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Common Law Marriages in Wisconsin

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COMMON LAW MARRIAGES IN WISCONSIN

The flagrant disregard, by the disciples of the many new "cults" and followers of the modern "isms," evidenced by the salacious headline stories of the yellow journals, to eradicate the traditional sex relation and God-endowed status of matrimony for a much freer relation,[1] and by the ever increasing number of divorces,[2] brings up forcibly the question of the Common Law Marriage in Wisconsin. All the authorities agree that during historical times promiscuity has been either non-existent or confined to a few small groups.[3] However, some writers have asserted that sex relations must at some time in the far distant past have differed but slightly from the corresponding usages among the brutes.[4]

It is not, of course, impossible that among some peoples intercourse between the sexes may have been almost promiscuous. But there is not a shred of genuine evidence for the nation that promiscuity ever formed a general stage in the history of mankind, although polygamy occurs among some people and polyandry among others. Monogamy is by far the most common form of human marriage. The experience of the race, in its evolutionary cycle toward civilization, has approved of monogamy for the simple reason that monogamy is in harmony with the essential and immutable elements of human nature. Taking the word *natural* in its full and basic sense, we may unhesitatingly affirm that monogamy is the only natural form of marriage. Nature's laws work impartial justice upon the ignorant and the knowing, the guilty and the innocent, the rich and the poor. Our courts and our laws seek to prevent promiscuity and polygamy, and to punish for seduction and adultery. The sanctity of the home must necessarily be preserved to endow one's government and people with the longevity essential to prosperity and happiness. Our legislative and judiciary will go far in preserving that sanctity.

From a moral and canonical aspect, marriage is said to be a contract, which, by its very nature, is above human law. It was instituted by God, is subject to divine law, and cannot, for that reason, be rescinded by human law. Some of the religious sects

[1]Bebel: *Women under Socialism,* translated from the German by Daniel De Leon.
[2]U. S. Census Report 1887-1906, and supplementary report for 1916.
[3]Howard: *History of Matrimonial Institutions,* Vol. 1, p. 90.
[4]Giddings: *Principles of Sociology,* p. 208.

have raised the institution of marriage to the dignity and grace of a sacrament.

Section 2328 of our statutes provided "that marriage so far as its validity in law is concerned is a civil contract, to which the consent of the parties capable in law of contracting is essential." While this is the legislative definition of marriage, yet, in the eyes of the municipal law, it is not a contract, strictly speaking, but is a status resulting from the contract to marry. Justice Story speaks of it as "an institution of society founded upon the contract and consent of the parties." The law does not permit it to be a subject of experiment or temporary arrangement, but a fixed and permanent status to be dissolved only by death, or, where statutes permit, by divorce. It is this irrevocability and permanency that contradistinguishes the marriage contract from the simple civil contract. If it would be considered but a contract, then the legislature would be powerless to amend the law of marriage, as it would be within the prohibition of the constitution against the impairing of contracts by state legislation.[5]

By the Common Law, as it was understood in England at the time of the colonization of the United States, and as it was declared and adopted by the American Courts, no ceremony was necessary—no declaration of the marriage—that is, by a magistrate or minister, or, even in the presence of such magistrate or minister. The parties need only exchange declarations of their present agreement to enter into the marriage relations.

The old maxim is: *Consenus, non-concubitus, facit nuptias;* and the rule became formulated as follows: Consent *per verba de praesenti,* with or without consummation, constitutes a Common Law marriage; or consent *per verba de futuro,* followed by consummation. The first part of this formula has lately received careful examination and criticism, and it has been held that *verba de praesenti* do not constitute a marriage unless followed by cohabitation, and the second formula, although used by many text writers, is not the law for if an agreement for future marriage followed by cohabitation is a valid marriage, then every case of seduction under promise of marriage would be a legal marriage in fact.

The latest Wisconsin case, *Becker v. Becker,* 153 Wis. 226, decided April 8, 1913, states the Wisconsin rule, as it was at the

[5] *Maynard v. Hill,* 125 U. S. 190.

time, as follows: "An oral promise of marriage made between competent parties *per verba de praesenti,* although without witness or ceremony of any kind, if consummated by cohabitation and corroborated by holding themselves out to the public as husband and wife, is a valid and binding marriage."

At that time our statutes required certain directions respecting the formation and solemnization,[6] prescribing that it be solemnized in a particular manner before certain authorized persons, under a license, and imposed penalties for non-observance. The court, however, construed these provisions as directory only, and held that the marriage was valid.

The Supreme Court of the United States,[7] prior thereto, had held that a marriage valid at Common Law is valid, notwithstanding the statutes of the state where it is contracted, which prescribe directions respecting its formation, unless the statutes contain express words of nullity.

The Becker case was decided in April 1913, but in the session of the 1917 legislature, Chapter 218 of the Laws of 1917 was passed, which, as yet, has not received judicial construction. Section 3 thereof, being section 2339n-21 provides: "All marriages hereafter contracted in violation of any of the requirements of sections 2339n-1 shall be null and void."

Thus our legislature has now placed into our statutes "express words of nullity" when the provisions, respecting the formation and solemnization, be not followed. They have taken those regulating statutes out of the "directory" class and made them "mandatory." The Supreme Court of Wisconsin in the Becker case, by way of *dicta,* intimated that they would not recognize a Common Law marriage, if such marriage, in disregard of the provisions respecting the formation and solemnization, were declared expressly by the statute to be void.

From the above, one must be forced to the conclusion that all Common Law marriages in Wisconsin since 1917 are no longer recognized, and our Supreme Court should so hold in their efforts to check modern liberalism.

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[6]Section 2339n-1 to 2339n-27.
[7]*Meister v. Moore,* 96 U. S. 76.