52, art. 1 sec. 1.

(2). N.H., G.L. chap. 180; secs. 1 & 2; O., R.S. sec. 6384; Ind. R.S. 1881 sec. 5334; Kan. C.L. 1879 chap. 61 sec. 2; Ill., Code 1887 p. 225; Nev., C.I. sec. 196; Ark., code sec. 4592

(3). Wis., R.S. sec. 2330; Minn., G.S. chap. 61 sec. 3; N.C. Code 1883 Secs. 1810-1; Ore., M.L. chap. 34 sec. 9.
(f). Georgia and Florida forbid all marriages within the Levitical degrees (1).

(C). On the next requisite it is not necessary to speak at any great length, for the parties must, of course, have physical capacity to consummate marriage in order to have it valid. In Kentucky, where the contracting parties are physically incapable, the marriage will be held to be void. In New York, Vermont, and California, physical incapacity renders marriage voidable, and in the other states, it forms grounds for what is termed a divorce (1). Many of these states however, require that the action be brought within a certain period of time after marriage (2). In some states actions may be brought by either party, while in others, the right of action is confined to the innocent party.

(D). To be valid, a marriage contract must be made between parties both of whom have sufficient mental capacity to give an intelligent consent.

(1). Ga., Code, sec. 4533; Fla. S. Dig. 188 chap. 59, sec8
(1). Stimson A.S.L. sec. 6203;
Stimson A.S.L. sec. 6156.
(a). Whenever the parties are mentally incapable, the statutes of nine states hold the marriages void (1). In the other states they appear to be voidable (2).

(7). A marriage, to be valid, must not be contracted while either party has a former wife or husband living, and not duly divorced according to the State law (3). Or where either party has been divorced for his or her adultery, and is forbidden to marry again by the law of the state where the marriage is solemnized. An exception however, seems to made to this rule in two or three states where the other party to the prior marriage has been absent and unheard of for a given length of time (4). In other states, such absence renders the second marriage voidable from the time that the other party to the former marriage is discovered to be living (5).

(1). Me. R.S. chap. 59, sec. 2; Ind. R.S. 1881 sec. 5325; Ill. code, chap. 89 sec. 2; Wis. Neb. Comp. Laws chap. 52, sec. 5; R.I. Pub. L. chap. 163, sec. 5; Ky. G.L. chap. 52, art. 1 sec. 2; S.C., S.S. 1882, sec. 2026; Ga. code, 1882 sec. 1899.
(2). Citation found in Stimson's A.S.L. sect. 6112 sub. (D) and 6113 sub. (C)
So in West Virginia, if absent seven years (1) Four states permit one party to marry, if the other party has been absent seven years, without being liable to bigamy (2). Alabama has also adopted the same rule where one party is absent five years (3). In Mississippi, the rule holds if one party is absent three years (4). Several states make the offspring of a marriage contracted in good faith, the legitimate children of the party not previously married (5). In a number of states, absence for a term of years is a ground for divorce. After a divorce has been obtained either party can contract a valid marriage (6). So much for the effect of an attempted marriage where one or both the parties are bound by a previous marriage tie, or forbidden by the law of the state to marry again. We will refer to this subject again when we come to speak of the principal points upon which the marriage laws of the several states come into conflict.

(1) "W. Va. Laws. 188 art. 45 sec. 2.
(2) Maine, Md., R. code art. 72, sec. 102; Mo., R.S. 1879 sec. 1534; S.C., S.S. 1882, sec. 2029 (3) Ala. code 1878 sec 4186.
(4) "Iss. sec. 595.
(5) Citations to these states may be found in Stimp. A.S.I. sec. 6116 subs. A and B. Also case in Ia. 2 So. Rip. 581.
(6) The laws of these states upon this subject will be found cited in Stimp. A.S.I. sec. 6204
In many states the parties to a marriage must be of the same race and color. Such provisions in the state laws probably do not conflict with the Fourteenth Amendment, for there is no discrimination in favor of or against any race (1).

The provision, forbidding in marriages the intermixture of color, is not confined to the southern states, and in some states is held to extend to marriages between all parties not of the same race and color. A marriage between a negro and a white will probably be valid in all states where nothing is said in the statutes to the contrary. The same is true with regard to marriages with Mongolians and Indians.

The laws of Michigan expressly hold such marriages valid (2). In West Virginia they are all voidable.

The laws of thirteen states make marriages between a white and a negro or mulatto, void (3). Six more states make a marriage between a white and a person of African descent void. Three of these six states also prohibit marriages with Mongolians, and the other three with Indians.

(1) Cooley's Constitutional Law p. 229.
(2) Mich. Howell's Statute art. 23 sec. 1
(3) Stimp. A.S.L. 6112 sub. 3 and 6050.
(G). A marriage must be solemnized in accordance with the law of the state where it is contracted. The provisions of the different states vary greatly upon this point, and therefore the discussion of them had best be kept till we come to speak of the solemnization of marriage. It would be well, however, to mention in this connection, that such provisions are generally merely directory.

Having given first the pre-requisites which seem to concern the parties, we will now mention the circumstances which must attend the contract.

(H). We now come to the last requisite to a valid marriage. Since marriage is a contract, parties marrying must give their free consent; it must not be induced by force or fraud. If nothing is said in the statutes of any of the states, those marriages will be held voidable at the suit of the innocent party, if such party has not freely given his or her consent after the discovery of the fraud.

(a). In Michigan and Georgia, a marriage where the consent of either party is obtained by force or fraud is null and void, if the parties separate and do not voluntarily cohabit afterwards(1).
(b). Twelve more states make such marriages voidable (2).

V. (A). By their statutes, all the states have given certain directions as to how marriages shall be solemnized within their jurisdiction, naming those persons who are permitted to perform the ceremony, requiring them, in some cases, to examine the parties as to their right to marry, forbidding them in certain states to join any persons in marriage who have not first obtained a license, or published certain banns or notices of intention to marry.

In some states the clerk or magistrates are not allowed to issue licenses to parties forbidden by the law of the state to marry. It is impossible to tell whether the provisions of these statutes are merely directory or mandatory, making the marriage void or voidable, if not complied with. Most of them, however, are probably, directory, and if not followed, they only render the parties that violate them liable to a fine or penalty; or, at the most, guilty of a misdemeanor.

(a). In the ten states mentioned in III A. (d) (4) the provisions of the statutes are mandatory, and an attempted marriage not contracted in the presence of an authorized person or society, is void.

(b). The same is probably true of Vermont and New Jersey(1). In the other states such marriages are probably valid.

(b). The next question to discuss under this head is who may solemnize a marriage. Among those mentioned by the statutes of the several states are: judges, chancellors, mayors, aldermen, recorders, justices of the peace, notaries, county supervisors, ministers, priests, etc. also certain religious societies(2). The public officers named here are of course known or ascertainable parties, and their authority is a matter of public knowledge. But who is a minister of the Gospel? What are religious societies? What is good and regular standing?

Some states require that before a minister be allowed to perform the ceremony, that he be ordained according to the usage of his denomination, or in others, licensed, while in some he must reside in the state

(1) A. (d) (3).
(2) Citations to the statutes of the different states upon this point will be found in Stimp. A.S.L. sec. 6130
In other states no such conditions are required. While the
laws of the several states as to how the marriage ceremony is
to be performed, and as to who may perform it, yet, as there
is no conflict of laws upon the subject, it would be best
just to give the section in Stimson in which citations to the
statutes of the several states may be found, and then say a
few words as to the evidence of marriage by public record(1).

(1) Restraints upon marriage, both in this country and in
England are considered as against public policy; but certain
wholesome restrictions should exist requiring them to be re-
corded, "For it is a fact, amazing though it may be, that in
some of our states not only does the law allow but practically
fosters the practice of entering upon a contract resulting in
a life-long relation and causing new life with all its momen-
tous incidents to spring into being—of entering, we say, upon
this contract with less formality or care for the preservation
of its evidence by way of public record than is absolutely
necessary for the general validity of a transfer of a quar-
ter acre plot of ground worth twenty five dollars; and even
where statutes are enacted to provide for or compel a general
registration of marriages, how often are the penalties inflic-
ted on those violating such laws totally inadequate to secure
their observance(2).

(1) Stimson A.S.L. secs. 6130-2
While the statutes of many states require all marriages to be recorded, it is well known that few clergymen preserve full records of the marriages which they solemnize. If we are ever fortunate enough to have a uniform marriage law, it is to be hoped that it will contain some provision requiring a record to be kept of all marriages, giving in this record the names of the parties, their ages and residences. If either party is under age, it should state whether such party has received the consent of those in legal charge of his or her person. Such a penalty should be inflicted for the violation of this provision as would be sure to secure its enforcement.

Leaving this subject we will speak in the next division of when illegitimate children are made legitimate by the future intermarriage of their parents.

VI. In what states are illegitimate children made legitimate by the future marriage of their parents?

While recognizing the fact that this topic comes more properly under "Parental Relation" still, we do not think it would be improper to mention it here, considering the conflict of state laws on the subject and its close connection with marriage proper. The common law rule holds that if a child is born out of wedlock, the future intermarriage of its pa-
rents will not make it legitimate. The civil law rule is just to opposite of the above.

(a). In ten states, if the parents of an illegitimate child subsequently intermarry, the child will be legitimate; but for the purposes of inheritance, the father must acknowledge the child to be his, in five of those states (1).

9b). Twenty one more states not only require the parents of a child born out of wedlock, to intermarry, but the father must acknowledge or recognize the child to be his child (2). Three of these states also require that the mother acknowledge the child.

(c). In five states, if the putative father was unmarried at the time of the birth, he has a process in court by which he may legitimate the child (3).

(d). All that is required in California or Nevada is that the father should publicly acknowledge the child as his own, in order that the child be legitimate for all purposes. Such child may be made the heir of a person who, in writing signed in the presence of a competent witness, acknowledged himself to be the father (5).

(1). Stimp. A.S.L. secs 6631 sub. A. and 6632 sub. C.
(2). Stimp. A.S.L. sec. 6631 sub. B.
(5). ibid sub. B.
(e). States not cited in Stimpson, will probably be held to follow strictly the common law rule, making children that are once illegitimate, always illegitimate. We will not speak here of the conflict of the state laws upon this subject; but will leave such discussion, as has been done in previous cases until we come to treat of the next and last division. In the last division we will treat of the principal points upon which the marriage laws of the several states come into conflict, and when the law of the place of contract is held to govern.

VIII. Judge Story laid down the rule in section 113 of his work on the Conflict of Laws, that the validity of a marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. If invalid there, it is equally invalid everywhere. He makes three exceptions to this rule which are, in fact, almost as important as the rule. These exceptions are: incest, polygamy, and those postively prohibited by the public laws of a country from motives of policy. Since his time, two more exceptions have been added to the three given by him.

The first exception applies to the first half of the rule, and the second, to the latter half. First, In most states, if parties forbidden by the law of their own states
to marry, go into another state and there contract a valid marriage, intending at the time to return to their own state, and they do so return, the marriage will be held to be either void or voidable in their own state, because contracted in fraud of the State laws. Second, if parties contract a marriage in a foreign country in accordance with the law of their domicile, such marriage will be held valid in the country in which they have a domicile (1).

This rule given by Judge Story, has been followed in a number of the states. There are still, however, many inconsistencies in the laws of the different states upon this subject, and of the cases in which these laws come into conflict. We will endeavor here to show this conflict by taking up, in regular order the topics treated in the previous pages of this thesis; when the law of the place of contract will govern and when it will not.

(a). If a marriage is solemnized in accordance with the law of the place of contract, and it is in other respects, valid, it will be held a good marriage in every state. But suppose a citizen of one state contracts a marriage in another

state, in accordance with the laws of his own state; it will certainly not be valid in the foreign state: will it be valid in his own state? The courts of New York and North Carolina have decided that such marriages will be held valid in the state in which the parties have their domiciles (1).

Probably, a number of other states hold the same way.

(b) It has been observed that the laws fixing the age of matrimonial capacity vary greatly in the different states, so that no one state is called upon to enforce the limitation in this respect, of the other states, when they conflict with its own.

If two parties, one or both of whom are under age, and are forbidden to marry in their own state, go into another state where they are not forbidden to marry, and there contract a valid marriage, such marriage will be held to be valid everywhere. Massachusetts, Maine, and West Virginia however, make such marriages voidable, if, with the intention of returning, the parties go out of the state in order to evade the marriage laws.

(c) In these last two cases, although there were great differences between the laws of the several states, yet, there were but few places where those laws came in conflict. On

the subject of consanguinity, there is a great conflict. Judge Story made this one of the exceptions to the rule that the "lex loci contractus" was to govern.

By their statutes, six states have provided that if a marriage is valid in the state where it is contracted, it would not be impeached in those states, simply because the parties were too closely related to marry in any one of those states.(1) In Massachusetts, however, if the parties go out of the state for the purpose of evading its laws, such marriage will be held to be voidable. Other states hold these marriages valid on the ground that a marriage which is valid in the place of its contraction is valid everywhere. They have, however, no express provision in their statutes on the subject. On the whole, it is the policy of this country to favor and encourage marriage; and unless there are express statutory provisions or adjudicated cases to the contrary, no state will recognize restrictions on matrimony, based on lateral consanguinity; beyond the first degree.

Therefore, in a number of the states, if the parties could have married in their own state, and they marry in another state in accordance with the laws of their state, such a marriage will still be valid in the state in which they have their domicile, although invalid in the state where the marriage was performed on account of the parties being too nearly related.

(d). Upon the subject of mental and physical capacity, there is so little conflict of the state laws, that we will not speak of them here. It is only well to say here that a degree of lunacy is impeachable and that a state is not bound to refuse to allow a person to marry in its territory, simply because that person has been decreed a lunatic by a court of another state.

(e). A marriage to be valid must not be contracted while either party has a former wife or husband living and not duly divorced. Some states add the case where either party has been divorced for his or her adultery.

It is the general policy of all the states of this country to hold that a second marriage, the first remaining undissolved, is void, and will be so treated no matter where contracted. A question that is constantly arising, however, is: when is a marriage considered to be dissolved? The
general rule is that a state will not hold a divorce by a foreign state as valid when neither of the parties to the marriage was distinctively subject to its law. To make the second marriage valid when the former wife is still living, the divorce must be internationally valid.

It has been decided that where a woman, a citizen of Connecticut, sued in the courts of New York for an absolute divorce and obtained it, that she could marry again in Pennsylvania in the absence of any restrictive provision in the statutes of those two states\(^1\). New Hampshire holds all divorces valid if they were regularly obtained in the state where given. A case has been decided in New Jersey which holds that where husband and wife resided in New Jersey and the wife left her husband and went to Michigan and there obtained a divorce without regular service of process upon her husband in New Jersey, that such divorce would not hold as against the husband and that when she married again she was guilty of adultery according to the law of her husband's state\(^2\). The next place in the connection in which the laws of the state come into conflict, is where the husband or


\(^2\) 7 A. Rep. 669.
wife has been divorced for his or her adultery and the law of
the place where such divorce is given forbids the remaining
of the guilty party to go out of the state and contract a
marriage which will be held valid in the state. The Mass.
courts once held that such a marriage would be valid in that
state even if the parties went out of the state to avoid the
provisions of the Mass. statutes forbidding the marriage of
the guilty party. This rule, however, has since been chan-
ged by statute.

A number of the states follow the old Mass. rule, New
York taking the lead (1). The grounds on which these dis-
cussions rest are first, that a prohibition of re-marriage is
simply penal; second, that a final statute has no force beyons
the jurisdiction of the state enacting it; third, that the cas-
use did not fall within any exception to the general prin-
cipal that a marriage valid where contracted is valid anywhere.

(1). Roberts vs. Ogdensburg and Lake Champlain R.R. Co.
34 Hun. 324; Clark vs. Clark, 10 N.H. 385; Emerson vs. Shaw,
56 N.H. 420; Van Voorhis vs. Pintnall, 86 N.Y. 18; Moore
vs. Hegeman 92 N.Y., 321 1 Yerg. 110 Tenn. Rep.; Thorp vs.
Thorp 90 N.Y. 602.
(f). The next point upon which there is a conflict of state laws is that of marriage between parties not of the same race and color. Provisions in some states upon this subject, are held to be matters of state policy, and if a marriage is contracted in another state by parties intending to return to the state which prohibits their marriage. Such a marriage will be held to be either void or voidable in that state(1).

In the other states, a marriage between parties of a different race and color, if valid where contracted, it is valid everywhere.

(g). As was said in a former place in this thesis, there is a great conflict as to when illegitimate children are made legitimate by the future intermarriage of their parents. The civil law rule makes the children legitimate upon the future intermarriage of their parents, while the common law rule holds that they will not be made legitimate by such marriage. The civil law rule, making the children legitimate upon the future marriage of their marriage of their parents and the common law rule which holds that such marriage will not make them legitimate, are repeatedly coming in conflict, and it is often difficult to tell which will govern.

(1) These states which make such attempted evasion invalid are Miss. Code 1880 sec. 1147; Ga. Code 1882 sec. 1710; Va. and W. Va.
"In America, the question as to which shall prevail in cases of conflict is as Mr. Wharton mildly puts it, still unsettled." Shall the status of the child in either of the four or five cases which may possibly arise depend upon (I), the law of the place of birth, (II), of the father's domicile at the time of birth, (III) of the place where the marriage is solemnized or legitimizing act performed, (IV) the father's domicile at the time of such act, (V) the law of the situs of real property to be inherited, or (VI) must the law of some two of the places above mentioned coincide to confer legitimacy? The few American decisions seem so conflicting in their character, that little save weariness and disgust results from any attempt to reconcile and classify them. Supposing the domicile of the father and mother to be in the state at the time of birth, we may conceive three cases in which a conflict will arise between the provisions of the two rules under discussion. (I). The birth and subsequent marriage may take place in the state where the civil law rule prevails; will the status of legitimacy thus conferred be recognized abroad? (II). The birth may occur and the marriage be contracted in a state wherein the common law rule controls. (III). The birth and marriage may take place in different states wherein different rules prevail. What
shall be the status of such children in those states?

No American decisions relating to this point is referred to by Chief Justice Gray of Mass. in Ross v. Ross wherein the learned Justice reviews all the authorities in a most exhaustive and scholarly manner. (1) The court, however, seems obiter to favor the doctrine of some Continental jurists, and one might agree with Mr. Potter in saying that "it cannot be doubted that if a mother and father should move from this state (New York), to a sister state and become citizens of that state and enter into a lawful marriage contract there for the express purpose of legitimating a child already born, the status of legitimacy thus conferred would render it legitimate in any state of the Union under the provisions of the Constitution."

In what has been said heretofore, it has been our desire to give a brief view of the statutes which regulate the marriage relation in the several states, and to show their points of conflict. We will now pass to the consideration of the remedy.

REM EDY.

The subject of marriage is so intimately connected with the subject of divorce that it is almost impossible to speak of the remedy for one without, at the same time, suggesting a remedy for the other. We will try, however, not to infringe upon the latter subject, but will confine ourselves to the discussion of a remedy to obviate the inconveniences which arise from the conflict of so many different systems of marriage laws. Anyone who has examined the marriage laws of the several states must know that there exist points of conflict, and diversities which are not only uncalled for and unreasonable, but in many cases, productive of evils of no inconsiderable magnitude.

It is also well known that in many states where there has been a divorce a mensa et thoro, or where the husband or wife, has been divorced for his or her adultery, that there exists that uncertain and indefinite state of a husband without a wife or a wife without a husband. The Court of Appeals of the State of New York in the case of People vs. Baker (1) has added to those two classes a third: that a similar relation may also exist between parties one of whom has obtained an ex parte divorce in a state not having jurisdiction over the other. These provisions together with any (1). 76 N.Y. 78.
others that impose unreasonable restraints upon marriage, are
against the interests of morality and opposed to the general
policy of the country,
and we trust that sometime in the near future we shall have
a uniform marriage law in which such restraints will not
exist. Such a law would be a great benefit to the country
for it would not only do away with the evils that result from
the present conflict of the marriage laws of the thirty eight
different states, but it would fix some reasonable age of
consent, such as, for instance, the one adopted in New York,
and it would abolish any useless restrictions like affinity,
or marriages between relatives not nearer connected than first
cousins. If such a general law should be passed, it would
probably contain a provision requiring an authentic register
to be kept of all marriages, and it would also very likely
provide for the legitimation of children born out of wedlock.
These two provisions in themselves, would be of inestimable
benefit.

Although numerous plans to provide for some uniform
marriage law, have from time to time been suggested, the one
that seems the most feasible and practical is to have the
Constitution amended, and then to have Congress pass a uni-
form marriage law. Leaving cases that arise under this
act to be adjudicated by the United States Courts, we would
thus avoid the confusion necessarily arising from the different state laws. This law would have the advantage of uniformity, and although tending towards centralization, it would probably in the end be a great benefit to the country.