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THE LEGAL STATUS OF WOMEN IN WISCONSIN[1]

CLAUDE D. STOUT[2]

WIFE'S RIGHTS TO INSURANCE

IN A former article it was shown that the disabilities surrounding the property rights of married women were at a very early day removed. Following the separate property act of 1850 came the next act of greatest importance in Chapter 158, Laws of 1851, which did away forever with the principle of the common law right enjoyed by the person who insured his own life for the benefit of his wife or infant child that such person was the real owner of the policy of insurance, where he paid the premiums himself, and that therefore such person enjoyed the right to drop the insurance at pleasure or change the beneficiary without restriction or regard to any rights of the wife or minor child who had been named the beneficiary. Chapter 158. Laws of 1851, now Section 246.09, provided that any policy of insurance taken for the benefit of any married woman or to any person in trust for her benefit regardless of who takes it out shall:

First: Inure to the benefit of such married women named as beneficiary and her children.

Second: That the same shall be her separate property.

Third: That in case of her survival of the term of such policy, the insurance money shall be payable to her or to her trustee for her benefit.

Fourth: That such insurance is free from the control of her husband or of any person effecting such insurance.

Fifth: And free from any claims of the creditors of her husband or those of any other person who may have effected such insurance.

This law expressly placed such insurance in the same class with the separate estate of a married woman and has remained substantially the same to the present day. It is undoubtedly one of the most beneficient enactments for married women ever passed and second in importance only to the separate property act of 1850. An amendment, Section 1, Chapter 71, Laws of 1889, later limited the amount that could be paid in annual premiums by any person taking out such insurance with intent to defraud his creditors to the sum of $150.00, with the provision that the excess of such amount of premiums should

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[1] This article is the second of a series of three articles; the third and last will appear in No. 4 of Vol. 14 of the *Review*.

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inure to the benefit of such creditors, but subject to the statute of limitations. It may be said that a premium of $150.000 will purchase a considerable amount of insurance. This provision is illustrative of the exceptional care the law has taken to preserve the benefits of such insurance to married women and children. A later provision came in Section 1, Chapter 15, of the Laws of 1903, now Section 246.11, which permits the married woman beneficiary, with the written consent of the person who effected the insurance, to assign, incumber or otherwise dispose of any interest she may have in such a policy. The foregoing wise provisions place all such insurance substantially and for all practical purposes within the exclusive control of the married woman. It is of the greatest benefit to the widow, on the death of her husband, to immediately receive the value of such a policy and enjoy the proceeds entirely free from the claims of her husband's creditors or the control of the executors or administrators of his estate.

The question of the possibility of legally changing the beneficiary of an insurance policy where a married woman is the beneficiary, and the policy contains a provision reserving to the person effecting the insurance the right to change the beneficiary came up for decision in *Nat'l. Life Ins. Co. of the U. S.* vs. *Brautigan,* 163 Wisconsin, page 270. The policy in question provided that on giving notice to the company in writing the change of the beneficiary named therein could be endorsed on the policy. The insured took a policy on his own life in favor of his wife and later gave the notice of change in writing, making the policy payable to his estate which change was duly endorsed on the policy. Later on the insured again, in the same manner, substituted as beneficiaries the children of a former marriage. The court at first decided that it was the intent of the legislature to make the right of a married woman absolute once the policy had been permitted to mature and the right had attached and affirmed the judgment of the lower court awarding the insurance to the widow. However, a rehearing was had and after most exhaustive arguments, participated in by an array of legal talent, the Supreme Court reversed its first decision and laid down a rule permitting the insured, where the right to change the beneficiary is reserved, to change the beneficiary, "even though the same be a married woman, if done in strict conformity with the terms of the reservation but not otherwise."

Shortly afterwards the case of *Christman* vs. *Christman,* 163 Wisconsin, page 433 came before the court where a married man had taken a policy on his life in favor of his wife. The policy contained the clause permitting the change of beneficiary on giving the notice, etc. The policy was taken out in 1901, the premiums paid regularly,

and in 1913 the wife obtained a divorce. A few months afterwards the insured died not having applied in writing to the company to have the change of beneficiary endorsed on the policy. The insured, however, had made a will in which he attempted to bequeath the proceeds of the insurance to certain of his relatives. The court was obliged to hold that as the insured had not strictly complied with the express terms of the policy reserving the right to change the beneficiary that the vested right of the former wife, even though through a divorce she was no longer the wife of the insured, was not divested of her rights and consequently she received the insurance. It is a cardinal principle of law that the wishes of a testator shall be effected. However, the right of the woman in such a case is superior to and supercedes the expressed intent of a last will and testament of the husband.

Wife's Separate Property Rights

From an early date the provisions of what is now Sec. 246.06 of the Statutes have provided in substance that when the husband of any married woman failed in his duty through desertion, drunkenness or any other cause to support his wife and support and educate the children that the wife has the right to:

First: Transact business in her own name.

Second: Collect her own earnings and those of her minor children in her charge and under her control.

Third: And that such business and earnings shall not be subject to the husband's control or liable for his debts.

Thus, whenever a husband fails to perform his legal duties to his family the law immediately steps in to permit the ambitious wife and mother, without any legal steps on her part, to exercise all the abilities she possesses. The Statutes of 1927 appear to show that the foregoing provisions were enacted at an earlier date; however, Chapter 49 of the Laws of 1855 first gave the wife under such conditions all the powers necessary to effectuate the well being of herself and children. It may, therefore, be said that during almost the entire history of our state, whenever the husband failed in his duties the law at once gave the wife full powers to transact business in her own name. In addition to the exclusive control of her separate property this additional power gave the wife substantially all rights needed for practical purposes.

Widow's Testamentary Freedom; Election

The next step to be consistent with the control by the wife of her separate property, came in Chapter 91 of the Laws of 1859 which

struck the provision contained in Section 1, Chapter 97 of the Revised Statutes of 1878 requiring the written consent of the husband to the will of his wife, a provision that followed as a necessary consequence. Thus, ever since 1859 the wife has been placed in a superior position to that of her husband for ever since then she has enjoyed full testamentary capacity over all her separate property, whereas the husband's right to make his will is restricted:

First: By the statutory provisions for allowances, and

Second: By the wife's exclusive right to file her election to take at law her share of her deceased husband's estate.

Furthermore, a wife has a year after the filing of the petition for the administration of her husband's estate to file her election, whether or not she shall take according to the provisions he has made for her in his will in lieu of her dower or whether she shall take her dower, homestead and other heirship rights at law. Section 18 of Chapter 62 of the Revised Statutes of 1849, now Section 233.13 of the Statutes read as follows:

"If any lands be devised to a woman or other provision be made for her in the will of her husband, she shall make her election whether she will take the lands so devised, or the provision so made, or whether she shall be endowed of the lands of her husband, etc . . ."

This right of election is an exclusive privilege that the widow has always enjoyed in this state.

Homestead

The rights of the widow in the homestead were enlarged by Chapter 270, Laws of 1864, which contained two provisions of greatest importance. The first provided that when a husband died without having made a will leaving a widow and there were no issue, the homestead descended to her absolutely, and the second that if there were issue the widow took the homestead during her widowhood. In case she never married again she, of course, enjoyed the homestead during her lifetime. See Section 237.02.

Heirship Rights

Chapter 61 of the Laws of 1868 went still further in the provision that where a husband died intestate, leaving no issue, the entire estate, both real and personal, descended to the widow. Thus, early in 1868, the widow became the sole heir of her husband where there were no descendants. The act read as follows:

"If he shall leave no issue, his estate, real and personal, shall descend to his widow . . ." Now a part of Section 237.01.

The widower, too, came in for an inning when Chapter 121 of the Laws of 1870 provided that if a woman shall die intestate, leaving no issue, her estate, real and personal, shall descend to her husband. Chapter 121 of the Laws of 1870 appeared as follows:

"1. If he shall leave no issue his estate, real and personal, shall descend to his widow; if he shall leave no widow, his estate shall descend to his parents, if living, and if either shall not be living, the survivor shall inherit his said estate.

"2. If a woman shall die leaving no issue her estate shall descend to her husband; if she have one at the time of her recease, and if she shall leave surviving her neither issue nor husband, her estate, real and personal, shall descend to her parents if living, and if either shall not be living, then the surviving parent shall inherit her said estate."

The husband and wife as early as 1870 were made equal in that each became the heir of the other under the aforesaid conditions and the property of either, where there were no issue and the decease of the intestate followed that of the other spouse, went to the parents of the deceased. These provisions materially increased the heirship rights of the widow in that the husband's relatives, including the mother-in-law, were cut off from any estate of the deceased husband in favor of the widow's blood relatives on her subsequent decease as an intestate. As heretofore stated, when the wife left any issue by a former marriage such issue has always, in this state, taken the estate free from any right of curtesy of the husband.

From an early date a married woman, if eighteen years of age or more, has enjoyed greater rights than the husband to devise and convey property. Section 13 of Chapter 86 of the Revised Statutes of 1878 provided:

"Any married woman of the age of eighteen years and upwards may bar her dower in any real estate within this state by joining with her husband in a deed of conveyance duly executed and acknowledged. . ." And Section 1 of Chapter 3 of the Laws of 1870 provided:

"Section 1 of Chapter 97 of the Revised Statutes is hereby amended . . . and any married woman of the age of eighteen and upwards may devise and dispose of any real or personal property held by her or to which she is entitled in her own right by her last will and testament in writing. However, Section 319.10 provides that "the marriage of any female who is under guardianship shall terminate the right and authority of the guardian to the *custody and education of the ward only;* but the county court *may,* in its discretion, on the application of such ward, discharge such guardian . . ," etc. Thus, when a woman under the circumstances stated marries, the law at once releases her from the custody and control of her guardian but leaves the release of the control of her estate to the discretion of the county court. The "mere husband" is not considered."

Disabilities of Married Women

The most pronounced common law disability of married women existed in the restriction of the right to contract, which resulted in a marked manner in the disability of the feme covert to execute a valid bond. Under this theory a married woman was not permitted to be the guardian of her own children where she had children by a former marriage and married again. Her identity, on marriage, being merged with that of her husband, it was for some years the law that she was incapable of giving the valid bond required for the protection of property placed under the guardianship trust. So strongly intrenched was the theory of this disability that should a widow or unmarried woman be appointed and qualify as guardian and thereafter marry, her guardianship was *ipso facto,* considered terminated, or proceedings to effect her removal were in order. Chapter 123 of the Laws of 1870 expressly authorized as follows:

"Sec. 1. No married woman shall be disqualified by coverture to be appointed or to act as general guardian of her own children by a former husband . . . ,"

and validated any bond given for such a purpose. It will be noted that by the terms of the enactment the disability was only in a small degree removed. She still was not authorized, for example, to be guardian of a small child of her own deceased sister, even though she might be the most logical person and best fitted to have its care during its tender years. Strange as it may seem, nevertheless, it is the fact that prior to 1870 a woman who had children by a former marriage and married again was disqualified to be the guardian of her own children.

A few years later Chapter 68 of the Laws of 1889 was passed giving married women the power to act as trustee, guardian, executor or administrator in any case whatsoever. It was, therefore, not until the generation of the present that a married woman in this state was permitted to act in such specified capacities. However, the right though greatly enlarged was confined to powers conferred by the specific enactments with the result that the capacity to execute a valid bond for any other purpose was still an inability under the common law rule. This is further illustrated in the enactment of Section 1, Chapter 34 of the Laws of 1891 as follows:

"No married woman who is authorized to practice as an attorney of any court of record shall be disqualified by coverture from being appointed or acting as a court commissioner, assignee, except when her husband shall be assignor, assignee in bankruptcy, or receiver in any case except as aforesaid . . . ."

However, not all disabilities of a married woman to give a valid bond were removed even by these several enactments, which is illustrated by a case that arose at Iron River shortly before Section 6.015 was enacted giving women, including married women, the right to the exercise of contract rights. A married woman who was operating her own separate business desired to have a relative released from jail pending trial and together with an obliging neighbor, signed the appearance bond. The criminal skipped his bail with the result that the obliging neighbor was obliged to pay the bond.

It is not to be surprised that the "modern woman" in the face of such leaden steps to remove her common law disabilities should chafe under such unreasonable restrictions. In no case is the tenacity to adhere to the common law rule more marked or the reluctance to depart therefrom more pronounced than in the foregoing.

Antenuptial Debts of Wife

Chapter 155 of the Laws of 1872, Section 1, buried forever the ancient idea that the husband and wife were one and that the husband was the one, and strange to say, it was a law for the benefit of the husband for it provided that he could no longer be held liable for the antenuptial debts of his wife. It is indeed significant that in the swing of the pendulum to the extremity of the arc in granting more and more rights to women, that during a period of twenty-two years the wife had been given complete control of all her separate property entirely free from any control of her husband or any claims of his creditors; still, during all that time, the husband was liable for all his wife's debts contracted before marriage.

Wife's Separate Earnings

Another provision is found in Section 2, Chapter 155 of the Laws of 1872 which, in the march of progress, did away with the old idea that the husband was entitled to all the earnings of the wife, with the single exception heretofore noted where the husband, by reason of desertion, drunkeness and failure to support the wife, was allowed to collect her own earnings and those of her minor children. For the first time the wife was given control of her individual earnings, together with the right to sue therefor in her own name. The act, Chapter 155 of the Laws of 1872, read as follows:

"Section 1. No marriage hereafter contracted shall render the husband liable for the payment of the wife's antenuptial debts.

"Sec. 2. Individual earnings of a married woman, except those accruing from labor performed for her husband in his employ, or

payable by him, shall be her separate property, and shall not be subject to her husband's control nor liable for his debts.

"Sec. 3. Every married woman may sue in her own name for her individual earnings, etc. . . . shall have all the remedies of a single woman, may sue in her own name, to recover the earnings secured to her by the preceding section and shall be liable to be sued as if single for the recovery of her antenuptial debts, and in every case in which judgment shall be recovered against a married woman for any cause, the collection thereof may be enforced by execution, or by any other process action or proceedings allowed by law against judgment debtors *except an execution against her person.*"

See Section 246.05. An amendment to the foregoing, hereinafter discussed, came in Chapter 99 of the Laws of 1881, which authorized a married woman to bring an action for "any injury to her person or character as if sole," etc.

Prior to the enactment of Chapter 155, Laws of 1872, the case of *Elliott* v. *Bentley,* 17 Wisconsin, page 591, resulted in a decision of great injustice to a wife. Any married woman, with the consent of her husband, earned money as a teacher of music intending to keep the moneys so earned for her own use, but from time to time loaned the funds to her husband to be used in his business. To repay her, he caused certain notes executed to him in payment of real estate sold, to be delivered to a third party in trust for her benefit. She afterwards obtained possession of the notes and transferred them, without consideration, to another party to hold for her. On an execution against the property of her husband having been returned unsatisfied, a receiver of his property was appointed by the court and it was held that such receiver was entitled to reduce the said notes to his possession and apply them on the debts of the husband. The court was obliged to render this decision because of the principle of the common law that the earnings of the married woman, during coverture, were the property of the husband, and hence she could make no contract with him pertaining thereto to the prejudice of his creditors. Chief Justice Dixon, in his opinion, written in 1865, remarked: "It is somewhat remarkable, among the many beneficial changes recently affected by legislation for the welfare and protection of married women, that the legislature should have omitted to secure to the wife the rewards of her individual skill and labor." From this it is seen that it has often been at the suggestion of the court that the rights of married women have been enlarged, and it is to the credit of the lawmakers that, promptly within a period of five years thereafter, they passed the legislation needed to remedy the evils of such a situation.

Women in the Practice of Law

The determination of women to participate in full competition with men in all walks of life, even in the most exacting field of the practice of law is illustrated in the example of Miss Goodell of Janesville who, having been admitted to practice before the Circuit Court of Rock County in 1875, applied for admission to the Supreme Court. The great Chief Justice Ryan had decided views as to the proper place in society of the women, and in the opinion denying her admission, reported in Volume 39, Wisconsin Reports, at page 244, proceeded at length to elucidate his views in general for the benefit of all would-be women lawyers. However, Miss Goodell was not daunted, and in 1877 a bill was introduced in the legislature containing the provision that no person shall be denied admission to the bar on account of sex, which became Chapter 33, Laws of 1877. Thereafter, in 1879 and about a year before the death of Judge Ryan, Miss Goodell again applied and was duly admitted before the Supreme Court. She exermised the woman's prerogative in having the last word. Whether or not the great justice failed to appreciate the spirit of progress of the modern woman, nevertheless, we here digress in the recommendation to all women deeply interested in the welfare of their sex to read the masterly tribute to women contained in the opinion. It stands as a foremost classic in the judicial reports of the state.

Women's Rights to Alienate Property

Chapter 197 of the Laws of 1878 provided:

"A married woman may, by separate deed of conveyance, or quit claim, release her dower to any lands of her husband which he has conveyed voluntarily or upon execution, judgment of foreclosure or decree of court."

(See Section 235.26.) This provision became necessary in that the prior statute permitting a married woman to release her dower and homestead rights to lands conveyed by her husband provided that she join in such deed with him. The married woman was now empowered to convey her interest by a separate conveyance of her own. A married woman of eighteen years or more may, under the terms of Section 235.27 bar her dower by joining with her husband *or with his guardian* if he be under guardianship for any cause, etc.

Women as Notaries

We are so familiar with women acting in the capacity of a notary public that we take it for granted that the privilege was one always enjoyed, but it is nevertheless the fact that it was not until the passage

of Section 3, Chapter 194 of the Laws of 1879 that women were permitted to act in such a capacity. Thus, one by one, the rights of women were increased in battling down the bulwarks of the ancient theories of the common law.

Married Women's Rights to Sue for Tort

During all the years covered by the discussion heretofore, the husband, where any action in tort was brought for injuries to the wife such as slander to her character, injuries to her person by the negligence of another, etc., was held to be the owner of whatever damages were recovered, and he could appropriate them entirely to his own use. Furthermore, he was allowed to control the action, could make any settlement according to his views, and took whatever damages were recovered. This was so for the reason that in spite of the married women's separate property act, such damages had, in the case of *Shaddock* v. *Clifton,* 22 Wisconsin, page 110, been held not to be property within the meaning of the act. Absurd as it may seem, the foregoing was for years the law, and it was not until the passage of Chapter 99 of the Laws of 1881 that the wife was, for the first time, given the right to bring and carry on such action in her own name for an injury to her person or character and retain the proceeds of such an action which thereafter became her separate property. The act provided:

"Any married woman may bring an action in her own name for any injury to her person or character the same as if she were sole, and any judgment recovered in such action shall be the separate property and estate of such married woman, provided that nothing herein contained shall affect the right of the husband to maintain a separate action for any such injury now provided by law." (See Section 246.07.)

Said the court in commenting on this statute in *McLinans* v. *Lancaster,* 63 Wisconsin, page 595:

"Chapter 99, Laws of 1881, took away from the husband the former right of being made a party, and to control and subsequent acquisition and appropriation, and to clothe the wife with full capacity to commence, prosecute, and to control the action in her own name alone and to collect and appropriate to her own use and judgment that might be recovered."

The husband, under the foregoing, may not confuse his action for damages with her separate action.

Joinder of Husband and Wife

Section 263.40 provides: "In any action by husband and wife to recover damages for *any injury to the person of the wife* sustained by

or through the act, procurement or negligence of the defendant, . . . the plaintiffs may claim in the complaint, and prove and recover, *all the damages sustained by both,* and which might otherwise be recovered by separate actions." In view of the fact that in *Brickner* v. *Brickner,* 133 Wisconsin, page 582, a demurrer was sustained on grounds of improper joinder where a husband in the same complaint joined his cause of action for his damages with those of his wife for injuries to her due to an automobile accident, the lawyers will read with care the opinion of the court and cases cited on pages 586 and 587 of the decision. As the court clearly adheres to the long line of holdings that preserve to the wife her separate action for such injuries to the person or character of the wife the provisions of Section 263.40 are to be avoided in the preparation of complaints in such actions. Since the passage of Chapter 99, Laws of 1881, "a cause of action for an injury to the person or character of a married woman *cannot be united in the same complaint* with a cause of action for the husband's loss of services and expenses in consequence of such injury, notwithstanding the action is brought in the name of both husband and wife." Consequently, if timely objection is brought, demurrer to such a complaint for dismissal of the action is proper. The distinction lies in that the husband has no action *for the injuries received by the wife,* while, on the other hand, the wife has no action for *loss of services sustained or expenses incurred.* Damages for the former belong exclusively to the wife, while the latter belong to the husband.

Husband's Liability for Torts of Wife

Chapter 25, Laws of 1883, was an act entitled, "An act to provide that husbands shall not be liable for the personal torts of their wives," and which read as follows:

"Section 1. Executions issued upon judgments that may hereafter be recovered against husband and wife in any cause or suit when the husband shall be joined with his wife to recover damages for any tort or wrong committed by the wife, shall be levied upon or satisfied from the property of the wife only, nor shall the property or effects of the husband be taken or seized in satisfaction of any judgment on execution, nor shall any such judgment be docketed against or be in any way a lien on the estate of such husband. . . ."

The foregoing enactment now appears as parts of Subsection 1 of Sections 270.79 and Subsection 9 of Section 272.05 of the Statutes.

It is indeed remarkable that it was not until 1883 that the husband was relieved of liability for the torts of the wife such as negligence and such wrongs as she might cause to others. Since 1850, married

women have enjoyed complete control of their separate property; still for thirty-three years and in the days when women were supposed to possess no rights, the husband's property was held liable for the torts of the wife. Such disabilities with which the law surrounded the married woman in particular were more for her protection, and were not so much for discriminations against women as the advocates for woman's complete emancipation would have us believe.

Conveyances Between Husband and Wife

It was not until Chapter 86, Laws of 1895, that all conveyances direct from a husband to the wife were legalized and such conveyances placed on the same footing as conveyances between other persons. Before 1895 a conveyance, absolute in form, from a husband direct to his wife was held not to pass the legal title under the rule, unless the wife purchased the property with her separate estate. The importance of this rests in the fact that prior thereto a wife could not take title directly by gift or grant from her husband, as the decisions held that such conveyances were void. See *Ripon Hardware Company* v. *Haas,* 157, page 466, and cases cited.

Suffrage

The entering wedge for suffrage for women came in the agitation from 1880 to 1890 to extend the vote to women at school elections. As Section 1 of Article III of the state constitution permitted male citizens only the exercise of suffrage and as the women had succeeded in wresting from the reluctant men so many rights and privileges, it was but natural that they should raise the hue and cry for the right to vote. In 1885 the legislature passed Chapter 211, laws of that year, which placed before the voters at the election of 1886 the question of whether women should be permitted to vote at school elections. The provisions of Article XII of the state constitution were not complied with in that a majority of the members elected to both houses in two successive legislatures had not approved the measure. Furthermore, the legislature neglected to provide the necessary machinery for such separate ballots as were necessary for such exercise of suffrage to permit women to vote for all school officers, including county and state superintendents of schools.

In 1887 the case of *Brown* v. *Phillips,* 71 Wisconsin, page 239, arose from the City of Racine, the charter of which city provided that school commissioners be appointed by the mayor, with the result that there was no direct vote of the electors for the school commissioners or members of the school board. The plaintiff, a woman of mature age, demanded the right to vote for the candidates for mayor and other

city officials. On rejection of the ballot which she tendered, she brought actions for damages against the inspectors of the election. The Supreme Court sustained the inspectors in that to permit her to vote for such officials would open the door to permit women to vote for officials other than mere candidates for school officials. The case did decide, however, that under the provisions of Section 4 of Article III of the State Constitution, the legislature could, by law approved by the people, extend the right of suffrage to women.

In 1888 a bitter contest in the election for superintendent of schools of Oconto County arose under the title of *Gilkey* v. *McKinley*, 75 Wisconsin, page 543, where the election officials of one of the election districts permitted separate ballot boxes in which the votes of thirty-three women were cast for county superintendent. These votes were held to be illegal because no provision had been made by law permitting separate ballots for women to vote for such school officials. The failure to provide separate ballots for women to vote for school officials at general elections resulted in their disfranchisement for some time at such elections and it was not until fifteen years later and until Chapter 285, Laws of 1901, required "separate ballots for women at every election on school matters for women to vote thereon" that full exercise of suffrage in all such cases intended by the act of 1885 was realized. Prior to 1901 the women could only vote at the school district meetings. It is doubtful whether an example of greater reluctance to give women the full exercise of a right conceded to them in all fairness can be found.

Dower, Homestead, and Curtesy in Descent and Probate

Much dissatisfaction has been expressed in late years with the laws of descent and probation of estates, and attempts have been made to abolish dower and curtesy entirely in giving either spouse who survived the entire residue of the small estate with an equal proportionate share to the survivor of larger estates. Such provisions would make little or no provision for the care and education of small children, and would remove the control of the comparatively small estates from the county courts.

In 1901 the legislature took up the matter of providing a better provision for allowances for the benefit of the widow and minor children and enacted Chapter 76 of the laws of 1901, which provided the additional allowance to the widow of family pictures not specifically bequeathed and for fuel on hand provided for the family use. Eight years later, by Chapter 56 of the Laws of 1909, the allowance of the residue for the support and maintenance of the minor children was increased from $150.00 to $500.00. In 1913, by Chapter 520, this last

provision was increased to $1,000.00, and in 1919, by Chapter 411, this provision was amended to apply to personal property, the intention being to relieve the real estate of such an allowance. Chapter 536 of the Laws of 1913 also increased the allowance to the widow to include all the household furniture of the deceased and which provision removed all limitation as to value of such allowance, which for years was limited to $250.00. From the foregoing, it is seen that earnest efforts have been made to provide equitable rules for the distribution of the small estate.

The women, in Chapter 44, Laws of 1917 which amended Section 3935, Subsection 6, scored a decided victory in obtaining a material increase in the provision as to the personal estate that she receives, as follows:

"The same share as a child when there is only one child and in all other cases, one-third of such residue."

See Section 318.06, Subsection 6. And in Chapter 552, Laws of 1917, an amendment to Subsection 2 of Section 2271 provided further for the widow in that:

"The limitation as to value of the homestead shall not apply between a widow and the heirs of her husband during widowhood."

Now, regardless of the value of the homestead, the widow, as between the heirs, retains its use unmolested during her widowhood.

A most radical departure from the old order came in the enactment of Chapter 99, Laws of 1921, in that dower in its ancient definition was entirely changed to mean one-third of the lands of the husband outside the homestead, so that instead of the wife receiving only the income from one-third of such real estate, she now takes the fee title to such share. As to the homestead, the wife, on its sale, if sold during her widowhood, takes her dower in the proceeds. See Section 233.01.

While the rights of the widow were increased, at the same time those of the husband were diminished, for Chapter 31, Laws of 1921 limited the right of curtesy of the husband in the estate of his wife in that it provided that should he marry again, any such right as he had was extinguished. (See Section 233.02.) The husband never took curtesy where his wife left any issue by any former marriage. By this law he lost the right to curtesy in his deceased wife's intestate real estate to his own children, should he marry again. It should be remarked that should such children be minors that he, as the father, is relieved of none of the liabilities for their support and education. Both curtesy and dower have therefore lost their distinguishing char-

acteristics. The curtesy right of the husband has been whittled down to a minimum while the dower of the wife has ripened into a fee title. The tendency has been to make husband and wife equal heirs of the other. Where there were no issue since 1870, such has been the case. Where there are issue, the commendable desire to place safeguards for the maintenance and education of the children has resulted in great reluctance to give the surviving widow the entire estate of the husband without reservations, even in the case of the comparatively small estate. Furthermore, it is difficult to conceive that legislation will be enacted that would give the husband the wife's separate estate where there are children of the marriage, and none by any former marriage, even where the children are young, in spite of the duty of the father, who is liable always for their support and education.

As the law now stands as between husband and wife as heirs of each other, the same may be summarized as follows:

I. As to the real estate, if there are issue living:

First: In the real estate, other than the homestead, the widow takes a fee outright to one-third thereof; the rest goes to the issue by right of representation. (Sections 233.01 and 237.01.)

Second: As to the homestead, this descends free of all judgments and claims against the estate, to the widow during widowhood, and should she marry again, the homestead goes to the heirs by right of representation. (Section 237.02.)

Third: If the homestead is sold during her widowhood, she takes her dower share in the proceeds. (See Chapter 314, also Chapter 310, Laws of 1929, amending Section 233.01.)

II. As to the personal property:

First: The widow takes the same share of the residue as a child of the deceased, that is, a one-half share where there is but one child or issue of one child, and

Second: If the deceased left more than one child or issue of such children, then the widow, regardless of how many, takes a full one-third share of all such property. (Subsection 6, Section 318.01.)

Furthermore, regardless of whether the husband made a will or not, the allowances to the widow provided by Section 318.01 go to her, whether or not she accepts the provisions made for her by her husband's will.

In addition to her personal allowances, provision is further made for allowances:

First: To the widow and minor children for their maintenance during the settlement of the estate. (Subsection 2, Section 318.01.)

Second: Allowances for the minor children. (Subsection 3, Section 318.01)

Third: Allowances for funeral expenses. (Subsection 4, Section 318.01.)

Fourth: And, if the residue of the personal property is sufficient, after the foregoing allowances and funeral expenses and expenses of administration have been paid, the court may allow a sum not in excess of $1,000.00 thereof to the widow and minor children, or in case of her decease, to such minor children, for their maintenance and support. (Subsection 4, Section 318.01.)

The husband's right to dispose of his property by will is decidedly restricted for he cannot:

First: By his will defeat his wife's right of dower.

Second: Neither can he defeat the right of his wife or that of his minor children to the allowances which go to them in any event regardless of whether there is a will or not. (See Section 318.01.)

Third: And, furthermore, the widow is entitled to both her homestead right and her dower right, (See *Breeze* v. *Stiles,* 22 Wisconsin, page 120), for while the husband has the power to devise the homestead (85 Wisconsin, page 240) still the wife, by filing the notice of her election provided by Section 233.14, will render his will inoperative as to her in that she at once becomes entitled "to her dower right in his lands and the same right to his homestead, and the same share of his personal estate, as if he died intestate. (See 65 Wisconsin, at page 291.)

If the husband attempt to devise the homestead to another person than his wife, even though he otherwise provide most liberally for her in his will, still she may, by filing her election within the year, defeat his disposition of the homestead. (Sec. 233.14.) Said the court in *Albright* v. *Albright,* 70 Wisconsin, page 536:

"The general scheme of the statutes is to give the wife and widow a right to the homestead, even as against the expressed wish and disposition of the same by the husband. This right is valid in law as against his general and judgment creditors? It is even available as a valid right against the husband's own children, much more as against his remote kinsmen."

The result is that unless the wife has barred her rights by a valid antenuptial agreement, she can break any will her husband can make. Her election permits her to step into the homestead and enjoy the same during her entire widowhood regardless of what other intentions her husband may have expressed in his last will. (See *Melms* v. *Pabst*

Brewing Company, 93 Wisconsin, page 140.) Furthermore, it may now be a question whether the wife may not under the additional powers to contract conferred under the provisions of Section 6.015, during the marriage, modify any antenuptial agreement she may have made before marriage to bar her dower rights. Possibly a wife may not be permitted to alter an antenuptial agreement on the grounds of public policy.

Where there is no will, and no issue by the marriage, and no issue by the wife by any former marriage, the husband also becomes the heir to his deceased wife's property and takes her entire estate, both real and personal:

First: If there are issue by the marriage, and none by any former marriage, the husband takes the right of curtesy which consists of the right to the use of his wife's real estate only during his widowerhood. (Sec. 233.23.) Should he marry again the statute expressly provides that this right is lost, a provision that became the law by Chapter 31 of the Laws of 1921.

Second: As to the deceased wife's personal property, where there is no will, if there are any issue whatsoever, the husband takes nothing, not even her pictures, not even a lock of her hair.

The foregoing provisions illustrate the great care the law has taken to preserve the estate of the wife to her heirs whether by a former marriage or the later one. Furthermore, the wife may by her will dispose of her entire estate, both real and personal, entirely without any reservation whatsoever for her husband and her doing so will defeat any limited right of curtesy he may have had otherwise while he remained unmarried, even where there are minor children of the marriage. The reason for this, it would seem, is that in the progress of the development of the laws which we have traced, the husband has been relieved of none of the duties placed upon him to support his wife and children.

The homestead rights may be summarized as follows:

A. Rights pertaining to administration, etc.
   1. Temporary removal does not destroy the right and the proceeds of its sale may be held exempt from sale and execution with the intent to procure another for a period of two years. (Sec. 272.20.)
   2. The homestead right may be assigned as also may the dower on petition and notice. (Secs. 314.01 and 214.15).
   3. The widow is entitled to both homestead and dower where there is no will and to both where she exercises her right to waive the provisions of the husband's will. (Sections

314.01, 233.01 and 233.14. *Breeze* v. *Stiles,* 22 Wis., page 120.)

4. The widow is entitled to dower in the homestead if the same is sold during her widowhood. (Sec. 233.01.) Amended by Chapter 210, Laws of 1929.
5. No general direction in a will will charge the homestead with debts or make the homestead liable therefor. (Section 313.26.)
6. The income from the homestead is not handled by the administrator and he is not entitled to such income. (Section 312.04.)
7. If the homestead is willed, it descends free from debts, provided:
   a. If no widow or minor child and if no other property sufficient for funeral expenses and expenses of administration and last sickness, the homestead descends subject to such charges.
   b. If no widow, child or grandchild and no other property sufficient to pay debts, then the same becomes liable for debts.
   c. Of course, the homestead is subject to
      Mortgages, if the wife joined in the execution of the same;
      Judgments under foreclosure of proper mortgages thereon and Mechanics liens.

B. The rights of the widow in the homestead otherwise are elsewhere herein discussed.

Surely the woman has little cause to complain with the rights the law has given her, especially as to rights of heirship and administration of estates.

Under the Wisconsin law a man of business ability may marry a woman with children and a separate estate received from a former husband. He may work for years supporting her and her children by her former marriage, may develop and greatly enhance the value of her property, may pay off a mortgage that otherwise would be foreclosed, resulting in the loss of her property, may educate her children and support them in luxury, and should she die without having made provision for him in her will, her ungrateful offspring can turn him out in his old age in abject poverty. We have laws requiring near relatives of indigent parents to contribute to the public for their support, but in the instance given, the law makes no provision. (See Section 49.11.) The advice to all men with matrimonial intentions should be to beware of the widow with children and property. The

law carefully safeguards the interests of the prospective wife as follows:

First: Will scrutinize transfers of a prospective husband before marriage with great care for any fraud to her property rights, and

Second: Places safeguards around and specifies the conditions under which any marriage settlements in lieu of her dower rights to her may be made, but we find no such provisions in the law for the protection of the husband. He is a good fellow and works for his wife for nothing. It is not the wife who needs a good lawyer, because the law amply protects her rights. It is the husband who is in constant need of competent legal advice.

Much of the dissatisfaction with the heirship rights of the widow are unfounded. The purpose of the inheritance laws is to preserve the estate, however small, if the residue exceeds the allowances provided, for the best possible interests of the widow as well as that of her minor children. Furthermore, Chapter 320 of the Statutes provides ample means by which the lands of any ward may, on proper application to the county court, whenever the personal property and income from the real estate are not sufficient for maintenance and education, be mortgaged or sold to raise the necessary funds. One familiar with the procedure of the county courts cannot but be impressed with the earnest efforts of such officials to carry out the provisions for the best interests of the widow and minor children as well as of society in general. As we shall see later the mother of small children is always given the preference in their guardianship, and the provisions discussed are the result of years of experience in providing adequately for the greatest good for the greatest number. The husband is always presumed to be able to take care of himself.

At an early date the Court laid down the rule "that it was the judicial policy to sustain and favor dower wherever possible." In *Munger* v. *Perkins,* 62 Wisconsin, page 499, a deed to land in which conveyance the wife had poined was set aside as fraudulent as to creditors, and the court held that the inchoate right of dower was not a future estate within the meaning of Section 2034, and that the wife's right of dower was such that she was entitled to recover damages for the with holding thereof. Even though she had participated in a conveyance that was held to be fraudulent, nevertheless, the court overlooked her participation and allowed her dower rights, together with damages for withholding it. Again the wife scored.

Our court has also held that the inchoate right of dower of the wife is a valuable consideration of sufficient importance in our law to make binding a promise given in return for the right. See *Share* v. *Trickle,* 183 Wisconsin, page 1. Furthermore, a failure to properly bar the

wife's claim of dower constitutes an incumbrance on the land conveyed. See *Wright* v. *Young,* 6 Wisconsin, page 127. Thus, the court has, from an early date, ruled that when the right of dower has been estallished, the right will, ever thereafter, be construed to favor the widow.

The declared policy to sustain and favor dower is further illustrated by the following:

First: On the foreclosure of a purchase money mortgage, if any surplus remains, the mortgagor's wife receives her contingent rights to dower therein. See *Thompson* v. *Lyman,* 28 Wisconsin, page 266.

Second: Where the wife of the owner of the equity of redemption is not made a party, the purchaser takes the property on sale on mortgage foreclosure, subject to her dower. See *Foster* v. *Hickox,* 38 Wisconsin, page 408.

Third: An undivorced wife, even though she may be living with another man, may assert her rights of dower. See *Davis* v. *Estate of Davis,* 167 Wisconsin, page 328, a strong case.

Section 233.33 provides in what circumstances and in what estates the dower rights attach. As the common law rule gave the wife no dower in the trust estates of the husband and as the constitution preserves the rules of the common law until changed by the legislature, the court, in at least two cases has been obliged to incline to the view that a wife is not entitled to dower in the trust estates of the husband. In the *Will of Prasser,* 140 Wis., page 92, the court followed its declared policy and held that the equitable interest of the husband in an estate that came to him absolutely at the end of ten years was a "legal estate" as against all persons except the trustees, and was therefore subject to the wife's claim of dower. And again in *Hartley* v. *Hartley,* 140 Wisconsin, page 282, the definition of the statute was stretched to apply to an estate of inheritance where the holder of the legal title had no further duty to perform except to convey to the holder of the equitable title. The two foregoing cases illustrate how the court has "gone the limit" under the constitution and statutes to give the wife the exercise of her dower rights in such estates. It should be remarked that to clear all question as to the right of dower in equitable estates legislative enactment should be had. This is one of the few instances where the law has neglected to provide adequately for the wife. The common law rule has always allowed the estate of curtesy to the husband in the equitable estate of the wife, hence all fairness demands that she, without any question, be allowed her dower in all his equitable estates.

In the case of *Schmidt* v. *Raymond,* 148 Wisconsin, page 271, the court, at length, distinguished between the dower and curtesy rights

and pointed out the preference enjoyed by the creditors of the wife to have her estate subjected to the payment of her debts over the rights of the husband's curtesy therein. The case clearly reasons:

First: That the husband acquires no interest by the curtesy in the lands of his wife prior to her death, and that the statute makes no provision to set aside his curtesy where her creditors have rights therein, and,

Second: That, immediately on marriage, the dower rights of the wife apply, and unless released in the manner provided by law during the marriage, continue to apply in giving the widow the preference over her husband's creditors in that, in the event of the necessity to sell the lands of the deceased husband, that adequate provisions are made for the admeasurement of her dower.

Chapter 314 of the Statutes provides in detail for the assignment of dower in the homestead, although it may be said that there appears to be a bit of confusion as to just what a widow receives on the sale thereof during the widowhood. Chapter 210, Laws of 1929, provides a more definite procedure, not only as to dower and the homestead rights, but to curtesy as well. It is to be hoped that its provisions will remedy the situation that arose in such a case as *Lands of Sydow,* 161 Wisconsin, page 325, which was decided in 1915, prior to the passage of Chapter 99, Laws of 1921. Both the court and counsel on both sides admitted their inability to determine the present value of the homestead to a widow twenty-two years of age, and remarked, with some humor, that "to us widowhood is an uncharted sea whose shores the future veils from sight. How long before her bark will reach a haven we cannot venture even a guess . . . ," and laid down the rule that "the widow was entitled to the *use of the proceeds* of the homestead, less her dower interest therein *if she elects to receive them presently,* during her widowhood, and that upon her remarriage or death the fund should become the property of her son."

The husband has no right by the curtesy in the lands of his wife prior to her death whereas her right of dower apply on the instant of marriage. See *Schmidt* v. *Raymond,* 148 Wisconsin, page 271.

Husband's Liability for Support

The husband has always been bound to provide such necessities for the support and maintenance of his wife and minor children as may reasonably be considered as consistent with their station in life; and that, insofar as it is necessary to accomplish this purpose, the wife, when living with the husband, may, by reason of the relation of her agency, bind her husband's credit for necessities. Furthermore, it

makes no difference that the wife may have ample funds in her own separate estate; nevertheless, her having such an estate does not relieve the husband of his liability for the necessities for his wife and minor children. The following cases illustrate the application of the rule:

In *Clark* v. *Tenneson,* 146 Wisconsin, page 65, a case arose where a wife who had been accustomed to attending to the dental affairs of herself and children had a set of false teeth made for herself. Later she returned them and refused to wear them for no other reason than that she did not like the expression on her face when she wore them. On her husband's refusal to pay, the dentist brought suit and was allowed to recover from the husband under the rule laid down in *Warner* v. *Heiden,* 28 Wisconsin, page 517, as follows:

"What in general constitutes necessities which a husband is bound to furnish to his wife," and declared, that "they embraced the usual provisions for the maintenance of the wife's health and comfort appropriate to her mode of life, in view of their social station and *his* financial abilities."

Mark the last three words of the rule. The rule is controlled not by what the wife thinks she wants, but by what the man she has married is able to provide.

In *Schuman* v. *Steinel,* 129 Wisconsin, page 422, a wife who possessed aesthetic qualities purchased a set of Stoddard's Lectures, and it appeared from the evidence that she signed her husband's name, and gave information to the agent regarding his position and circumstances. The court held that the property in question could not be classed as a necessity for which the husband should be obliged to pay.

Where a wife institutes an action for divorce her attorney will, where she has no funds, promptly draw an order for the signature of the court ordering the husband to pay the reasonable fees of her attorney and temporary alimony. These are, in such a case, properly classed as necessities for which the husband will be obliged to pay.

In *Gimbel Brothers* v. *Adams,* 178 Wisconsin, page 590, a case arose where a man and wife, after living together since 1908, separated in 1916. The wife then went to Chicago with the children where she found employment. Later the father took the children itno his and his mother's care at Racine. While there the wife came to Racine, took the little girl with her to Milwaukee, falsely represented to the store that she and Mr. Adams were again living together, that Mr. Adams had authorized her to open a charge account, and purchased articles for herself and the little girl. The husband, in

making payment for other articles, had instructed the credit department to close the account. The court in its opinion, reviewed the earlier case of *Morgenroth* v. *Spencer,* 124 Wisconsin, 564, and following the rule of that case, which is stated:

First: "Where a wife was living separate and apart from a husband without cause, he is not liable for necessities he did not authorize, and

Second: "That one who furnishes necessities to a wife under such circumstances has the burden of showing that she was in fact living with her husband."

However, as the father had allowed the little girl to retain and use the articles the wife had bought and which the child brought to his mother's home at Racine, he was held liable to pay therefor; but was relieved from the payment for the articles the wife had purchased for herself.

In *Simpson Garment Co.* v. *Schultz,* 182 Wisconsin, page 506, a husband and wife had lived together from 1896 to 1919, at which latter date the husband ceased to take his meals with the family and thereafter boarded at a hotel, but retained a room in the family home. He was worth $18,000.00, had a home worth $8,000.00, and enjoyed an income of $5,500.00. He had refused to allow credit to his wife and daughter, and the wife went on a spending spree and purchased $250.00 worth of goods on his credit, consisting of apparel for herself and a complete graduation outfit costing $125.00 for the daughter who was eighteen years of age. The lower court refused the right to recover from the husband. However, the Supreme Court reversed the lower court in part in holding:

"That the duty rests upon the husband not only to provide food, fuel, and light, but also with suitable clothing as well as other articles in a household such as his . . . ,"

and held that judgment must go against the husband for the graduation outfit for the daughter. As to the articles purchased by the wife, due to a lack of sufficient evidence, the case as to that part was sent back for further consideration by the trial court.

In a case reported in the newspapers in December from the District of Columbia Court of Appeals it is stated that representative George Huddleston of Alabama had provided his wife with a monthly allowance of $75.00 per month. The wife, on his credit, purchased a fur coat costing $245.00 for which the husband was relieved of the payment on the grounds that:

First: Where husband and wife are living together and she is properly maintained, she has no implied authority in law to pledge her husband's credit, and

Second: That in the liability of the husband to support, "he should have the power to regulate the expenditure for which he is responsible, by his own discretion, according to his own means."

The decision sustains the right of the husband "to clutch the pocketbook." The opinion reviewed the authorities in a thorough manner, and in view of the modern equality statutes is significant in that in following the decisions from the earliest day, it develops that women, in obtaining equality statutes, have gained nothing in the way of pledging their husband's credit other than they heretofore enjoyed.

Wife's Interest in Husband's Property Before Marriage

When any man marries, the law contemplates that the wife has an interest in any real property he may thereafter acquire. Even before the pronouncement of the benediction of the marriage vows, her interest attaches, because should he attempt to dispose of any of his real estate shortly before marriage without the knowledge of his intended wife, courts will scrutinize such transfers with great care for grounds of fraud as to her rights, and will set aside any such transfers as may show a fraud to prejudice her future rights to his estate.

Jointure

Space will scarcely permit a review of the extensive provisions of the jointure statutes which from Section 233.09 to Section 233.14 specify, in the most minute detail, the manner in which the husband may provide for the wife in lieu of dower and for the election of the widow in lieu thereof. It may be said that Sections 14, 15, 16 and 17 of Chapter 62 of the Revised Statutes of 1849 contained substantially the same provisions for jointure as exist at the present day. In the case of *Biebelhausen* v. *Biebelhausen,* 159 Wisconsin, page 365, the court distinguished between antenuptial contracts, which were characterized as agreements settling property rights by treaty, before marriage, and legal jointures authorized by the aforementioned statutes, and remarked that the jointure statutes did not take away, but rather encouraged and recognized the right to make antenuptial agreements.

The chapter of the statutes pertaining to dower and curtesy contains twenty-two sections providing for every possible contingency as to dower than can be conceived while there is but one single section pertaining to the right of curtesy of the husband. (See Section 233.23.)

Deed by Husband to Wife; No Trust

Should a husband, in a spirit of generosity, on purchasing a parcel of real estate, cause the conveyance thereto to run to his wife as sole grantee, by virtue of the married woman's separate property act, the law at once steps in and the property becomes her separate estate. As we have seen in *Price* v. *Osborn,* heretofore cited, the rule was established that even had the husband paid the entire purchase price, that he could not thereafter, without the wife's consent, regain title to the property. What the wife gets she may keep.

The trend of the decisions has always been to give to the married woman the benefit of any statute that changed the rigor of the common law surrounding her with disabilities. In *Good Land Co.* v. *Cole,* 131 Wisconsin, page 467, it was held that as a wife had a perfect right to manage her separate estate and all rights incident thereto, that it followed that she could invest her own property in the stock of a corporation, and also be an incorporator and hold stock in the same corporation as her husband, on the theory that his ownership of stock gave him no control over her stockholder's rights.

Coeducation

By Chapter 117, Laws of 1867, women were admitted to every department at the state university, "under such regulations and restrictions as the board of regents may deem proper." (See Volume 39, Wisconsin, page 235.) Coeducation had been somewhat accepted in unrestricted form at the university in 1874, however, for most practical purposes women had been given the advantages of a college education by the state since as early as 1869. See *History of Women Suffrage,* Volume 3, page 642, where it is recorded that at first the students recited together, but that Mr. Chadbourne made it a condition of accepting the presidency "that they should be separated." The fact remains that the women students were not given the same full privileges of selection of courses for degrees as were afforded to male students for some time after the passage of the constitutional amendment permitting their attendance. It is with some humor in view of the historical background that the famous Chadbourne Hall that now houses the women, on education bent, should be named in honor of the man who refused to accept the presidency until the regents, in accepting his conditions, turned back the wheel of progress within the constitutional reservation. One cannot but speculate as to the consternation of this famous president could he but view the mode of dress and bobbed hair of the bubbling womanhood that now throng the historic halls of the building named in his honor and dedicated to their use.

Property Exempt from Execution

Section 272.18, Subsection 5 provides:

That all wearing apparel of the debtor and his family,
All beds, bedsteads and bedding kept and used for the debtor and his family,
All stoves and appendages put up or kept for the use of the debtor and his family,
All cooking utensils and other household furniture not herein enumerated, not exceeding two hundred dollars, etc., are exempt from sale and execution.

The above provisions are substantially the same as those of Subsection 5, Section 58, Chapter 102 of the Revised Statutes of 1849.

Section 241.08 provides that no mortgage on such personal property as is exempt from sale and execution shall be valid unless the same be signed by the wife. (See Chapter 218, Laws of 1885.)

Assignment of Husband's Earnings

Although the wife is given her separate earnings, still Section 241.09 specifically provides that:

"No assignment of the salary or wages of *any* married man, then or at the accruing thereof exempt by law from garnishment, shall be valid for any purpose unless:

1. Such assignment be in writing and
2. Signed by the wife, if she be a member of his family at the time,
3. And unless her signature be witnessed by two disinterested witnesses,
4. Nor shall any such assignment be valid as to any salary or wages to accrue more than two months from the date of making such assignment. (See Sec. 1, Chapter 148, Laws of 1905.)

The wife is given the control of the disposition of the salary and wages of the husband to a considerable extent and, it would seem, amply sufficient for the needs of the ordinary wife. It matters not that the wife may exercise the poorest judgment in the matter of family expenses, neither does it make any difference should the wife have an abundance of income in her own right; still the law's intent is first to provide for the protection of the wife and family from the husband's efforts, even at the expense of his creditors. It would, however, be unfair to say that all such statutes relating to exemption of earnings from attachment, execution, and garnishment similar to Subsection 15, Section 272.18, are alone for the wife's benefit, because its

liberal provisions protect the husband in his legal duty to support the wife and children.

On the other hand, under the married woman's separate earnings act, the wife who is employed may assign her earnings without any restrictions whatever on the part of her husband or anyone else. Furthermore, should the wife happen to own the household goods, no lawyer would hesitate for a moment to give the opinion that she may sell, encumber, give away or even destroy them without violating any legal rights of the husband therein and without any fear of hindrance from him or anybody else.

Husbands and Wives as Parties to Actions

Section 260.16 provides that where a married woman is a party, *her husband must be joined with her,* except when the action concerns:

First: Her separate property or business,

Second: Or alleged antenuptial debts,

Third: Or actions between husband and wife. (See Chapter 120, Laws of 1856.)

In other words, the law has for years politely instructed the husband to lend aid and comfort to his wife in many of her law suits, and be responsible for her attorney fees. However, there is a saving provision for the benefit of the husband should judgment go against the wife. Section 270.79 provides that:

"Any judgment rendered in an action or proceeding in which a husband may be joined as defendant with his wife to recover damages for any tort committed by her shall not be docketed against or be in any way a lien on his estate." (See Chapter 25, Laws of 1883.)

In *Cummings* v. *Friedman,* 65 Wisconsin, page 183, a case arose where a husband had given his wife a sum of money which she placed in a handbag which a third person carried away. It was argued at the trial that, as she was a married woman, the husband was the proper party to bring the action, which was for damages in the sum of $2,000.00, for the willful and malicious taking of the sum of $60.00. The court disposed of this objection, stating that a married woman may take title to property from her husband which is good except as to his creditors; that, in this state, a married woman may own and possess exclusively her own separate property, and have control of it the same as any other person. Hence, her proof of mere possession without proof of title was all that was necessary for her to maintain and conduct such an action separate from her husband.

Women in Industry

Within the past few years decided changes have been made in provisions pertaining to labor, although laws relating to employment of womenwomen in factories have existed for years. See Chapter 134, Laws of 1883, which amended the existing laws and provided that women cannot be employed more than eight hours a day in factories, etc. Section 104.125 provides that *no wages paid an adult female shall be oppressive.* Section 103.05 provides that

No female or minor can be employed in any employment dangerous or prejudicial to:

1. Life,
2. Health,
3. Safety,
4. Or welfare;

and that the Industrial Commission has powers to exercise jurisdiction and authority to

1. Investigate,
2. Determine and fix *reasonable* classification of employments and places of employments.

Section 103.05 Subsection d provides that:

1. No female under 17 years of age can be employed in any capacity where it is necessary to constantly remain standing.
2. No female can be employed about any mine or quarry. No female under 21 years of age can be a bellhop in any hotel.

The supervision over industry exercised by the Industrial Commission for the benefit of women is far reaching.

Property Rights of Husband and Wife

Should a husband purchase a homestead and, in a spirit of generosity, cause the deed to run to the wife as sole grantee, she thereupon holds the title *absolutely.* It makes no difference that she may give a mortgage back on this homestead and that he may labor for years to satisfy the incumbrance, still the wife can:

1. Without his consent, convey away the title, give an absolutely good conveyance thereto, and turn him out in the cold,
2. Or will it away from him entirely on her death,
3. Or, in case of her death without a will, leaving children by a former marriage and none by him, he will have no curtesy rights in the property because Section 233.23 makes no exception for such case.

In this respect the wife's property right is far superior to that of her husband, because:

1. He can make no conveyance of the homestead without her signature where the title is in his name, and
2. While, as to his other real estate, he may make a valid conveyance, grantees will not accept his title unless the wife joins or releases her inchoate dower.

Men who deal in real estate to any extent, to avoid the complications of the wife's dower interest and the inconveniences due to the whims of their wives as to their signatures, hold title to trading properties in corporate ownerships.

The wife has the absolute veto on the conveyance of the homestead by the husband without her signature, for Section 235.01, which was substantially the same as Section 52, Chapter 102, Revised Statutes of 1849, provides:

"No mortgage or other alienation by a married man of his homestead, exempt by law from execution or any interest therein, legal or equitable, present or future, by deed or otherwise, without the wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance, shall be valid or of any effect whatever, except a conveyance from husband to wife."

Prior to 1905, courts were inclined to favor the rights of third parties who, in good faith, had dealt with the husband for the homestead, and held that the husband's disability extended only to such alienation as interfered with its use as a homestead, and that a deed executed by him alone conveyed an equitable interest which entitled a grantee to a legal title when the homestead rights ceased. However, in 1905, the legislature enacted the amendment:

"No mortgage or other alienation by a married man of his homestead, exempt by law from execution, *shall be valid or of any effect* as to such homestead without the signature of the wife to the same."

The purpose of this statute is to protect the wife from being compelled to litigate her homestead rights frequently, were the law otherwise. See *Town* v. *Gensch,* 101 Wisconsin, page 449. Thus the law, in its policy to protect the wife, looks ahead to safeguard her homestead rights without regard to the rights of others. The law does nothing of the sort for the husband. In the interpretation of the homestead, the court has even gone so far as to hold that a conveyance of the homestead by the husband, together with other of his property, was absolutely void without the signature of the wife, even though such other property was entirely separate from the homestead.

In *Helander* v. *Wogesen,* 179 Wisconsin, page 520, a man in Wood County, in the month of August, agreed to sell his farm for $10,000.00,

together with certain personal property. The purchaser, who resided in Chicago, paid down $1,400.00. In January following, the plaintiff moved onto the farm. Between the time the contract was made and the closing of the deal, the vendor used some of the personal property such as hay, grain, etc. When the time came to close the deal the wife of the vendor, regretting the transaction, refused to sign the deed. The vendee then agreed to pay $700.00 more, whereupon the vendor's wife signed. Later, the vendee discovered that some of the property he should have received had ben consumed and brought suit to recover therefor. It was held that he could not do so. The wife of the vendor, not having signed the first contract, enabled her husband to obtain $700.00 more, besides consuming several hundred dollars worth of the personal property he had agreed to sell with the farm. This was done to protect a wife's interest in her homestead.

In *Henon* v. *Stone Co.,* 72 Wisconsin, page 553, it was held that should a husband attempt alone to deed the homestead, that his wife is not validated even by the subsequent death of the wife without children.

In *Wallace* v. *John,* 119 Wisconsin, page 585, in 1885, the title to property paid for by the husband was taken in the name of the husband and wife. Thereafter, the husband built a house on one parcel and he and his wife lived thereon for several years. In 1901 the wife left her husband about two months before her death, went to live with a son by a former marriage, and commenced an action for divorce. She then conveyed an undivided one-half interest to this son, taking back his note and mortgage. Shortly thereafter the wife returned to her home where she died, the divorce action still pending. The lower court held that the conveyance to the husband and wife was by the entirities, and that any right she attempted to convey terminated at her death. The Supreme Court, however, held that the common law estate of the entirities by which neither could convey without the consent of the other and the survivor took the entire estate, was abolished by the statute of 1878. Hence, the conveyance of the wife to her son was allowed to stand. Of course, had the wife attempted to devise her interest by will, her attempt to do so would not have been allowed to stand, as the right of survivorship in a joint tenacy from its very nature takes precedence of and is superior to the right to devise. See *Frederich* v. *Huth,* 155 Wisconsin, page 196.

Women's Contract Rights

In *Ryan* v. *Dockery,* 134 Wisconsin, page 431, a situation arose where a widow, who owned a small property worth $1,800.00 and who was blind, old, and living alone, made an oral contract with the plain-

tiff, that if he would marry her and give her care and *support,* that she would give him all her property. He did so and cared for her for five years when she died, not having made, in her will, the provision promised. The court denied his claim for compensation in the most vigorous language, as follows:

"The law requires a husband to support, care for and provide comforts for his wife in sickness as in health. The requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order. Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself."

This case was decided in 1908 and before Section 6.015 had given women the full right of contract. However, the legality of such a contract would be open to attack for the same reasons.

In *State* v. *Ducket,* 90 Wisconsin, page 272, a situation arose under the provisions of Section 2355, which then provided that on imprisonment for life of either party, the marriage shall he absolutely dissolved. (See provisions contained in one Section 247.07 Subsection 3.) One French was sentenced for life for first degree murder and promptly appealed to the Supreme Court, which reversed the decision of the lower court. Pending the appeal the wife married one Ducket, whereupon the authorities, on the exoneration of French, brought prosecution against Ducket for adultery. The second marriage to Ducket was held valid, but it will be observed that the prosecution was not brought against the former Mrs. French but the man whom she married.

Section 245.13 provides that "No persons shall be joined in marriage within this state until a license shall have been obtained . . . from the county clerk . . ." At Park Falls, not long ago, a couple appeared before a party who, at one time, had been a justice of the peace, but who had not been qualified to act as such for some time. The couple did not have the required license. The former justice, however, conducted a pretended ceremony, whereupon the couple proceeded joyfully on their way. Later the man on returning from a trip abroad died. The woman applied to the county court for the wife's share of his estate. The claim of the wife was most ably briefed by Attorney W. K. Parkinson of Phillips, Wisconsin, chiefly on the grounds that the parties had acted in good faith followed by cohabitation and that

the presumption of the validity of a marriage is one of the strongest in the law, and although voidable, is nevertheless valid for all purposes until annuled by judicial decree in direct proceedings for that purpose, entered during the lifetime of both parties. See page 462, Volume 4, of Opinions of Attorney General. The point is that the woman was allowed a widow's interest in the estate.

Privileges of Women from Civil Arrest

Women have, in this state, always been more or less privileged from civil arrest. Chapter 155, Section 3, Laws of 1872, gave a married woman the right to sue in her own name, etc., and to be sued as if single for the recovery of her antenuptial debts, and that execution might be levied on any judgment against her as against other judgment debtors except that an *execution against her person could not issue.* Section 209, Chapter 88 of the Revised Statutes of 1849 provided: "No female shall be arrested or imprisoned upon any execution issued from a justice's court in a civil case." Section 264.02 provides at length for arrest in civil cases. Paragraph 2 specifically provides as follows: "No female shall be arrested in any civil action except for a wilful injury to:

First: Person,

Second: Character, or

Third: Property.

See Subsection 2, Chapter 127, of the Revised Statutes of 1858 and of 1878. A person who suffers a wrong by the act of any female in this state, unless he can prove the act is a wilful one, beyond a doubt, must proceed with great care in procuring civil arrest, as otherwise she will have redress in an action for malicious prosecution or false arrest.

Wife's Rights in Action for Alienation of Husband's Affections

In the late case of *Howard* v. *Lunaburg,* 192 Wisconsin, page 507, an action for alienation of the affections of plaintiff's husband and for criminal conversation was considered. The complaint recited that by reason of the

"wrongful, wilful, wicked, and unlawful acts of defendant, the love and affection . . . was wholly alienated and destroyed and plaintiff was deprived of the comfort, society, and assistance, love, and affection of her husband," etc.,

but alleged no loss of support or lawful divorce. An important point decided was that such an action does not survive the death of the de-

fendant. The early cases were reviewed and the rights of the wife clearly set forth. The famous case of *Duffies* v. *Duffies,* 76 Wisconsin, page 374, was cited where it was held that neither, under the then existing statutes or at common law, "Whatever equality of rights with her husband she may have, it is not proper to say that her right to the society of her husband is the same in kind, degree, and value, as his right to her society." The opinion by Justice Orton, in vigorous language supported the idea of a double standard of morals between husband and wife in refusing to her an equality with him in such an action. The later case of *Lonsdorf* v. *Lonsdorf,* 118 Wisconsin, page 159, which in 1903 followed the doctrine of *Duffies* v. *Duffies* where it was pointed out that Wisconsin and the state of Maine stood alone in holding that the wife had no action for the loss of her husband's society and affection. These cases, to both of which vigorous dissenting opinions were filed, excited great comment, and again, to its credit, the legislature promptly came to the rescue two years later in the enactment of Chapter 17, Laws of 1905, which expressly placed the wife on an equality in giving the wife the same right for the alienation of his affections as the husband has enjoyed. However, *Howard* v. *Lunaburg* did clarify the status of the wife in holding:

First: That "a wife is *not* entitled to the services of her husband, hence, if she loses them, she has parted with nothing of financial value, since she still has her right to support," and

Second: "Damages to feelings, or loss of consortium, does not constitute a property right or interest" under the existing statute providing for survival of actions, etc.

The court was confronted with the interpretation of the statute applying to the right of survival of the actions, but to the woman the reasoning that a wife in the ancient right of her support is still deprived of and not entitled to any financial interest in the services of her husband may seem a bit far fetched.

The Eugenics Provision

The Eugenics law, so called, was passed by the legislature in 1913 and is known as Chapter 738 of the laws of that year. It requires the prospective husband to obtain a health certificate from a physician before obtaining a marriage license, and places many drastic requirements of an unreasonable nature as conditions precedent to the right of the male to marry. It excited widespread comment and its constitutionality was most bitterly attacked in *Peterson* v. *Widule,* 147 Wisconsin, page 641. At the trial several experienced physicians testified that the requirements were unreasonable and impractical. Neverthe-

less, the opinion written by Chief Justice Winslow sustained the law in conceding that women, as a class, are more moral than men, and ruled that, under the police power, all men, as a class, "even though drastic penalties were provided and suspicion is cast upon every male candidate for marriage of immorality and criminality of a most serious nature, must comply therewith." In the efforts of society to protect the virtue of woman and enhance the betterment of society, the men must submit to its discriminations. No such health certificate is required of the prospective bride.

An Example of Joint Tenancy

In *Dupont* v. *Jonet,* 165 Wisconsin, page 554, a widower seventy-five years of age and the father of seven adult children, furnished money to his housekeeper of two years standing to obtain a divorce from her former husband. Before his marriage to her, he caused a deed to his property to be made to himself and her jointly or to the survivor. Immediately after the marriage, he also caused certain certificates of deposit to be made to himself and wife as joint owners. Later, both were overcome with gas, but she lived a day longer than the husband. His heirs sought most strenuously to persuade the court to hold that a trust estate had been created, but the court ruled:

First: That, as to personal property, such a relationship must be clearly established, and

Second: That the wife took the entire real estate by reason of the joint conveyance which carried the right of survivorship.

The result is that a husband may give his entire property to his wife and his heirs cannot complain. Again the wife of persuasive qualities over her husband scores to the benefit of her heirs over the husband's children, who may have assisted materially in the accumulation of his estate.

Liability for Last Sickness and Funeral Expenses of Wife

At the common law neither the wife nor her estate were liable for the expenses of her last sickness or funeral for such was the obligation of the husband, and hence her separate estate could not be charged therewith. Although since 1850 the wife has been allowed complete control of her separate estate and although Section 313. 16 provides that in the probate of *any* estate, after the expenses of administration have been paid, necessary funeral expenses and expenses of last sickness follow in the order of preference, still courts have generally refused to allow the expenses of the last sickness of the wife to be a charge against her separate estate *where her husband was solvent and could pay them.* The theory of the rule is based on the conclusion that

the expenses of her last sickness are incurred on the credit of the husband whereas the funeral expenses are incurred on the credit of the estate. The question is, can the husband, who had paid the funeral expenses of his deceased wife, be reimbursed therefor out of the probate of her estate. In *Schneider* v. *Estate of Breier,* 129 Wisconsin, page 446, the claim of the undertaker for funeral expenses of a deceased wife was allowed as a proper debt against her estate, although the husband had requested the undertaker to perform the services but had not advanced the payment himself.

In *Estate of Phalen* v. *Central Wis. Trust Co.,* 197 Wisconsin, page 336, a husband had requested a sister of his ailing wife to care for her in her last sickness. The sister filed her claim against the estate of the deceased wife, which the County Court of Dane County allowed. On the administrator's appeal, the Supreme Court reversed the lower court in holding that as the husband had requested the services rendered, the obligation was therefore his alone, for which he was obligated to pay, irrespective of the financial ability of the wife's estate to bear the expense. From this it is seen that a husband of moderate circumstances, who is married to a woman of wealth in her own right is, nevertheless, liable for the expenses of her last sickness. It matters not that he exercises the best of intntions in caring for hr, still his doing so relieves him of none of the common law duties to provide for his wife throughout her last sickness. As the court in *Schneider* v. *Brier* reserved from decision the question of whether an implied promise arises on the part of the administrator of a wife's estate to reimburse the husband who has paid the expenses of his wife's funeral, the husband's obligations may be said to be unsettled as to secondary liabilities. For a comprehensive discussion of the subject, the reader is referred to February, 1916, number of the MARQUETTE LAW REVIEW.

RIGHTS OF PARTIES IN DIVORCE

The subject of divorce is not a pleasant topic for discussion. However, the rights of the wife on the dissolution of the marriage come to the fore in a marked degree. First, it may be said that the rights of society, safeguarded by the state, in the preservation of the social order, has a primary interest in the marriage relation to which the interests of both the divorced wife and husband must, of necessity, give way. This is a basic necessity in the maintenance and education of the minor children of the marriage. In no branch of the law are the rights of the woman more pronounced than in the rules and provisions governing the salvaging when the ship of matrimony goes on the rocks. It will ,therefore, be necessary to dwell at some length

on a number of the cases that have established the status of the wife when she and the husband "agree to disagree."

Reference has heretofore been made to Section 22, Chapter 79, of the Revised Statutes of 1849 which is substantially the same as Section 247.34, providing for restoring to the wife on divorce the whole of or any part, as may seem just and reasonable, of any estate the husband may have received from the wife, or the value thereof, etc.

Section 247.35 which is substantially the same as Section 2372 of the Revised Statutes of 1878, provides:

"No judgment nullifying a marriage or for a divorce of any kind shall in any way affect the right of the wife to the possession and control of her separate property, real and personal, except as provided in this chapter; and nothing contained in this chapter shall authorize the court to divest any party of his title in any real estate further than expressly provided herein."

The exception, as to the wife, is found in Section 247.27, which provides as follows:

"*Wife to support children, when.* When a divorce shall be adjudged for a cause or fault committed by the wife and the care, custody and maintenance of their minor children, or any of them shall be adjudged to the husband, the court may adjudge to the husband, out of the separate estate of the wife, such sums for the support and education of such minor children as it shall deem just and reasonable, considering the ability of the parties and all the circumstances of the case." (See Section 2365 Revised Statutes of 1878.)

However, although the statute has existed for years, there are no cases cited, and the revisors' notes state "that it is a power likely to be rarely exerted, but that ought to exist in the court." The only instance, therefore, where the wife is required to pay anything that has the earmarks of alimony to the husband is in the extremely rare instance where the wife has an abundance of separate estate and is of such a character that the court is obliged to award the care and custody of the minor children to the husband. As hereinafter shown, the provisions are most specific and drastic as to the awarding of alimony to the wife or division of the property of the husband; however, the aforementioned provisions take great care to preserve the estate of the wife undisturbed in case of divorce.

In the case of *Kistler* v. *Kistler,* 141 Wisconsin, page 491, a wife obtained a divorce and it was adjudged that the husband pay her $1,000.00. The judgment erroneously termed such payment as both a permanent alimony and a division of the husband's property. A few months later and before the judgment was paid, the parties remarried. After a time the wife commenced a second action for divorce, and

the husband doubtless realizing that she had the best of the argument, obtained an agreement with her to separate, in which it was provided that the wife proceed with the divorce, that the husband pay the wife the sum of $300.00, and that the wife would demand no further sum whatever. The court, not unanimously, however, ruled that:

First: The first judgment was a final division of property and hence became the separate estate of the wife.

Second: That whatever estate is given a wife as a final division, still remains her separate property, even in case the parties thereafter remarry.

Third: And that the agreement they had made was void as one in aid of divorce.

In *Westerlund* v. *Hamlin,* 188 Wisconsin, page 160, a divorce decree granted in 1919 placed the real estate, the title to which was owned jointly, in the hands of a receiver who was directed to collect the rents, pay the wife $30.00 per month, and that if the property could be sold within one year, the court would make an equal division or otherwise proceed as authorized by law. The husband died within the year, having made a will disposing of his interest in the property. However, the court, under the provisions of Section 247.37, which provides that a judgment of divorce from the bonds of matrimony shall not affect the status of the parties or be effective for one year, and in case either party dies within the year, unless vacated or reversed, the judgment shall be deemed to have entirely severed the marriage relation immediately before such death, ruled as follows: That the provision as to the death of either party within the year fixes the status for the purpose of determining questions of inheritance and does not otherwise change the title to the property. Consequently, the wife took the title to the entire property by virtue of the joint tenancy, and the husband's heirs received nothing therefrom.

In *Bruhn* v. *Bruhn,* 197 Wisconsin, page 358, the court, in dissolving a marriage of only fourteen months duration, held that an allowance made by the lower court to the wife of $16,306.00 which consisted of a one-sixth part of the husband's estate was excessive where the wife was a woman of demonstrated ability, who had not aided in the accumulation of the husband's property, had a separate income of $1,000.00 annually and had a separate estate of $20,000.00. The Supreme Court reduced the allowance to $5,000.00 under the provisions of Section 247.26, which leaves the matter to the discretion of the trial court. The court, however, expressly reserved from decision the question of whether or not on divorce the court *must* give some of the husband's property to the wife. Consequently, it has

never been decided in this state that some part of the husband's estate must be given to the wife on divorce. The court, in this late case. discussed the modern status of women with a marked frankness, stating that in late years the relationship between husband and wife had been materially changed by adding to the rights and privileges and well as increasing the liabilities of married women; that a substantial change has been wrought in the marriage relationship from that formerly recognized at common law and the contemporaneous statutes; that the dower right of the wife had been increased to an absolut estate of one-third, and that the wife now has the broad grant of equal rights under Section 6.015*"with its many consequences."* The foregoing dictum from the court in its frank view of the modern status of women would indicate that the future decisions, in matters of divorce, will not be as favorable to women as they have been in past.

In *Lally* v. *Lally,* 152 Wisconsin, page 56, a decree of divorce provided that the defendant husband and *his heirs and administrators* pay the plaintiff during her life the sum of $300.00 a month as a final division of the estate. The court in its ruling that the provision was in the nature of alimony which ceased on the death of the husband, consequently could not be made a charge against his estate that his heirs would be obliged to continue paying. This case reviews many of the earlier decisions pertaining to divorce, and distinguishes between alimony and a final division of the estate in that:

First: Alimony is a burden on the husband during his life to support his wife, and hence is not assignable by her before due, and

Second: That on a final division, the wife gets a definite portion of the estate which is set over and becomes her separate property and hence may be devised by her will or otherwise disposed of.

In *Ashby* v. *Ashby,* 174 Wisconsin, page 549, a judgment of divorce had been granted in 1871 which provided that the husband pay alimony of $10.00 a month, which was paid until about 1874, when he became in arrears. The wife then sought to have him punished for contempt, but the court dismissed her complaint and refused to send the husband to jail. Matters were allowed to run along until 1920, when the wife again caused proceedings to be brought to collect the back alimony. As the husband had become old and infirm, the court permitted the judgment to be modified in amount, but did impose the judgment as a lien on his real estate, even though the same constituted his homestead. This case:

First: Required back alimony, to be paid after a period of forty-four years had elapsed, and

Second: Regardless of the provisions of Section 330.16, which provide that "an action upon a judgment or decree of any court of record in this state or of the United States sitting within this state," must be commenced within twenty years from the time the cause of action accrued.

The exception to the application of the twenty-year statute of limitations rests in the fact, of course, that the payments for alimony continue from year to year. Thus a husband gains no refuge within any statute of limitations by his failure to make the alimony payments regularly, neither does he gain by his removal to another state, for should he fall heir to property within the state, the lien therefor will attach to the property he may so acquire. This wife, who had lived her own life in a distant state, was permitted to come into the courts of this state and enforce her lien against the little homestead of the husband with whom she had come to the parting of the ways forty-four years before.

At this point a nice constitutional question may be considered. Where a decree providing for alimony is rendered in cases where there are small children and the husband departs to another state, he is guilty under the abandonment statute and extradition will lie. However, should he remove to another state, send back payments of the alimony for a time and thereafter discontinue, the offense has been committed in the *other state* and extradition does not lie. To be brought back the party must be a fugitive from justice for the commission of a crime committed in the state fro mwhich he has fled. where the payments have been made for a time from another state, the offense is committed there and the delinquent, under the constitutional provisions, is not a fugitive from justice. Those who would pursue this matter further are referred to the Monthly Bulletin of the District Attorneys' Association for November, 1929, where the entire subject is discussed in a comprehensive manner.

In *Steinkopf* v. *Steinkopf,* 165 Wisconsin, page 224, presents an interesting situation where a husband brought a divorce action against his wife, Bertha, in which the circuit court rendered judgment awarding her $25.00 a month alimony *during her lifetime,* made such payments a lien on certain of his real estate, and awarded her the *use,* during her lifetime, of the homestead, household furniture, etc. The lower court, having thus disposed of the first wife by giving her both alimony and a final division of property in violation of the law, the husband thereupon set up another homestead and married a woman named Martha. After some four years of this, he died and Martha, being deprived of her support, realized that Bertha had the best of the arrangement and accordingly instituted proceedings, questioning the

judgment for the benefit of Bertha. The circuit court then ordered the payment of $25.00 per month to Bertha to be stopped and the real estate freed from the lien created by the judgment of divorce. The Supreme Court stated the rule that there could not be both alimony and final division and held that Bertha got a final division and hence was allowed to keep the homestead the remainder of her life and also the *absolute title* to the personal property. The $25.00 per month payments were consequently improper and the appeal resulted in favor of Martha in that the real estate was freed from further payments of the monthly alimony while Bertha was given the absolute title to the personal property in question as well as the use of the homestead during her lifetime.

In *Davis* v. *Estate of Davis,* 167 Wisconsin, page 328, an extreme case arose where, in 1871, a man named Davis married one Naomi Davis, who three months afterwards abandoned him, departed from his home and ever thereafter lived apart from him. In 1874 a child was born to her, she not being then married to any one or divorced from Davis. In 1877 she entered into a marriage with one Bradfield in the state of Ohio, not having been divorced from Davis, and lived with Bradfield as his wife until his death in 1914, during which time nine children were born to this pretended marriage. She never had made any attempt to ascertain whether Davis was deceased during all these years. Davis died testate in 1914 and this woman, claiming to be his wife, came into the courts of this state, filed her election to take her dower and petitioned to be allowed a widow's share of his estate at law. It may seem strange to many, but this woman was permitted to so share in the estate of Davis and his will was of no avail to defeat her rights as his wife. The Supreme Court reviewed the English rule that permitted a husband to bar his wife's dower where she voluntarily left him to live in adultery with another, and he did not reconcile her, and ruled that the same had been replaced by the statute which permitted a husband to bring a divorce for a single act of adultery and in the decree bar the wife's dower. As Davis had not, during his lifetime, applied for a divorce, even though for religious or other reasons, and had not availed himself of the remedy provided for him by the law, this woman was still his wife. Thus, under this case, when a man once marries, no matter how unfaithful his wife may afterwards become, she remains his wife during his lifetime and unless divorced, on his death, is his widow with the rights the law allows to such. The law treats this sort of a wife with the same consideration as the one who in all respects has fully performed her duties. This woman, who for forty-four years had led her own life, bore ten children by other

men, and had repudiated her marriage in every manner conceivable, yet, in the end, was the wife of Davis.

Undoubtedly as suggested in the dissenting opinion by Justice Eschweiler, the court could and perhaps should have held her estopped from asserting her claims at such a late date. There are such cases where rights of other parties are involved. See *Wright Lumber Company* v. *McCord,* 145 Wisconsin, page 93, and *Sommers* v. *Germania National Bank,* 152 Wisconsin, page 210.

In *Estate of Liesenfeld* v. *Liesenfeld,* 196 Wisconsin, page 7, an interlocutory decree of divorce was taken in 1911 in favor of the husband, the wife not appearing in the action. The wife thereafter went to the state of California where, in 1914, she married and later on was divorced. In 1918 she married another man with whom she lived for some time. When, in 1925, her husband in Milwaukee, in whose divorce action a final decree had never been entered, died having made a will leaving considerable property to his daughter, this woman who had entered into two void marriages, hastened back to Milwaukee. She promptly petitioned the county court in proceedings to require the will to be set aside as to her and filed her election to take the share of a wife. On the appeal the court adhered to the rule in *Dallman* v. *Dallman,* 159 Wisconsin, page 480, in that as the final decree of divorce had never been entered after the year and held that she was entitled to prevail.

In the famous case of *Pfingsten* v. *Pfingsten,* 164 Wisconsin, page 308, there was presented the question of whether, where a divorce is granted because of the adultery of the wife, the court may devest the wife of the separate estate she has received from the husband. The facts of the case were that the husband had been persuaded by his wife to deed the homestead worth $13,000.00 to her, and some years later, due to her repeated acts of adultery, the divorce action came about. The lower court, Judge Quinlan presiding, granted the husband his divorce on the grounds stated, properly refused her any alimony, and further divested her of the entire estate, giving it all back to the husband. The Supreme Court, in view of the provisions of Section 247.35 preserving to the wife her separate estate, fell back on Section 247.26, the terms of which permit the court to finally divide "so much of the estate of the wife as shall have been derived from the husband," etc. The court stretched a point in reasoning that the property a wife has received from her husband is to be treated for such purposes *as the property of the husband;* refused to permit such a wife to be turned out in the cold; remarked that hope is held out to the worst of criminals, and sent back the case with instructions to

divide the property between the parties, giving the husband so much thereof as might be equitable.

In *Twohig* v. *Twohig,* 176 Wisconsin, page 275, where it was conceded that the wife had been guilty of desertion and was extravagant, nevertheless, it was held that it was proper to award her the custody of the children aged eight and thirteen respectively; that the failure of the trial court to appoint a trustee of the property awarded her would not be disturbed, and that an allowance of more than one-third of the property to the wife was not excessive, notwithstanding her greater fault.

In *Brenger* v. *Brenger,* 142 Wisconsin, page 26, the plaintiff and defendant had lived together for years. At the time of the marriage each had property worth about $800.00, and shortly afterwards acquired an eighty-acre homestead, the title to which was taken jointly. The husband, after a few years, became blind and infirm, whereupon the wife procured from him a conveyance of his interest in the property and thereafter made life so miserable for him that he was thrown out of his home in his old age, an object of charity. After being a public charge for a year, the divorce action was brought by which he was awarded $200.00 to reimburse the town for his poor support, $100.00 for his expenses in the divorce action and $25.00 a month during his lifetime. The Supreme Court entirely changed this arrangement because there is no authority in the law, where there are no minor children, to allow the husband alimony out of the property of the divorced wife, and ordered an equitable division of the property.

In *Towns* v. *Towns,* 171 Wisconsin, page 32, a judgment of divorce went to a husband in which it was provided that he pay the wife as a full, complete, and final division of the estate of the parties the sum of $1,000.00 and a balance of $1,400.00 in monthly payments of $50.00. After the term of court had ended, the plaintiff sought a revision of this judgment on the grounds that the divorced wife had been convicted of vagrancy and sentenced to sixty days in the house of correction, had frequently been intoxicated, and was then living with another man as his wife. The lower court revised the judgment of divorce in ordering that the $1,000.00 already paid constitute a full settlement on the wife. The Supreme Court, however, held that the statute gave no such authority, that since a final division had been made to the wife that the same became her separate property, and hence its allowance could not be modified after the term in which it had been awarded. As a consequence the divorced husband was obliged to continue making the payments on the $1,400.00 to this woman, regardless of her having developed into a jail inmate, a drunkard and a woman otherwise bad.

In *Estate of Fox,* 178 Wisconsin, page 369, a woman of mature years who had had the experience of obtaining a divorce, married a man who was divorced from bed and board only. Although this second wife had been shown the decree from bed and board and had been told by the former wife and daughter that the marriage was in adultery, nevertheless, continued to live with Fox until his death. Not being able to claim the wife's share of the estate, she filed a claim for services rendered on which the lower court allowed judgment for $1,445.00 on th finding of the jury that she believed she was legally married, had acted in good faith, and did not know the legal effects of a divorce from bed and board. The Supreme Court allowed the verdict of the jury in her favor to stand on the ground that it was justified in its findings that she was not, as a matter of law, to be charged with the knowledge of the effect of such a divorce, under all the circumstances. As the evidence further appeared to show a fraudulent intent on the part of Fox, it was considered just that his estate should reimburse her. This case goes rather far in excusing "ignorance of the law" and may be compared with *Ryan* v. *Dockery* as illustrating that as between the man and the woman before the law the latter "gets the breaks of the game."

The discussion of divorce may be closed with the following outline presenting the general rules applicable in concrete form:

A. On divorce the court may either allow alimony or decree a final division of the property, but may not do both. See Section 247.26 and *Westerlund* v. *Hamlin,* 188 Wisconsin, page 160.

I. Alimony:

First: The court *may* grant alimony to the wife for any of the causese the law provides for divorce from the bonds of matrimony except for the wife's adultery. See Section 247.26 and *Pfingsten* v. *Pfingsten,* 164 Wisconsin, page 308.

Second: Allowance of alimony is within the discretion of the trial court. See *Goerner* v. *Goerner,* 182 Wisconsin, page 18.

Third: Alimony is based on the theory that it is the duty of the husband to support his wife and minor children. See Section 247.26.

Fourth: Alimony continues during the joint lives of the parties. See *Maxwell* v. *Sawyer,* 90 Wisconsin, at page 354.

Fifth: Alimony may be modified at any time by the court on a proper showing by either party. See Section 247.37.

Sixth: Alimony is not affected by bankruptcy of the party liable therefor.

Seventh: Non-payment of alimony is not affected by the statute of limitations. See *Ashby* v. *Ashby,* 174 Wisconsin, page 549.

Eighth: Alimony is not assignable by the wife before the same is due.

Ninth: Alimony is not allowed to the husband out of the separate estate of the wife, hence no lien can be created against her property for alimony to the husband. See *Brenger* v. *Brenger,* 142 Wisconsin, page 26.

Tenth: Alimony, as a general rule, is cut off on the remarriage of the wife, or may be reduced to a nominal sum where the wife has married a man able to support her, or retained at a sum sufficient for the support of the minor children.

Eleventh: If the wife has adequate property of her own, she has no claim for alimony. See *Campbell* v. *Campbell,* 37 Wisconsin, page 206.

II. Final division of property:

First: Final division of the estate of the husabnd on divorce is discretionary with the court, subject to revision on appeal.

Second: By a final division, the wife gets a share of the husband's estate, which is set over to her and becomes her separate estate, (see *Lally* v. *Lally,* 152 Wisconsin, at page 61), and may be

a. Disposed of by will, or
b. Otherwise disposed of by the wife.

Third: A final division cannot be modified after the term. See *Towns* v. *Towns,* 171 Wisconsin, page 32.

Fourth: The general rule is that, on final division, one-third of the property of the husband awarded to the wife is liberal, but even one-half is allowed in some cases. See *Gauger* v. *Gauger,* 157 Wisconsin, at page 633.

B. Dower and homestead rights of the wife, except as preserved in the decree, are terminated on dissolution of the marriage. See Section 247.36 and *Gallager* v. *Gallager,* 101 Wisconsin, page 202.

C. The husband, on divorce, must pay back money borrowed of the wife. See *Pauley* v. *Pauley,* 69 Wisconsin, page 419.

D. Money awarded a wife on a final division of the husband's estate becomes her separate property, even though payable in installments. See *Towns* v. *Towns,* 171 Wisconsin, page 32.

E. The lien created by an award of alimony or other allowances for the wife and children imposes a charge on the property of the husband including the homestead. See *Schultz* v. *Schultz,* 133 Wisconsin, page 125.

F. On a divorce granted from the bonds of matrimony, if there are no children of the marriage, the wife may be allowed to resume her maiden name or that of a former husband. See Section 247.20.

G. During the pendency of a divorce action, the court may:

First: Allow temporary alimony;

Second: Require the husband to pay the fees of her attorney necessary to carry on and defend the action, and

Third: May prohibit the husband from imposing restraint on her personal liberty. See Section 247.23.

H. The presumption—one of the strongest in the law, is in favor of the validity of the marriage. From the very circumstances, it works to the decided advantage of the wife.

Wife's Rights to Will and Convey

In *Scheiner* v. *Arnold,* 142 Wisconsin, page 564, a man had married a woman in 1893, who had a property in her own name. The husband, under the impression that he was a joint owner, occupied the premises on which the couple conducted a florist and gardening business until her death in 1908. During all these years he paid all taxes, paid off a mortgage, and expended approximately $13,000.00 in improvements, additions and other expenditures in the business. It was held, nevertheless, that he had no claims, either equitable or legal whatever in the property and that the money a husband spends on his wife's property is presumed to have been for her benefit. Not even the fact that he acted under the mistaken impression that he was a joint owner, nor the fact that he had paid off a mortgage on his wife's property gave him any rights or any subrogation for having paid the incumbrance. As a result, the wife's heirs, by a former marriage, took the entire property and turned the old man out. The husband's "ignorance of the law" was of no avail as is that of the wife in cases cited.

The wife has an advantage over the husband where he purchases real estate and permits the title to run to himself and wife as joint tenants for the wife can, at any time, convey or mortgage her one-half interest, whereas any such deed as he might attempt to dispose of his interest would not release her dower rights therein. Furthermore, if the property is the homestead, as we have seen, no conveyance of the same by the husband for any purpose is valid without the wife's signature thereto.

Inheritance Taxes

The inheritance tax provisions of Subsection 2, Section 72.04 give the wife a decided preference in that the wife may inherit property from the husband, of the clear value of fifteen thousand dollars, free from the tax, whereas the property which the husband may inherit from the wife is tax exempt to the amount of two thousand dollars. As illustrative of how this works out, suppose a man purchases a homestead worth $10,000.00, and, in his commendable desire to save

his wife free from the trouble, delay, inconvenience and expense of administration in case of his death, causes the title to run to himself and wife jointly. However, should the wife die, the law steps in, takes one-half the value of this property as the share he receives from her, deducts as exempt the sum of $2,000.00 and charges him the tax of two per cent on $60.00 on the amount in excess of such exemption. It matters not that the husband may be left with two or three small children to support. He must, nevertheless, pay the tax to clear the title to the property, while the wife, in case of his prior decease, would not be obliged to pay such a tax due to her more liberal exemption.

In view of the far reaching decisions cited, especially in rights pertaining to dower and divorce, it does seem that both the legislature and the courts have joined with the woman, at times, in viewing her status "through the wrong end of the telescope." In such cases as *Ashby* v. *Ashby,* some statute of limitation— possibly ten or twelve years, should be provided after which the wife should be barred from coming into court with her claims.

In the highly privileged position the married woman has been permitted to acquire, the court has, in one case, even gone so far as to hold that she may, without the presence of her attorney, and against his wishes and protest, settle and discontinue suits in her favor. See *Dolloff* v. *Curran,* 59 Wisconsin, page 332.

Many of the special privileges that have been granted to women in the past have been conferred to compensate for the disabilities with which they were surrounded. Whatever restrictions there were as to the right of contract by married women worked to their advantage in almost every instance. Furthermore, it is doubtful whether, prior to the equal rights law, women anywhere enjoyed a more favored position in the law than in the state of Wisconsin.

The legal status of the woman, especially the wife, as compared to that of the man,—especially the husband, may be recapitulated, in part, as follows:

First: The wife has absolute control of her separate property, both real and personal, and may deed her real estate entirely free from any control whatever on the part of her husband, while he must obtain her signature in conveying real estate in which he may own an estate of inheritance at any time during the marriage to release her homestead and dower rights therein.

Second: A wife may will her separate property, both real and personal, absolutely free from any control of her husband and entirely away from him, while she can, within a year from the filing of petition for the administration of his estate, break any will, as to her,

that the husband can make; and her doing so gives her the full heirship rights of a wife at law.

Third: A wife over eighteen years of age may both devise and convey her property, a right the husband, if under twenty-one years of age, never possessed.

Fourth: The wife has an absolute veto on the sale of the homestead or any encumbrance thereon, while she, on the other hand, if she holds the title in her own name, enjoys the ownership absolutely with full rights of conveyance thereto entirely independent of the husband.

Fifth: A wife has control over the assignment of the wages of the husband while she may do whatever she desires with her separate earnings.

Sixth: A husband cannot mortgage the exempt household goods without her consent while she may own such property free from any such restrictions on the part of her husband.

Seventh: The husband is bound to support his wife and children, whereas no such duty is imposed on the wife, who may have an abundance of separate income.

Eighth: The wife has control of the life insurance in which she is the beneficiary, while her husband has no such control over insurance she may take on her own life for his benefit.

Ninth: A husband has no legal or equitable rights in any improvements he makes to his wife's separate property or any subrogation to any mortgage he may have paid thereon.

Tenth: A husband cannot recover title to any property, the title to which he has permitted to go to his wife, except when, on divorce. the court may take pity on him and give some of it back.

Eleventh: The dower right of the wife has been increased to a fee title to one-third all real estate outside the homestead, whereas the husband's right to curtesy in her real estate, when he does take the same, ceases on his remarriage.

Twelfth: The husband, otherwise entitled thereto, takes no curtesy if the wife leaves issue by any former marriage whatever.

Thirteenth: The husband must furnish necessities for his wife and children consistent with their station in life.

Fourteenth: The widow is obliged to pay an inheritance tax only on the excess of property of the clear value of $15,000.00 transferred from the husband, while he is obliged to pay such tax on the excess of the value of $2,000.00 transferred to him from her estate.

Fifteenth: The widow has a year after the petition for administration of her husband's estate to file her election to take a wife's full

heirship rights, a law regardless of what other adequate provisions the husband may have made for her in his will.

Sixteenth: A judgment of divorce is not allowed to disturb the separate estate of the wife for the benefit of the husband, whereas his property is either divided for her benefit or her support provided for by way of alimony.

Seventeenth: Pending the hearing on divorce, the wife is allowed temporary alimony and her attorney's fees.

Eighteenth: The wife's dower rights are far superior in all their applications to those of the curtesy of the husband.

Nineteenth: A poor husband is liable for the last sickness of his wealthy wife, and may also be obliged to pay for her expensive funeral.

Twentieth: Women have always been privileged over the men from civil arrest.

Twenty-first: The liberal allowances on the probate of estates apply particularly to the widow and children because the duty of the husband to support his minor children continues after his wife's death.

Twenty-second: Specific provision to the widow for damages for withholding her dower rights has existed for years, whereas none such existed for the benefit of the right of curtesy of the husband.

Twenty-third: The health certificate on marriage is not required of the prospective bride.

Twenty-fourth: The mother's pension, so-called, is intended primarily to permit the mother to maintain the family home. While aid will be given to the needy father of small children, he is not relieved of his duty to support them.

Twenty-fifth: Judgment for alimony is not affected by bankruptcy or the statute of limitations.

Twenty-sixth: The right of creditors of a deceased wife to have her estate subjected to the payment of her debts takes precedence over the husband's estate by curtesy in his wife's estate, whereas provisions have existed for years for admeasurement of dower in cases of the sale of property while the wife has such rights therein.

Twenty-seventh: The widow takes the dower right in any property the husband may have owned at any time during marriage to which she did not convey her dower interest, whereas the husband is entitled to his curtesy, when the same does apply, only in property the wife owned at the time of her death.

Twenty-eighth: The law requires that in many cases where the wife is a party that the husband be joined with her in her suits at

law. The wife is never required to assist her husband in his law suits.

Twenty-ninth: Even where the deceased wife has made no will and there are issue by the marriage, the husband's heirship rights in her property is far inferior to that the wife enjoys in his intestate property.

The reader is here referred to the March, 1930, number of McCall's magazine, on page 115, where appears an article which, in a very comprehensive manner, discusses the laws of inheritance in general. It is to be noted that in this, as is the case in such frequent discussions of property rights, no criticism is made of the property or other rights which women, especially married women, enjoy in the state of Wisconsin. Such omissions are of significance to the women of the state, especially married women, in the frank admission that it is becoming an accepted fact that "emancipation has its disadvantages." The most noticeable instance of the backward swing of the pendulum is the reference to the Decedent's Estate law enacted by the New York Legislature recently by which, after September, 1930, married women, in that state, will no longer be permitted to make wills that will deprive their husbands of from one-third to one-half of their property. This state has borrowed much from the practice and procedure as well as statutes pertaining to inheritance from the state of New York. Such was the case of the Separate Property Act. Agitation here by women for "further rights" may result in a reaction of far reaching importance.

A third article will treat somewhat of the so-called Equal Rights Statute with some of "its many consequences."