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Consanguineous Marriages—A Scientific Approach

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Co.,[26] it is said: "Permitting a defendant to allow judgment against him for a maximum amount is usually not a consummation devoutly to be wished for by him." That the Wisconsin courts are careful to employ its practice in proper cases is indicated by the language found in *Rueter v. Hickman, Breuner Co.*[27] "But aside from that in a case like this where there is legitimately such a wide range in the amount of damages that may be properly assessed depending upon how the proof impresses the jury and the court, it is deemed a better administration of justice to let another jury assess the damages."

Thus to adopt a logical and theoretically justifiable practice is to decrease its utility through a limitation of its operation and application. The objection, however, which the Wisconsin doctrine seeks to avoid is perhaps not as serious as it appears. A second jury is not likely in case of *increscitur* to award larger damages than the court has fixed upon or in case of *remittitur*, smaller damages.

If the court possesses the power to order a *remittitur* there is no logical objection to its ordering an *increscitur*. It has been advanced by those judges of the Supreme Court of Missouri, who were out of sympathy with the exercise of the doctrine of *remittitur*, that to allow a remission of part of the verdict would also obligate the courts to allow an *increscitur*.[28] There can be little doubt that on principle the court occupies the same position as to both. *Increscitur* like *remittitur* is applicable or should be applicable to all cases where the award is not the result of passion or prejudice which contaminates the whole verdict and permeates the question of liability as well as damages, and where the evidence supports the finding of liability.

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CONSANGUINEOUS MARRIAGES—A SCIENTIFIC APPROACH

Consanguineous marriages have been a problem for the human race as far back as the memory of man goes. Whether such unions should be favored, merely tolerated, prohibited, or actually made criminal is a question which has puzzled the lawmakers of every generation. Today despite the fact that both legal science and eugenics have advanced considerably, there is still grave question as to the advisability of first-cousin marriages especially, and to a lesser degree uncle-niece (or aunt-nephew) unions. This is shown in the present legal status of

[26] N. 12 above.
[27] N. 12 above.
[28] See dissenting opinions in Burdict v. Mo. Pac. Ry. Co., n. 6 above.

such unions. There are thirty jurisdictions in this country which make first cousin marriages either absolutely void (which is the usual case) or voidable, while there are twenty which allow them.[1] England now allows first cousin marriages.[2] Marriages between uncle and niece (or aunt and nephew) are now generally prohibited.[3]

In England in the early days, when marriage was governed entirely by the ecclesiastical courts the degrees within which persons related to each other could marry were regulated by church law. This was based on chapter XVIII of Leviticus. Gradually, however, the church began to extend the prohibition beyond all reasonable bounds, so far that persons related to each other in the seventh degree (by canon law; therefore the fourteenth by civil law) could not get married. The abuse became so serious that it was not safe to get married. It was corrected, however, by statute in the reign of Henry VIII, which statute continued to remain the law (with minor changes) in England to date. Under this law only persons related nearer than first cousins (*i. e.*, prohibition includes uncle-niece and aunt-nephew marriages) are prohibited from marrying.[4]

Consanguineous marriages were by ecclesiastical law not void, but merely voidable. In England, however, in 1835, a statute made them void, and this is the tendency in the great majority of American states.[5] Thus where a legislature declares a marriage to be consanguineous, one so entered into is no marriage at all, and may be dissolved at the will of either party or attacked collaterally by third persons.

There have not been many American decisions on cousin-mar-

[1] States which prohibit first cousin marriages are: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina (prohibits double first-cousins only), North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia, Wisconsin and Wyoming. Jurisdictions where such unions are allowed are: Alabama, California, Connecticut, District of Columbia, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia and Federal. See also May, MARRIAGE LAWS AND DECISIONS IN THE UNITED STATES (1929) and very interesting chart opposite p. 476.

[2] Long, DOMESTIC RELATIONS (1923), p. 27, sec. 22.

[3] May, *op. cit.* opposite p. 476.

[4] For a more detailed account see Bishop, MARRIAGE, DIVORCE, AND SEPARATION (1891) 108 ff. Also see, Long, *op. cit.* 26 ff. Also Pollock & Maitland, HISTORY OF ENGLISH LAW (1923) vol. 1, 366, 385-388.

[5] Long, *op. cit.* 27, sec. 22.

riages, but a fairly exhaustive search fails to reveal any profound public policy which the courts are trying to enforce. Most of the cases are decided on purely statutory or technical grounds.[6] These cases usually come up when one party has died and the other is trying to inherit, claiming that the marriage is merely voidable, and cannot therefore be attacked after death. The heirs claim it is void. And the courts, as noted above, occupy their entire decisions in determining whether such marriage is void, or merely voidable, rather than trying to fit the statute to any policy.

Some, however, are not so reticent. One court reasons in this manner: "The statute declaring marriages between uncles and nieces to be void is a declaration of public policy of the State in the interest of the welfare and morals of the State."[7] Another court highly indignant, perhaps because it could not apply the statute retroactively to a marriage entered into prior to its enactment, says: "We cannot, however, refrain from stating that such connections are destructive of good morals, and should not only be frowned upon by the community, but be very severely punished."[8] But perhaps the crowning piece of judicial thought is this omniscient declaration: "The statutes of this state on marriage and divorce have mercifully provided that those who unwittingly enter into marriage that leads to a continual violation of law, notwithstanding their original sin, may have such relation annulled so that they may go and sin no more. Such transgressors should get from before the public gaze as quickly as possible."[9] These gems of legal thought typify the attitude of the great majority of uninformed minds, both legal and otherwise.

Of course in jurisdictions where such unions are permissible the question of their validity does not arise. It is interesting to note that the Uniform Marriage Law takes no stand on consanguineous marriages, but leaves the matter entirely to the states.[10] Apparently its authors did not consider themselves

[6] See for example: Bowers v. Bowers (S. C. 1858) 10 Rich. Eq. 551; State v. Smith (1915) 101 S. C. 293, 85 S. E. 958; Sutton v. Warren (1845) 51 Mass. 451; Blaisdell v. Bickum (1885) 139 Mass. 250, 1 N. E. 281; Walter's Appeal (1872) 70 Pa. 392; Arado v. Arado (1917) 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28; Weinberg v. Weinberg (1926) 242 Ill. App. 414; In re Estate of Wittick (1914) 164 Iowa 485, 145 N. W. 913; Baity v. Cranfill (1884) 91 N. C. 293, 490 Am. Rep. 641; Succession of Bruissiere (1889) 41 La. Ann. 217.

[7] Williams v. McKeene (1915) 193 Ill. App. 615.

[8] Jane Parker's Appeal (1863) 44 Pa. 309.

[9] Martin v. Martin (1903) 54 W. Va. 301, 46 S. E. 120.

[10] See 9 Uniform Laws Annotated 190, Uniform Marriage and Marriage License Act. sec. 1.

competent to decide, or, perhaps, felt it was a matter best left to local prejudice.

The origin of all such laws is the so-called "horror of incest" which is supposed to be "instinctive" in all of us. Recourse to the works of anthropologists can only leave the student of law in doubt as to whether such "horror or incest" is really instinctive or not. One of them summarizes for us the various views.[11] Howard mentions Westermarck, one of the first students of the institution of marriage and its history, as being the most prominent believer in the "instinctive" idea. He believes that as the "most fit" were products of exogamous rather than endogamous marriages, and these were the ones who survived, the "horror of incest" became instinctive, being transmitted from generation to generation. This theory is unfounded, say others, notably Crawley, because it assumes that the most fit are always products of exogamous (out-breeding) rather than endogamous (inbreeding) families. He insists that incest was never "anything but the rarest exception in any stage of human culture, even the earliest, it being prevented by the *psychological* difficulty with which love comes into play with persons either closely associated or strictly separated before the age of puberty [both systems are used by various primitive people], a difficulty enhanced by the ideas of sexual taboo, which are intensified in the closeness of the family circle, where practical as well as religious considerations cause parents to prevent any dangerous connection."[12]

Still another view is presented by Letourneau, quoted with approval by Gillette: "It is quite certain that during the first ages of the evolution of societies, the ties of kinship, even those which we are accustomed to regard as sacred and respect for which seems to be incarnate in us, have not been any impediment to sexual unions. Like the sentiment of modesty, the horror of incest has only been engraved on the human conscience with great difficulty and by long culture."[13]

It is apparent that the cause of these diverging views on the origin of the horror of incest is that in primitive societies both exogamy and endogamy existed, often side by side. Thus Crawley shows us that a certain Fijian stock who by custom marry first cousins are "considerably superiors in all the usual physical tests, of those stocks who forbid cousin marriage."[14] Thus

[11] G. E. Howard, A. HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 130 ff.
[12] M. A. Crawley, THE MYSTIC ROSE, OR A STUDY OF PRIMITIVE MARRIAGE (1902) 222 ff.
[13] J. M. Gillette, THE FAMILY AND SOCIETY (1914) 48.
[14] Crawley, *op. cit.* 444.

we cannot say for certain on the basis of anthropology what causes the "horror of incest" in most of us. We must therefore turn to another source to determine whether or not there is a scientific basis for forbidding cousin-marriage.

Norman Haire emphatically concludes that "Geneticists have proved that the harm to the race from any single case of inbreeding is at least problematical, even if the union results in offspring."[15] This, in a general way, is the conclusion reached through the study of eugenics. "Scientifically the results of inbreeding are now well understood. They represent merely the union of similar heredities; for instead of possessing wholly different inherited traits, the two mates are, by virtue of their common ancestry, possessors to a greater degree than usual of the same heritable characteristics."[16] Thus if the ancestry is good, a double benefit results; if it is poor, a double detriment.

We may now proceed to examine the two familiar examples of the Eighteenth dynasty and also that of the Ptolemies in Egypt. Both of these were founded at a time when it took excellent human material, both physically and mentally, to found a dynasty. Both were continued, not by cousin-marriages, but actually by brother and sister marriages. This practice existed for several generations, and the offspring all proved capable rulers. This close inbreeding in these two cases continued for the longest known time in history, and none of the evils generally attributed to cousin-marriages resulted.

The results here nearly equalled those obtained by breeders of domestic animals, who long ago found that close inbreeding brought out the best characteristics.[17]

Common superstition, apparently present in the minds of many of our legislators, as well as the rest of the masses, seemingly explained, naively enough, that when defective children are born out of a marriage of kin, there was something inherently wrong in the marriage of relatives, when in fact it was the ancestry that should be blamed. A proposed union should be questioned not on the basis of "are they related by blood" but rather "are they carriers of desirable traits."

In 1908 Dr. George B. Louis Arner made a study of 723 cousin-marriages collected from various sources. His conclusions seem to be based on a very careful research which is apparently unbiased.[18] He found that consanguinity had little

[15] Norman Haire, HYMEN OR THE FUTURE OF MARRIAGE (1927).

[16] See interesting chapter in Popenpoe's MODERN MARRIAGE (1925) 60-70.

[17] *Id.*

[18] See his article on *Consanguineous Marriages*, 31 COLUMBIA UNIVERSITY STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW, No. 3 (1908) for a detailed account of the study.

or no direct effect upon the physical or mental condition of the offspring. The most important effect of such a marriage is the double inheritance. "It is probable that in the absence of degenerative tendencies the higher qualities of mind and body are intensified by marriage between highly endowed members of the same family." Again, "the instinctive horror of incest is a myth, for although a horror of incest does very properly exist in civilized, and some tribal societies, it is purely a matter of custom and education, and not at all a universal law." The relative amount of degeneracy and disease among the offspring of consanguineous marriages has been enormously exaggerated, and the danger is by no means as great as is popularly supposed.[19]

Thus, the science of eugenics has established the idea that the consanguinity of the parents is not the cause of poor offspring; it is the defective heredity being doubled which brings out recessive characteristics.

There are, however, reasons which tend to justify the continuance of the idea of the "horror of incest" among civilized people. First, Arner's study indicated the fact that recessive characteristics do crop out even in the most healthy individual unions, in some cases after continued inbreeding.[20] Further, Popenpoe gives us a psychological reason for not encouraging this type of marriage. He says "too great an attachment between members of the same family, originating in youth, imposes a heavy handicap on the personality, ever vainly seeking to free itself from the cramping influence of this emotional bond in order to take its place in the outside world." It is better, further, to have two families to advise and help, rather than one.[21] At best cousin-marriage usually connotes "a narrow horizon and a lack of opportunity on the part of the mates to meet a wider circle of eligible young people."[22]

There remains then, having examined the data, to discover in what way legal machinery should operate to control consanguineous marriages.[23] As has been seen, in many cases marriages of the sort under discussion should actually be encouraged.

[19] *Id.* 90-93.
[20] *Id.* 90, 91, 22.
[21] Popenpoe, *op. cit.* 67-70.
[22] *Id.*
[23] It is well to note here that even where marriages of cousins are void by statute the law is not enforced and cannot be. License clerks in many states do not ask whether parties are related or not. No figures are available but violations by not mentioning the relationship, or by going to another state, are undoubtedly frequent. One of its effects is to provide a "painless method" of dissolving the marriage. See further Arner, *op. cit.* 14-15.

The laws today which make such marriages void are foolish. They render the relationship insecure, and are ineffective. They have no real basis, for it has been proved that the bad heredity, not the consanguinity of the parties, is the cause of ill effects when they do follow. Perhaps in the future the law will not forbid marriage on account of consanguinity. It will incorporate the principle that a marriage cannot be avoided on grounds of consanguinity, but only because of proof of bad heredity (in certain traits enumerated by the statute, such as deafness, tuberculosis, etc.). And all marriages whether consanguineous or not will be subject to such policy. It will insist that parties to all marriages, not merely consanguineous, have a fairly good ancestry. Or, in those cases where the heredity is poor, it will provide for the sterilization of such unions. In short the laws of marriage in the future will not be based on consanguinity, but on the health and mentality of the parties entering them.

But without waiting for such a time, the laws making cousin-marriages illegal, incestuous and void should be repealed. Such marriages, at most, should be only voidable. In this way successful unions could be allowed to exist legally, and not be in danger of collateral attack after death. Unsuccessful marriages could be voided at the suit of either party and possibly, of health authorities of the state. The possibility that, due to double heredity, there might be poor offspring could be provided for, as indicated above, by special statute. Today we find the startling situation of the majesty of the law forbidding marriage of two healthy young people merely because, by accident of birth, they are related, and allowing two congenitally deaf persons to marry and produce progeny unfit to share the burdens of life!

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STATUTORY PRESUMPTIONS OF GUILT

The validity of statutory presumptions of guilt in criminal prosecutions has long been a source of perplexing confusion and a prolific basis of judicial conflict.[1] The root of attack lies in the provisions of the Fifth and Sixth Amendments to the Constitution and their corresponding embodiment in state constitutions and in the Fourteenth Amendment to the Constitution of the United States.

One of the most important legal presumptions is that of inno-

[1] As early as 1793, this type of statute was passed. "In all prosecutions and suits, whether criminal or civil, against persons for cutting out, altering or destroying the marks of the owner upon any logs or lumber, the possession of the logs or lumber by the accused shall be presumptive evidence of his guilt, and the burden of proof thrown on him to discharge himself." Mass. Laws (1793) c. 42, sec. 6.