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The Legal Status of Women in Wisconsin

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THE LEGAL STATUS OF WOMEN IN WISCONSIN [1]

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THE most remarkable legislation pertaining to women came in Chapter 529, Laws of 1921, now known as Section 6.015 of the Statutes. It is directed at all discriminations against women in its purpose to place them on an equality with the men in all respects under the law. It reads:

"6.015. Women to have equal rights.

1. Women shall have the same rights and privileges under the law as men

in the exercise of suffrage,
freedom of contract,
choice of residence for voting purposes,
jury service,
holding office,
holding and conveying property,
care and custody of children, and
in all other respects. The various courts, executive and administrative officers shall construe the statutes where the masculine gender is used to include the feminine gender unless such construction shall deny to females the special protection and privileges which they now enjoy for the general welfare. The courts, executive and administrative officers shall make all necessary rules and provisions to carry out the intent and purposes of this statute.

2. Any woman drawn to serve as a juror upon her request to the presiding judge or magistrate before the commencement of the trial or hearing, shall be excused from the panel or venire."

Since its passage the Wisconsin Supreme Court has had occasion to refer thereto in the Wisconsin Reports as follows:

First Wisconsin National Bank v. *Milwaukee Patent Leather Co.*, 179 Wis. 117, 119, 120, 121, 125, 126 and 129, a case holding a wife liable as surety on husband's note.

Herro v. *Northwestern Malleable Iron Co.*, 181 Wis. 198, 200, a case holding that the husband is entitled to the same services of his wife as theretofore.

Lloyd-McAlpine Logging Co. v. *Whitefish*, 188 Wis. 642, 646, a case holding that the wife has equal rights of custody of children, as a presumption in the law.

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[1] This article is the third and last of a series of three articles.

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Wait v. *Pierce,* 191 Wis. 202, 203, 209, 210, 218 and 224, a case giving a wife the right of action against the husband for his negligence resulting in her injury.

State v. *Wescott,* 194 Wis. 410, 420, a case pertaining to the right of a woman to be excused from jury service.

Sparks v. *Kuss* 195 Wis., 378, 398, a case holding that a wife is liable on a partnership undertaking with the husband.

Ansorge v. *City of Green Bay,* 198 Wis. 325, a case pertaining to the right of a woman to contract to be discharged as a teacher by a school board on her marriage.

The frequent occurrence is indicative of the influence its broad terms are exerting on the well laid rules that had theretofore defined the status of women.

It was claimed that having attained suffrage, women were still hedged in with discriminations not consistent with the full rights of citizenship. Those favoring the act were not content to amend individual statutes one by one, but demanded a so-called "declaration of rights" or a proclamation of a general "bill of rights to build on."

It may be said with truth that Wisconsin was the first state to attempt to grant absolute equality to the women. The most serious objection lies in that the enactment is blanket legislation that presents numerous problems for future decision. That women have not been insured the rights they desired and that the act was not politic in its failure to accomplish the ends intended is evidenced, in a measure, by the few decisions that have followed its passage. While trial courts have generally followed the long established rules, still questions have been brought squarely at issue resulting in decisions that have reached under the cloak of protection. The question may well be asked: "Did the women of Wisconsin benefit to the extent they were led to believe?"

The well defined policy of the Legislative Reference Library encouraging legislation that shall express in terms so clear that there need be no doubt either in the minds of the court or the people as to the intent, has been set aside in this most flagrant violation of the principle that we have on record. Presumably the act amends many sections of the statutes, and what is far more, sets as naught innumerable decisions of the courts. Just how many none of us know. In attempts to enumerate the benefits, its most ardent defenders have repeatedly been obliged to seek refuge within the term, "It probably does this," or "It probably does that." Able lawyers in the senate argued with great force against the bill, but to no avail. Confronted with the enormous pressure brought to bear, the legislature simply "passed the buck" to the courts in a complete abdication of its prerogative to the judicial branch of the government, and what is far worse, to boards and com-

missions, each of which may render widely varying interpretations. Unless the situation is corrected by appropriate legislation, years will elapse before the court will have opportunity to pass on the many possible questions its broad terms present for solution. Women have been vigorous in denouncing the conservative interpretations courts have taken at times in matters of general welfare legislation. Still, a bit selfishly it seems, to get what they thought they wanted they overrode the principle of distinction between the legislative and judiciary functions of government which sound principles require should not be confused. In one breath this act declares women shall have the same rights and privileges "in all other respects as men," and in the very next goes through the entire gamut in the command to the courts, the executive, and the administrative officers to so interpret the law "unless such construction shall deny to females the special protection and privileges they now enjoy for the general welfare." They want "to have the cake and eat it,"—a thing that cannot be done in the interpretation of law with impartial justice to all men and women alike.

I. The Exercise of Suffrage

This provision added little or nothing for the law that permitted women to vote only at school elections was repealed by the nineteenth amendment to the federal constitution which became effective a year before and which granted suffrage to women everywhere. The revisor's bill, Chapter 15, Laws of 1921, was passed early in the session to effectuate the federal amendment, consequently the insertion in the equal rights act was little more than an idle gesture.

II. Freedom of Contract

This provision is by far the most far reaching in the act. Prior thereto, as has been shown, the married woman's right to contract had been enlarged to include full control of her separate property, her separate business undertakings, her separate earnings and full authority as to family affairs when the husband failed in his duties. It seems to be an established fact that married women are now empowered to contract under *all circumstances.* This, of course, is a valuable right, *but it carries full responsibilities.*

Undoubtedly Section 246.05 which applied only when the husband failed in his duties as such has been enlarged so that the wife can obligate herself, for example, for her physician's services and in other similar respects where she could not theretofore be held liable.

As it is conceded that the prime intent was to place all women, whether married or not, on an equal basis with the men in respect to both civil and political rights, the constructions courts are placing on

the contracts of the *feme covert* follow as a necessary result. One might well ask, "What more right of contract could a married woman ask for than what she had theretofore enjoyed." Of course the married woman was surrounded with some disabilities. Those pertaining to her worked to her advantage as do the numerous restrictions placed upon the husband.

Shortly after the passage of 6.015 Statutes in 1922, the construction of the provision, "unless such construction shall deny to females the special protection and privileges they now enjoy for the general welfare," as applied to the right to contract came in the celebrated case of *First National Bank* v. *Jahn,* 179 Wisconsin, page 117. The court frankly stated at page 125 that "freedom of contract means what it says and that women shall be as free as men to make personal contracts." On page 126 Chief Justice Rosenberry points out that the distinction between the disabilities of the common law applying to the *feme covert* the law aimed to remove were separate and apart from those rights and privileges which women have enjoyed by various statutory enactments under the general welfare and police powers. The dictum may be considered as expressing doubt as to the wisdom of such legislation; however, the decision goes far in holding:

First. That absolute equality of rights and privileges before the law does not destroy the established principle of sex as constituting a classification for laws pertaining to health or morals, etc., and

Second. That the right of contract carries with it the corresponding liabilities.

Hence, the long line of decisions holding that a married woman could not be a surety on her husband's note was over-ruled. Consequently, for the first time, a married woman was obliged to pay the note she had endorsed for her husband as an accommodation endorser, even though her separate estate received no benefit therefrom. What is more, the decision means that, in such case, the married woman is now subject to liability on a deficiency judgment.

Another most important decision followed in *Sparks* v. *Kuss,* 195 Wisconsin, page 378, which held, for the first time, that a married woman can enter into a partnership undertaking with her own husband and consequently be held liable for the debts of such a partnership. The decision is far reaching in that in the early case of *Merchants National Bank* v. *Raymond, 27* Wisconsin, page 569, the established rule that had been consistently followed was that a married woman who possessed a separate estate could engage in a partnership venture with a person *other than her husband,* but that in order to preserve the control of her separate estate apart from that of her husband, as was the obvious intent of the separate property act, it

followed that a wife could not be permitted to suffer the consequences of liability of a partnership with her husband. Married women now need to exercise great care in making such agreements. They will not relish the collection of judgments from their separate estates resulting from the poor business management of husbands with whom they have been inveigled into partnership ventures. The decision is loaded with dynamite.

Antenuptial agreements have been favored where elderly people contemplating marriage have been permitted, before doing so, to enter into agreements respecting their property rights. Having legally done so, the court has not permitted the wife thereafter to alter the settlement. Under the full power to contract, it is believed that the court will, when called upon to decide, hold that a wife may, for the first time in this state, during her marriage, contract freely with her husband in respect to such agreements.

III. Choice of Residence for Voting Purposes

The phrase "for voting purposes" was added to the original bill as an amendment, and of course permits married women to vote in the precinct where she resides regardless of the fact that her husband may reside and vote in another. It was, therefore, a very necessary and proper provision.

It was evidently the intent of the legislature to limit the right the women desired to have to a word in fixing the family domicile to apply to her convenience in the exercise of suffrage. It was, however, believed for a time by some that under the "in all other respects" provision the wife possessed a right to participate with the husband in its selection. But in the late case of *Kruger* v. *Groth,* 190 Wisconsin, page 387, decided in 1926, the court went far in holding that "although the homestead is for the benefit of the family, yet, as *between the husband and wife* he has the right of selection and the power of abandonment." The Chief Justice joined with two other judges in a vigorous dissenting opinion and the decision may not always remain the law. Although the decision made no mention of the rights of the wife under the statute under discussion, nevertheless, it has a direct bearing thereon. It would seem, therefore, that if anything the husband has gained rather than lost as to his rights as to the family domicile.

IV. Jury Service

All doubts that existed under existing laws and the nineteenth amendment to the federal constitution as to the right of women to serve on a jury were, of course, removed by this provision. Modern

women keenly resented the discrimination in not being subject to call for jury service. However, it should be noted that Section 255.02 enumerates more than thirty classes as exempt from jury service. Therefore, the discrimination cannot be said to have been aimed exclusively at the women. In the celebrated debate between Zona Gale and Hon. A. E. Matheson before the Wisconsin State Bar Association in 1922, the argument advanced by the affirmative that women admitted to the bar were not permitted to sit on a jury merely because they were women entirely overlooked the fact that all lawyers are exempt from such service.

V. Holding Office

Here again was an unnecessary provision as the revisor's bill, Chapter 15, Laws of 1921, passed in March, pursuant to the nineteenth amendment to the federal constitution antedated this duplication. Women are now eligible to any office and we now even have women sheriffs. However, under the police regulations of Section 13.13, Subsection 1, the legislature may employ in its service only male persons, due to the unfitness of its unreasonable hours for the employment of women. To be consistent with the spirit of the protective labor provisions, the law makers saw fit to exclude the women from its service. Furthermore the legislature is a separate and distinct department of government having a constitutional prerogative to regulate its own functions with which other departments of the government are loath to interfere. In seeking to force down this barrier the women did not benefit their cause.

VI. Holding and Conveying Property

It is difficult to conceive what more as to property rights married women could ask for than they already have had. No restrictions have ever existed as to the property rights of the *feme sole.*

It is claimed that Section 247.31 which permits courts in divorce actions to appoint a trustee of funds awarded the wife for her maintenance and the maintenance and education of minor children is a discrimination in that no similar provision exists as to the husband. The argument is far fetched for property is not awarded to the husband out of the separate property of the wife except in the rare instance provided by Section 247.27 where the custody of children is awarded to the husband and then only for the benefit of her own children. The court may do so where it is evident that the wife does not possess sufficient business experience, and furthermore, her trustee is obliged to give his bond for the performance of his duties as to the funds to be expended for her benefit.

VII. Care and Custody of Children

Chapter 147, Laws of 1921, published in April, some months prior to the statute under discussion, amended Section 3964 to confer joint guardianship rights as follows:

"The father and mother of the minor, if living together, and if living apart, then either as the court may determine for the best interests of the minor, and in case of_____ the death of either parent the survivor thereof_____ shall be entitled to the custody of the minor and to the care of his education."

Prior to the amendment, it read:

"The father of the minor, if living, and in case of his death, the mother, while she remains unmarried," etc.

It was claimed that the former statute was a discrimination directed against the mother. However, in *Jensen* v. *Jensen,* 168 Wisconsin, page 502, decided in 1919, Chief Justice Winslow said:

"The paramount right of the father to the custody of his children, which was recognized by the common law and by the words of our statute, has become the merest prima facie right, which yields readily when it is shown to be best for the child."

The opinion cited the early cases of *Wesch* v. *Welch,* 33 Wisconsin, page 534 and *Sheers* v. *Stein,* 75 Wisconsin, page 44, and further said:

"The welfare of the child is now the controlling consideration; and with regard to children of tender years, especially girls, preference will ordinarily be given to the mother, other things being equal and she not being unfit."

Thus long ago the rule of the court has consistently given the preference to the mother wherever the interests of the child were promoted thereby.

In *Jensen* v. *Jensen* the former husband sought to have the custody of his minor child taken from his divorced wife on the ground that she was then living with a man under an illegal marriage. However, the court refused to permit him to do so as it was not shown that her unlawful act manifested a depravity of mind or moral unfitness, and it appeared the child was well cared for and had a good home.

Equal care and custody opens the door as to whether the earnings of children belong alone to the father as theretofore, or to the father and mother jointly. The further serious question of practice follows in case the father is not alone entitled to such earnings whether in actions for loss of such services both the father and mother must join

in the action and on recovery to whom the same belongs. If the argument that the mother is now entitled to share in the earnings of the children has merit, then it must follow in view of her enlarged rights to custody that she should be obliged to participate somewhat in the duty of the support of the children.

Heretofore, the father having been entitled to the custody was, in some instances, correspondingly liable for the torts of his minor children, which of course, is not the general rule. The following is an illustration of this exception. In the case of *Halverson* v. *Noker,* 60 Wisconsin, page 511, a father was held liable for damages resulting from shouting and firing of toy pistols by his children on his premises which frightened the team of the plaintiff being driven along the highway. It mattered not that the mother may have supplied the mischievous machines and utterly failed to exercise any restraint whatever over the mischievous propensities of her offspring; nevertheless, the damages were sought from the father. Now, with equal right of custody, why should not a father who is absent from home and has no participation in supplying the mischievous implements be permitted to plead that the liability should be shifted from his to the shoulders of the mother?

Section 319.04 does seem to give the husband superior rights to guardianship in that:

"The father of every legitimate child, if living, and in case of his death the mother of such child may, by last will in writing, appoint a guardian." (See Sec. 10, Chapter 80, R. S. 1849.)

It may now be contended that a mother may, by last will, transfer her equal custody to a person other than her husband on her death.

Chapter 106, Statutes, permits a minor over sixteen years of age to be apprenticed under the circumstances therein provided and that such indentures shall first be signed by the father, if living, and if the father be dead, or legally incapable of giving consent, then the mother may do so. It is claimed that this provision is superceded by the equal custody clause. If so, opportunity is afforded for family dissentions due to the divided parental authority not heretofore permitted.

VIII. In All Other Respects

The term above is so indefinite that mere speculation as to its many possible consequences are of little value. However, there are a few statutory provisions that may be considered as coming within its purview.

Section 247.20 permits the court, in its discretion, to allow the wife, on divorce, where there are no children, to resume her maiden name

or that of a former husband. It may now even be contended that the court is required to restore to the wife her maiden name *under all circumstances.* If so, what names will be taken by the children? If the custody of part are given to the mother and others to the father, are each group to take the names of the parents to whom their custody has been awarded? Of course, the ancient custom requiring the wife to assume the name of the husband "for better or for worse" is a relic of antiquity. Modern emancipation of women has brought complications that even the companionate marriage cannot solve. If the "all other respects" provision is given its broadest construction, then all common law rights are swept aside—even the ancient and hallowed theory of dower.

Regardless of the decision in *Kruger* v. *Groth* supra, this clause seems to leave open some question as to the rights of domicile which the wife may, in some instances, have acquired. At common law, the husband was of necessity given the selection of the family domicile, and if the wife refused to follow, without sufficient cause, such action constituted desertion. However, the rule has not been absolute and has been tempered with justice and mercy for the husband could not unreasonably jeopardize the health of the wife by a change of domicile and thereafter claim cause of divorce on grounds of desertion, due to her refusal to jeopardize her health in following him to a new home. Furthermore, when cause of divorce existed, the wife is permitted to establish a separate residence.

In the case of *Rockwell* v. *Estate of Robinson,* 158 Wisconsin, page 319, a husband, on his own behalf, made a contract to do certain work with the help of his wife. It was held that the amount due therefore belonged to and as recoverable by him and was not "individual earnings" of the wife within the purview of the separate earnings act. It was contended without success that the husband could not alone sue for such services. Under the terms of Section 6.015 it may now be a debatable question whether *Rockwell* v. *Robinson* is the law. Possibly a husband cannot even now make such a contract.

Section 49.02 and following sections provide for relief and support for the poor pertaining to legal settlements and how the same may be obtained, the purpose being to determine when and under what circumstances the burden of caring for the poor may shift from one municipality to another. Subsection 1 provides that:

"A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by the marriage . . ." etc., and Subsection 5, "and every married woman whose husband has no settlement in this state

who shall have resided one year in any town, village, or city in this state shall thereby gain a settlement therein."

Surely the foregoing have given the wife all that could be desired.

It seems that in spite of the "in all other respects" phrase in view of the decision in the *First National Bank* v. *Jahn* case that no greater interpretations will be placed than the legislature intended. It is, of course, far fetched to contend that the well established sections as to dower and curtesy are modified; nevertheless, if women are now equal in all respects, why should not their separate property be subjected to the same provisions and, on divorce, the same rules of division apply to them as apply to the husbands?

It may be that the criminal punishment for abandonment of minor children may hereafter be construed to apply with equal force to the mother who joins with her husband in participation in the crime provided in Section 351.30.

Section 319.14 permits the income of property of a minor who has a father living to be used for his maintenance and education where his needs are more expensive than the father can afford. It may be argued that the separate property of the mother of such an infant may now come within the purview of this section in that mother's separate property should be used for such purpose before that of the infant can be disturbed.

If equal in all other respects, why should Section 238.01 be permitted to go on allowing married women over eighteen years of age to make their wills, while the male must wait until his full majority? Absolute equality certainly permits of such a contention.

Under the *First National Bank* v. *Jahn* case the distinction in the sexes as to the ages at which marriage may take place should be considered as coming within the exception pointed out in the opinion for the general welfare.

Wait v. *Pierce,* 191 Wisconsin, page 202, opened the theretofore closed door to permit a married woman to bring and maintain an action against her own husband for injuries to her person proximately caused by his negligence. Of course, such actions are usually confined to the recovery of damages from insurance companies in automobile accidents. Nevertheless, the rule permits either the wife or husband to sue the other in tort actions as was pointed out in the vigorous dissenting opinion participated in by three justices. The decision which placed a new interpretation on Chapter 99, Laws of 1881, contained the significant statement that

"the rigor of the common law has been greatly relaxed, and both

by decision and statute married women have gradually attained a place of equality with the husband in the marital status,"

and that Section 6.015 has

"modified the rights of the husband and wife as they existed at common law and that it was designed to place them on a basis of equality before the law not only in the particulars mentioned but *in all other respects.*"

The fears of the dissenting judges as to the right of a child to sue the parent in such cases were somewhat laid at rest in *Wick* v. *Wick,* 192 Wisconsin, page 260, which held, on grounds of public policy, that

"an infant under fourteen years could not be permitted to bring an action against a parent for personal injury resulting from the negligence of the parent in an automobile accident."

In *Wallace* v. *Newdale Furniture Company,* 188 Wisconsin, page 205, a young married woman, twenty years of age, became ambitious and, without the approval of her husband, purchased furniture on a conditional sales contract, gave her notes in payment, opened up a rooming house, conducted the venture herself, and collected all the income from the undertaking. The venture was not a success and the couple separated. She then tendered back the furniture in repudiation of her contract on the claim that she was a minor and demanded back the money paid. The vendor thereupon brought suit against the husband on the theory that she became his agent by operation of law to the extent that he became liable for the payment for the property. In the denial of recovery, Justice Jones made the significant statement that "If husbands may thus be held answerable unawares for the business speculations of their wives, there would be some ground for the assertion which has been made in jest, that *the next great revolution must be by married men to obtain their rights.*" This dictum of the court would seem to indicate that it is not disposed to favor a wholesale extension of rights and privileges women may desire to assume they have attained through so-called equality legislation. Although no direct reference was made to the equal rights act under discussion, nevertheless, the language of the court is very pertinent to the modernized status of the wife.

In *Herro* v. *Northwestern Malleable Iron Co.,* 181 Wisconsin, page 198, a husband brought an action for loss of services resulting from the negligence of the defendant. The amazing argument was advanced by counsel for the defendant that under Section 6.015 the

husband could no longer recover for such services on the theory that under the equal rights act a married woman was entitled to *all her earnings.* This wife had been of exceptional assistance to her husband in the operation of his confectionery business besides performing the usual household duties. The court, however, ruled that Section 2343, now Section 246.05, controlled the situation, and restated the statute aforesaid. As a result the husband has the same right to recover for the loss of such of the services of the wife as are performed in the usual household duties and in his business as theretofore. Furthermore, any claims that, under the equality statute, the right of the wife to her services had been enlarged or that, per chance, she had acquired any right to recover from her husband for such services as had been performed for him were set at rest. The decision is far reaching because the wife is relieved of none of the duties she owes to her husband and family as fixed by the separate earnings act of 1872. It may be said that when a man has such a wife he has something, and when he loses her, he has lost something, as the court properly concluded in awarding him the sum of $7,500.00.

In *Ansorge* v. *City of Green Bay,* 198 Wisconsin, page 325, the action of school officials in discharging a teacher on her marriage was held not to contravene the provisions of Section 6.015, she having entered into a contract with full knowledge of the rule and signed the same providing for discharge on her marriage and notice of the termination of the employment. Clearly, it could not be expected that the plain terms of a written contract could be avoided under any rights assumed to be given under the equality statute in view of the broad powers vested in school boards in the employment of its teachers.

In *Aaby* v. *Citizens National Bank,* 197 Wisconsin, page 56, it became necessary to over-rule a part of the holding in *Dupont* v. *Jonet,* 165 Wisconsin, page 554, in erasing another of the time-worn rules of the common law as to which, due to seeming conflict of decisions, some doubt existed. It was believed that where the title to personal property was jointly taken by husband and wife, an estate by the entireties existed under which neither could convey his or her interest apart from the other as was held in *Dupont* v. *Jonet,* supra. Under the reinforced provisions of Section 6.015 and decisions thereunder, it is now clear that "the estate by the entirity no longer exists either in real or personal property" resulting in the holding that a husband may now assign his interest in such a joint fund, in payment of his debt, without the signature of the wife. The decision so held, regardless of the fact that the fund resulted from the sale of a homestead, which under Section 272.20 could be held intact for a period of two years with the intent of acquiring another therewith on the theory

that if a wife can voluntarily dispose of her interest in such an estate, *the husband could likewise do so.* The husband, it seems, as well as the wife, has acquired additional rights under "equality legislation."

It should be noted in view of recent legislation "to remove discriminations against females" that Chapter 4, Revised Statutes of 1849, contained the same provision found in Subsection 2 of Section 370.01, i.e., "Every word importing the masculine gender only may extend and be applied to males as well as females." Consequently statutory construction has never discriminated between the sexes.

In concluding, brief reference is made to the proposed amendment to the federal constitution the National Women's Party advocate that "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction." The founders of the federal plan of government wisely granted definite powers and guaranteed to the people those not therein expressly provided for otherwise. If the women are not to be denied and if this type of legislation must come, it is far better that it come through steps taken in recognition of the sovereign right guaranteed to the states to regulate their own affairs in such matters rather than through federal interference. The reader is referred to pages 192 to 195 inclusive of the proceedings of the Wisconsin State Bar Association for 1922, where the ablest students of jurisprudence in the country expressed grave fears of the dire results likely to follow such an amendment.

Equality of women is not new to the age of the present for in the ancient civilization of Egypt, women, as in matters of divorce, had acquired rights superior to those of the male. As was said in the first article of this series, "the end is not yet," nor has the half been told.