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# ANOTHER VERSION OF THE LEGAL STATUS OF WOMEN IN WISCONSIN

By MRS. JULIA B. DOLAN\*

The three articles dealing with the Legal Status of Women in Wisconsin, appearing in the *Marquette Law Review*, in February, April, and June, 1930,<sup>1</sup> reviewed the legal progress of women in the State of Wisconsin. The writer of these articles compared womens' progress with that of men. He approached from a historical viewpoint, and the writer herein feels that that approach puts the wrong emphasis on what has been gained for women as a class. He makes the statement that "the legal right of men and women, and especially husband and wife, are so closely interlocked that the privileges and disabilities of each must be considered together," yet in the opinion of this writer he seems to disregard this. Of course there can be differences of opinion. The question is whether the differences pointed out by him are differences with a distinction.

The writer concurs that since the admission of Wisconsin as a state of the Union, women have made rapid strides in obtaining legal rights; and is in accord with the statement made in the previous article that our legal position today is far more advantageous than at that time. But the writer also feels that the present legislation pertinent to this subject is not abreast of the times, and that society, and present economic conditions, demand, that in justice to women and in justice to the family, constructive efforts to modernize this legislation be made. To quote words of Justice Winslow, "It is not because women ask it, nor because man's gallantry prompts it, but because justice demands it."

Practically, the identical homestead and dower rights which were

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<sup>1</sup> Vol. 14, Issues 2, 3, 4. The articles referred to were written by Claude B. Stout, a member of the Milwaukee Bar (Published in Vol. XIV, Nos. 2, 3, 4 *Marquette Law Review*). They have been generally recognized as the best and most complete summary of the laws of Wisconsin respecting the legal rights of women as a class. In view of Wisconsin's leadership in the matter of legal recognition of women's equality with men while at the same time recognizing the necessity of special protection to women because of the peculiarity of their economic position in the marital state, his articles have been generally acclaimed by women as a clear-cut brief to be used in all their activities and discussions. They have been of great assistance to the leaders of that great body of women who believe that they should not throw away their privileges made necessary by the facts of their marital status for absolute legal equality as contended for by some women.—Editorial Note.

H. WILLIAM IRHIG.

part of our law in 1849 are in existence today. Women enjoyed a dower right in one-third of a husband's property 81 years ago, as they do today. It is true that change has been made as to the division of this property on her death as well as giving her the one-third outright instead of the mere benefit of it; but the important point to women is that 81 years ago our lawmakers saw fit to award the wife the use of one-third of her husband's property on his death, as compensation for her companionship, work and labor, and effort in caring for the home and bearing and rearing their children. Yet, when women, in 1931, four score years later, contend that such apportionment is unjust and insufficient, they are censured by some for demanding more legal rights, and for failing to appreciate what the law has provided for them. In the writer's opinion economic conditions in four-fifths of a century, have altered to such an extent that women are justified in asking for a change and an increase commensurate with the times. In the writer's opinion, the development, training, education, and the general advancement of women, entitle them to greater consideration as man's companion and homemaker. A wife is far more valuable to man today than in 1849, from every conceivable angle. Marriage is no longer the only career open to women. Practically every known field in business and professions include women in its ranks. So that today, when a woman enters marriage, we have not the same situation as we had in 1849. She is, in many cases, relinquishing a comfortable and independent income, or a promising career, in exchange for the cares of a home and family; and, all without compensation, under the law, save her support, and absolute necessities. Certainly, the tremendous change which has attended woman's position in the world, warrants the careful consideration of our legislators.

What has just been stated is applicable to the homestead law. In 1849 women enjoyed homestead privileges. While there have been some amendments in the law since that time, the true spirit and intent of the law was then as it is today. So that if persons agitate for changes, it is only because they believe to do so will elevate the position of the modern married woman to that which they believe is commensurate with the times. Her position today is so far removed from her status in 1849 that it is unbelievable that objection should be raised by anyone to the modernization of laws relating to her legal status. Other things in our world have progressed with the transition attending the passing of the years—the scale of living, standard of education, etc., but when an attempt is made to modernize legislation to justify the present marriage relationship from the woman's angle there is a hue and cry that the proponents of such changes are becoming unreasonable.

This paper will be limited to a discussion of the previously referred to articles from a technical and legal standpoint. The writer contends that throughout the articles a construction is placed on statutes and cases cited, which gives the reader and student an incomplete viewpoint of the law. The writer has selected those points which she feels are most outstanding in that respect, and will attempt to convey to the reader the validity of her contention.

Among the significant privileges enjoyed by women, the author of the previous articles lists and elaborates upon the wife right to insurance. Page (121). He dwells at great length upon a definition of Chapter 158, Laws of 1851, and the subsequent amendments, and on the great benefits derived by the wife under it. At the outset, we may say that altogether too much emphasis is placed on the supposed advantages women enjoy under this law, and that an examination of the law will convince the reader that the situation is far less favorable than it appears. In the first place, the choice of carrying insurance rests entirely with the husband. Whether the protection which the insurance affords is needed or not, the wife has no legal remedy to compel the husband to contract for insurance. If he does carry insurance, the wife is entirely dependent upon her husband paying the premiums. If he cannot, or refuses to pay the premiums, the policy lapses, and the wife loses whatever interest she might have had as beneficiary. Insurance is not classified as a "necessity" in the law, and if the husband chooses not to continue the policy, the wife has no legal or equitable remedy, and finds herself in the same position as any ordinary beneficiary of an insurance policy. The insurance is thus under the dominance of her husband, and subject to his wishes and his pleasure. The privileges and advantages provided for women by Section 246.09 of the Statutes of 1929 allowing her to insure her husband for her own benefit, in the opinion of this writer practically inure to any beneficiary under an insurance policy, whether man or woman.

The previous articles place emphasis on Section 246.11, "which permits the married woman beneficiary with written consent of the person who effected the insurance, to assign, encumber or otherwise dispose of any interest she may have in such a policy." *The written consent of the husband, (if he be the insured), would be a condition precedent to any transaction the wife might make, so that the privilege which the statute attempts to give her is negligible. Of course, it is still her husband's property to all intents and purposes, and if any assignment or encumbrance were made in this writer's opinion she is in reality nothing more than the agent of her husband. While it is true that "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 the husband's creditors or the control of the executors or administrators of his estate," yet the same rights and privileges inure to every beneficiary of an insurance policy. Regardless of the claims of his creditors, or the condition of his estate, if a man leaves an insurance policy which designates his brother or father or son as beneficiary, that beneficiary has the legal and equitable right to claim the proceeds of the policy without restraint or interference by the insured's creditors, administrators or executors, except, of course, where fraud is an element, in which case the rights of a wife would be similarly affected subject to the provisions of section 246.09 of the statutes.

The case of *National Life Insurance Company of the U. S. vs. Brautigan*,<sup>2</sup> confirms the writer's objection to the law. Where the right to change the beneficiary is reserved, the insured is permitted to change the beneficiary, even though the same be a married woman, if done in conformity with the terms of the policy. It follows that a married woman who is named as a beneficiary finds herself in no more favorable or superior position than any other person named as a beneficiary, *where her husband reserves the right to change the beneficiary.*

The previous writer's version of the case of *Christman vs. Christman*,<sup>3</sup> does not present a complete picture to the reader. To make my point clear, I will briefly present the undisputed facts: A married man had taken a policy on his life in favor of his wife, reserving the right to change the beneficiary. Twelve years later the wife obtained a divorce. The husband died testate several months afterward, bequeathing the proceeds of the insurance policy to certain relatives. He never made application to the Insurance Company, however, for a change of beneficiary. The court held that, inasmuch as the insured had not strictly complied with the express terms of the policy in changing the beneficiary, that the wife, even though divorced, was entitled to the proceeds. The previous writer goes on to say: "\* \* \* 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." This is an incomplete conclusion; *not alone the right of the woman in such a case, but the right of any beneficiary under an insurance policy, whether man or woman.* A beneficiary of an insurance policy cannot be divested of his rights by will, or in any other way, unless the change is made in strict conformity with the provision of the policy. The provisions of the policy will govern.

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<sup>2</sup> 163 Wis. 270

<sup>3</sup> 163 Wis. 433

Great emphasis is placed on the wife's testamentary freedom, (pages 123-124.) The previous writer makes a point of the fact that woman enjoys full testamentary disposition over all her separate property, whereas the husband's right to make his will is restricted by her homestead and dower rights and the widow's right of election, which he point clear, I will briefly present the undisputed facts: A married inquria, because of the fact that this "exclusive privilege" is an absolute necessity. Without this protective statute our homestead and dower laws would be a nullity. A husband's will could void the law. The previous writer does not deny nor discuss the rights of the wife to such protective legislation; nor the fact that the husband's accumulations are in the average case made with the aid and assistance of the wife. Much of the differences of opinion on these questions is due to the different case examples in the minds of different writers when treating this question. The law gives a wife the right to nothing but support during her husband's lifetime, but decrees that as her compensation for services and consortium during her wifehood she be awarded one-third of her husband's property upon his death, and her homestead rights in the home of the parties. The question of the inequality in various cases of such an apportionment will not be treated in this article. Aside from that, however, the reader can comprehend the indispensability of the section on widow's election (Section 233.13), and why it is necessary to refer to this statute not only as an "exclusive privilege," but also as an "absolute necessity."

On page 125 the question of "Heirship Rights." is discussed. Mention is made of the fact that where a husband dies intestate leaving no issue the widow becomes heir to all his property, thereby cutting off all of his relatives, including the mother-in-law, in favor of the widow's blood relatives on her subsequent decease as an intestate. Indisputably, the same would be true if the wife died intestate, leaving no children. The husband would become her sole heir, cutting off the wife's surviving relatives, including the mother-in-law, in favor of his own blood relatives in the event he subsequently died intestate. Again, the former article puts emphasis on the fact that the husband enjoys no right of curtesy where the wife dies intestate, leaving children by a former marriage, not mentioning the fact that, usually, where a wife has a separate estate which has not been consumed in purchasing the necessities and luxuries of life, the husband had no part in the wife's separate earning, or her acquisition of property by a previous marriage; whereas, on the other hand, the wife generally may be considered to have assisted the husband in his accumulations. As a "privilege," the previous writer points out the fact that a married woman of eighteen years and upwards may bar her dower in real estate; that she may

make a will; and that the law will release her on attaining the age of eighteen years, if married, from the custody and control of her guardian. Much space could be devoted to showing that these "privileges" can be in many cases very much of a detriment. Granting the technical "privilege" it may be exceedingly advantageous to the husband for his youthful wife of eighteen years to have the right to bar her dower and to be free from control of a guardian. The youthful husband gets greater practical protection than the adolescent wife due to the voidability of his acts, and far from being favorable, women are conscious that these "privileges" are frequently detrimental.

The writer concludes that with the passage of Chapter 99, Laws of 1881, the wife's rights in the matter of being permitted to sue for injury to her person and character have been materially increased to her benefit. The fact still remains true, however, that while the husband may sue for damages for loss of his wife's consortium, companionship and services, (where she has sustained personal injuries), yet the wife has no right to a similar suit except indirectly through the husband or his estate obtaining compensation for his loss. This manifests that the law recognizes the right of the husband to the services of the wife, but recognizes no corresponding right to the wife to the services of the husband.

The previous writer makes a point of the fact that the husband's right of curtesy in his wife's separate estate has been curtailed, disregarding the fact that the husband usually had no hand in the accumulation of this estate, or that it may be an inheritance, or individual earnings to which he contributed nothing. It is admitted that there is an apparent inequality between the bare provisions for dower and for curtesy but it is expected that in normal marital relations a wife with the ability to gather or hold an estate of moment will use equal ability in disposing of it. On page 138, he portrays the case of "a man of business ability marrying a woman with children and who had a separate estate, supporting them for years, paying off a mortgage which would otherwise be foreclosed, and should she die without making provision for him in her will, her ungrateful offsprings can turn him out in his old age in abject poverty." A very, very extreme state of facts, and difficult of reconciliation. Be that as it may, the law provides the husband with ways and means of protecting himself in such predicament. In the first place, we might mention that the man in such a case would have original choice as to his actions. Further, if he invests money in enhancing her property, he can protect himself by receiving a mortgage on the property as security for his investment. And there are many other methods of preservation open to the husband which are too

obvious to enumerate if his actions cannot be classified as voluntary paymentst.

The reader's attention is called to the case of *Munger vs Perkins*,<sup>4</sup> quoted on page 139. The previous writer's statement of the case makes it appear that the wife perpetrated a fraud. To clarify this, we submit a brief statement of the facts. It appears that the wife in this case joined with her husband in a deed conveying certain property to their daughter. The consideration for the deed was payment of \$100, and an agreement on the part of the daughter to support the parents during their lifetime. Later, bankruptcy proceedings were instituted against the husband, and an action was commenced to set aside the aforementioned deed as fraudulent and void as to the creditors of the husband. The creditors were successful in voiding the conveyance. The wife thereupon claimed her dower rights in this property, and the court held that she was entitled to the same, on the ground that the conveyance to the daughter having been set aside as fraudulent as to the husband's creditors, she would thereupon be revested with such rights. The previous writer on page 139, makes this statement: "Even though she (referring to the wife) 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." It does not appear that the wife in this case was a party to a fraudulent transaction. In good faith she parted with her dower right by a conveyance to her daughter, for a valid consideration, to-wit, the agreement by the daughter to support the parents during their lifetime. When the creditors of the husband stepped in and succeeded in having this deed declared void, as affecting their interests, the consideration for her having parted with her dower rights was annihilated. There being no consideration for her participation in the conveyance, the conveyance, of necessity, fails, and she still retains her dower rights. As to her husband's creditors, she never parted with her dower rights, and it would be inequitable to divest her of them.

On Pages 141-142, the matter of the husband's liability for his wife's necessities is discussed. The previous writer quotes from the case of *Warner vs Heiden*,<sup>5</sup> "What in general constitutes necessities which a husband is bound to furnish his wife?", declaring 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 financial abilities." Certainly, the husband can find no cause

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<sup>4</sup> 62 Wis. 499

<sup>5</sup> 28 Wis. 517



for complaint, as it is not a question of what the wife wants, but what the husband is able to provide. The wife plainly is receiving no favoritism from the law in this respect. That previous writer mentions the fact that "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." Undisputably, in the opinion of this writer the law should give her little less. The reader should note that this is true "*where the wife has no funds.*" As a general rule, and in the average case, all that the husband is required to pay is \$25 to his wife's attorneys, and the balance of the costs of the divorce suit are borne by her except as is ordered by the court in the order of the final disposition of the action. Of course it is disagreeable for a husband to be sued for divorce and to have to pay for what may to him seem the unreasonable attitude and handling of the case by his wife's attorney, who is usually a man. One may sympathize, but then there is his wife's viewpoint also. On page 144, to again quote: "\* \* \* 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." May we call attention to the fact that many of those seeking equality legislation are attempting to do away with the pledging of the husband's credit?

The previous writer, on Page 145, suggests the remote—it may be hoped, case of a husband, who in a spirit of generosity, on purchasing real estate, causes the conveyance to run to the wife. The property immediately becomes hers, and the poor husband is left in the cold. And, that writer adds "what the wife gets she may keep." It is to the point to reply that a man can purchase property and cause the deed to run to his mother or brother or sister, and if that individual wishes to shut him out in the cold he or she can do so, possibly easier than could the wife. It is a well known principle of law that no trust can be impressed on real estate under such a state of facts. If the wife purchased real estate out of her individual estate and "in a spirit of generosity" caused the deed to run to her husband, that would make him the sole owner of the real estate, and all that the law would give her would be a dower right, *one-third of the fee on his death*—the remaining two-thirds going to his heirs, or devisees.

In reference to the assignment of the husband's earnings, and household property exempt from execution, on Page 146, to again quote: "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." These statutes

were enacted chiefly and primarily for the protection of the family, and secondarily for the protection of the wife and husband. Moreover, the statutory allowance of \$60 per month, with \$10 additional for each child, for practical purposes is negligible, and affords insignificant protection for the family. The exemption on household furniture is extremely meager, and is substantially what was allowed a family in 1849. The times have changed to such an extent as to render this "protection" almost a nullity.

As to the protection of Women in Industry, many women will dispute whether this is protection or discrimination. The National Woman's Party contends that these "protective measures" are discriminations; that they prevent women from entering the competitive market on an equal basis with men, and deter them from advancement in their work and from engaging in many gainful occupations. Primarily, the purpose and intent of the Industrial Laws, if the basis they are sustained on by the courts is taken, is for the security of future and unborn generations, rather than for the protection of women. Men, too, get their full share of protection under our Industrial Laws. "The supervision over industry exercised by the Industrial Commission for the benefit of women is far reaching." Many women are inclined to think that it is too far reaching for the best interests of women.

In discussing "Property Rights of Husband and Wife," (Page 149), the previous writer cites the case of *Helander vs. Wogesen*.<sup>6</sup> In this case, a man by the name of Wogesen entered into a written contract with the plaintiff to sell the plaintiff his farm, which included his homestead, and certain personal property, including certain crops, for \$11,000. The plaintiff paid as earnest money the sum of \$1400. *The defendant's wife did not join in this contract of sale.* Within the time specified by the contract, the parties met to complete the transaction. *The defendant's wife refused to join in a deed unless they were paid more money for the property.* Finally, plaintiff agreed to pay them \$700 additional, and the deal was closed. The defendant, between the time of the signing of the contract of sale, in August, and the closing of the deal, the following January, had taken certain crops from the farm. After the deal was consummated, plaintiff sued defendant for the value of these crops. The court held that the original contract of sale between plaintiff and defendant, entered into in August, was void, because it had not been participated in by the wife; that the first valid transaction between the parties was in January, when the deal was closed, and title passed, as at that time defendant's wife joined in the transaction. Therefore, the previous contract of sale being void,

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<sup>6</sup> 179 Wis. 520

any crops taken by the defendant from the property were his, and plaintiff could make no claim for their value. The decision is reasonable and just, although it may have been hard, and necessary to protect the wife's interests. Otherwise, a husband could, without consulting his wife, enter into a contract to sell the homestead of the parties, and the wife would be obliged to convey because of such agreement. Had the decision been different, the wife's homestead rights would have no adequate protection.

The previous writer refers us to the case of *Henon vs. Stone Co.*<sup>7</sup>, stating with reference thereto, "Should a husband attempt alone to deed the homestead, his deed is not validated even by the subsequent death of the wife without children." Briefly, the facts were these: A husband executed a mortgage on his homestead while he and his wife were living apart, the wife not joining in the encumbrance. On the husband's death the wife enjoyed her homestead rights, receiving the rents thereof until her death. The question was raised as to whether the mortgage was valid because of the fact that the wife was living apart from her husband when the mortgage was executed, thereby dispensing with the necessity of her signature to the instrument to make it valid. The court held that, inasmuch as the marital status of the parties continued to the husband's decease, the wife, even though living apart from the husband, would be a necessary party to the validity of the mortgage. The court said: "The statute declares that a mortgage of the homestead by a married man shall not be valid without the signature of the wife to the same; and, as we have said, the land embraced in the mortgage was occupied as a homestead by the husband when the instrument was executed, and the marital relation existed between him and his wife. The disability of the husband was not removed because the wife had voluntarily left the homestead and lived apart from him. In contemplation of law, the domicile of the husband is the domicile of the wife; his homestead is her homestead; and its character is not changed because the wife, for a sufficient reason, or for no reason, has seen fit to leave it and live separate from her husband."

While a wife has the right to sue for alienation of her husband's affections, she, nevertheless, is not entitled to sue for her loss of his services, nor has she the right to sue for damages for loss of consortium. "\* \* \* to the woman," the previous writer says, "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 reader will agree that such reason-

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<sup>7</sup> 72 Wis. 553

ing is far fetched. The husband is permitted to sue for services of his wife, but no such right is given the wife.

The prospective husband undeniably can find no cause for complaint because of the Eugenics Law, which applies to him but not to his prospective bride, or claim that he is discriminated against. Considered from a practical standpoint, the husband's burden is negligible. The Eugenics Law, unfortunately, is so poorly enforced in the state of Wisconsin that it is virtually nullified. The prospective husband can claim very little imposition upon himself, hardly more than the \$2.00 fee he pays his doctor for a certificate. It would be far better for society if the Eugenics Law were properly enforced, and that the true spirit and intent of the law were observed.

The previous writer cites the case of *Dupont vs. Jonet*,<sup>9</sup> bringing out the facts that an elderly widower, and the father of seven adult children, married, and caused the deed to certain of his property to run to himself and wife jointly. Both husband and wife were at a later time overcome with gas, the wife living a day longer than her husband. "The wife," it is pointed out, "took the entire real estate by reason of the joint conveyance, which carried the right of survivorship." There is not added that the law would be equally favorable to heirs of the husband, were he the one to die last. Had the husband lived a day longer than the wife his heirs would take the entire estate, leaving her heirs out entirely. Citing further, "The result is that a husband may give his entire property to his wife and the heirs cannot complain. Again the wife of persuasive qualities over her husband scores to the benefit of her heirs over her husband's children who may have assisted materially in the accumulation of his estate." In the case cited immediately above, (*Dupont vs. Jonet*, 165 Wisconsin 554), the fact that the husband caused the title to his property to run to himself and wife shows conclusively that it was his intention to give this property to her as his survivor. Why should his heirs have any voice in this property during his lifetime, and what right of complaint should they be entitled to? And if there are persuasive and designing women, it may be asked whether there are not as many persuasive and designing men. If the beguiled widower gives his all to his second wife, to the detriment of his children, may it not be said that there are as many gullible and inexperienced widows who are captivated by middle aged Romeos who succeed in parting them from their money, "to the detriment of the poor widow's children who may have assisted materially in the accumulation."

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<sup>9</sup> 165 Wis. 554

Let us call the reader's attention to the case of *Friedrich vs. Huth*,<sup>10</sup> which involved these facts: A wife inherited certain real estate from her mother. The title to this real estate was transferred by the trustee of the estate to the wife and her husband jointly. Upon her death, the husband succeeded to the entire title, as the surviving joint tenant. The executor of the wife's estate brought an action in equity to recover this property of the husband, attempting to impress the real estate with a trust in favor of the wife's estate. The court held that the husband, being a joint tenant in the deed, took the entire real estate as the survivor, and that no resulting trust was created in favor of the wife's estate even though she had paid the consideration. The court held that the wife having had full knowledge of the form of the conveyance at the time it was executed and having made no objection thereto, no trust could result.

Far from being abused in the matter of divorce, in the opinion of this writer, the husband receives very fair and equitable treatment from our courts. The allowances and privileges given the wife are a minimum, and in many cases the wife has difficulty in enforcing even this minimum.

A point is made of the fact that the statutes provide that a divorce shall in no way affect the right of the wife to the possession and control of her separate property. While a wife may have obtained her separate property from her husband, if in most cases her husband is not the source of such property, this law is reasonable. Why should a wife's separate property be affected by a divorce? The previous a wife's separate property be affected by a divorce?

In *Westerlund vs. Hamlin*,<sup>12</sup> (cited on Page 157), the previous writer omits to add that if the positions of husband and wife were reversed here that the husband would have the same advantage the wife enjoyed. A divorce decree in this case was entered to the effect that the receiver of property held jointly by the husband and wife pay the wife \$300 per month. The husband died before the final divorce decree was entered, leaving a will disposing of the property. Under Section 247.37, the wife took title to the entire property by virtue of the joint tenancy, because the statute specifically provides that a divorce judgment is not effective for one year. The ruling of the court that the wife take the property as survivor was made not only because she is a wife, but because of this statute. If the husband had occupied the position of the wife in this case, he would, under this statute, have been accorded identical treatment.

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<sup>10</sup> 155 Wis. 196

<sup>12</sup> 188 Wis. 160

The previous writer makes a point of the fact that the case of *Ashby vs. Ashby*,<sup>13</sup> holds that the Statute of Limitations does not apply to judgments for alimony. He says, "Thus a husband gains no refuge within any Statute of Limitations by his failure to make 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." No one would have us believe that he would encourage a husband to circumvent payment of alimony and that he should have some sort of "refuge" from such payment? However, alimony being an equitable incident of divorce jurisdiction, courts consider circumstances as to why an ex-wife allows alimony to go uncollected for long periods, and if it is found that she spurned what is ordered or decided against assistance from a husband due to a decision to rely on herself the courts will hold her estopped as to accrued alimony and give effect to her intentions as the part alimony. There are too many men today who, aggrieved by a court's decision, or for some other personal reason, make every conceivable effort to avoid payment of alimony, however just the court's order might be. To give them further leeway by holding that as a matter of law rather than equity an alimony judgment may be outlawed by the Statute of Limitations is inviting nothing but trouble, and would only serve to increase the problems which burden society, of alimony and divorce, and enforcement of law and court orders, and would only serve to increase our too numerous contempt actions, and the unsolved problems of divorced women without means of support for themselves and children.

The case of *Davis vs Estate of Davis*, 167 Wisconsin 328, cited by the previous writer, (Page 160), gives no advantage or concession to the wife. To make her point clear to the reader, the writer will briefly restate the material facts: A man named Davis married one, Naomi, who abandoned him three months later. She entered into marriage with another six years later, and had ten children. Davis died testate forty-three years after their marriage, and Naomi, claiming to be his wife, claimed a widow's share of the estate. The final ruling of the court was that, inasmuch as Davis had never applied for a divorce, and had never availed himself of his legal remedies, Naomi still remained his wife. The previous writer after a recital of the facts, goes on to say: "Thus \* \* \* 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 wife

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<sup>13</sup> 174 Wis. 549

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." The decision rendered by the Supreme Court in this case was not made because Naomi Davis was a woman, but because she was married to Davis and was never divorced by him. If Davis had deserted her, under an identical state of facts and Naomi had died intestate, he could come in and claim his right of curtesy, *because of the fact that their marriage had never been legally dissolved*. A marriage, once consummated, remains a marriage until legally dissolved, and merely the acts of the parties, *without legal dissolution*, will not amount to such a repudiation which can be recognized by the law as terminating the marriage union.

Referring to the case of *Estate of Liesenfeld vs. Liesenfeld*,<sup>14</sup> the same arguments may be applied.

This writer takes exception to the previous writers version of the case of *Pfingsten vs. Pfingsten*,<sup>15</sup> (Page 161), particularly to the statement that "the husband had been persuaded by his wife to deed the homestead worth \$13,000 to her," and the statement that "The lower court, Judge Quinlan presiding, properly refused her any alimony." The writer believes there is nothing in the case to indicate that the husband had be persuaded to deed the homestead to the wife. So far as appears to this writer from the records of the case the deed was a voluntary gift by the husband to the wife. As to Judge Quinlan's properly refusing to award the wife alimony, the fact that the Supreme Court held Judge Quinlan's version of the statute incorrect shows that the lower court improperly refused to award the wife alimony. In this case, a husband was granted a divorce on the ground of the wife's adultery. The wife had received sole title to the homestead of the parties from her husband some time previous. The lower court restored the property in its entirety to the husband and refused to grant the wife any alimony or division of property. The Supreme Court, in its opinion, among other things, makes the statement that property possessed by husband and wife is in many cases the result of their joint efforts, so that, equitably, a part of it should go to each, not excluding the wife, necessarily, because of her fault being adultery. "The division may be made according to the equities of the case, as regards the origin of the possessions, and the relations between the parties be completely ended as in case of a separation without any

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<sup>14</sup> 196 Wis. 7.

<sup>15</sup> 164 Wis. 308

jurisdiction to award alimony." The Supreme Court, in construing the statute, held that an equitable division and distribution of the property of the parties might be made, even though the wife was guilty of adultery. Had not the Supreme Court given a reasonable construction to the Statute, it would, of necessity, have been obliged to permit the wife to continue to own the homestead of the parties, as, under Section 2342 of the Statutes, in effect at the time of this decision, a wife may take title to property from her husband to hold it as her sole and separate estate; and under Section 2372 cited in said case, no judgment of divorce can effect her right to such estate, nor can the court in such action divest her title thereto, except upon a division of property between the parties as provided in Section 2363. (Section 2364 provides that alimony cannot be allowed the wife where divorce is granted because of her adultery, *but the division and distribution of property may be made even though the divorce be granted for such cause.*) The Supreme Court's decision in this writer's opinion was not based as the previous writer indicates, because "hope is held out to the worst of criminals," or "because the court refused to permit a wife to be turned out in the cold," but for the reason that the reasonable interpretation of the statute made its ruling imperative.

Brenger vs. Brenger,<sup>16</sup> cited in the previous articles (Page 162), is most favorable to the husband. Where the joint earnings of both parties were merged, and title placed in the wife, the court ordered an equitable division made between the parties, instead of granting merely an allowance to the husband out of the proceeds of the property.

Briefly restating the pertinent facts of Towns vs. Towns<sup>17</sup>: A judgment of divorce was awarded the husband, providing that he pay the wife as a complete and final division of the estate, the sum of \$1,000, and \$1,400 in monthly payments of \$50. *After the term of court had ended*, the husband sought a revision of the judgment. The Supreme Court held that a final division having been made the wife, and the same becoming her separate property, *its allowance could not be modified after the term in which it had been awarded*. This ruling was made because of the fact that the husband sought to have the judgment revised *after the term of court had ended*. Once a judgment of divorce is entered and made final and absolute it cannot be modified under such a state of facts. The rule is undisputed that, except for the power given the court to open a judgment within a year after thereof, for mistake or surprise, a judgment in a divorce action, making a final division and distribution of the property, cannot be reviewed or altered, after the term of court in which it was rendered. This rule is repeated in Zentzis

<sup>16</sup> 142 Wis. 26

<sup>17</sup> 171 Wis. 32



vs. Zentis,<sup>18</sup> Lally vs. Lally,<sup>19</sup> Thompson vs. Thompson,<sup>20</sup> and Webster vs. Webster.<sup>21</sup> In commenting on the case, after a recital of the facts, the previous writer says: "As a consequence the divorced husband was obliged to continue making the payments on the \$1400 to this woman, regardless of her having developed into a jail inmate, a drunkard and otherwise bad." The court's ruling was based on the law which holds that a judgment cannot be modified after the term of court has ended, not because the court was inclined to favor the wife. The legal question involved was one of procedure, and did not involve the merits of the husband's charges.

This writer differs with the previous writer as to the proper version to be given the case of Estate of Fox.<sup>22</sup> After a resume of the facts, he makes the statement that "as between the man and the woman before the law the latter gets the break of the game." That this statement is without merit is the opinion of this writer. *The jury made its findings to the effect that the plaintiff believed she was legally married, had acted in good faith and did not know the legal effects of a divorce from bed and board, and on the findings of the jury the award was based.* It is an elementary principle of law that unless the findings of the jury are contrary to the great preponderance of the evidence they shall stand. The court's ruling was not because they wanted to "give the woman the break of the game," but because of this rule of law. Where the jury found these to be the facts, they remain as decisive in the case regardless of the charges alleged by the other side; and under these circumstances the wife should certainly be entitled to her claim against the deceased's estate.

Another comment made by the previous writer, on page 165, is "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." This presumption is for the benefit of the family, and not alone for the wife. It is imperative that society, and future generations, be accorded this presumption, in order that the existing order of things may harmoniously continue. Would one contend that this presumption be otherwise, or that there be no presumption and that it be established by evidence when the issue is raised?

At the conclusion of his second article, the previous writer extensively and elaborately lists the advantages which women in Wisconsin enjoy, superior to the privileges accorded the members of the male

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<sup>18</sup> 163 Wis. 342

<sup>19</sup> 152 Wis. 56

<sup>20</sup> 73 Wis. 84

<sup>21</sup> 64 Wis. 438

<sup>22</sup> 178 Wis. 369

sex. There are a few statements made therein, however which the writer will take up in the present paper.

In the sixth point (Page 167) he lists as a superior privilege enjoyed by the wife is the fact that "a husband cannot mortgage the exempt household goods without her (the wife's) consent, while she may own such property free from any such restrictions on the part of her husband." As a primary argument, we may say that the wife's control in this respect is limited to only the exempt household goods, which is a negligible amount. The home is the very foundation of society. If the wife were not given this protection, how long would the home, and society exist? How many irresponsible fathers and husbands, wearying of family burdens and responsibilities, would, if they could, dispose of the household effects, and disrupt the domicile? All too many of them. Then there must be remembered that this restraint upon the husband is a protection to him against the urgent demands of his creditors in as much as most families have little else than their exempt personal property and homestead. It is more a disability working against a family's creditors than against any member of the family. Should the wife, who is confined to the home, her earning power curtailed, receive no protection from the law? The husband has the privilege of mortgaging and encumbering his business and assets outside of the home (real estate excepted) without the consent of the wife. Our lawmakers also recognized the imperative necessity of withholding a portion of the household effects from the exclusive direction of the husband, for the safeguarding of the family and home, foreseeing these dire possibilities.

His tenth point, (Page 167): "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." No element of "pity" enters into a court of equity, which court has jurisdiction of divorce actions. It is a matter of right, and of restoring the parties to their status quo, of doing justice. If the husband has conveyed property to the wife for which there was no adequate consideration, the court, on a divorce, will make equitable and adequate distribution. If it is presented to the court that the wife transferred property to the husband for no adequate consideration, the identical treatment will be accorded. It is equity and justice, not "pity" which gives to both parties their just dues. Of course, as he says, in cases other than divorce a husband cannot obtain the return of property he has transferred to, or taken in his wife's name.

There is listed as a special privilege, in No. 14, Page 167, the fact that "the widow is obliged to pay an inheritance tax only on the excess of property of the clear value of \$15,000 transferred from the hus-

band, while he is obliged to pay such tax on the excess of the value of \$2,000 transferred to him from her estate." There can be no dispute that if the machinery of our government is to operate and function it is only by means of taxation. Would it be just to tax a widow's inheritance to the same degree as that of the widower's? This writer believes not. The widow, on the death of the husband, loses her means of support. She is, in the majority of cases, unable after years spent in the home, to enter into a heavily competitive market and earn money for sustenance. The husband, on the contrary, usually loses no source of revenue with the death of his wife although he may be put to additional expense to provide his family with the curtailed heart and hand of his missing helpmate. His earning capacity is not curtailed or diminished. From an economic and practical standpoint, the burden of taxation should be lighter for the person who will suffer the greater loss and hardship, than on the individual whose financial status undergoes little or no change.

In point 16, (Page 168), the previous writer says: "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." While it may be true that a judgment of divorce will generally not disturb the separate estate of the wife for the husband's benefit, yet, it is also true that where a wife has a separate estate, that fact, and the relevant issues, will vitally affect the division which the court will make between husband and wife. If the wife's income is substantial, she will generally be awarded a smaller share of the husband's estate or a smaller sum in alimony than under circumstances where she is possessed of no separate estate. The court takes all these facts into consideration in making the award. Fortunate indeed is the husband who wife has a separate estate, for it is to his benefit and advantage, as less alimony will be meted out to her. As to "his" property being divided for the wife, it certainly is not equitable to refer to the property of husband and wife as "his." In the majority of cases, property and holdings of husband and wife are accumulated only through joint efforts and mutual denials, and the husband alone should not be given the entire credit for the result. Reverting to the economic situation, where a wife is possessed of no separate estate, some provision must be made for her by way of alimony, as well as on the death of the husband, for there is a complete termination of association. There must be some recognition by the law of the wife's services to the home.

In number 24, (Page 168), he says: "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." The husband receives the equivalent of the "mother's pension", by government aid where it is necessary this writer believes. Where the woman is a widow, she is chargeable with the care and support of her children. If she fails in her duties in these respects, she is deprived of the custody of her children. Hence, while the father is not relieved of the duty of support to his children, neither is the mother free from such responsibility.

In concluding Article II, the previous writer conveys a warning to the women of Wisconsin to the effect that in their agitation to obtain further rights they may find themselves at a disadvantage through the backward swinging of the pendulum. Women interested in, and agitating for, a change in our present existing domestic relations laws, cannot, nor should not be deterred, because of any such fear. They are agitating only for what they earnestly believe is just, fair and equitable for both men and women. It is their intention to analyze what rights and privileges they now have under our laws, and where they reach the conclusion that they are adequately and fairly treated they concur in upholding the existing order of things. Where they reach the conclusion that they are deserving of greater consideration and privileges, they feel it incumbent upon them to assert themselves. Where they can be convinced that they are permitted greater privileges than are just and equitable, they stand willing and ready to relinquish. Also, they realize that along with the privileges they feel they merit, are necessarily, so-called "consequences" and responsibilities. These they do not intend to shirk or evade. But they should not terminate their efforts to obtain what they earnestly and conscientiously believe are just and equal rights because of the imminent or suggested possibility that legislators may penalize them.

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One of the purposes of the Review is to afford its readers a medium for discussion of timely legal questions. Occasionally differences of opinion will arise, and it is well that both sides have opportunity to be heard whenever possible. Such articles express the opinions of the writers, however, and not those of the Review.—Editor.