AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Federalism

Cunningham v. Cunningham, 206 N.Y. 341 (NY 1912)

William Cunningham was a forty-year-old machinist staying in a New York City boarding house. He fell in love with Anna Prell, the seventeen-year-old daughter of the boarding house owner. The couple tried to get a marriage license at the city hall, but they were turned away when the age of the bride was revealed. New York law required that individuals be eighteen or older to be married. They travelled to Westwood, New Jersey, and found a minister who married them. New Jersey law at the time likewise barred anyone from performing a marriage ceremony for a bride under the age of eighteen (without parental presence and consent), but Prell apparently lied about her age to the New Jersey minister. The couple immediately returned to the New York boarding house, where they kept the marriage a secret and continued to live separately. Some months later, however, William got into a drunken argument with Anna's father, revealed the marriage, and demanded that his status be recognized in the household. The bride's parents immediately evicted the groom and hired a lawyer to have the marriage annulled in the New York courts. The petition for an annulment was denied by the lower courts, but the New York Court of Appeals reversed in a 5–1 decision.

Although illegal under either New York or New Jersey law, the marriage license had in fact been granted. Judicial precedents in many states tended to favor giving recognition to illegal but de facto marriages rather than break up established families (which potentially included children). Since the Cunningham marriage had not been consummated, the court had more leeway in granting the annulment. A crucial question for the court was which law governed the case. The license had been granted in New Jersey, but the couple were residents of New York. Was the status of their marriage governed by New York or New Jersey law? The majority contended that New York law should govern, which facilitated the annulment. Although the justices did not expressly address the constitutional issue of whether New York must give full faith and credit to a New Jersey marriage license, both the majority and dissent were clear that the state did not have to recognize marriages granted elsewhere that were against New York public policy. For example, marriages against "natural law" did not require recognition.

Why did the justices not confront more directly the full faith and credit issue? If the couple had instead traveled to a jurisdiction that allowed marriage before the age of eighteen, would the New York courts have been obliged to recognize it? If a husband left his wife in New York and received a divorce in Ohio in circumstances that violated New York law, would the New York courts recognize the divorce? If both parties traveled to Ohio to get the divorce but then returned to New York, would New York recognize the divorce?

JUSTICE HAIGHT

. . . .

The plaintiff and the defendant were both residents of this state at the time of the marriage and have continued to be such residents ever since. Their only absence was during the time they took to go to New Jersey for the ceremony and return. . . .

It will be observed that the statute in force at that time, which was read in evidence upon the trial of this action, does not state whether the marriage of a person under the age specified by the statute shall

be void or valid. Ordinarily a contract which is prohibited by statute is a void contract and unenforceable. But marriage contracts have always been considered as involving questions of public policy, and the interests of others than those of the contracting parties, and should, therefore, be construed in accordance with such policy. The legislatures, therefore, of most of our states have deemed it unwise to permit marriage contracts to be entered into between minors whose judgment and discretion were still immature. And yet where the contract has been made which has been followed by cohabitation, it has not been considered good policy to declare such marriage void, for it might be followed by the birth of children whose legitimacy might be affected thereby. . . .

. . . . We thus have the question presented in this case as to whether a marriage ceremony performed by a minister, in violation of the statute, between parties, one of whom is under the age of legal consent, which has not been consummated by cohabitation, is valid and forever binding upon the parties and is beyond the power of the courts of any state to annul or grant the parties relief.

It appears to me that the construction of the statute given below defeats the purpose of the legislature in establishing an age limitation and becomes exceedingly burdensome upon minor children of immature years whose consent to the ceremony may have been obtained without their knowing or comprehending its full meaning and import. No public policy calls for such a construction, and to my mind the legislative intent was to make such marriages voidable, so that the courts in a proper case may relieve the infant party.

But assuming that under the statutes of New Jersey the marriage was valid, and not voidable, it then becomes necessary to determine the extent of the jurisdiction of our courts in the matter. . . .

It will be recalled that the parties to this action reside in this state and have so resided ever since and before the marriage. The right of a government, as well as that of the several states of the Union, to determine the marital status of its own citizens and prescribe the terms and conditions upon which their relations may be changed is elementary and beyond question.

In the case of *Kinnier v. Kinnier* (1871) Church, Ch. J., in delivering the opinion of the court, says: "It is now well settled that the *lex loci* which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time, where the parties have their domicile, and where they are amenable for any violation of their duties in that relation."

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It must be borne in mind that I have been discussing the question of the powers of the courts of our state to determine the status of our own citizens. I do not question the validity of marriage contracts made in other states conformatory to the laws of such state, or that they will be recognized as valid in this state, unless they are contrary to the prohibition of natural laws, or to the express provisions of our statute. We would not in this state recognize a contract of marriage in another state in several instances, such as between a father and a daughter, or where the consent was procured through force, duress or fraud, etc. We do recognize the remarriage of a former husband or wife who has been divorced and has been forbidden to again marry, where such remarriage took place in a state in which it was authorized. But this is upon the ground that the forbidding to remarry was in the nature of a penalty which had no effect outside of this state.

My conclusions are that the marriage of the plaintiff to the defendant in the state of New Jersey, while she was under the age of legal consent, without the knowledge or consent of her parents, was repugnant to our public policy and legislation, and in view of the fact that the parties were, and ever since have been, residents of this state, our courts have the power to relieve the plaintiff by annulling the marriage.

The judgment of the Appellate Division . . . should be *reversed* . . . .

JUSTICE WERNER, dissenting.

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This statute, it will be noted, does not invalidate marriages between minors, and it does not even declare them to be voidable. It is simply a law of regulation which imposes upon those who are authorized to perform the marriage ceremony the duty of observing the specified statutory details to the end that the evils of premature and ill-considered marriages between persons of immature years and undeveloped characters may be minimized as much as possible. Human experience has long since demonstrated that such marriages cannot be entirely prevented and that to invalidate them ipso facto would be to create two evils where but one existed before. The New Jersey legislature, recognizing this obvious truth, has sought to render the statute effective by imposing a penalty upon those who officiate at such marriages in defiance or neglect of its mandates. There the law significantly stops and leaves the parties to the marriage where they have placed themselves. . . .

The learned counsel for the appellant, evidently recognizing the perplexity of his position, now invokes the statutes of this state to support his suit. The argument is that marriage is something more than a mere contract; that it establishes a status which is subject to the law of the domicile; that each state has the inherent right to make its own laws for the regulation of marriage and divorce; and that under our law, which fixes the age of legal consent at eighteen, the right is expressly given to maintain an action to annul a marriage when either of the parties thereto is under that age. This argument ignores the fundamental distinction between the contract and the *status*. The initial validity of a marriage is one thing, and the right to dissolve it for causes arising after it has been established is quite another thing. It has long been definitely settled in our courts that the validity of a marriage is to be determined by the law of the state where it was entered into. If valid there, it is to be recognized as such in the courts of this state, unless contrary to the prohibition of the natural law, or the express prohibitions of a statute. . . .

. . . . Marriage is primarily a contract. In its constitution it is purely personal and consensual. Considered merely as a contract it is valid everywhere if entered into according to the *lex loci*. . . .

But marriage, although initiated by contract, creates a *status* with manifold continuing rights, duties and obligations which follow the parties wherever they may go and which cannot be left to their discretion or caprice. These continuing rights, duties and obligations must necessarily be subject to the law of the domicile, for otherwise the state would have no control over its subjects or citizens. . . .

. . . . The question here is whether it is competent for our courts to invalidate a marriage contract, valid under the laws of the sister state where it was made, upon the sole ground that a similar contract entered into in this state is by our laws made voidable. That question has been correctly decided by the courts below in the dismissal of the plaintiff's complaint, and I think this judgment can be reversed only by judicial legislation.