As to the right of a wife to change her residence for voting purposes from the residence of her husband, see 17 Atty. Gen. 489.

6.015, Stats. 1929, does not grant a Chinese married woman the privilege of establishing her residence in the state, independently of the residence of her husband, so as to exempt her from payment of nonresident tuition fees at the university. 18 Atty. Gen. 359.

The legal rights and status of women. Stout, 14 MLR 66, 121 and 199.

CHAPTER 247.

Actions Affecting Marriage.

Editor's Note: For foreign decisions construing the "Uniform Divorce Act" consult *Uniform Laws, Annotated.*

247.01 History: R. S. 1849 c. 79 s. 8, 15; R. S. 1858 c. 111 s. 8, 15; R. S. 1878 s. 2348; Stats. 1898 s. 2348; 1925 c. 4; Stats. 1925 s. 247.01; 1959 c. 595 s. 43; 1961 c. 495; 1969 c. 352.

Legislative Council Note, 1959: This is a restatement of present law which clarifies the fact that circuit courts always have jurisdiction of actions affecting marriage even though such jurisdiction may be concurrent with special courts created by statute. When a circuit court is handling marital actions it is to be known as a family court branch, a term presently used in the second circuit. (Milwaukee county) (Bill 151-A)

A traversable fact put in issue in a court of competent jurisdiction and tried thereby, is a bar to another action between the same parties and based on the same fact although the relief asked in the last case is different from that in the first. Kalisch v. Kalisch, 9 W 529.

Courts possess no power in actions for divorce except such as are given by statute. A circuit court may grant a divorce although the guilty party has never resided in this state and the acts alleged as cause therefor were committed elsewhere. Shafer v. Bushnell, 24 W 372.

A stipulation by defendant as to time and place of trial is a waiver of all defects in process and of process itself if none has issued. Keeler v. Keeler, 24 W 522.

For the purpose of bringing or defending a divorce suit the wife may acquire a domicile distinct from her husband. Where they reside in different counties suit may be commenced in either; but if brought in that of plaintiff's residence it may be removed to that of defendant. Moe v. Moe, 39 W 308.

A circuit court for one county has authority to examine testimony reported by a referee appointed by the circuit court of another county in the same circuit, in an action for divorce begun in the latter county, and to sign a judgment. Coad v. Coad, 41 W 23.

Courts possess no power in actions for divorce, except such as are conferred by statute. Cook v. Cook, 56 W 195, 14 NW 33, 443.

If an order for publication of a summons and judgment of divorce is obtained by plaintiff's perjury the order and all subsequent proceedings should be vacated. Everett v. Everett, 60 W 200, 18 NW 637.

In an action by a wife for divorce and alimony a third person may be made a party where it is necessary to protect her rights. Way v. Way, 67 W 662, 31 NW 15.

Although an agreement to separate and live apart is void as against public policy, a court will not, in the absence of fraud, decree a restoration of property or cancellation of deeds delivered pursuant thereto. Anderson v. Anderson, 122 W 480, 100 NW 829.

Circuit courts are empowered by sec. 2348, Stats. 1919, to issue writs of ne exeat to prevent judgments for alimony from becoming ineffective. In re Grbic, 170 W 201, 174 NW 546.

See note to 247.02, citing Lyannes v. Lyannes, 171 W 381, 177 NW 683.

The court has no discretion to deny a divorce where the facts entitling a party to a divorce are established by the evidence to the requisite degree of legal certainty. Mattson v. Mattson, 204 W 424, 235 NW 767.

An action for divorce is a statutory action, and the trial court can grant only such relief therein as the statutes prescribe. Hirchert v. Hirchert, 243 W 519, 11 NW (2d) 157.

Courts of equity have jurisdiction of personal rights, including those of infants, and such jurisdiction may be exercised in divorce actions as well as in other actions of an equitable nature. Dovi v. Dovi, 245 W 50, 13 NW (2d) 585.

So long as the jurisdiction of the divorce court was operative in respect to custody and allowance for children, no other court of coordinate jurisdiction in this state could interfere to alter or modify judgment in either of those respects. The divorce court has power to modify alimony and support payments retrospectively. Halmu v. Halmu, 247 W 124, 19 NW (2d) 317.

The equitable principles of laches are applicable to divorce actions under 247.01, Stats. 1947. It makes applicable to divorce actions the procedure and practice by the court in other actions including statute of limitations. Zlindra v. Zlindra, 252 W 606, 32 NW (2d) 656.

In its disposition of divorce actions, the trial court is not confined to the facts as they existed at the time of the commencement of the action merely, but may take cognizance, under proper pleadings, of what is done by either or both parties thereto during the pendency of the action. The same statutory provisions with respect to the amendment of pleadings apply in divorce actions as in other actions. Whether or not to permit an amendment to pleadings is largely within the discretion of the trial court, and considerable liberality is permitted. Limberg v. Limberg, 5 W (2d) 327, 92 NW (2d) 767.

247.02 History: R. S. 1849 c. 79 s. 3; R. S. 1858 c. 111 s. 3; R. S. 1878 s. 2351; Stats. 1898 s. 2351; 1909 c. 323; 1917 c. 584, 586; 1925 c. 4; Stats. 1925 s. 247.02; 1959 c. 595 s. 44, 45.

Legislative Council Note, 1959: As to (intro. par.): The new language makes it clear that a marriage may be annulled only through a judicial proceeding.

As to (2): The present law barring marriages between parties who are nearer of kin than second cousins has been restated without change in substance. Marriage between first

cousins is permitted if the female is 55 years old. [See proposed s. 245.03 (1)]

As to (5): Restatement of present law with verbal changes to modernize the language.

As to (6): Present law is restated and changed in the following respects: (1) The marriage of a female who is below marriage age (16 years) may be annulled at suit of the parent or guardian. (2) Such marriages can be confirmed only by remarriage in compliance with ch. 245.

As to (7): Present law relating to a marriage involving a male who is below marriage age (18 years) has been changed in the same manner as proposed in sub. (6) supra. [See note to s. 247.02 (6)]

As to (8): This subsection is new. It permits redress by a parent when the required consent to a marriage has not been obtained. This redress is consistent with provisions requiring parental consent for marriages of females (16-18 years) or males (18-21 years). (Bill 151-A)

The concealment by the woman, before the marriage, of her previously unchaste character or representations falsely made by her inducing the man to believe her chaste are not such a fraud as will support a judgment declaring a marriage void. Varney v. Varney, 52 W 120, 8 NW 739.

A marriage between persons under the age of consent is not absolutely void, but is so only from such time as is fixed by the judgment, which in many contingencies should be at a later date than the marriage. During the intervening time the parties are legally husband and wife, occupying that relation on condition that it may be disaffirmed. The disaffirmance may be made at any time before the marriage has become absolute, though the complaining party has not reached the age of consent. Eliot v. Eliot, 77 W 634, 46 NW 806.

An infant who is incapable for want of age to enter into a valid contract of marriage is incapable also to estop himself by a fraudulent declaration of his age to assert the invalidity of the marriage in an action for its annulment. Eliot v. Eliot, 81 W 295, 299, 51 NW 81.

Sec. 2351 authorizes an action to annul a marriage void because the wife at the time thereof had a former husband living. Restitution may be decreed to her in such action of any estate which her husband may have received from her. Wheeler v. Wheeler, 76 W 631, 45 NW 531; Zahorka v. Geith, 129 W 498, 109 NW 552.

A husband who was sued for divorce on the ground of cruel and inhuman treatment, the complaint alleging that before marriage he had become afflicted with a venereal disease and had transmitted it to the wife, answered by way of counterclaim and at the trial proved that the wife was the one afflicted and that she had transmitted the disease to him. The facts so proved constituted such a fraud within the meaning of sec. 2351 (4) as warranted an annulment of the marriage. C—— v. C——, 158 W 301, 148 NW 805.

Actions for annulment of marriage are of purely statutory jurisdiction, which cannot be enlarged or extended by resort to the general equity powers of the circuit court; and such statutory action may be had to set aside either a void or a voidable marriage. Neither representation by the man that he was 2 years older than his true age, nor his inducing a marriage in evasion of the state law, in another state, nor both, is or are of such a serious nature as to warrant an annulment of the marriage for fraud. Lyannes v. Lyannes, 171 W 381, 177 NW 683.

The marriage of the plaintiff to the defendant, induced by the pretense of the defendant that her pregnancy was due to intercourse with him, will be annulled upon proof that such pregnancy was due to intercourse with another man. Winner v. Winner, 171 W 413, 177 NW 680.

The evidence was insufficient to sustain a finding that a marriage was induced by fraud, force or coercion. But even if the evidence was sufficient, 6 months of cohabitation after marriage confirmed the marriage. Hempel v. Hempel, 174 W 332, 181 NW 749, 183 NW 258.

See note to 245.02, citing Swenson v. Swenson, 179 W 536, 192 NW 70.

False representations which would set aside ordinary civil contracts are not necessarily sufficient to avoid the contract of marriage. The policy depends not alone on the vital importance of the dissolution of the marriage relation to the parties directly concerned. It rests on the deep concern of the state that the integrity of the marriage contract shall, so far as possible, be preserved. Where the parties to a civil marriage had previously agreed that such marriage should be followed by a second marriage ceremony performed according to the rites of the church of one of the parties, and the other party thereafter refused to carry out such an agreement, such refusal did not warrant a decree of annulment. Wells v. Talham, 180 W 654, 194 NW 36.

A marriage may be annulled only for the reasons authorized by statute. Although sec. 2330 provides that no insane person shall contract marriage, the marriage of such person cannot be annulled at the suit of the public or upon grounds of public policy, but only under sec. 2351 (5) at the suit of one of the parties to the marriage, and upon the ground that the insane person was not capable of assenting to the marriage contract. Kuehne v. Kuehne, 185 W 195, 201 NW 506.

A complaint alleging that prior to marriage the defendant had promised to perform the marital duties of a wife, that for the month during which the defendant lived in the plaintiff's home she refused to have marital relations, and that she had secretly intended to enter into the marriage solely to gain financial advantages, stated a cause of action for annulment of the marriage on the ground of fraud going to the essence of the marriage contract. The husband's living with the wife for a month after her first refusal to engage in the marital relation did not constitute a confirmation of the marriage so as to bar the husband's action for annulment. Zerk v. Zerk, 257 W 555, 44 NW (2d) 568.

The fact that the woman incorrectly stated her age in the application for a marriage license in Illinois did not invalidate the marriage. The fact that the parties did not reside together after the marriage ceremony in Illi-

nois and their return to Wisconsin, and may have represented themselves as being single, did not invalidate the marriage. The fact that the parties, residents of Wisconsin and returning to Wisconsin to reside, failed to comply with the then existing, but since repealed, 68.48, as to filing a marriage certificate here, did not invalidate a marriage that was valid in Illinois. Marriages valid where celebrated are valid everywhere, except those contrary to the law of nature and those which the law has declared invalid on the ground of public policy. Estate of Campbell, 260 W 625, 51 NW (2d) 709.

247.02 was intended to be exclusive in character as to grounds for annulment, thus negativing the right of the circuit courts, sitting as courts of equity, to grant annulments on additional grounds not specified by such statute. Witt v. Witt, 271 W 93, 72 NW (2d) 748.

See note to 893.18, citing Witt v. Witt, 271 W 93, 72 NW (2d) 748.

On evidence of fraud see Rascop v. Rascop, 274 W 254, 79 NW (2d) 828.

Where a man is induced to marry a woman because of the woman's intentionally false representation that she is pregnant by him, when in fact she is not pregnant, and he would not have married her if she had not made such false representation, he is entitled to an annulment of the marriage on the ground of fraud. Masters v. Masters, 13 W (2d) 332, 108 NW (2d) 674.

See note to 245.24, citing Davidson v. Davidson, 35 W (2d) 401, 151 NW (2d) 53.

A marriage may be annulled for fraud at the suit of the innocent party unless the marriage has been confirmed by the acts of the injured party, but the misrepresentation must be made at the time of the marriage or prior thereto, must be of such nature as to be material and go to the essential of the marriage contract, and must be of such a character that no marriage would have taken place except for such false representations. Heup v. Heup, 45 W (2d) 71, 172 NW (2d) 339.

Annulment of marriage on the ground of fraud. 23 MLR 147.

Grounds for annulment of marriage. Harpster, 35 MLR 81.

247.03 History: 1959 c. 595 s. 48; 1959 c. 690; Stats. 1959 s. 247.03; 1969 c. 348.

Legislative Council Note, 1959: Proposed s. 247.03 is entirely new. Sub. (1) merely enumerates actions affecting marriage. It is to be noted that legal separation (d) is used instead of divorce from bed and board. This is to better distinguish the action from absolute divorce. The action to compel support in (e) is from s. 52.11 and is renumbered s. 247.08 in Section 3 of this bill. Sub. (2) codifies the 10-year limitation on equitable causes of action as expressed in Zlindra v. Zlindra, 252 W 606 (1948). Sub. (3) defines divorce. Since the revision does not use divorce from bed and board, no confusion should result from the use of the simple term "divorce." (Bill 151-A)

See note to 247.055, citing Jezo v. Jezo, 19 W (2d) 78, 119 NW (2d) 471.

The provision for actions for annulment in 247.03 (2) does not apply to a marriage as to which the prior 10-year statute of limitations (330.18 (4)) had run prior to the enactment of 247.03 (2) in 1959. Ginkowski v. Ginkowski, 28 W (2d) 530, 137 NW (2d) 403.

The existence of statutes which permit divorce or separation of married persons is not an indication of public policy favoring provisions that encourage divorce; likewise, statutes allowing divorce should not be indicative of a public policy that would attempt to prohibit restraints on the seeking of a divorce. Will of Heller, 39 W (2d) 318, 159 NW (2d) 82.

Neither the 10-year limitation imposed by 247.03 (2), Stats. 1967, nor the 6-year statutory limitation imposed by 893.19 (7), are applicable to a division of property in a divorce action, and hence could not be interposed by the husband as a bar precluding restoration to the wife of her separate estate. Walber v. Walber, 40 W (2d) 313, 161 NW (2d) 898.

247.04 History: R. S. 1849 c. 79 s. 4; R. S. 1858 c. 111 s. 4; R. S. 1878 s. 2352; Stats. 1898 s. 2352; 1925 c. 4; Stats. 1925 s. 247.03; 1959 c. 595 s. 47; Stats. 1959 s. 247.04.

In an action to have a marriage declared valid, where the evidence showed that such marriage was voidable in the state where it was contracted and was not entitled to be recognized as valid under the public policy of this state, the court should have proceeded to annul and declare void such marriage, even though there was no counterclaim, and no desire on defendant's part, to have it annulled. Kitzman v. Werner, 167 W 308, 166 NW 789.

247.05 History: 1959 c. 690; Stats. 1959 s. 247.05.

The question of the validity of a decree of divorce is decided in accordance with the law of the domicile of the parties, including the conflict-of-law rules of the domiciliary state. A court has no jurisdiction to grant a divorce where neither party has a bona fide domicile in the state where the court sits; at least one of the parties to the marriage must be domiciled in such state. Domicile, like any other jurisdictional fact, is subject to collateral attack in any other state by the party who was not personally before the court when the decree of divorce was granted. A divorce granted by a court of a state in which neither party to the marriage has a bona fide domicile being void, such divorce decree is not entitled to full faith and credit. Estate of Gibson, 7 W (2d) 506, 96 NW (2d) 859.

247.05, Stats. 1967, which permits courts to hear the issue of custody incident to other actions affecting marriage whether or not the child is present in the state, requires that custody be put in issue before it is decided. Shohet v. Shohet, 40 W (2d) 48, 161 NW (2d) 235.

In an action pursuant to 247.08, Stats. 1967, by a nonresident mother to compel her husband to support her and their minor child (residing with her outside the state), the trial court, which held no adversary hearing specifically to determine the fitness of the parents and made no specific determination of what was best for the child, possessed no subject-matter jurisdiction to decide the issue of its custody and hence erred in awarding such custody to the mother. Shohet v. Shohet, 40 W (2d) 48, 161 NW (2d) 235.

Child custody; subject matter jurisdiction in Wisconsin. 1961 WLR 347.

247.055 History: 1959 c. 690; Stats. 1959 s. 247.055; 1967 c. 198.

A court with divorce jurisdiction is not authorized to entertain actions for property division wholly independent of either a previous or contemporaneous granting of a divorce or legal separation. Jezo v. Jezo, 19 W (2d) 78, 119 NW (2d) 471.

247.057 History: 1967 c. 198; Stats. 1967 s. 247.057.

247.06 History: 1909 c. 323; Stats. 1911 s. 2355; 1925 c. 4; Stats. 1925 s. 247.06; 1951 c. 419; 1953 c. 540; 1959 c. 226 s. 12; 1959 c. 369; 1959 c. 595 s. 50; 1959 c. 690; 1967 c. 198.

The residence required must be actual and bona fide, such a residence as would make a qualified elector. Dutcher v. Dutcher, 39 W 651.

Under 247.06, Stats. 1939, the court was without jurisdiction to grant an absolute divorce where neither of the parties had been a bona fide resident of this state for the 2 years next preceding the commencement of the action and neither adultery nor bigamy was alleged as a ground for divorce. A judgment of divorce entered without jurisdiction to grant the divorce is wholly void, and hence a provision therein relating to the custody of the minor children of the parties is void. Sang v. Sang, 240 W 288, 3 NW (2d) 340.

The theory that the domicile of the wife follows the domicile of the husband is excluded by our statute, 247.06, from application to an action for divorce by requiring an actual residence here of the plaintiff, whether husband or wife. Lucas v. Lucas, 251 W 129, 28 NW (2d) 337.

247.061 History: 1959 c. 690; Stats. 1959 s. 247.061; 1961 c. 505; 1963 c. 194; 1965 c. 500.

247.062 History: 1959 c. 690; Stats. 1959 s. 247.062; 1963 c. 194; 1965 c. 46, 118, 252, 500.

The requirement in 247.062 (1) that the summons and complaint be filed in 10 days after service is not jurisdictional. Buenger v. Buenger, 22 W (2d) 451, 126 NW (2d) 21.

247.063 History: 1959 c. 690; Stats. 1959 s. 247.063.

247.066 History: 1959 c. 690; Stats. 1959 s. 247.066; 1965 c. 500.

On procedures to be followed in making service in civil actions in order to conform with provisions of chapters 226 and 690, Laws 1959, see 49 Atty. Gen. 154.

247.07 History: R. S. 1849 c. 79 s. 9; R. S. 1858 c. 111 s. 9; 1866 c. 37; 1867 c. 74; R. S. 1878 s. 2356; 1881 c. 297; 1882 c. 230; Ann. Stats. 1889 s. 2356; Stats. 1898 s. 2356; 1913 c. 612; 1925 c. 4; Stats. 1925 s. 247.07; 1957 c. 535; 1959 c. 595 s. 51 to 55.

Legislative Council Notes, 1959: As to (intro. par.): Restatement of present law with language changes to conform to proposed new terminology of the chapter.

As to repeal of (2), (7) and (7a) [Stats. 1957]: Impotency as a cause for divorce [s. 247.07 (2)] is repealed. Impotency existing at the time of the marriage goes to the essence of a marriage contract. It therefore is properly treated as grounds for annulment. [See s. 247.02 (1)] The repealed subs. (7) and (7a) have been incorporated in proposed s. 247.07 (6) and (7).

As to (2): This cause for divorce is predicated on the principle that imprisonment deprives each mate of his conjugal rights, and that the blameless mate is entitled to redress. A suspended sentence or probation does not result in such deprivation, hence, actual commitment to prison has been added.

As to (4): Restatement of present law with minor language changes for conciseness.

As to (6): Restatement of present s. 247.07 (7).

As to (7): Restatement of present s. 247.07 [(7a)] with minor language changes for conciseness and uniformity.

As to (8): Restatement of present law with minor language change for clarity. (Bill 151-A)

1. Adultery.
2. Desertion.
3. Cruel and inhuman treatment.
4. Habitual drunkenness.
5. Voluntary separation.
6. Nonsupport.

1. Adultery.

Adultery may be proven by a clear and satisfactory preponderance of the evidence. Poertner v. Poertner, 66 W 644, 29 NW 386.

2. Desertion.

To make refusal to live with a husband wilful desertion he must show that it was safe for her to do so, that she unreasonably refused, and that she had no intention of returning. McCormick v. McCormick, 19 W 172.

A judgment for plaintiff for desertion may not be disturbed on appeal, where it was for the interest of both parties, although there is considerable evidence tending to show that defendant was compelled to leave plaintiff by reason of cruelty, but the answer fails to allege that or other facts as a counterclaim. Olson v. Olson, 99 W 107, 74 NW 543.

To constitute a desertion under the statute the desertion must be not necessarily malicious, but wilful and intentional and for the statutory period. The consent of the complaining party is fatal. As long as husband and wife agree to live apart there is no desertion. Mere separation or living apart even for an extended period does not amount to desertion. There must be in addition the intent not to return or resume the marital relation. Although the living apart begins with mutual consent, there may nevertheless be desertion; and it begins when the spouse complaining in good faith makes offers to terminate the separation and the other party unreasonably refuses and shows the intention of continuing the separation. Schopps v. Schopps, 188 W 151, 205 NW 829.

The commencement of a groundless divorce action by a deserting spouse did not interrupt the period of desertion, and the filing of a counterclaim on the trial date, the plaintiff having abandoned the divorce action, was the

commencement of an action by the defendant for divorce within the statutes permitting divorce for one year's desertion preceding the commencement of the action. Heinemann v. Heinemann, 202 W 639, 233 NW 552.

The husband has the right to select the place where the family shall reside, and if the wife unreasonably refuses to remove with him to the place he selects, her conduct constitutes wilful desertion. A wife who wilfully deserts her husband forfeits her right to support, and cannot during the period of such desertion maintain an action for divorce on the ground of failure to support. Gray v. Gray, 232 W 400, 287 NW 708.

Desertion is a ground for divorce when it continues a sufficient length of time, but it does not constitute cruel and inhuman treatment. Moen v. Moen, 249 W 169, 23 NW (2d) 472.

To constitute desertion as a ground for divorce, where the parties are living apart, there must be an unreasonable refusal to terminate the separation and an intention of continuing the separation, and there must be a fixed and deliberate intention to terminate the marital relation. Evidence as to the separation of a wife from her husband after he had locked her out of the house one night while suspicious that she was associating with another man, and as to the refusal of the wife to resume the marital relation on conditions demanded by the husband, supported a determination that the refusal of the wife to resume the marital relation was not unreasonable, and warranted the denial of a divorce to the husband on the ground of desertion. Delware v. Delware, 259 W 499, 49 NW (2d) 403.

A husband has the right to select the place where the family shall reside and, if the wife unreasonably refuses to remove with him to the place of his selection, her conduct constitutes unlawful desertion. Accompanying the husband's right to choose the domicile of the family is his duty to support his wife and maintain her in a home in which she need have no fear that she will be dominated by his relatives and in which she may have some hope of remaining as more than a tenant at the sufferance of relatives. Under evidence disclosing, among other things, that a wife was living with her husband in Milwaukee and was gainfully employed there, that the unemployed husband returned to an Indian reservation where they had formerly resided, and that the husband, not earning enough to support both of them, requested the wife to return to the reservation to live there with the husband in a house owned and occupied by the husband's sister, the wife's refusal to return was not unreasonable and did not warrant the granting of a divorce to the husband on the ground of desertion. Powless v. Powless, 264 W 71, 58 NW (2d) 520.

On the elements of desertion see Cahill v. Cahill, 26 W (2d) 173, 131 NW (2d) 842.

3. Cruel and Inhuman Treatment.

Cruel and inhuman treatment is such as renders the living and cohabiting together unsafe; the facts and details must sustain the general allegation. Johnson v. Johnson, 4 W 135.

The treatment which lays foundation for divorce must be unmerited and unprovoked or wholly disproportioned to the provocation. It is a sufficient answer to a petition for divorce on such ground that petitioner was regardless of her duties. Skinner v. Skinner, 5 W 449.

Any wilful misconduct which endangers the wife's health or life, exposes her to bodily hazard and intolerable hardship and renders cohabitation unsafe is cruel and inhuman treatment. Beyer v. Beyer, 50 W 254, 6 NW 807.

Violence, profanity and grossly indecent language and conduct toward a wife, with threats to kill her, and pushing her about in anger and handling her roughly, constitute cruel and inhuman treatment. Crichton v. Crichton, 73 W 59, 40 NW 638.

Defendant in an action for divorce on the ground of cruel and inhuman treatment may plead plaintiff's adultery as a defense. Hubbard v. Hubbard, 74 W 650, 43 NW 655.

The findings made a case of cruel and inhuman treatment, within sec. 2356, R. S. 1878. Wachholz v. Wachholz, 75 W 377, 44 NW 506.

If no injury to the plaintiff, either mentally or bodily, is alleged or proven, or no claim is made that her health has been impaired because of the refusal of her husband to have sexual intercourse with her, such refusal is not wilful desertion or cruel or inhuman treatment. Schoessow v. Schoessow, 83 W 553, 53 NW 856.

For a husband and wife to live and sleep in the same house and eat at the same table food prepared by her, without his speaking to her, except in anger, for 3 months evinces abnormal affections, persistent wantonness and deliberate perversity; and where it seriously impaired plaintiff's health was cause for divorce. Reinhard v. Reinhard, 96 W 555, 71 NW 803.

The testimony of a 19-year-old son that he saw marks on his mother's face, immediately after she left home at the time of the alleged cruelty, is a sufficient corroboration. Roelke v. Roelke, 103 W 204, 78 NW 923.

The evidence did not sustain a judgment for divorce for cruelty. Johnson v. Johnson, 107 W 186, 83 NW 291.

Where defendant was compelled to leave plaintiff's home on account of his cruel and inhuman treatment and where after such separation the plaintiff took no steps to effect a reconciliation and provided no means for the support of the defendant, the plaintiff was not entitled to a divorce. Jakubke v. Jakubke, 125 W 635, 104 NW 704.

Where treatment of the husband by the wife which did not operate directly on the body but which was of a nature calculated to inflict pain and suffering in body and mind and thus make cohabitation dangerous to the defendant's health and life, it is a sufficient ground for divorce. Kohl v. Kohl, 143 W 214, 125 NW 921.

The grievous mental suffering which may be inflicted by one spouse upon the other by means of words and conduct causing wounded feelings may result in the most serious cruel and inhuman treatment. Banks v. Banks, 162 W 87, 155 NW (2d) 916.

Misconduct of the plaintiff, if not itself a ground for divorce, will not prevent the granting of a divorce for defendant's misconduct;

but it may be considered in deciding whether without the provocation it furnished the defendant's misconduct would have merited a divorce. Cruel and inhuman conduct to merit a divorce, need not have impaired the plaintiff's health if it naturally caused great mental suffering and, continued, might probably impair plaintiff's health in the future. Hiecke v. Hiecke, 163 W 171, 157 NW 747.

As to what constitutes cruel and inhuman treatment, and what does not constitute such treatment, see Bird v. Bird, 171 W 219, 177 NW 4.

Cruel and inhuman treatment by the wife is not sufficiently established by proof that she had previously brought several actions against the husband charging failure of support, desertion and illicit relations with another woman. Mahonna v. Mahonna, 174 W 586, 183 NW 675.

The evidence was insufficient to sustain a wife's complaint for a divorce on the ground of cruel and inhuman treatment, and was held sufficient to sustain the husband's counterclaim for a divorce on the same ground. Schoen v. Schoen, 175 W 20, 183 NW 876.

The bringing of an action by a husband against his wife for an annulment of their marriage based upon false charges that they were never married, but had lived in illicit relations for 12 years, constituted cruel and inhuman treatment for which the wife might maintain an action for divorce. Owen v. Owen, 178 W 609, 190 NW 363.

The doctrine of condonation has no application to a divorce action based on cruel and inhuman treatment, consisting of a long succession of relatively trivial incidents. Cudahy v. Cudahy, 217 W 355, 258 NW 168.

A judgment of divorce from bed and board on the ground of cruel and inhuman treatment was a final judgment and barred an action, brought 16 months later and while such judgment was in full force and effect, for an absolute divorce on the same ground of cruel and inhuman treatment. Weber v. Weber, 257 W 613, 44 NW (2d) 571.

In a husband's action for divorce on the ground of cruel and inhuman treatment, the doctrine of recrimination applied so that the wife, although not counterclaiming for divorce, should have been permitted to prove, if such was the fact, that the husband was guilty of cruel and inhuman treatment toward her in making false accusations of misconduct, and also because it would tend to show provocation of certain conduct on her part and the part of her son which, standing unexplained, amounted to cruelty by her. Elsinger v. Elsinger, 258 W 524, 46 NW (2d) 761.

Where it appeared that the husband's real reason for wanting a divorce was not any cruel and inhuman treatment on the part of the wife, but was to permit the husband to marry one of the girls with whom he had kept company since his marriage, the record did not support a judgment of divorce in favor of the husband. Cascio v. Cascio, 259 W 273, 48 NW (2d) 510.

Where, on a formal appeal in an unsuccessful action for divorce on the ground of cruel and inhuman treatment, the supreme court held that the wife had left the family home without just cause so that she was not entitled to support and maintenance from the husband while living apart from him, such holding was res judicata, in a subsequent action by the husband for a divorce on the ground of desertion, as to the matter of the wife having left home without just cause, although not res judicata as to other essentials which the husband was required to establish in order to make out a case of desertion constituting a ground for divorce. Leach v. Leach, 266 W 223, 63 NW (2d) 73.

There is no yardstick definition for "cruel and inhuman treatment," and each case depends for construction on its own peculiar circumstances, but treatment which does or is well calculated to impair the health of a party, makes the marriage state intolerable, and renders a party incapable of performing his or her duties in married life, is cruel and inhuman treatment. Gordon v. Gordon, 270 W 332, 71 NW (2d) 386.

Acts of cruelty and harsh treatment on the part of one spouse toward the other, although condoned by the injured spouse, are revived by subsequent mistreatment and may be relied on as a ground for divorce, provided the recrudescence is not provoked by the offensive conduct of the other spouse. Gordon v. Gordon, 270 W 332, 71 NW (2d) 368.

If the conduct of both parties has been such as to furnish grounds for divorce, neither of the parties is entitled to relief. The doctrine of recrimination, which does not recognize the principle of "comparative rectitude," precludes the granting of a divorce to either party. Bahr v. Bahr, 272 W 323, 75 NW (2d) 301.

Conduct which, although involving no acts of violence, was continuous and persistent, constituted cruel and inhuman treatment, so as to warrant the granting of a divorce. Wingad v. Wingad, 2 W (2d) 393, 86 NW (2d) 425.

Membership in the Communist party alone may not be cruel and inhuman treatment, but overt acts and especially their effects on the other party resulting from Communist beliefs may be. Ondrejka v. Ondrejka, 4 W (2d) 277, 90 NW (2d) 615.

To warrant a divorce for cruel and inhuman treatment, a wife is not obliged to suffer abuses such as cuts, bruises, black eyes, and bloody noses, until a major and permanent impairment of her health has been accomplished. A divorce for cruel and inhuman treatment is not primarily a matter of punishing an erring spouse for his bad behavior, but is directed principally to the protection of the wronged spouse and the prevention of the evils incident on the continuation of a marriage relation which has become unbearable. The 2 latter considerations apply equally whether or not the wrongdoer is mentally or morally responsible for his act. Caldwell v. Caldwell, 5 W (2d) 146, 92 NW (2d) 356.

Treatment which does or is well calculated to impair the health of a party, makes the marriage state intolerable, and renders a party incapable of performing his or her duties in married life, is cruel and inhuman treatment within the meaning of 247.07 (4). Garot v. Garot, 24 W (2d) 88, 128 NW (2d) 393.

In order to constitute cruel and inhuman treatment, such as to warrant the granting of divorce or legal separation, the court must consider the totality of conduct and the detrimental effect it has upon necessary marital relationships and its grave effect upon the health of the other spouse. Such misconduct of the offending spouse must be unreasonable and unwarranted, must render the parties incapable of performing their marital duties, and must have a detrimental effect upon the physical or mental health of the offended spouse. Heffernan v. Heffernan, 27 W (2d) 307, 134 NW (2d) 439.

Acts of a husband do not constitute grounds under 247.07 (4) if the wife was not seriously upset or disturbed by them and there was no physical abuse. Mecha v. Mecha, 36 W (2d) 29, 152 NW (2d) 923.

In a husband's action for legal separation on the ground of cruel and inhuman treatment, findings of the trial court in his favor would not be disturbed where, resolving conflicting versions of the parties and attributing verity to the husband's testimony, the evidence in the main disclosed that he was subjected to unfounded accusations of infidelity, threats, constant nagging, and acts of humiliation, all of which rendered their marriage one of tense discord and disharmony. Jackowick v. Jackowick, 39 W (2d) 249, 159 NW (2d) 54.

In a husband's action for divorce based on cruel and inhuman treatment allegedly consisting of the wife's frequent intoxication, embarrassing phone calls, and unwarranted accusations of infidelity, a finding by the trial court that the charge was unsupported would not be disturbed where resolution of the issues was predicated on the trial court's determination in favor of the wife. Moonen v. Moonen, 39 W (2d) 640, 159 NW (2d) 720.

Proof which, when viewed as a whole, established an unreasonable and unwarranted course of conduct evidenced by a lack of respect for the wife as a human being, as well as disregard of her rights to her own property which he had obtained from her by overreaching—all of which adversely affected her health—was sufficient to warrant the trial court in concluding, as it did, that the husband's conduct was cruel and inhuman. Walber v. Walber, 40 W (2d) 313, 161 NW (2d) 898.

The evidence was sufficient to establish cruel and inhuman treatment, the proof disclosing that the husband constantly found fault with the wife, that he continually criticized and embarrassed her in the presence of others, and that he was a domineering and uncompromising person, the wife's testimony being corroborated by 2 of her children and a neighbor. Jacobs v. Jacobs, 42 W (2d) 507, 167 NW (2d) 238.

In a wife's action for divorce on the ground of cruel and inhuman treatment, ultimate findings of fact in her favor were not subject to challenge because of claimed inadequacy or generality, where there was no request made to the trial court for more specific findings. Mason v. Mason, 44 W (2d) 362, 171 NW (2d) 364.

In a wife's action for divorce for cruel and inhuman treatment which the husband defended on the ground of recrimination and counterclaimed for annulment based on fraud, there was no question of the wife's entitlement to the divorce if the charges in the defense and counterclaim failed, where, as the trial court found, during the 2 years of their marriage she had been subjected to unceasing criticism and fault-finding and on 2 occasions was beaten by the husband (who claimed this method of chastisement as a biblical prerogative), all of which affected her mental health and the marital relations. Heup v. Heup, 45 W (2d) 71, 172 NW (2d) 339.

Single act of cruelty as grounds for divorce. 49 MLR 449.

Divorce: cruel and inhuman treatment. 52 MLR 329.

4. Habitual Drunkenness.

On the effect of a judgment of divorce for 2 years, and certain income for 5 years, without prejudice to plaintiff's right to sue for absolute divorce if defendant's condition (habitual drunkenness) continued, and not providing for final division of property, see Lamberton v. Lamberton, 125 W 616, 104 NW 807.

5. Voluntary Separation.

It is not necessary to show that it was intended that mutually voluntary separation should be final. Thompson v. Thompson, 53 W 153, 10 NW 166.

To constitute a voluntary separation it must appear that the separation was mutually voluntary in its inception and so continued throughout the statutory period. Sanders v. Sanders, 135 W 613, 116 NW 176.

Where a husband and wife were divorced from bed and board, her requests, known by the husband to have been sincere and made in good faith, for a resumption of marital relations, although they were not accompanied by a formal request that their divorce be set aside, prevented the granting of an absolute divorce on the ground of voluntarily living apart. Krause v. Krause, 177 W 165, 187 NW 1019.

The evidence supported a finding by the court as showing a voluntary separation for 5 years. Salinko v. Salinko, 177 W 475, 188 NW 606.

An offer to resume conjugal relations, by a husband who has abandoned his wife and family, made with an intent to predicate a divorce action on the wife's refusal, is not a foundation for an action of divorce on the ground of voluntary separation, the initial circumstances giving character to the entire period, and the justifiable refusal of the wife to resume such relations not being a basis for converting the husband's offense into grounds for divorce. Rooney v. Rooney, 186 W 49, 202 NW 143.

To constitute a voluntary separation under 247.07 (7), Stats. 1949, it must appear that such separation was mutually voluntary at its inception and so continued throughout the statutory period. Powless v. Powless, 269 W 552, 69 NW (2d) 753.

6. Nonsupport.

The refusal or neglect must be substantial and designed, since it must be coupled with sufficient ability. The mere fact that a hus-

band has provided his wife with temporary support for a definite time, pursuant to an order of court, does not relieve him from supporting her thereafter. Nor does the pendency of an appeal from a judgment in an action for divorce make it obligatory upon her to obtain further temporary support by an application for and through an additional order. Nor does her failure to prove want of support prior to the first action prevent her from maintaining a second action for divorce on the ground of his subsequent failure to support. Varney v. Varney, 58 W 19, 16 NW 36.

A wife who, without legal justification or excuse, abandons her husband's home and forfeits the right to support from him cannot maintain an action for divorce on the ground of nonsupport during the time of such abandonment. Friend v. Friend, 65 W 412, 27 NW 34.

The evidence justified the granting of a divorce from bed and board under sec. 2357 (3), R. S. 1878, on the ground that the husband, being of sufficient ability, had neglected to provide for the wife, and that it was unsafe and improper for them to live together. Hacker v. Hacker, 90 W 325, 63 NW 278.

To justify divorce for failure to support, it must appear that the defendant is of sufficient ability, but refuses or neglects. Goerner v. Goerner, 177 W 603, 187 NW 976, 1023.

See note to 247.26, on alimony for divorced wife, citing Nowack v. Nowack, 235 W 620, 293 NW 916.

247.08 History: 1939 c. 211; Stats. 1939 s. 247.095; 1953 c. 31 s. 13; Stats. 1953 s. 52.11; 1959 c. 595 s. 3; Stats. 1959 s. 247.08; 1963 c. 426.

See note to 46.10, citing Steffenson v. Steffenson, 259 W 51, 47 NW (2d) 445.

A wife in leaving her husband without just cause is not entitled to be supported by him, but such fact does not justify his refusal to support the minor children, and he cannot avoid this by offering to support them if they are returned to his custody. A father of sufficient means must support his child, regardless of the financial standing of either the mother or the child. Schade v. Schade, 274 W 519, 80 NW (2d) 416.

Where an ambiguous summons was issued, which the court construed as intending to start an action for support, and which was served in Texas and by publication, the court acquired no jurisdiction and had no power to amend the summons to refer to an action for legal separation. Rosenthal v. Rosenthal, 12 W (2d) 190, 107 NW (2d) 204.

An award of $350 per month out of the husband's annual net income of $13,000 for support of an infant (age 3 years) is deemed a subsidy to the wife (who was gainfully employed and who had requested only $5,400 annually for herself and child), and is improper. Shohet v. Shohet, 40 W (2d) 48, 161 NW (2d) 235.

247.081 History: 1959 c. 690; Stats. 1959 s. 247.081; 1961 c. 505; 1965 c. 500.

247.085 History: 1959 c. 595 s. 57; 1959 c. 690; Stats. 1959 s. 247.085.

Legislative Council Note, 1959: This is a new section which, for purposes of clarity in actions affecting marriages, elaborates the general provisions on pleading contained in ch. 263 Stats. and incorporates references to pleading contained in present s. 247.14. (Bill 151-A)

The requirement of alleging a prior action was placed in the statute as a matter of public policy and for the information of the court, and a strict compliance therewith is required in order that no fraud be perpetrated on the court. An allegation in the complaint, that a prior action for a divorce was commenced in "this" court and was dismissed by it, was not a compliance. Eule v. Eule, 5 W (2d) 543, 93 NW (2d) 438.

247.09 History: R. S. 1849 c. 79 s. 11; R. S. 1858 c. 111 s. 11; R. S. 1878 s. 2358; Stats. 1898 s. 2358; 1925 c. 4; Stats. 1925 s. 247.09; 1957 c. 535; 1959 c. 595 s. 58.

Legislative Council Note, 1959: The first sentence rephrases the language of present s. 249.09 [247.09] in accordance with the new terminology of the chapter. It also changes present law in that the court's discretion to grant a divorce or legal separation regardless of the demand by the parties is somewhat restricted by the new requirement that he must formally make a finding and state the reason therefor.

The second sentence is entirely new. It emphasizes that conscientious objection to divorce is a factor to be considered by the court in the exercise of discretion to grant either a divorce or legal separation even when there is no hope of reconciliation. (Bill 151-A)

An absolute divorce may be granted upon proof warranting it, even though the complaint asks only a limited divorce. Shequin v. Shequin, 161 W 183, 152 NW 823.

To determine the right of a divorced wife to share in the estate of her deceased husband, the oral statement of the court in the divorce action brought by the wife that "the divorce will be granted," followed by an admonition that the parties were not to marry again within year and a statement that he would determine property rights, but never did, and entry of the clerk that the divorce was granted on the grounds of cruel and inhuman treatment (no formal judgment being entered), are construed, particularly in view of the prayer in the complaint for a divorce from bed and board, as a divorce from bed and board; hence she continued to have the status of a wife and upon his death she was entitled to share in his estate as his widow. Estate of Kehl, 215 W 353, 254 NW 639.

If the testimony in the case warrants, the trial court may grant an absolute divorce even though the plaintiff asks only for a divorce from bed and board. Rohloff v. Rohloff, 244 W 153, 11 NW (2d) 507.

The fact that the court, in denying a divorce to a wife on the ground of cruel and inhuman treatment, could not order the payment of alimony did not preclude the court in a subsequent action from granting a divorce to the wife for nonsupport. Buss v. Buss, 252 W 500, 32 NW (2d) 253.

A divorce can be granted in an action for legal separation, where one party has been a

resident for 2 years preceding entry of judgment, even though not a resident for 2 years when the action was commenced. Hooker v. Hooker, 8 W (2d) 331, 99 NW (2d) 113.

247.10 History: R. S. 1849 c. 79 s. 13; R. S. 1858 c. 111 s. 13; R. S. 1878 s. 2360; Stats. 1898 s. 2360; 1909 c. 323; 1925 c. 4; Stats. 1925 s. 247.10; 1959 c. 595 s. 59.

Legislative Council Note, 1959: Present law has not been changed. The word "judgment" has been substituted for "decree" as a matter of uniformity in the chapter and in conformity with terminology used in present practice. (Bill 151-A)

A collusive agreement between husband and wife to procure a divorce when no breach of duty had been committed would be a fraud upon the court. Hopkins v. Hopkins, 39 W 167.

A husband will not be granted a divorce on the ground of his wife's adultery when he has been guilty of cruel and inhuman treatment of her. Sec. 2360, R. S. 1878, is declaratory of the common law. It was not intended to do away with the general principle that one cannot have redress for a breach of the marriage contract which he has violated by committing a like offense as that of which he complains, but must come into court with clean hands. Pease v. Pease, 72 W 136, 39 NW 133.

Condonation is subject to the implied condition that the injury shall not be repeated and that the other party shall thereafter be treated with conjugal kindness. After condonation former injuries will be revived by subsequent similar misconduct, although of a slighter nature. Crichton v. Crichton, 73 W 59, 40 NW 638.

Condonation is conditioned upon subsequent good conduct. Edelman v. Edelman, 125 W 270, 104 NW 56.

In a divorce action the court is not confined to facts as they existed when the action was commenced, but upon proper pleadings may take cognizance of the conduct of the parties during its pendency. The fact that neither party has remarried before the expiration of a year may be presented by supplemental pleading. Upon the rehearing the prior division of property may be modified. White v. White, 167 W 615, 168 NW 704.

See note to 247.07, on cruel and inhuman treatment, citing Cudahy v. Cudahy, 217 W 355, 258 NW 168.

The doctrine of recrimination bars a divorce where it is shown that each party has been guilty of an offense which the statute has made a ground for divorce in favor of the other. Roberts v. Roberts, 204 W 401, 236 NW 135.

A husband whose wife is insane cannot have the advantage of a divorce from her merely because she had a lucid interval at the time the divorce was granted if he colluded with the granting of it; nor is a divorce granted to an insane wife on her complaint validated because she had a lucid interval at the time the divorce action was instituted and the divorce granted. Heine v. Witt, 251 W 157, 28 NW (2d) 248.

The defendant husband's voluntary resumption of marital relations with the plaintiff wife, after knowledge of the wife's adultery, constituted condonation, but the wife's involuntary resumption of marital relations, after knowledge of the husband's adultery, did not constitute condonation, so that 247.10 would not preclude the granting of a divorce to the wife but would preclude the granting of a divorce to the husband, and the doctrine of recriminaton had no application. Neblett v. Neblett, 274 W 574, 81 NW (2d) 61.

Condonation of cruel and inhuman treatment is conditioned on subsequent good conduct and is abrogated by similar misconduct thereafter, and condonation also requires a restoration of the offender to his former status. Caldwell v. Caldwell, 5 W (2d) 146, 92 NW (2d) 356.

247.101 History: 1959 c. 595 s. 60; Stats. 1959 s. 247.101; 1969 c. 225.

The doctrine of recrimination in relation to divorce actions is discussed in Hiecke v. Hiecke, 163 W 171, 174—176, 157 NW 747, 749.

See notes to 247.10, citing White v. White, 167 W 615, 168 NW 704, Roberts v. Roberts, 204 W 401, 236 NW 135, and Neblett v. Neblett, 274 W 574, 81 NW (2d) 61.

The supreme court is not foreclosed from considering the defense of recrimination (which is an equitable doctrine) even though raised for the first time on appeal if the facts are apparent from the record and if to do so would not result in any unfairness to the other spouse. The wife could not successfully rely on the defense of recrimination (raised for the first time on appeal) based on acts of alleged misconduct which the husband explained to the satisfaction of the trial court, especially where she failed to establish that her health was impaired thereby or that his conduct had a detrimental effect upon their marriage. Gauer v. Gauer, 34 W (2d) 451, 149 NW (2d) 533. Compare Jackowick v. Jackowick, 39 W (2d) 249, 159 NW (2d) 54.

Whether the doctrine of recrimination is a bar to a divorce in Wisconsin depends upon whether the person seeking the divorce is guilty of an offense which would be ground for divorce. Heup v. Heup, 45 W (2d) 71, 172 NW (2d) 339.

Recrimination and related doctrines in the Wisconsin law of divorce. Feinsinger and Young, 6 WLR 195.

247.11 History: 1909 c. 323; Stats. 1911 s. 2360f; 1925 c. 4; Stats. 1925 s. 247.11.

247.12 History: 1909 c. 323; Stats. 1911 s. 2360g; 1925 c. 4; Stats. 1925 s. 247.12; Court Rule XXVIII s. 2; Sup. Ct. Order, 212 W v; 1959 c. 595 s. 61.

Legislative Council Note, 1959: Restatement of present law with minor language changes for uniformity and conciseness. 270.07 (1), which is added to this section as a cross reference, requires a jury determination of the issue of adultery in divorce actions. (Bill 151-A)

The trial of a divorce action is conducted under the same rules that apply in other civil actions, except so far as modified by statute; and no statute prohibits the use of depositions

in the trial of such actions. Bloomer v. Bloomer, 197 W 140, 221 NW 734.

Procedure whereby a family court commissioner pursuant to court direction took testimony and made recommendations as to whether plaintiff was a bona fide resident of the county for 30 days prior to commencement of the suit, the parties being afforded the right to present additional evidence and make argument to the court (which finally decided the issue, adopting the findings of fact and conclusions of the court commissioner), did not amount to a formal reference made in violation of 270.34 (1) (which expressly precludes directing a reference in actions for divorce or annulment of marriage). Strandberg v. Strandberg, 27 W (2d) 559, 135 NW (2d) 241.

247.125 History: 1959 c. 595 s. 60; 1959 c. 690; Stats. 1959 s. 247.125; 1961 c. 505.

247.13 History: 1909 c. 323; Stats. 1911 s. 2360h; 1919 c. 362 s. 22; 1925 c. 4; Stats. 1925 s. 247.13; 1929 c. 262 s. 17; 1945 c. 408; 1951 c. 581; Sup. Ct. Order, 259 W v; 1953 c. 34; 1959 c. 259 s. 28; 1959 c. 595 s. 61; 1959 c. 615, 690; 1961 c. 495, 505.

Legislative Council Note, 1959: Restatement of present law except that the family court commissioner (divorce counsel under present law) is accorded the authority of a regular court commissioner who generally has the power of a judge in chambers. (See s. 252.15 Stats.) (Bill 151-A)

The duties and powers of divorce counsel are discussed in Subacz v. Subacz, 183 W 427, 198 NW 372.

The county board may not abolish the office of divorce counsel or alter the compensation paid thereto. 22 Atty. Gen. 744.

256.49, Stats. 1957, applies only to attorneys appointed by the court and therefore does not affect the fees of the divorce counsel, who is appointed by the circuit judge or judges under 247.13. 46 Atty. Gen. 163.

A district attorney cannot be appointed to the office of family court commissioner and continue to serve as district attorney. 48 Atty. Gen. 296.

The county board may not restrict the circuit and county court judges from appointing a family court commissioner over 65 years old. 247.13 (4), Stats. 1965, does not prohibit the appointment of a retired judge as full time commissioner. 54 Atty. Gen. 229.

247.14 History: 1909 c. 323; Stats. 1911 s. 2360h—1; 1913 c. 696; 1917 c. 312; 1925 c. 4; Stats. 1925 s. 247.14; 1959 c. 595 s. 61; 1961 c. 505.

For Legislative Council Note, 1959, to this section see note to 247.15.

Service of the original pleading in a divorce action upon the district attorney as divorce counsel and his approval of the court's findings was a substantial compliance with the statutes, though the counter-claim on which divorce was granted was not served upon the district attorney and he did not appear in open court. Heinemann v. Heinemann, 202 W 639, 233 NW 552.

247.145 History: 1961 c. 505; Stats. 1961 s. 247.145.

247.15 History: 1909 c. 323; Stats. 1911 s. 2360h—2; 1913 c. 696; 1923 c. 99 s. 1; 1925 c. 4; Stats. 1925 s. 247.15; 1951 c. 726; Sup. Ct. Order, 259 W v; 1959 c. 595 s. 61; 1959 c. 690; 1965 c. 500.

Comment of Judicial Council, 1951: (2) was created by ch. 581, Laws 1951, as 247.13 (3). It is renumbered 247.15 (2), to place it in the section which deals with the necessity of the divorce counsel appearing in default divorces, instead of the section (247.13) which provides for the appointment of divorce counsel. The renumbering clearly indicates that the provision for Milwaukee is an exception to the general rule requiring the appearance of the divorce counsel. [Re Order effective May 1, 1952]

Legislative Council Note, 1959: In conformity with the new concept of a family court commissioner under the provisions of proposed ss. 247.14 and 247.15 it is mandatory that he be served with all pleadings in all actions affecting marriage whether such action is contested or not. He is charged with the following responsibilities:

1. to appear in court in uncontested actions and also in contested actions when requested by the court
2. to conduct pre-trial investigations
3. to attempt reconciliation
4. to report his findings to the court
5. to cause witnesses to be subpoenaed on behalf of the state
6. to enforce court orders requiring payment of fees

Judgments are not to be granted until investigation by the family court commissioner is made in uncontested actions. Judgments may be withheld when the commissioner has not been served with pleading or where there has been failure to answer his inquiries.

The deleted provisions in proposed s. 247.14 pertaining to allegations of the complaint are incorporated in proposed s. 247.085 (1) (c). (Bill 151-A)

An order setting aside a default judgment of divorce is reviewable when the case reaches the supreme court on appeal from the final judgment. Kelm v. Kelm, 204 W 301, 235 NW 787.

Because the instant action for annulment was tried as a default matter in the circuit court, and no order was entered pursuant to 247.15 (2) dispensing with the presence of the family court commissioner, it was proper for such family court commissioner to appear in behalf of the public in this appeal and to file a brief herein. Masters v. Masters, 13 W (2d) 332, 108 NW (2d) 674.

By 247.15 it is contemplated that the family court commissioner will on behalf of the public make a fair and impartial investigation of the case and fully advise the court as to its merits and as to the rights and interests of the parties and of the public and of his efforts toward reconciliation. Bottomley v. Bottomley, 38 W (2d) 150, 156 NW (2d) 447.

247.16 History: 1909 c. 323; Stats. 1911 s. 2360h—3; 1913 c. 696; 1925 c. 4; Stats. 1925 s. 247.16; 1959 c. 595 s. 61.

Legislative Council Note, 1959: Restatement of present law with minor language change for uniformity. (Bill 151-A)

247.17 History: 1909 c. 323; Stats. 1911 s. 2360h—4; 1913 c. 696; 1925 c. 4; Stats. 1925 s. 247.17; 1947 c. 383; 1959 c. 595 s. 62, 63.

Legislative Council Note, 1959: In keeping with the important function of a family court commissioner the proposed section makes it mandatory that he be a salaried employe of the county instead of being compensated on a fee basis. The county board may provide him with a furnished office, supplies, and stenographic services. (Bill 151-A)

247.18 History: 1909 c. 323; Stats. 1911 s. 2360i; 1925 c. 4; Stats. 1925 s. 247.18; Court Rule XXVIII s. 3; Sup. Ct. Order, 212 W v; 1959 c. 595 s. 64; 1961 c. 505.

On a record which shows that the plaintiff in a divorce action did not comply either in pleading or proof with the circuit court rule requiring corroboration of any testimony, and which also discloses that possibly the marital offenses complained of have been condoned, a decree of divorce will not be permitted to stand. Weichers v. Weichers, 197 W 159, 221 NW 733.

A letter sent by the defendant to the plaintiff, and showing that a considerable quarrel had very recently occurred, was sufficient corroboration of the plaintiff's testimony to satisfy 247.18 (2) so as to authorize the granting of a divorce. The plaintiff's testimony was sufficient to show residence in the state for the required 2 years immediately prior to the commencement of the action for divorce; and a statement of the defendant's attorney admitting the residence in open court, together with an admission thereof in the verified answer, was sufficient corroboration to satisfy 247.18 (2), in the absence of a claim that the required residence did not in fact exist. Hirchert v. Hirchert, 243 W 519, 11 NW (2d) 157.

247.18 (2) is not a legislative enactment limiting the jurisdiction of the trial court, but is a rule of practice and procedure adopted by the supreme court pursuant to 251.18, so that, notwithstanding such rule, the trial court is not without jurisdiction to grant a divorce on the uncorroborated testimony of the plaintiff, even though there is no showing that no corroborating evidence is available. Swenson v. Swenson, 245 W 124, 13 NW (2d) 531.

247.18 (2), Stats. 1967, requires corroboration not only of the cruel and inhuman conduct, but also of the fact that the conduct has a grave detrimental effect upon the physical or mental health of the offended spouse. Jacobs v. Jacobs, 42 W (2d) 507, 167 NW (2d) 238.

247.19 History: 1909 c. 323; Stats. 1911 s. 2360j; 1925 c. 4; Stats. 1925 s. 247.19; Court Rule XXVIII s. 4; Sup. Ct. Order, 212 W vi.

In an action brought for the purpose of determining the right to custody of a minor child of the parties, impounding the decision in the interest of public morals could not be justified by recourse to 247.19, Stats. 1967, it clearly appearing that the motive of the trial judge in suppressing the decision was not in the interest of public morals, but rather in the interest of the child, and that the record and testimony had previously been made available to the public. State ex rel. Journal Co. v. County Court, 43 W (2d) 297, 168 NW (2d) 836.

247.20 History: 1889 c. 280; Ann. Stats. 1889 s. 2376a; Stats. 1898 s. 2371; 1909 c. 323 s. 6, 8; Stats. 1911 s. 2360n; 1925 c. 4; Stats. 1925 s. 247.20; 1959 c. 369; 1959 c. 595 s. 65; 1959 c. 690.

Legislative Council Note, 1959: Present law is restated and changed in the following respect: (1) After granting a divorce the court may permit the wife to resume her maiden name only if she receives no alimony. (2) If there are children of the marriage and the wife may be permitted to resume her maiden name if her parental rights have been terminated. (Bill 151-A)

247.21 History: 1909 c. 323; 1911 c. 174; Stats. 1911 s. 2360r; 1925 c. 4; Stats. 1925 s. 247.21; 1959 c. 595 s. 65; 1959 c. 690.

Legislative Council Note, 1959: Present s. 247.21 is restated in language that conforms with other changes in the chapter. (Bill 151-A)

The statutes of Illinois forbidding remarriage within one year after a divorce and their interpretation by the courts of that state, being substantially the same as the statutes and decisions of Wisconsin relating to the same subject, the courts of this state will take cognizance of the Illinois law and decisions and declare void in Wisconsin a marriage contracted in Indiana in violation of the laws of Illinois by residents of Illinois. Hall v. Industrial Comm. 165 W 364, 162 NW 312.

247.21 does not render a judgment of divorce obtained in another state ineffective merely because the divorce was granted for a cause not a ground for divorce in Wisconsin, but there must also be established the additional fact that an inhabitant went into the other state for the purpose of obtaining a decree for such a cause. Although the court in the wife's action for divorce sustained the husband's plea in abatement based on a judgment of divorce obtained by him in Nevada, the court had jurisdiction to adjudicate as to division of estate, alimony, and custody and support of a minor child, where the court expressly retained jurisdiction in respect to such matters because they were not judicially determined elsewhere, and the wife petitioned the court to entertain such matters, and both parties continued to appear, acquiesce, and participate in the proceedings relating thereto. Ische v. Ische, 252 W 250, 31 NW (2d) 607, 32 NW (2d) 70.

The defendant in an action for divorce who is not a resident of the state of the forum, and is not served personally with process in the state of the forum and who takes no part in the proceedings, is not concluded by the judgment of divorce from raising the issue of the plaintiff's domicile in another court; the state

where the parties admittedly resided up to the time of the divorce is not required to extend faith and credit to the judgment under such circumstances; but where both parties are physically present and participate in the divorce proceedings, the decree is conclusive. Davis v. Davis, 259 W 1, 47 NW (2d) 338.

See note to 247.26 (general), citing Pollock v. Pollock, 273 W 233, 77 NW (2d) 485.

A Wisconsin court having jurisdiction of husband and wife, in an action by the wife for divorce, alimony, and custody of a minor child and its support, need not give full faith and credit to an Illinois divorce decree so far as it awarded custody of the child to the husband, when such decree was obtained by the husband in a divorce action in an Illinois court which had no personal jurisdiction over the mother or the child. Eule v. Eule, 9 W (2d) 115, 100 NW (2d) 554.

247.22 History: 1949 c. 214; Stats. 1949 s. 247.40; 1953 c. 61; Stats. 1953 s. 247.22; 1955 c. 10; 1959 c. 595 s. 65.

Legislative Council Note, 1959: Restatement of present law with surplus language deleted. (Bill 151-A)

Editor's Note: For foreign decisions construing the "Uniform Divorce Recognition Act" consult *Uniform Laws, Annotated.*

Where, in a husband's action for divorce in a Wyoming court, the defendant wife, domiciled in Wisconsin, was not served personally in Wyoming, did not attend personally, and took no part in the proceedings except to enter a formal special appearance by counsel objecting to jurisdiction because the plaintiff husband lacked domicile, the wife was not concluded by the judgment of divorce from raising the issue of the husband's domicile in an action brought by her in a Wisconsin court to annul the divorce, and the Wisconsin court was not concluded by the full-faith-and-credit clause from determining that both parties at all times were residents of Wisconsin and entering judgment declaring the judgment of the Wyoming court void for lack of jurisdiction. Davis v. Davis, 259 W 1, 47 NW (2d) 338.

Full faith and credit must be given a foreign state's divorce decree where a defendant spouse has appeared or been personally served. Plaintiff wife (who was plaintiff in the Nevada action) cannot collaterally attack the judgment on the ground of domicile. Hartenstein v. Hartenstein, 18 W (2d) 505, 118 NW (2d) 881.

247.23 History: R. S. 1849 c. 79 s. 16 to 18; R. S. 1858 c. 111 s. 16 to 18; R. S. 1878 s. 2361; Stats. 1898 s. 2361; 1925 c. 4; Stats. 1925 s. 247.23; 1939 c. 211; 1953 c. 31; 1959 c. 595 s. 66; 1959 c. 690; 1961 c. 505; 1965 c. 500.

Legislative Council Note, 1959: Restatement of present law except that authority to make orders pertaining to the support of a wife and child is granted to the family court commissioner. This authorization is in conformity with the new concept of the functions of this officer. (Bill 151-A)

A circuit judge at chambers or a county judge may, in a divorce case, order payment to a wife of suit money and temporary alimony and restrain the husband from interfering with her personal liberty. In re Gill, 20 W 719.

Judgment giving custody of a child to the mother with direction that the father should be permitted to see it once a week implies that the child should be kept within the jurisdiction of the court. Under the circumstances removal of the mother and child to a place without the jurisdiction was not a contempt or bar to recovery of judgment for increased alimony. Campbell v. Campbell, 37 W 206.

Where a divorced wife has married before expiration of the time for appeal from the judgment and her second husband was living, it was proper for the court to refuse an allowance to enable her to litigate the appeal. Coad v. Coad, 40 W 392.

A circuit court may, upon rendering judgment dismissing a wife's complaint, order the husband to pay such sum as is necessary to meet expenses of suit. Sumner v. Sumner, 54 W 642, 12 NW 21.

Attorneys for the wife may, in the discretion of the court, secure an allowance of proper compensation. But unless the husband has promised to pay for their services they cannot maintain an action against him therefor. Clarke v. Burke, 65 W 359, 27 NW 22.

The record will be examined and if the appeal is obviously without merits temporary alimony and suit money will be denied. Friend v. Friend, 65 W 412, 27 NW 34.

Where it appeared that the defendant, though able, had been delinquent in paying temporary alimony and had left the jurisdiction to avoid process an allowance of suit money was proper. Pauly v. Pauly, 69 W 419, 34 NW 512.

It is competent for a circuit court, even after the term at which judgment for divorce was entered, to order that defendant pay counsel fees and suit money during the pendency of a proceeding, to modify the judgment as to alimony. But it cannot then require security for such payment. Blake v. Blake, 70 W 238, 35 NW 551.

Where a plaintiff moves to discontinue a divorce action the court should require as a condition the payment of reasonable expenses incurred by the wife. Expenses for attorney's fees should be estimated upon the services performed and not by the number of the attorneys, where there were various substitutions. The court may also order payment of alimony previously due but unpaid. Schulz v. Schulz, 128 W 28, 107 NW 302.

See note to 247.10, citing White v. White, 167 W 615, 168 NW 704.

Sec. 2361, Stats. 1919, does not empower a court to review and alter its judgment dividing and distributing property after the term at which the judgment was rendered. Express authority granted by 247.37 to revise such judgments, as they affect the status of the parties, does not authorize a revision as to the division of property without any change of status. Towns v. Towns, 171 W 32, 176 NW 216.

A defendant wife in a divorce action cannot be allowed, for attorney's fees and disbursements, a sum greater than reasonably neces-

sary for defense of the action. Cudahy v. Cudahy, 217 W 355, 258 NW 168.

The amount of an allowance for counsel fees to the wife in a divorce action is largely within the discretion of the trial court. Szumski v. Szumski, 223 W 500, 270 NW 926.

An order refusing to award suit money and counsel fees against a divorced husband to enable the divorced wife to defend against a motion for modification of the judgment of divorce so as to award the custody of the child to the husband was not an abuse of discretion, where the wife had remarried and there was no showing that her second husband was unable to supply her with funds necessary to her defense. Elies v. Elies, 239 W 60, 300 NW 493.

An allowance to the wife for attorney fees for services rendered in defending against the husband's motion to set aside the divorce judgment is proper as an allowance to enable the wife to carry on or "defend the action," particularly where the husband was asking for a new trial, and his counterclaim constituted an "action" by him. Although the wife has means with which to carry on her divorce action, the trial court in its discretion may require the husband to pay the expense of her so doing if the circumstances make such payment equitable. Swenson v. Swenson, 245 W 124, 13 NW (2d) 531.

Where the husband instituted the action for divorce, and much of the services rendered by counsel for the wife, who counterclaimed for divorce, were necessary in defending the action, it was within the sound discretion of the trial court, on denying a divorce to both parties, to require the husband to pay to the wife's attorneys two-thirds of their total bill for services rendered to the wife in the action. Leach v. Leach, 261 W 350, 52 NW (2d) 896.

See note to 247.26, (general) citing Pollock v. Pollock, 273 W 233, 77 NW (2d) 485.

247.232 History: 1967 c. 220; Stats. 1967 s. 247.232; 1969 c. 55.

247.235 History: 1965 c. 55; Stats. 1965 s. 247.235.

247.24 History: R. S. 1849 c. 79 s. 19; R. S. 1858 c. 111 s. 19; R. S. 1878 s. 2362; Stats. 1898 s. 2362; 1909 c. 323; 1925 c. 4; Stats. 1925 s. 247.24; 1955 c. 575; 1959 c. 595 s. 66; 1961 c. 505; 1969 c. 366 s. 117 (2) (b).

Legislative Council Note, 1955: A child whose parents are unfit to have his custody is a neglected child regardless of whether the court making that finding is a juvenile court or a divorce court. Therefore, when the divorce court transfers legal custody of a child the same restrictions should apply as in the case of a juvenile court. The language inserted in s. 247.24 is exactly the same as that in s. 48.35 regarding the transfer of custody of neglected children by the juvenile court. (Bill 444-S)

If the husband has obtained a divorce for other causes than the wife's adultery the court may, on petition or motion, take testimony in regard to her alleged adultery (discovered since the institution of divorce proceedings), as affecting alimony and the custody of infant children. Helden v. Helden, 7 W 296.

The authority of the circuit court may be exercised at its discretion with a view to subserve the best interests of children. It may order that one party shall be guardian for nurture and the other for education and discipline. Welch v. Welch, 33 W 534.

If the wife has obtained a divorce because of the husband's cruelty she is prima facie best entitled to custody of young children. Pauly v. Pauly, 69 W 419, 34 NW 512.

A judgment requiring the husband to pay the wife a sum annually as long as she has the care and custody of the children only requires such an annual payment during their minority. Boehler v. Boehler, 125 W 627, 104 NW 840.

Where a judgment purported to wholly release the plaintiff from responsibility for the minor child, the provision must be read in connection with secs. 2362 and 2363, Stats. 1898, and would not prevent a revision of the judgment. Lessig v. Lessig, 136 W 403, 117 NW 792.

By the death of the mother who had been awarded custody of a child in a divorce action, the right of the father over the child was restored and he was legally bound to provide for all her wants and he was entitled to her care and custody. Yates v. Yates, 165 W 250, 161 NW 743.

Under the facts stated, the mother, rather than the father, was entitled to the custody of her daughter. Jensen v. Jensen, 168 W 502, 170 NW 735.

In determining the question of custody of minor children in a divorce action, the result reached should subserve the best interests of the children, and the conclusion of the trial court will not be disturbed unless clearly wrong. Jenkins v. Jenkins, 173 W 592, 181 NW 826.

It was proper to give the custody of 2 minor daughters, aged thirteen and eight, to the wife, notwithstanding she was guilty of desertion, where there is no claim that the wife was not morally fit to care for the children. Twohig v. Twohig, 176 W 275, 186 NW 592.

An order relating to the custody of a child entered subsequent to a divorce judgment is in fact an order modifying the judgment as to such custody. Having been made without necessary findings as to whether the interest of the child demanded a change of custody or as to the fitness of either parent to have its custody, and having awarded such custody to a nonresident for 60 days, it was void upon its face under the requirements of the statute. In proceedings for modification of a divorce judgment in the matter of the custody of children, a hearing should be granted if demanded, witnesses should be sworn, opportunity given for cross-examination, and a record made. Smith v. Smith, 209 W 605, 245 NW 644.

Custody of children of tender years, especially girls, will ordinarily be given to the mother, other things being equal and she not being unfit. Acheson v. Acheson, 235 W 610, 294 NW 6.

A provision in a judgment of divorce, awarding the custody of the minor children to a nonresident, was void. Sang v. Sang, 240 W 288, 3 NW (2d) 340.

In awarding the custody of a child, the welfare of the child is the controlling consideration, paramount to legal rights which a parent might otherwise have to the custody of his child. Siskoy v. Siskoy, 250 W 435, 27 NW (2d) 488.

In determining the question of custody of minor children of divorced parents, the welfare of the children is the controlling consideration, and the action of the trial court resolving that question should not be disturbed unless clearly wrong. Hansen v. Hansen, 251 W 574, 30 NW (2d) 227.

A judgment in a divorce suit does not prevent the court from modifying a judgment providing for the minor children, if the circumstances of the parties have so changed as to render such modification equitable, but a modification in matters relating to custody is an abuse of discretion in the absence of a substantial change in the premises on which the original determination was made. In a divorce action wherein the husband alleged certain adulterous acts on the part of the wife, and the trial court found that the husband had falsely accused the wife of adulterous conduct, an adjudication of the judgment of divorce that the wife was a proper person to have the custody of the children was res adjudicata as to the fitness of the wife, so far as the alleged events preceding the judgment were concerned. Hill v. Hill, 257 W 388, 43 NW (2d) 455.

Improper conduct of the wife in riding with a married man and on occasions embracing him and "petting" did not require the court to find that she was an unfit person to have the custody of the children. Barrock v. Barrock, 257 W 565, 44 NW (2d) 527.

When the wife is proved to be morally unfit to have the custody of the minor children of the parties and there is no testimony that the father is incompetent, unfit, or unworthy to have the care and custody of the children, their care and custody should be awarded to him if he can provide for them a suitable home with competent and proper supervision in his absence. Vogel v. Vogel, 259 W 373, 48 NW (2d) 501.

The purpose of 247.24, Stats. 1949, so far as requiring a determination as to the custody of minor children of the parties, is to assure that there shall be at least one person directly chargeable with the responsibility that accompanies having the custody of a minor child. Where the judgment provided that the child should remain at a school for the deaf, but did not award custody to either parent, the cause is remanded for further action. Julien v. Julien, 265 W 85, 60 NW (2d) 753.

Considering the income of the husband, an award requiring the husband to pay support money for each of the 3 children until he or she reaches the age of 21 years, or completes his or her formal education, whichever first occurs, was not an abuse of discretion. Brackob v. Brackob, 265 W 513, 61 NW (2d) 849.

The provision that in rendering a judgment for divorce the trial court "may" make further provision therein concerning the maintenance of the minor children of the parties, it is not required that such provision be made. A judgment requiring the husband to pay a designated sum to the wife "as and for final division of estate and as and for support and maintenance for the minor child," was not void as depriving the child of support and operating to relieve the father from the obligation to support him. If the allowance made by such judgment for the support of the child was inadequate, or even if construed as no allowance at all, it was merely erroneous, and it might have been corrected by appeal or by a motion to modify, but it was not open to a motion to vacate it as void after the death of the father. Paulson v. Paulson, 267 W 639, 66 NW (2d) 700.

An order denying the application of a divorced mother for leave to move a 5½-year-old daughter to Minnesota, to live there with the remarried mother and her husband, and granting the application of the divorced father for a change of custody from the mother to him, and contemplating that the child would stay with the father's sister on a farm near Eau Claire, Wisconsin, until the father completed his military service, was not an abuse of discretion under all the facts and circumstances. A specific finding that the mother was unfit to have the custody was not required as a prerequisite to ordering a change of custody from the mother to the father. Dodge v. Dodge, 268 W 441, 67 NW (2d) 878.

The welfare of minor children is of paramount importance in determining to whom their custody shall be given in a divorce case. Grosberg v. Grosberg, 269 W 165, 68 NW (2d) 725.

Where the plaintiff husband had advanced $5,500 to the defendant wife prior to and during the 4 months of their marriage, which sum she used in the purchase of a house and lot having a value of $14,500, a provision in the judgment of divorce requiring the wife to pay $5,500 to the husband, and awarding to him a lien on the real estate to secure the payment of such sum was proper. Dziengel v. Dziengel, 269 W 591, 70 NW (2d) 21.

When a court finds, on sufficient evidence, that a parent is unfit to have the custody, it implicitly follows that changing such custody from such parent is for the welfare of the child. The matter of the custody of children in divorce actions is a matter peculiarly within the jurisdiction of the trial court, who has seen the parties, had an opportunity to observe their conduct, and is in much better position to determine where the best interests of the child lie than is an appellate court. Hamachek v. Hamachek, 270 W 194, 70 NW (2d) 595.

In determining custody, the court may consider the wishes of the children, as well as the financial condition of the parents, the prospective home surroundings of the children, the character of persons who would associate with them, the fact that the children are to be removed to another country and the children's opportunities for education and moral training, but no one of these is controlling. State ex rel. Hannon v. Eisler, 270 W 469, 71 NW (2d) 376.

A custody proceeding based on a warrant in lieu of habeas corpus is equitable in nature, and the principles which pertain to habeas corpus, when that procedure is used as a means for inquiring into and determining the

rights of conflicting claimants to the care and custody of minor children are applicable. State ex rel. Hannon v. Eisler, 270 W 469, 71 NW (2d) 376.

Although the support of a second wife should not be taken into consideration in determining the amount which the divorced husband should be required to pay for the support of his children by his former marriage until they complete their high school education, it would not be an abuse of discretion for the trial court to consider such factor, together with others, in determining whether the divorced father should be required to continue such payments further. Peck v. Peck, 272 W 466, 76 NW (2d) 316.

The court may modify an order fixing the custody of a child of divorced parents when there has been a substantial change in the premises on which the original determination was made, but the court is not empowered, when fixing custody, to anticipate such substantial change merely on the basis of the passage of time; so that an order, although valid so far as awarding the custody to the mother, is invalid so far as directing that the custody be transferred to the father. Pollock v. Pollock, 273 W 233, 77 NW (2d) 485.

The husband, a hospital superintendent, should be required to pay the entire amount of fees allowed by the trial court to the wife's attorneys for the successful defense of an annulment action against the wife, a nurse. The trial court's allowance of fees of $1,000 to the wife's attorneys was within the discretion of the trial court and will not be disturbed by the supreme court on appeal. Rascop v. Rascop, 274 W 254, 79 NW (2d) 828.

See note to 319.09, citing State ex rel. Tuttle v. Hanson, 274 W 423, 80 NW (2d) 387.

The court has the continuing power to change the custody of children as between the parents, relatives, or others, and to prescribe terms and conditions for visitation or deny it altogether, if the interests of the children will be thus served. The court could deny to the husband any right of visitation with the children unless and until a psychiatric examination by a psychiatrist appointed by the court showed the father's fitness. Neblett v. Neblett, 274 W 574, 81 NW (2d) 61.

A court of equity in which an action for divorce is pending has the inherent jurisdiction to protect the interests of a child of the parties whether or not the divorce is granted, and jurisdiction to determine custody in accordance with the child's interests is neither dependent on statute nor limited by it. Subrt v. Subrt, 275 W 628, 83 NW (2d) 122.

Where the husband in a divorce action requested an investigation and report by the department of public welfare as to the fitness of both parties to have custody of the children, and the wife left the state before trial and defaulted, he cannot object if the court acts on the report, although not in evidence and contrary to the evidence in court. Onderdonk v. Onderdonk, 3 W (2d) 279, 88 NW (2d) 323.

Where, at the time an action for divorce was commenced, both the wife and the husband and their minor children were within the jurisdiction of the trial court, the court, on granting a divorce to the husband on his counterclaim, had the power and authority to make an order with reference to the custody of the children, although at such time the wife and children were absent from the state. Onderdonk v. Onderdonk, 3 W (2d) 279, 88 NW (2d) 323.

The trial court has discretion to exclude evidence of habits and conduct occurring so long prior to the time of hearing as to shed little light on the present fitness of a party to have custody of a child. Bliffert v. Bliffert, 14 W (2d) 316, 111 NW (2d) 188.

The court can enter an order changing visitation rights of a parent based on mail service at his last-known address of the notice of hearing, where defendant cannot be found and personally served. Block v. Block, 15 W (2d) 291, 112 NW (2d) 923.

The court can require a public welfare department to accept custody of minor children, but cannot order a specific institution to accept custody. State v. Ramsay, 16 W (2d) 154, 114 NW (2d) 118.

No jurisdiction or authority is conferred on the court to provide in a divorce judgment, or in any proceeding in a divorce action, for the support of adult children of the parties. O'Neill v. O'Neill, 17 W (2d) 406, 117 NW (2d) 267.

An order allowing the father to have the child visit him in another state for extended periods each year does not amount to a grant of dual custody. The order is proper if consistent with the child's welfare. Patrick v. Patrick, 17 W (2d) 434, 117 NW (2d) 256.

A court may properly change custody of a child from the mother to the father when the father has remarried and the mother has not been able to care for the child herself. Greenlee v. Greenlee, 23 W (2d) 669, 127 NW (2d) 737.

Although "fit and proper" ordinarily connote moral fitness, lack of mental and emotional stability are also to be considered. Seelandt v. Seelandt, 24 W (2d) 73, 128 NW (2d) 66.

An award of custody to the father because the wife professed herself to be an agnostic, although expressing a qualified belief in deity, and because of other factors which had no significant effect upon her right to custody, constituted an abuse of discretion. Welker v. Welker, 24 W (2d) 570, 129 NW (2d) 134.

A court should not determine custody on the basis of a stipulation without taking testimony to determine the best interests of the children. A specific finding of unfitness is not required as a prerequisite to an order denying custody. King v. King, 25 W (2d) 550, 131 NW (2d) 357.

Generally, the same considerations which determine custody of children are applied to the question of removal of children out of the state; the controlling consideration is the welfare of the child and that determination is primarily the task of the trial judge, whose order should prevail except where there is a clear abuse of discretion. Whitman v. Whitman, 28 W (2d) 50, 135 NW (2d) 835.

Immoral conduct per se does not make a person unfit to have custody of children. Wendland v. Wendland, 29 W (2d) 145, 138 NW (2d) 185.

Fitness should be determined as of the time of the hearing and as to its future probability, and a finding of fitness or unfitness should be subject to subsequent determination upon the then existing circumstances. In considering the question of fitness or unfitness, evidence of past conduct, prior physical and emotional conditions, and other previous circumstances is relevant and material insofar as it constitutes a reasonable guide to present qualifications and future probabilities, but evidence of this kind should not be received only to bolster a feeling of outrage or to reemphasize the facts that originally gave rise to the divorce or separation. Larson v. Larson, 30 W (2d) 291, 140 NW (2d) 230.

The term "unable to adequately care for" a minor child is not limited to the parent's financial inability to support the child, but refers to circumstances other than those arising from moral unfitness, which could include the parent's physical, mental, or other conditions or circumstances which would make it difficult or impossible for a morally fit person to give proper care to a child. Sommers v. Sommers, 33 W (2d) 22, 146 NW (2d) 428.

Where a judgment determining custody is entered in the appropriate court of a sister state and is then presented to a Wisconsin court with demand that it be accorded full faith and credit, the Wisconsin court is not thereby compelled to ignore a change in the factual circumstances and accept the foreign judgment without going into the merits of the disputed custody to ascertain wherein the welfare of the children lies. Anderson v. Anderson, 36 W (2d) 455, 153 NW (2d) 627.

While the law recognizes the rule that, other things being equal, the custody of the children with the mother is favored, especially with young children, that legal guideline is subservient to the paramount rule that custody of minor children must depend upon what is in the best interests of the children's welfare. Koslowsky v. Koslowsky, 41 W (2d) 275, 163 NW (2d) 632.

The phrase "unable to adequately care" in 247.24, Stats. 1967, provides an alternative basis for denying custody, thereby broadening the basis of trial court discretion in the custody placement area, but does not narrow the concept of "unfitness" as limited to the morality of parental conduct. Dees v. Dees, 41 W (2d) 435, 164 NW (2d) 282.

In addition to establishing fitness and ability to provide adequate care, a person seeking custody must also establish that the award of custody to him is in the best interests of the child. Dees v. Dees, 41 W (2d) 435, 164 NW (2d) 282.

Under 247.24, Stats. 1967, the husband's financial ability is an important fact in determining the extent of his responsibility for the education of his children, and this includes the question as to the extent of a father's duty to contribute toward the support and education of a son or daughter under 21 years of age who has completed high school and is desirous of a college education. Jordan v. Jordan, 44 W (2d) 471, 171 NW (2d) 385. See also Beberfall v. Beberfall, 44 W (2d) 540, 171 NW (2d) 390.

In a contested custody matter, where a judicial determination is to be made of what is in the best interests of the children at the initial hearing or at a later hearing where the first full-scale inquiry is to be made on the issue, each party has a burden to establish what is in the best interest of the child or children, and as each contends for the custody of the children, it is his burden to show that the best interests of the children call for placement with him, if that is his desire. Gochenaur v. Gochenaur, 45 W (2d) 8, 172 NW (2d) 6.

In a habeas corpus proceeding attacking the right of a mother to retain possession of her minor children, an Ohio court is not required to give full faith and credit to a Wisconsin decree awarding custody of the children to their father, when that decree has been obtained in an *ex parte* divorce action in a Wisconsin court which had no personal jurisdiction over the mother. May v. Anderson, 345 US 528.

In rendering a judgment of divorce, the court does not have the authority to transfer guardianship in any form to the county or the state agencies specified in 247.24, Stats. 1967, even though the court may give the care and custody of the minor children of the parties to such agencies. 57 Atty. Gen. 233.

247.245 History: 1961 c. 266; Stats. 1961 s. 247.245; 1965 c. 121.

247.25 History: R. S. 1849 c. 79 s. 20; R. S. 1858 c. 111 s. 20; R. S. 1878 s. 2363; Stats. 1898 s. 2363; 1925 c. 4; Stats. 1925 s. 247.25; 1959 c. 595 s. 66.

Legislative Council Note, 1959: The new provision requiring the judge to notify the commissioner of an alteration of a judgment is necessary since the commissioner has the responsibility of enforcing the judgment. (Bill 151-A).

A circuit court may revise its judgment in a divorce case. Welch v. Welch, 33 W 534.

Modification of a judgment for an allowance in support of children, made without notice to a divorced husband or the surety on his bond, releases the latter. Sage v. Strong, 40 W 575.

After a judgment for final division and distribution of property, expressly made in lieu of alimony or other provision, the court may still alter or revise the judgment so as to provide allowances to minor children. (Bassett v. Bassett, 99 W 344, 74 NW 780, distinguished). Renner v. Renner, 127 W 371, 106 NW 846.

Refusal of the trial court to enter an order changing custody of a boy from the mother to the father after divorce, was error, where there was evidence that the mother frequently drank intoxicating liquors to excess in the boy's presence with other people, and harbored in her home a married man under circumstances indicating existence of adulterous relations. Obenberger v. Obenberger, 200 W 318, 228 NW 492.

A modification or revision of a judgment of divorce in matters relating to alimony and to the custody of minor children is an abuse of discretion in the absence of a substantial change in the premises on which the original determination was made. Romanowski v. Romanowski, 245 W 199, 14 NW (2d) 23.

In modifying a divorce judgment as to the custody of the minor child, the court erred in basing its order in part on a report of the department of domestic conciliation, which report was not before the court, in that it was never submitted to the parties or to counsel nor offered in evidence. In such situation, the order is reversed and cause remanded for further proceedings. Wunsch v. Wunsch, 248 W 29, 20 NW (2d) 545.

In proceedings to obtain a change of custody from the father to the mother, the court did not err in taking into consideration former evidence as to the mother's misconduct and unfitness preceding the trial which resulted in the judgment of divorce against her and the award of the custody of the child to the father. (Elies v. Elies, 239 W 60, distinguished.) Wall v. Wall, 252 W 339, 31 NW (2d) 527.

After the time has expired within which the trial court can modify its judgment or appeal can be taken, provisions disposing of property can be reached only by an attack on the judgment itself. Dunn v. Dunn, 258 W 188, 45 NW (2d) 727.

Notice to the nonresident wife of the resident husband's application for modification need not be delivered to her within Wisconsin and the court does not thereby lack personal jurisdiction over her. Brazy v. Brazy, 5 W (2d) 352, 92 NW (2d) 738, 93 NW (2d) 856.

On the record in the instant case, the Wisconsin trial court still had jurisdiction to modify its previous orders with respect to the custody and visitation of a minor child presently living with the father in Virginia, personal notice having been given to the father in Virginia. Greef v. Greef, 6 W (2d) 269, 94 NW (2d) 625.

247.25, authorizing the trial court to revise and alter divorce judgments concerning the care, custody, maintenance, and education of the children, presupposes that the children referred to are the children of the parties, and the continuing jurisdiction of the court thereunder is limited to the purposes therein stated, and may not be used for a collateral attack on the status of the parties to the divorce action. Limberg v. Limberg, 10 W (2d) 63, 102 NW (2d) 103.

If a divorced parent who has the custody of a child has good reason for living in another state and such course of action is consistent with the welfare of the child, the courts will permit the removal. Peterson v. Peterson, 13 W (2d) 26, 108 NW (2d) 126.

The rule of res adjudicata, recognized by the supreme court in custody matters, does not apply where the fitness of a parent has not been determined. In matters of custody, the interest of the child and of the public in the child's welfare should not be concluded by the failure of the parents to bring relevant and important facts to the attention of the court. Bliffert v. Bliffert, 14 W (2d) 316, 111 NW (2d) 188.

When the question presented concerns the custody of the children of divorced parents, the trial judge must not be foreclosed from inquiring into matters antedating the preceding judgment, and the doctrine of res judicata is not a complete barrier in custody matters if circumstances exist which prompt the trial judge, in his discretion, to go behind the previous determination, but such re-examination should be had only under special conditions. Miller v. Miller, 15 W (2d) 583, 113 NW (2d) 403.

New needs arising out of the fact that the children have grown older may be deemed a substantial change in circumstances, justifying modification as to support payments; growing old enough to present the need for summer camp would be sufficient change to justify a modification in the support payments, if other prerequisites were met. A further relevant factor relating to change in circumstances is the ability of the husband to pay the increased support payments sought; but it is not necessary for the party seeking the same to demonstrate that the husband's ability to pay had substantially increased, it being sufficient to demonstrate that the husband in his present economic position can absorb the increased expenditure. Kritzik v. Kritzik, 21 W (2d) 442, 124 NW (2d) 581.

There is no time limit on authority of a court to modify a judgment as to maintenance of children. Where the fact of pregnancy at the time of the divorce was not called to the court's attention, it could later order payments for the after-born child. Hutschenreuter v. Hutschenreuter, 23 W (2d) 318, 127 NW (2d) 47.

The awarding of attorney's fees and expenses in a custody matter is in the discretion of the court, and the power is based on the court's continuing jurisdiction to modify the decree under 247.25, Stats. 1963; hence, in the instant case, where the wife did not remarry and the trial court found her to be in debt, requiring her attorney's fees and expenses to be paid by the husband did not constitute an abuse of discretion. King v. King, 25 W (2d) 550, 131 NW (2d) 357.

The trial court erred when, in considering the father's claim for equitable offsets and without petition by the mother, it ordered retroactive increase in support payments, for 247.25, Stats. 1963, grants only prospective power to the trial court and this only when the party seeking the change petitions the court for that relief. Foregger v. Foregger, 40 W (2d) 632, 162 NW (2d) 553, 164 NW (2d) 226.

See note to 48.40, citing 42 Atty. Gen. 341.

247.26 History: R. S. 1849 c. 79 s. 24, 29; R. S. 1858 c. 111 s. 24, 29; R. S. 1878 s. 2364; Stats. 1898 s. 2364; 1919 c. 128; 1925 c. 4; Stats. 1925 s. 247.26; 1935 c. 379; 1959 c. 595 s. 66; 1961 c. 406.

Legislative Council Note, 1959: Restatement of present law with verbal changes for uniformity and clarity. (Bill 151-A)

1. General.
2. Alimony for divorced wife.
3. Allowance for minor children.
4. Division of estate.

1. General.

In view of the facts in this case, the allowance for alimony should be reduced to $3,000, and the annual allowance for the support of children should be reduced to $200. The court is without power to give the plaintiff a life es-

tate in a farm, with the remainder to the children. Moul v. Moul, 30 W 203.

The supreme court will not consider the questions of allowance, alimony or division of estate until the trial court has passed upon them. Crichton v. Crichton, 73 W 59, 40 NW 638.

A final decree dividing the property of the parties cannot be modified after the term at which it was rendered; the right to alimony ceases upon the death of the husband; and provision for the support of children terminates at their death or majority. The court was without jurisdiction, after the husband and children were dead, to modify the judgment in either respect, upon the wife's application. A decree awarding property to the wife "in trust" was an award of the absolute title to enable her to support the children. Kuether v. State, 174 W 538, 183 NW 695.

When a final division of the property is made a judgment of divorce may include both a provision for alimony and a provision for division of the property, but a judgment providing only for the final division of the property may not thereafter be modified to substitute therefor or to include therein a provision for alimony. A provision for alimony in a judgment of divorce may be revised from time to time, but not so as to a provision for division of the estate. Gray v. Gray, 240 W 285, 3 NW (2d) 376.

The trial court was correct in holding that the wife was not entitled to alimony and in making a full and final division of property in lieu thereof, but an award of support money to the wife for her use and benefit for the support of herself and 2 children, with $70 of the total of $150 per month to be used for herself, was an award of alimony to the wife contrary to the finding that she was not entitled to alimony, requiring that the case be returned to the trial court for further consideration of the matter of support money for the children. An allowance of $150 per month as support money for 2 children would not be excessive, considering the husband's net estate of $25,000 and his earning capacity, although his income presently was only approximately $125 per month. Weihert v. Weihert, 265 W 438, 61 NW (2d) 890.

Where a wife obtained a divorce without personal service in Washington, she can bring an equity action in this state to determine items of alimony, custody and support money on the ground of the Washington divorce, without commencing a divorce action here. Pollock v. Pollock, 273 W 233, 77 NW (2d) 485.

In determining alimony and property division, the trial court should take into account the husband's interest in a retirement plan, even though he has not retired. Schafer v. Schafer, 3 W (2d) 166, 87 NW (2d) 803.

Where a husband against whom a divorce was granted was steadily employed and had a salary of $10,000 per year plus overtime of $414, the divorce judgment, so far as requiring the husband to pay $150 per month alimony and $75 per month support money for each of the 2 children whose custody was awarded to the mother, and also requiring the husband to continue in force at a cost of $25.38 per month 2 life policies for the benefit of the 2 children, was not an abuse of discretion. Morris v. Morris, 13 W (2d) 92, 108 NW (2d) 124.

On health of parties, misconduct, life insurance, prospective receipt of trust assets, and out-of-state assets as factors affecting property division and alimony see Trowbridge v. Trowbridge, 16 W (2d) 176, 114 NW (2d) 129.

In making a division of property or in granting alimony, or both, consideration should be given by the trial court to the tax consequences, for the tax impact is a matter which permeates the whole process. While tax considerations are not controlling, the trial court should be aware of the tax consequences of his rulings and take such consequences of any proposed division into consideration in making its ruling. Wetzel v. Wetzel, 35 W (2d) 103, 150 NW (2d) 482.

The division of property in a divorce judgment is peculiarly a matter resting in the discretion of the trial court, subject to such rules as have been established by the supreme court for guidance in respect to the matter; and, similarly, the amount of alimony to be paid by a husband to his divorced wife is also a matter peculiarly within the discretion of the trial court. Since such matters are discretionary with the trial court, the trial determination must prevail unless clearly characterized by mistake, or some manifest error, or disregard of established guidelines, amounting to a clear want of judicial discretion or judgment. Williams v. Williams, 44 W (2d) 651, 171 NW (2d) 902.

Upon termination of the marriage relationship, a husband has a continuing obligation to support his wife at the social and economic status to which she has become accustomed during the marriage, and both alimony payments and division of the estate are means whereby a husband meets that obligation. Williams v. Williams, 44 W (2d) 651, 171 NW (2d) 902.

2. Alimony for Divorced Wife.

Where property, acquired with money of the husband is retained by the wife after divorce, title in her is treated as his in determining alimony. Cole v. Cole, 27 W 531.

One who takes conveyance of husband's property for purpose of defeating a recovery of alimony may be joined as a defendant in a divorce suit. Damon v. Damon, 28 W 510.

Defendant should be required to submit to an examination concerning his property and income before permanent alimony is allowed. When this is allowed the plaintiff should be awarded judgment for taxable disbursements. Williams v. Williams, 29 W 517.

If the wife has an adequate estate of her own she has no claim for alimony. Campbell v. Campbell, 37 W 206.

An allowance to the wife of a gross sum in an action for divorce must be regarded as alimony proper, unless expressly stated in the judgment to be a division of property between the parties. Thomas v. Thomas, 41 W 229.

Alimony is a personal charge upon the husband, payable from his income. Bacon v. Bacon, 43 W 197.

One to whom husband conveyed land previous to his marriage in fraud of his wife's marital rights and who holds it in trust for

him may be joined as a defendant in a divorce action. Way v. Way, 67 W 662, 31 NW 15.

Every provision made for the support of the wife, unless expressly stated to be a division of estate, is presumed to be for alimony. Blake v. Blake, 68 W 303, 32 NW 48.

The issue as to alimony may be separated from the trial of the divorce suit or both may be tried together. The latter practice is preferable. Pauly v. Pauly, 69 W 419, 34 NW 512.

The ability of a husband to maintain his wife does not depend upon the amount of property he has accumulated. His ability to accumulate, his social position and the treatment accorded his wife will be considered in fixing the amount which shall be allowed as alimony. McChesney v. McChesney, 91 W 268, 64 NW 856.

Under sec. 2364, Stats. 1898, the court is not limited to payments at stated periods but may award a gross sum. Hooper v. Hooper, 102 W 598, 78 NW 753.

The court has no authority to require the wife to pay alimony to the husband. Brenger v. Brenger, 142 W 26, 125 NW 109.

A divorce judgment providing a monthly allowance only for the wife which is to terminate on her remarriage or death is not a final division of the husband's estate, no matter how it is designated, but is a judgment for alimony which is subject to revision. Norris v. Norris, 162 W 356, 156 NW 778.

Alimony allowed by a judgment of divorce continues only during the joint lives of the parties. Yates v. Yates, 165 W 250, 161 NW 743.

A judgment for alimony remains subject to modification during the life of the parties. Ashby v. Ashby, 174 W 549, 183 NW 965.

A reasonable sum should have been allowed as alimony in this case, instead of a payment of $300 as a final division, where there was no physical property to divide and the plaintiff wife's physical condition and ability to care for herself in the future were materially impaired. Schoenemann v. Schoenemann, 181 W 13, 193 NW 983.

A judgment for alimony entered in a court of general jurisdiction of another state should be given the same faith and credit as it has in such other state. Estate of Wakefield, 182 W 208, 196 NW 541.

Adultery of the wife not known to plaintiff when suit for divorce was begun may be set up after a decree as affecting alimony. A satisfaction of a divorce judgment insofar as it relieves the husband from further payments of alimony, executed by the wife after the husband had procured what he deemed evidence of adulterous conduct on her part, and threatened to make formal application for a modification of the judgment, is immoral and contrary to public policy. During the term within which a divorce judgment was rendered the court may vacate or modify the same; and the misconduct of the wife subsequent to the entry may be a sufficient ground for modifying the allowance of alimony. Weber v. Weber, 153 W 132, 140 NW 1052; Haritos v. Haritos, 185 W 459, 202 NW 181.

On appeal from an order for alimony the supreme court may determine whether such order for alimony amounts to an abuse of discretion or results in manifest injustice. Littig v. Littig, 229 W 430, 282 NW 547.

Where the judgment of divorce is silent as to alimony, the court in effect has adjudged that the plaintiff should not be required to pay alimony and that judgment could not be altered after the term. Hannon v. Hannon, 230 W 620, 284 NW 499.

A wife on leaving her husband without reasonable cause is not entitled to be supported by him. Nowack v. Nowack, 235 W 620, 293 NW 916.

A denial of alimony to a wife, granted a divorce, was an abuse of discretion, where it meant that the wife, although awarded a portion of the estate of the parties, and receiving an allowance for the 2 small children sufficient to maintain them, would be required to seek full-time employment in order to meet expenses of the household, and the income of the husband, an officer in the army air corps, was sufficient to warrant alimony, at least in an amount that would relieve the wife of the necessity of seeking full-time employment and thereby enable her to give the children the care which they should have. Hahn v. Hahn, 250 W 397, 27 NW (2d) 359.

See note to 247.32, citing Schall v. Schall, 259 W 412, 49 NW (2d) 429.

Where the divorce was granted to the wife, and she was to have the custody of all 4 children, and there was evidence respecting her health which might give rise to a future need for alimony, an award, in addition to the award of property, of alimony of $1 per month, in order to retain jurisdiction of such subject, was not an abuse of discretion. Burg v. Burg, 1 W (2d) 419, 85 NW (2d) 356.

Under a stipulation and a judgment providing for $200 per month as alimony for the wife, subject to revision by the court with variations in a standard price index, and creating a trust to protect the wife, the provision was for alimony and the trust and payments would continue until the death of the wife. Estate of Traver, 2 W (2d) 509, 87 NW (2d) 269.

Where a 45-year-old wife is awarded $12,000 as property division, alimony of $60 a month should be increased to $125 where the wife has only one arm, is unskilled and has no other assets and the husband is earning $700 a month. Allen v. Allen, 3 W (2d) 100, 87 NW (2d) 797.

Where defendant husband intentionally reduced his income in an attempt to reduce the alimony allowed, the court could base the allowance on his earning capacity or prospective earnings. Knutson v. Knutson, 15 W (2d) 115, 111 NW (2d) 905.

The general principle is that alimony payments to a divorced wife cease on the death of her divorced husband; but this principle is subject to the rule that alimony can be given after the death of the husband if the spouses so agree by stipulation; and where ambiguity exists, resort may be had to the surrounding circumstances in interpreting the judgment and stipulation as well as their express language. Estate of Rooney, 19 W (2d) 89, 119 NW (2d) 313.

See note to 247.32, citing Sholund v. Sholund, 34 W (2d) 122, 148 NW (2d) 726.

An award in a divorce action of $1 per year

alimony was not void as being beyond the court's jurisdiction, though such provision, containing no statement of reasons for the nominal sum awarded, was vulnerable to attack as being possibly arbitrary if timely appeal were taken. It cannot be attacked collaterally after the time for appeal has expired. Kriesel v. Kriesel, 35 W (2d) 134, 150 NW (2d) 416.

Award of monthly alimony of $200 and child support of $250 for 4 children (to be paid by the husband out of his annual income of $25,000 before taxes) could not be deemed manifestly unjust, the record being barren of evidence as to their financial needs, and the proof otherwise revealing that the wife received about one-third of the estate in property division and an additional $100 per month for 17 months. Jackowick v. Jackowick, 39 W (2d) 249, 159 NW (2d) 54.

Award of $125 per month for the support of each of 4 minor children of a marriage and $500 per month alimony is not deemed excessive where the record disclosed that the husband's income in past years averaged $28,000, and in recent years $39,000. Wahl v. Wahl, 39 W (2d) 510, 159 NW (2d) 651.

3. Allowance for Minor Children.

A husband able to work should not be absolved from the obligation to contribute to the support of dependent minor children. Lewis v. Lewis, 201 W 343, 230 NW 77.

The U.S. government's allotment of part of the insane veteran's monthly compensation for the support of the child did not prevent application of the accumulated funds in the hands of the veteran's guardian to the payment of accrued support money under the divorce judgment. Guardianship of Gardner, 220 W 493, 264 NW 643.

See note to 247.32, citing Romanowski v. Romanowski, 245 W 199, 14 NW (2d) 23.

Where the husband, who was to have the custody of 4 children, had a salary of $500 per month and was awarded the home and household furnishings of the parties, and the wife, who was to have the custody of the other 2 children, would presumably have to spend all or most of her $8,000 cash allowance for a home for herself and such 2 children, one of whom was still an infant, and the wife might not be able to supplement her income by accepting employment, an allowance of $125 per month for the support of such 2 children was not so unwarranted as to establish an abuse of discretion. Hansen v. Hansen, 259 W 485, 49 NW (2d) 434.

An award of $140 per month as support money for the 4 children, in the custody of the wife, was not excessive or arbitrary, although the husband's monthly net take-home pay was only about $310 and he had other obligations, the court's primary concern being the need of the children. Burg v. Burg, 1 W (2d) 419, 85 NW (2d) 356.

An award for support of children may not include any items of personal and living expenses of the wife. Farwell v. Farwell, 33 W (2d) 324, 147 NW (2d) 289.

4. Division of Estate.

Where a judgment assigned to the wife an undivided half of the husband's land she can show by parol, in ejectment against a third person, that the husband owned the land, when judgment in divorce was rendered, by an unrecorded deed which he subsequently destroyed and procured a new deed to be executed by his grantor to defendant, for the purpose of defrauding her. Wilke v. Wilke, 28 W 296.

Courts have no power to give a life estate in land to a divorced wife, with remainder to children. Moul v. Moul, 30 W 203.

"Estate," as used in the statute, includes income of whatever nature as well as subsisting property. No part of the estate or income is exempt from a judgment. The court may make an equitable division of the real and personal estate, divest the husband's title to realty and transfer it to the wife to be held in fee simple. Bacon v. Bacon, 43 W 197.

The unchastity of the wife before marriage may be considered in the division of property. Varney v. Varney, 58 W 19, 16 NW 36.

A judgment which gives to the plaintiff wife all the property of the husband and confirms the title of the homestead in her makes a final division and distribution of his estate. Thompson v. Thompson, 73 W 84, 40 NW 671.

In Blake v. Blake, 68 W 303, 32 NW 48, it was adjudged that the defendant pay the sum the parties had agreed upon, and that the plaintiff execute a release of her dower right in his real estate. That judgment did not make a final division of the defendant's property. On a further hearing the trial court adjudged that defendant pay a much larger sum as a final division of the estate. Such judgment was not affected by the original agreement between the parties; nor by the original judgment. Blake v. Blake, 75 W 339, 43 NW 144.

The statute authorizes an equitable and final division of the husband's entire property, whether it be held in his own name or in his wife's name, and excludes from such division the property of the wife not derived from him Gallagher v. Gallagher, 89 W 461, 61 NW 1104.

Where the trial court found the aggregate of the defendant's property to be $18,900 and that he owed debts amounting to $5,410, an award to the plaintiff as a final division of the property of one farm worth $6,000 and also $400 in money, in addition to sums awarded for support of children, was too large. Roelke v. Roelke, 103 W 204, 78 NW 923.

A husband had built a house upon land belonging to his father and the property was deeded by the father to the wife for a nominal consideration. She paid from her own earnings the taxes and interest, more than the cost of the house. The court had no power to charge the property with the payment of a sum to the husband. Frackelton v. Frackelton, 103 W 673, 79 NW 750.

The fact that property was transferred to the wife by the husband in fraud of creditors would not prevent its being derived from the husband under sec. 2364, Stats. 1898. Hoernig v. Hoernig, 109 W 229, 85 NW 346.

Where defendant husband was awarded an absolute divorce from plaintiff, each party being found guilty of cruel and inhuman

treatment, and the net value of defendant's real estate was $2,004, the plaintiff should not be awarded judgment for more than $650. Lindenmann v. Lindenmann, 118 W 175, 95 NW 96.

Where a sum required to be paid by a divorce judgment was described as for "permanent alimony and division of property" it will be construed as a division of property and not subject to revision after the term at which the judgment was rendered. Kistler v. Kistler, 141 W 491, 124 NW 1028.

A divorce followed by a final division of the property of the husband is such a changed condition of circumstances as to operate as an implied revocation of a provision in the husband's will in favor of the wife. Will of Battis, 143 W 234, 126 NW 9.

Where a divorce was granted to the wife on the ground of cruel and inhuman treatment, and the husband was found to have a net worth of $100,000 and to have an income of $8,000 per year, a final division of the property awarding to the wife $23,000 together with the household furniture was, under all the circumstances, a proper exercise of judicial discretion. Minahan v. Minahan, 145 W 514, 130 NW 476.

The division of property by the trial court in this case is sustained, it not clearly appearing to be a departure from the general rule that a liberal allowance to the divorced wife is one-third of the husband's estate, which may be increased for special circumstances. Hiecke v. Hiecke, 163 W 171, 157 NW 747.

A valid title to property may be conveyed by the husband to the wife, and she may hold the same as her sole and separate estate. Her right to such estate cannot be affected by any judgment of divorce except upon a division of property. Alimony cannot be allowed to a wife divorced on the ground of adultery, but the division and distribution of her estate may be made in such an action. Pfingsten v. Pfingsten, 164 W 308, 159 NW 921.

The rule that upon a final division of the husband's property the wife will be given from one-half to one-third is not inflexible. The wilful desertion of the husband by the wife and her misconduct should be considered. Roder v. Roder, 168 W 283, 169 NW 307.

A judgment, in an action for divorce brought by the wife, which divested her of title to a vacant lot and gave it to the husband and which required him to pay to the wife $1,400 in cash, was not inequitable, the total value of the property accumulated by the joint efforts of the parties being about $3,640 and the wife having derived the vacant lot from the husband. Slowikowski v. Slowikowski, 172 W 460, 179 NW 510.

In a divorce action the division of property is affected by the award of the custody of the children. Jenkins v. Jenkins, 173 W 592, 181 NW 826.

Where the husband had secured an absolute decree because of cruel and inhuman treatment, the evidence justified the application by the trial court of the rule that under ordinary circumstances one-third of the property of the parties will be awarded to the wife. Schoen v. Schoen, 175 W 20, 183 NW 876.

It is proper when the custody of children is awarded to the wife to award to her more than the usual one-third of the property, even though the marital fault is chiefly hers. Twohig v. Twohig, 176 W 275, 186 NW 592.

Where the evidence showed that the wife was 45 years of age and was contributing to the education of a son of the marriage, and the husband had an estate of $5,000, though his earnings as a physician were not large, an allowance to the wife of $1,000 in lieu of alimony and as a final distribution of her husband's estate was unjustly meager. Salinko v. Salinko, 177 W 475, 188 NW 606.

In determining the allowance to be made to the wife on a division of the estate, the state of health of the parties, their earning power, and the property owned by each should be considered. Towers v. Towers, 184 W 188, 199 NW 75.

A contract between husband and wife providing for a division between them of their respective properties and relieving each from liability to the other was void. Martin v. Martin, 167 W 255, 167 NW 304; Bergerin v. Bergerin, 168 W 466, 170 NW 820; Haritos v. Haritos, 185 W 459, 202 NW 181.

In a divorce action the question of the final division and distribution of the property of the husband is generally one for the discretion of the trial court; and the exercise of that discretion is subject to the control of the supreme court. The amount of the wife's separate estate is a proper element for consideration in determining a division of the husband's property. Bruhn v. Bruhn, 197 W 358, 222 NW 242.

A special estate of the wife, together with the estate of the husband and so much of the wife's estate as has been derived from the husband, is to be considered in making a property award after a divorce. Interest on the amount of the wife's loan to the husband does not necessarily have to be deducted from the gross estate of the husband to determine the amount of his estate to be divided. Kalbakken v. Kalbakken, 199 W 501, 227 NW 11.

In a wife's divorce action, property divided between the parties, being partially derived from the husband, was properly subjected to a lien securing the husband's share. In dividing the property in a divorce action, the wife's costs and attorney's fees could be included in property awarded to her. Lewis v. Lewis, 201 W 343, 230 NW 77.

The trial court's division of property in a divorce action must prevail unless there appears to be an abuse of judicial discretion. Voegeli v. Voegeli, 204 W 363, 236 NW 123.

An allowance to the wife, because of whose misconduct the husband was granted a divorce, of an amount approximating one-third of the value of the net estate as a final division of property, is excessive under the evidence, and is reduced, with direction for a provision for instalment payments at the option of the husband. Seyfert v. Seyfert, 206 W 503, 240 NW 150.

The husband's estate consisting of $5,500 and $600 worth of furniture, an award to the wife of $5,000 and $30 monthly for their child's support is excessive, and reduced to $2,000 and the furniture, the allowance for sup-

port of the child not being disturbed. Perloff v. Perloff, 206 W 565, 240 NW 126.

A provision ordering the husband to pay the wife the value of a ring converted by him did not constitute a division of estate so as to raise a question as to the validity of an alimony order included in the judgment, but was merely a provision of restitution of the wife's separate property. Zuehls v. Zuehls, 227 W 473, 278 NW 880.

See note to 42.50, citing Wolf v. Jebe, 242 W 650, 9 NW (2d) 124.

The division of property in a divorce case is peculiarly within the discretion of the trial court, and its determination must prevail in the absence of mistake or error respecting details, or disregard of established guides amounting to want of judicial discretion. Quigley v. Quigley, 244 W 94, 11 NW (2d) 638.

On the basis of findings which did not show that the husband had legal title to or any equitable interest in the property, or that the wife derived any portion of the property from the husband, and negatived any contributions on the part of the husband toward payments made on the property, and showed the property to be the separate property of the wife, the trial court was not empowered to make a division thereof and award the husband a share therein. Ruppert v. Ruppert, 247 W 528, 19 NW (2d) 874.

A conveyance of real estate by the husband to the wife shortly after marriage, not made pursuant to any antenuptial or postnuptial agreement, was property of the wife "derived from the husband" and could be finally divided by the court. Polak v. Polak, 248 W 425, 22 NW (2d) 153.

In determining the allowance to be made to the wife on the division of estate in a divorce case, it is necessary to consider the state of health and the earning power of the parties as well as the property owned by each, and the property held in common, the age of the parties, the nature of the property and the manner of its acquisition, together with all of the circumstances bearing on the question. Tupitza v. Tupitza, 251 W 257, 29 NW (2d) 54.

An award of $5,110 to the defendant wife as her share of the husband's property of the value of $14,600 was not an abuse of discretion. Lerner v. Lerner, 252 W 87, 31 NW (2d) 208.

Our divorce statute provides for the equitable division of the property of the parties, including property of the wife derived, either mediately or immediately, from the husband even though title is in the wife. Hartman v. Hartman, 253 W 389, 34 NW (2d) 137.

A property settlement in lieu of alimony granted the wife the farm of the parties, which was acquired originally by the investment of $4,000 of the wife's money, and is now subject to indebtedness of $4,900, and valued by the trial court at $16,000 but producing an income of only $1,500 per year, on condition that the wife pay $5,500 to the husband in specified instalments. The judgment is inequitable as unduly jeopardizing the wife's rightful share, and the husband's share is accordingly reduced to $3,500. Gipp v. Gipp, 258 W 220, 45 NW (2d) 623.

Where a divorce was granted to the husband on the ground of misconduct of the wife, an award to the wife of $8,000 in cash as a final division of an estate of the net value of $23,250, although liberal, was not an abuse of discretion. Hansen v. Hansen, 259 W 485, 49 NW (2d) 434.

Where the court makes a division of the property of the parties in divorce cases, there should be an actual division wherever possible. A judgment of divorce, granted to the wife of a veterinarian, so far as providing that a lot and the home thereon should remain in the names of the parties as joint tenants, and awarding an animal hospital on the rear of the lot to the husband, and giving the wife the right to occupy the house so long as she desires, is impractical and is modified so as to award the house and lot to the husband, and to give the wife and children the right to occupy the house for a period not exceeding 2 years, the husband then to pay the wife for her interest in such real estate. Horel v. Horel, 260 W 336, 50 NW (2d) 673.

A division of estate in a divorce case is an adjustment of property rights and equities between the parties, and it is clearly distinguishable in its use and purposes from alimony for the wife and from support money for dependent children. Brackob v. Brackob, 262 W 202, 54 NW (2d) 900.

In a divorce action, the question of a final division and distribution of the husband's property is one for the discretion of the trial court. There is no precise measure by which to determine the amount to be awarded to a divorced wife and, although the general level to start from is a third, the amount to be allowed may be less than a third in some cases. Where the parties lived together about 7 years during which the plaintiff wife and her children of a former marriage gave the husband a great deal of help in the operation of his household and farm, and during such period the value of his holdings was increased, and the parties earned sufficient to invest about $1,600 in the purchase of land and approximately $5,000 in the purchase of farm machinery, a property division awarding the wife $4,200 out of the husband's net estate valued at $13,380 was not an abuse of discretion. Starzinski v. Starzinski, 263 W 104, 56 NW (2d) 784.

In a divorce judgment awarding the wife $4,200 out of the farmer-husband's net estate valued at $13,380, a provision requiring him to pay $4,200 to the wife forthwith would place an undue burden on him, so that further proceedings should be had to determine what would be a reasonable requirement as to time of payment and whether it would lighten his burden to permit him to pay the amount in fixed reasonable instalments. Starzinski v. Starzinski, 263 W 104, 56 NW (2d) 784.

In an action for divorce against a husband whose net estate was valued at $10,000, an award of $1,000, as a final division of property to the wife, who had lived with the husband only a relatively short period of time and who had contributed only in small part to his accumulations, was not an abuse of discre-

tion. Baehmann v. Baehmann, 264 W 178, 58 NW (2d) 634.

A divorce granted from the bench at the conclusion of the original trial was effective as of such date, and such date would be the proper time as of which to determine the value of the estate of the parties on which to base a division of property on a second trial of such matter, in the absence of any exceptional intervening circumstances occurring in the meantime. Brackob v. Brackob, 265 W 513, 61 NW (2d) 849.

If the husband, before his death, does not name a different beneficiary for his life insurance, or cash savings bonds payable jointly, his divorced wife can claim the proceeds of both, despite the divorce judgment which divided his estate, entered pursuant to a stipulation that the wife would make no further claim to any other of his property. Hott v. Warner, 268 W 264, 67 NW (2d) 370.

An award of half of an estate of a net value of $10,780 to a farmer's wife who had worked in the fields and at the various chores on the farm during the 14 years of the marriage, and who had contributed as much to the acquisition of their property as had the husband, who was 39 years of age and in good health, and would have no further obligation to support the wife because no award of alimony was made, was not an abuse of discretion. Hoffman v. Hoffman, 270 W 357, 71 NW (2d) 401.

In general, a clear third of the whole property to be divided in a divorce action is a liberal allowance to the wife, subject to be increased or decreased according to special circumstances. Hull v. Hull, 274 W 140, 79 NW (2d) 653.

In making a division of the estate of the parties, the court can divest the wife of any interest in the husband's insurance, since she derives it from him, and if it does so, 247.35 is inapplicable. Spalding v. Williams, 275 W 394, 82 NW (2d) 187.

An award to the wife of specified items and to the husband of "all the rest of the property" was sufficient to divest the wife of any interest in his insurance. Spalding v. Williams, 275 W 394, 82 NW (2d) 187.

Considering the small size of the estate of the parties, and that the wife, granted a divorce, had contributed probably more than half of the $5,750 net value of a 6½ acre farm, and was to have the custody of the 4 minor children and would need a home for them, and that the wife was unable to work out because of a heart ailment but could realize a small income on the farm, an award of the farm to the wife, together with household furniture and certain other property, was not an abuse of discretion, although leaving the husband with practically no property. Burg v. Burg, 1 W (2d) 419, 85 NW (2d) 356.

Taking into account the various factors which the trial court could properly consider in making a division of the property of a 63-year-old husband, granted a divorce, and of the property of a 57-year-old wife — such as the relatively short duration of the marriage, and the fact that substantially all of the husband's property had been accumulated before the marriage, and at the time of the marriage amounted to $27,391 as compared to the wife's separate estate of $3,300—a division of $31,726 to the husband and $10,000 to the wife, in lieu of alimony, was not so inadequate as to the wife as to constitute an abuse of discretion. Wingad v. Wingad, 2 W (2d) 393, 86 NW (2d) 425.

Where, among other things, the wife was to receive no alimony, and the care of 5 children, whose ages ranged from 11 years to less than one year, would make it impossible for the wife to take employment so as to contribute anything to her own support, an award of approximately 50% of the property of the parties, of a net value of $30,400, as a final division of property, was within the discretion of the trial court. Mentzel v. Mentzel, 4 W (2d) 584, 91 NW (2d) 101.

The husband's transfer of assets to an adult son by a former marriage having been made for the intended purpose of hindering, delaying, and defrauding the wife and minor child and escaping the husband's obligations to them, and the trial court having properly set the transfer aside, it was proper for the court to consider the transferred property as a part of the husband's estate in determining the the property division, since to leave it out of consideration would be to reward the husband for his wrongdoing, and would defeat the purpose of the law which permits such transfers to be set aside. Caldwell v. Caldwell, 5 W (2d) 146, 92 NW (2d) 356.

An award of $65,000 plus certain other items, amounting altogether to approximately one third in value of the 57-year-old husband's total assets, to the 31-year-old wife as a division of property, with no allowance of alimony, was not excessive but was within the proper bounds of the trial court's wide discretion in such matters. Outrageous mistreatment of a wife by a husband will justify a larger allowance by way of alimony or property division than would otherwise be permissible. The fact, that most of the husband's estate was accumulated before the marriage, does not necessarily require the award to the wife to be drastically limited. Caldwell v. Caldwell, 5 W (2d) 146, 92 NW (2d) 356.

Circumstances to be considered in determining the propriety of a property division in a divorce action are the ability to earn and the earnings of the parties, the special estate of the wife, the nature of the property and the manner of its acquisition, and the behavior of the parties. Yasulis v. Yasulis, 6 W (2d) 249, 94 NW (2d) 649.

There is no fixed rule that, in making a division of property, the wife is entitled to not less than a third of the value thereof. An award of only $5,000 to the wife out of the property of the parties having a value of $18,000, to be paid in cash, was not an abuse of discretion. Antholt v. Antholt, 6 W (2d) 586, 95 NW (2d) 224.

In general, a clear third of the whole is deemed a liberal allowance to the wife, subject, however, to being increased or decreased according to special circumstances. Manske v. Manske, 6 W (2d) 605, 95 NW (2d) 401.

On the record in the instant case an award of only $600 to the wife is an abuse of discre-

tion, and further, an award of $2,000 to her is deemed a fair division under the circumstances. Manske v. Manske, 6 W (2d) 605, 95 NW (2d) 401.

Where neither party to a divorce action had any substantial property at the time of their marriage, but both parties were hard workers throughout their married life, so that a substantial estate had been accumulated by the time of the divorce action, and the husband's shown net worth was almost $250,000 and the wife's shown net worth was less than $2,500, the trial court's award to the wife, as a final division of property, in lieu of alimony, of property or cash to the amount of $90,000, and the further award to the wife of her separate estate was not an abuse of discretion as being inadequate. Rohm v. Rohm, 7 W (2d) 431, 96 NW (2d) 817.

See note to 247.32, citing Anderson v. Anderson, 8 W (2d) 133, 98 NW (2d) 434.

Under evidence that at the time of the marriage the separate estate of the wife was $15,000, and that at the time of the divorce her estate was of the net value of $49,531.16, and under evidence that the claimed contributions of work and money by the husband were not so substantial as to greatly enhance the value of the wife's property, the trial court did not abuse its discretion in determining that the husband had no interest in the estate of the wife and was not entitled to a division thereof under the statute. Polleck v. Polleck, 8 W (2d) 295, 99 NW (2d) 98.

Where it appeared that all of the property owned by the parties either individually or jointly, was purchased in whole or in substantial part from the wife's separate estate, a division of property, made in lieu of all future alimony, and awarding substantially all of the property to the wife, was not inequitable, and the trial court did not abuse its discretion in making its determination in relation thereto. Zachman v. Zachman, 9 W (2d) 335, 101 NW (2d) 55.

In making a division of property the trial court properly valued the employed husband's inchoate interest in the federal civil-service retirement fund at $6,263.04, which was the sum that his estate would have been entitled to as a lump-sum settlement on the date of the trial if he had died leaving no widow, and the court properly disposed of the matter by awarding $2,100 to the wife, to be paid in instalments of $50 per month, and also awarding alimony of $50 per month with the proviso that the future potential value of the husband's interest in the retirement fund be a subject for consideration in determining alimony at such time as the husband had actually received more than $6,263.04 as an annuitant under the fund. Schafer v. Schafer, 9 W (2d) 502, 101 NW (2d) 780.

Even where the case is tried as a default action the court should consider the conduct of the parties as one of the circumstances in dividing the estate. Wagner v. Wagner, 14 W (2d) 23, 109 NW (2d) 507.

The holding of title in the names of both parties as to property which the wife had acquired but had the deed of conveyance name herself and husband as grantees in joint tenancy, plus the fact that the husband performed valuable labor in improving the property, prevented such property from constituting the wife's separate estate at the time of the trial in determining the division of property. Van Erem v. Van Erem, 14 W (2d) 611, 111 NW (2d) 440.

Where the wife held title to an undivided half of of the homestead real estate, but the greater amount of its value as improved had come from the husband's earnings, one half of the homestead did not constitute her separate estate so as to be excluded in making the division of estate. A division of estate should not be used as a means of punishment to a party guilty of bad conduct. Knutson v. Knutson, 15 W (2d) 115, 111 NW (2d) 905.

Misconduct of a spouse may be given weight by the trial court in making a division of property, but that spouse is not to be pilloried; and where loss results from deliberate misconduct, it is reasonable that the loss be made to fall more heavily on the guilty party; but the court's power to divide property is not an appropriate means of punishment. Trowbridge v. Trowbridge, 16 W (2d) 176, 114 NW (2d) 129.

A divorce decree may by its own force vest title to property in one of the parties, but it is not defective under 247.26 because of ordering a party to convey title or because of adjudicating a division of property, leaving the implementation of the division to the parties. Estate of Massouras, 16 W (2d) 304, 114 NW (2d) 449.

Although arrearages under a temporary order for alimony and attorney fees and costs, which the husband is required to pay, do not constitute part of the wife's division of the estate, nevertheless, they are a charge against the entire estate and should be deducted either from the gross estate in determining the net estate available for distribution between the parties, or from the assets awarded to the husband. Kronforst v. Kronforst, 21 W (2d) 54, 123 NW (2d) 528.

Taking into consideration the 34-year duration of the marriage of the parties, the complete lack of any separate estate in the wife, coupled with her inability to support herself by employment in the future, that the legal separation was brought about by the husband's wrongful conduct, and that the wife is presently denied permanent alimony, an award of approximately 49% of the $55,000 net estate of the parties to the wife is not excessive. Kronforst v. Kronforst, 21 W (2d) 54, 123 NW (2d) 528.

Since in the instant case 3 of the 4 factors constituting special circumstances were present, i.e., long marriage, no separate estate and inability of the wife to support herself by her own efforts, and wrongful conduct on the part of the husband, with but one factor militating against such increase—the grant to her of substantial permanent alimony—an award not to exceed approximately one-half of the whole marital estate was not inappropriate. Radandt v. Radandt, 30 W (2d) 108, 140 NW (2d) 293.

In a division of property in a divorce action the rule is that an award of one-third of the husband's net estate to the wife is a proper starting point, subject to increase or decrease according to circumstances. Strand-

berg v. Strandberg, 33 W (2d) 204, 147 NW (2d) 349.

An antenuptial agreement limiting the wife's share of the estate may be considered in dividing the property on divorce but is not controlling. Strandberg v. Strandberg, 33 W (2d) 204, 147 NW (2d) 349.

Whereas alimony is a provision for the maintenance of the wife, the division of the estate is an adjustment of property rights and equities between the parties, which under 247.26, Stats. 1965, requires taking into consideration the ability of the husband, the special estate of the wife, the character and situation of the parties, and all of the circumstances of the case. Johnson v. Johnson, 37 W (2d) 302, 155 NW (2d) 111, 156 NW (2d) 492. See also Johnson v. Johnson, 42 W (2d) 237, 166 NW (2d) 230.

247.26, Stats. 1965, which provides that the court in dividing and distributing the estate of the husband between the parties should give due regard to certain factors, indicates that granting a property division is a matter lying within the discretion of the trial court. Spheeris v. Spheeris, 37 W (2d) 497, 155 NW (2d) 130.

An award of 40% of the husband's net worth (exceeding $400,000) is not deemed excessive where the record revealed that 3 of the 4 factors warranting the grant of an award of more than one-third to the wife were present (i.e. misconduct of the husband was flagrant, the wife had no separate estate, and there were 4 minor children of a marriage which had endured for over 12 years). Wahl v. Wahl, 39 W (2d) 510, 159 NW (2d) 651.

Property in the wife's name, if derived in part through the husband's efforts, should be included in the property in determining the division of the estate. Koldrich v. Koldrich, 40 W (2d) 373, 162 NW (2d) 132.

Where during trial of a divorce action the parties, their attorneys and the trial court had extensive discussions in camera concerning the value of the matrimonial estate and stipulated for the record that the net value of the estate was $200,000 (which was within the range of values set forth in the appraisals) and that $15,000 thereof was to be deducted for attorney's fees, ample evidence supported the trial court's finding that the net value of the estate after such deduction was $185,000. Award to the wife of $61,000 was not, as the husband claimed, excessive, taking into account the circumstances involved in the case. Schmidt v. Schmidt, 40 W (2d) 649, 162 NW (2d) 618.

Division of property in Wisconsin is based on the property of the husband and not on the combined holdings of both husband and wife, the relative value of the wife's property being merely one of many factors to be considered when establishing whether the award should be more or less than one-third. Mason v. Mason, 44 W (2d) 362, 171 NW (2d) 364.

Although review by the supreme court of a division of property award is normally on the record, the interest of justice requires remand of the case where lack of sufficient evidence is coupled with the trial court's failure to make specific findings concerning the valuation of disputed assets. Jordan v. Jordan, 44 W (2d) 471, 171 NW (2d) 385.

The aim of 247.26, Stats. 1967, is to provide for an equitable division of the property of the parties, not only the property of the husband but also such property of the wife as she shall have derived either mediately or immediately from the husband. Williams v. Williams, 44 W (2d) 651, 171 NW (2d) 902.

The wife is not guaranteed that she will receive at least one-third of her husband's estate, but rather that one-third may be the starting point, with the award being increased or decreased according to the special circumstances of the case. Williams v. Williams, 44 W (2d) 651, 171 NW (2d) 902.

247.265 History: 1965 c. 129; Stats. 1965 s. 247.265; 1967 c. 220; 1969 c. 236.

Domestic relations—wage assignment after divorce. 1968 WLR 261.

247.28 History: R. S. 1849 c. 79 s. 33; R. S. 1858 c. 111 s. 33; R. S. 1878 s. 2366; Stats. 1898 s. 2366; 1909 c. 323; 1925 c. 4; Stats. 1925 s. 247.28; 1943 c. 553 s. 36a; 1945 c. 272; 1959 c. 595 s. 67.

Legislative Council Note, 1959: The word "estate" has been deleted as surplusage. (Bill 151-A)

An order for the support of the wife and child should be made upon denying a divorce applied for by the husband in a case where the evidence showed that he had been guilty of grossly immoral conduct which in a large measure provoked the misconduct of the wife. Voss v. Voss, 157 W 430, 147 NW 634.

The court may, while denying a divorce, allow the wife to live apart from the husband, award to her the custody of the minor children and require the husband to pay a reasonable amount for her and their support. Penn v. Penn, 168 W 267, 169 NW 558.

Sec. 2366 permits, on denial of divorce, an award of the custody of a child to its father. Adams v. Adams, 178 W 522, 190 NW 359.

Actions for divorce are purely statutory, and only such judgments may be entered therein as are authorized by statute. 247.28, Stats. 1935, does not authorize the court to relieve the husband from the duty to support his wife. Szumski v. Szumski, 223 W 500, 270 NW 926.

Where the question is presented to a court of equity in a divorce action, the court, although denying a divorce, may properly exercise its jurisdiction to determine the custody of children, which it possesses independently of any statute. 247.28, Stats. 1941, was procedural in character, and the repeal thereof (by sec. 36a, ch. 553, Laws 1943) left the jurisdiction and procedure of the courts where it was before the enactment thereof. Dovi v. Dovi, 245 W 50, 13 NW (2d) 585.

247.28, Stats. 1949, does not make it mandatory, where a divorce is denied to both parties, that the trial court shall award support money to the wife; and in applying the statute, which is procedural in nature, in a case where the wife has left the home of the parties without just cause, the quoted phrase is to be interpreted in the light of the common law as declared in the decisions of the supreme court

passing on the question of the right of a wife, who has abandoned the marital home without just cause, to compel her husband to support her while living apart from such home. The trial court's award of support money to the wife was an abuse of discretion as being contrary to the principles applicable to such a situation as announced in the prior decisions of the supreme court. Leach v. Leach, 261 W 350, 52 NW (2d) 896.

247.29 History: 1923 c. 99 s. 2; Stats. 1923 s. 2366a; 1925 c. 4; Stats. 1925 s. 247.29; 1927 c. 321; 1947 c. 383; 1957 c. 280; 1959 c. 595 s. 68; 1961 c. 505; 1965 c. 295.

Legislative Council Note, 1959: As to (1): Present law restated with language changes for clarity and uniformity except the fees for officers including compensation of the family court commissioner is increased from $20 to $50 per day. It should be noted that although the family court commissioner is expected to be a salaried employe, provisions for payment on a fee basis are retained until he becomes salaried and also to provide a measure for payment when the commissioner is disqualified and another attorney acts in his stead. (Bill 151-A)

When attorney's fees and expenses to the wife are awarded by the court by order or judgment in a divorce action, such amounts should be paid through the office of the clerk of circuit court as provided by 247.29, Stats. 1967, and if not paid, the clerk or family court commissioner should institute appropriate proceedings to secure payment. 56 Atty. Gen. 195.

247.30 History: R. S. 1849 c. 79 s. 27; R. S. 1858 c. 111 s. 27; R. S. 1878 s. 2367; Stats. 1898 s. 2367; 1919 c. 128; 1925 c. 4; Stats. 1925 s. 247.30; 1959 c. 595 s. 69.

Legislative Council Note, 1959: Restatement of present law. (Bill 151-A)

A divorced wife, after the husband's death, can enforce a claim for arrears of alimony only by proceeding as for a claim against decedent's estate. A surety on a judgment debtor's bond can be compelled to pay arrears of alimony only by action on the bond. Appeal of Guenther, 40 W 115.

No other court, without leave of that which granted the divorce, can take jurisdiction of an action on the bond given by order of the court which decreed the divorce to secure payment of alimony. Guenther v. Jacobs, 44 W 354.

A judgment for alimony may be enforced like other money judgments. Keyes v. Scanlan, 63 W 345, 23 NW 570.

The court may make an order requiring a bond to be given for the payment of alimony, with a surety. It is not limited to cases where the husband has property upon which security can be given, but extends to cases where he has no property and can give a bond with surety. If he fails to comply with the order he may be punished as for contempt. Wright v. Wright, 74 W 439, 43 NW 145.

A judgment for a gross sum, payable at once, may be docketed as a money judgment and enforced by execution; but a judgment which provides for payments in instalments cannot be docketed. Notwithstanding that contempt proceedings for the nonpayment of money are only authorized where execution cannot be awarded, such proceedings may be resorted to compel the payment of instalments of alimony ordered to be paid by a final judgment of divorce. Staples v. Staples, 87 W 592, 58 NW 1036. See also Zuehls v. Zuehls, 227 W 473, 278 NW 880.

Sec. 2367 does not authorize a judgment making alimony a charge upon personal property. Swanson v. Swanson, 161 W 5, 152 NW 452.

The court may award alimony, making the same a lien upon the homestead of the husband. Schultz v. Schultz, 133 W 125, 113 NW 445; Ashby v. Ashby, 174 W 549, 183 NW 965.

A wife who holds a judgment for alimony cannot bring a garnishment action to reach money to which her husband is entitled from the policemen's pension fund of Milwaukee, but her remedy for reaching such pension fund is a proceeding in the divorce court. Courtney v. Courtney, 251 W 443, 29 NW (2d) 759.

Where the former husband had moved to Mexico City with intent to reside there and had withdrawn all bank deposits and other funds from Wisconsin, the trial court did not abuse its discretion in granting the wife's application to make the alimony payments a lien on the husband's Wisconsin real estate. Bunde v. Bunde, 270 W 226, 70 NW (2d) 624.

The divorce court may, in a proper case, require the father, or his estate after the father's death if that should occur while such support is otherwise in order, to provide for the support of a minor child, and may require the father to secure the payments for the support of a minor child, by lien, trust, or other appropriate device. Caldwell v. Caldwell, 5 W (2d) 146, 92 NW (2d) 356.

247.31 History: R. S. 1849 c. 79 s. 23; R. S. 1858 c. 111 s. 23; R. S. 1878 s. 2368; Stats. 1898 s. 2368; 1925 c. 4; Stats. 1925 s. 247.31; 1959 c. 595 s. 69.

Legislative Council Note, 1959: Restatement of present law. (Bill 151-A)

It is discretionary with the trial court whether or not to appoint a trustee to receive money adjudged to the plaintiff wife, and an order appointing such a receiver will not be disturbed except for abuse of discretion. Slowikowski v. Slowikowski, 172 W 460, 179 NW 510.

It was within the power of the court under 247.26, 247.30, 247.31, for the purpose of having sufficient security, to order in the judgment of divorce that the husband assign to the clerk of the court in trust for current payments for alimony and support money and for the payment of such amount as might subsequently be adjudged to the wife as a final division and distribution of the husband's estate. Dillon v. Dillon, 244 W 122, 11 NW (2d) 628.

In providing for the support and education of minor children in a divorce judgment, the court could order the husband to assign corporate stocks to a trustee as security for such support and education. Beck v. First Nat. Bank in Oshkosh, 244 W 418, 12 NW (2d) 665.

An award to the wife of a division of property in lieu of alimony will not be set aside on the ground that the trial court erroneously considered itself without power to create a trust out of the husband's estate for the payment of alimony, where, assuming but not deciding that the trial court is authorized by 247.31 to create such a trust, the court in its opinion indicated no strong desire to set up such a trust, and discussed the matter in response only to the insistence of the husband's counsel that the wife be allowed alimony only, and after it had determined that the equities and circumstances of the parties required a division of the husband's property, and where the result produced thereby was a salutary one. Roberts v. Roberts, 253 W 305, 34 NW (2d) 130.

247.32 History: R. S. 1849 c. 79 s. 28; R. S. 1858 c. 111 s. 28; R. S. 1878 s. 2369; Stats. 1898 s. 2369; 1925 c. 4; Stats. 1925 s. 247.32; 1959 c. 595 s. 69.

Legislative Council Note, 1959: The new provision requiring notice to the family court commissioner is discussed in note to 247.25. (Bill 151-A)

The statute authorizing a change of venue for prejudice of the judge is not applicable in proceedings for modification of a judgment for alimony. Hopkins v. Hopkins, 40 W 462.

The rule is that, after divorce, the primary duty of maintaining the wife and children of the marriage still remains with the former husband; and in revising its judgment the court may properly consider the value of the wife's past services and disbursements in their maintenance, whether or not an allowance ought to be made for them. Thomas v. Thomas, 47 W 229, 2 NW 283.

Trial court may grant alimony and provide for support of children after a judgment of divorce which made no provision for either. But on application therefor the paternity of a child born before the marriage cannot be inquired into in order to charge the husband with its support. Crugom v. Crugom, 64 W 253, 25 NW 5.

So far as the judgment vests title to realty in the wife it is final and conclusive and cannot be modified by the trial court after the term at which it was rendered. Webster v. Webster, 64 W 438, 25 NW 434.

The court which gives a judgment for alimony may, from time to time, revise it and render such new judgment as it might have originally made. Blake v. Blake, 68 W 303, 32 NW 48, and 70 W 238, 35 NW 551.

Security for the payment of alimony may be required after the judgment awarding it has been rendered. Wright v. Wright, 74 W 439, 43 NW 145.

A judgment for alimony may be modified so as to provide for a final division of the husband's property. Kempster v. Evans, 81 W 247, 51 NW 327.

A conclusion to divide the property may be changed prior to the entry of judgment. Reinhard v. Reinhard, 96 W 555, 71 NW 803.

Where a decree of divorce was granted and alimony is sought but the judgment does not provide therefor, the court cannot upon appeal enter an additional judgment for alimony. Bassett v. Bassett, 99 W 344, 74 NW 780.

Judgment of divorce from bed and board divesting each party of all interest in real estate owned by the other, giving the plaintiff the household furniture and requiring the defendant to pay a certain sum per month does not make a final division of the defendant's property but provides for alimony and is subject to revision. Palica v. Palica, 114 W 236, 90 NW 165.

Where an application for final division of property is made, the value is to be determined as of the date of the application and not as to the date of the original judgment. Martin v. Martin, 126 W 237, 105 NW 783.

Where a decree of divorce divided the property and awarded the custody of the children to plaintiff and made no allowance for their support, the court could subsequently require the defendant to pay an amount for such support. Renner v. Renner, 127 W 371, 106 NW 846.

A decision of the trial court revising an allowance of alimony will not be disturbed unless manifestly unjust. Newton v. Newton, 145 W 261, 130 NW 105.

A judgment decreeing a final division of the husband's estate cannot be modified after the term at which it was entered; but a judgment for alimony may be modified at any time. A provision that the husband, "his heirs, executors and administrators" shall pay a specified sum to the wife annually as a division of the husband's estate is in fact a provision for alimony and is a nullity as to the heirs and legal representatives because alimony is not a charge upon the husband's general estate, although it may be made a charge upon specific real estate. Lally v. Lally, 152 W 56, 138 NW 651.

A trust agreement for the support of a child, entered into in the course of a divorce action by the wife, the husband and the trustee, which agreement was approved by the divorce judgment, was properly set aside upon application under sec. 2369 after the death of the wife and the lawful restoration of the child to the father. Yates v. Yates, 157 W 219, 147 NW 60.

A judgment of divorce may be revised or altered only upon the petition of a party, not upon the application of the guardian ad litem of a child whose custody was determined by the judgment. Yates v. Yates, 165 W 250, 161 NW 743.

In the husband's proceeding for modification of the judgment as to the alimony, costs should have been allowed to the wife for attorney's fees. Littig v. Littig, 229 W 430, 282 NW 547.

The fact that under 247.25 and 247.32 the court had authority to review and modify the judgment of divorce in question, so far as it related to the children, has no bearing on whether that part of the income of the trust payable to the wife was taxable income of the husband, since such authority did not affect the provision made by the court for the wife as a final division of the husband's estate and did not give the court any power to alter such provision after the expiration of the term at

which the judgment was entered. Friedmann v. Tax Comm. 235 W 237, 292 NW 894.

See note to 247.26, (general) citing Gray v. Gray, 240 W 285, 3 NW (2d) 376.

Application to change or vacate a judgment should be made in the action in which it was entered and to the court that rendered it. The parties cannot confer jurisdiction on another court by stipulation. Kusick v. Kusick, 243 W 135, 9 NW (2d) 607.

A provision in a divorce judgment for the support of minor children could be revised at any time on petition of the parties to the divorce action, even though a trustee had been appointed to hold the assets of the trust created by the judgment as security for such support, and even though the provision in the judgment for such support and trust was based on a stipulation of the parties. Stipulations of that kind become merged in the divorce judgment when incorporated therein, and are not so far of a contractual nature as to be controlling on the court or to preclude the court from subsequently revising the judgment in a proper case. Beck v. First Nat. Bank in Oshkosh, 244 W 418, 12 NW (2d) 665.

A divorce terminates only the relationship of husband and wife and does not affect the parental relation or the duty of the husband to support a minor child of the couple, and the omission in the judgment of divorce of provisions for the support of the child is not a final action in that respect so as to preclude the exercise of the court's power to revise such judgments in respect to provisions for the children. Romanowski v. Romanowski, 245 W 199, 14 NW (2d) 23.

The powers of the divorce court to revise and alter its judgment respecting the amount of the allowance for the minor children of the parties ends at the attainment of majority by the children. Halmu v. Halmu, 247 W 124, 19 NW (2d) 317.

Where a divorce judgment required the husband to provide for the support of the wife and children, and the husband contumaciously refused to comply therewith, the court, entering an amended judgment decreeing recovery of the amount of the arrearages of alimony and support money, had jurisdiction to insert in the judgment provisions for enforcing the same by contempt proceedings if the husband should fail to pay such amount in specified monthly instalments, the judgment in such case not being one for a gross sum payable at once. Larson v. Larson, 248 W 352, 21 NW (2d) 725.

In a judgment of divorce granted to the wife, it was within the power of the trial court, under 247.26 and 247.32, to provide for a final division of property and also to provide that the matter of alimony be left to the further determination of the court, and as to the latter provision the judgment was an interlocutory judgment within 270.54, so that, on application made by the wife, it was within the power of the court to determine the amount and make an award of alimony more than a year after the entry of the divorce judgment. (Hannon v. Hannon, 230 W 620, distinguished.) Schall v. Schall, 259 W 412, 49 NW (2d) 429.

The matter of support money is always open for revision by the trial court on the motion of either party. A judgment of divorce may make a final division of property and grant alimony as well. After judgment making a final division and no allowance for alimony, no revision of the judgment to provide for alimony may be had, but where a divorce is granted because of misconduct by the wife and she is given a fairly substantial division of the property of the parties, the supreme court cannot approve of an alimony allowance of $1 per year without a definite statement by the trial court of its reason for making such award. Hansen v. Hansen, 259 W 485, 49 NW (2d) 434.

See note to 247.24, citing Paulson v. Paulson, 267 W 639, 66 NW (2d) 700.

A material change in the status of the wife subsequent to the entry of a decree of divorce constitutes sufficient ground for modifying the alimony provisions of the judgment. Bunde v. Bunde, 270 W 226, 70 NW (2d) 624.

Where a divorced husband knew for 8 years that his ex-wife was not keeping him advised of their child's whereabouts so that he could visit it, and where he failed to comply with the judgment or to seek relief from it until after the child's death, equity will not relieve him from the judgment. The fact that the ex-wife and her second husband treated the child as if it were their own will not excuse his compliance with the judgment. Braun v. Brown, 1 W (2d) 481, 85 NW (2d) 392, 86 NW (2d) 427.

The death of the child operated to terminate the jurisdiction of the divorce court to modify the judgment for support money, and the ex-wife could then maintain an independent action to recover the unpaid instalments from the ex-husband. Braun v. Brown, 1 W (2d) 481, 85 NW (2d) 392, 86 NW (2d) 427.

The rule that courts may modify the provisions of a judgment in a divorce action relating to alimony and support money only where there has been a substantial or material change in the circumstances of the parties should be strictly applied where the amount to be paid for alimony and support money has been stipulated. Bruun v. Bruun, 5 W (2d) 59, 92 NW (2d) 213.

A provision in a divorce judgment which defendant sought to have modified, incorporating a stipulation of the parties that the husband should pay to the wife the sum of $72,000 at the rate of $300 per month, payable in semimonthly instalments, "as and for a final division of the estate of the parties," was a provision of property division, and not a provision for alimony, although the sum of $72,000 exceeded the total assets of the parties subject to division. (Lally v. Lally, 152 W 56, distinguished.) Anderson v. Anderson, 8 W (2d) 133, 98 NW (2d) 434.

Under 269.46 (3), in the absence of any claim that the property-division provisions of a divorce judgment were the result of the defendant's mistake, inadvertence, surprise, or excusable neglect, the jurisdiction of the trial court to review the same expired 60 days after the term at which such judgment was rendered, whereas, under 247.32, a provision for

alimony, if there was one in the judgment, could be revised from time to time. Anderson v. Anderson, 8 W (2d) 133, 98 NW (2d) 434.

A party who asks modification of a judgment as to alimony must show substantial or material change in the circumstances of the parties, especially where the judgment was based on a stipulation. The court should consider not only changes in income but also other assets. Miner v. Miner, 10 W (2d) 438, 103 NW (2d) 4.

The trial court could include in the judgment in an action for divorce both a final division of property and an award of alimony, but it could not "freeze" the alimony by providing that the amount awarded should not be raised or reduced in any future proceeding, and hence such provision was a nullity. Trowbridge v. Trowbridge, 16 W (2d) 176, 114 NW (2d) 129.

If a modification of a divorce judgment rests on a factual determination it will be sustained unless the determination is contrary to the great weight of the evidence, whereas if it rests primarily on an exercise of discretion, the supreme court will not disturb it unless it finds an abuse of discretion. Chandler v. Chandler, 25 W (2d) 587, 131 NW (2d) 336.

A party who has been awarded the custody of a minor child should procure leave of court, by an order properly entered in the cause in which the custody was awarded, before taking the child out of the state. Except in instances where the trial court finds it would be contrary to the best interests of the children, or unduly restrictive or detrimental to the removing parent, the supreme court deems it advisable for the trial court to stay the execution of the order permitting the removal of the minor children pending the appeal from that order when an appropriate motion is made, because of the disrupting effect it may have upon the children if the order is reversed. Whitman v. Whitman, 28 W (2d) 50, 135 NW (2d) 835.

Where the trial court awarded the defendant wife a sum of money as a property settlement in lieu of alimony and in addition a sum payable monthly for 9 months as alimony, the judgment must be treated as awarding alimony and be subject to revision in the future if circumstances change. Sholund v. Sholund, 34 W (2d) 122, 148 NW (2d) 726.

A husband's ability to pay alimony should be considered as of the time of trial, but an award of alimony can be revised upon the showing of a material change of circumstances. Jordan v. Jordan, 44 W (2d) 471, 171 NW (2d) 385.

Where a divorce judgment is subject to modification during the life of the parties, no court has power to enter a final judgment for arrearage in favor of a wife, child or assignee. 55 Atty. Gen. 191.

247.33 History: R. S. 1849 c. 79 s. 34; R. S. 1858 c. 111 s. 34; R. S. 1878 s. 2370; Stats. 1898 s. 2370; 1909 c. 323; 1925 c. 4; Stats. 1925 s. 247.33; 1957 c. 535; 1959 c. 595 s. 69.

Legislative Council Note, 1959: Restatement of present law. (Bill 151-A)

247.34 History: R. S. 1849 c. 79 s. 22; R. S. 1858 c. 111 s. 22; R. S. 1878 s. 2371; Stats. 1898 s. 2371; 1909 c. 323; 1925 c. 4; Stats. 1925 s. 247.34; 1945 c. 25; 1959 c. 595 s. 69.

Legislative Council Note, 1959: Restatement of present law. (Bill 151-A)

It is competent for the court which annuls a marriage to direct the husband to return to the wife money received from her, and interest thereon. In this case it was not unreasonable to compel him to pay one-half the net profits of the business carried on by her, and conducted by him, after the supposed marriage. Wheeler v. Wheeler, 79 W 303, 48 NW 260.

247.35 History: R. S. 1849 c. 79 s. 29; R. S. 1858 c. 111 s. 1, 29; R. S. 1878 s. 2372; Stats. 1898 s. 2372; 1925 c. 4; Stats. 1925 s. 247.35; 1959 c. 595 s. 69.

Legislative Council Note, 1959: Restatement of present law. (Bill 151-A)

A husband and wife lived on land which was hers prior to their marriage, and such land was sold 2 or 3 years thereafter and another tract was bought with the proceeds, title to which tract was taken in his name with her consent, and 4 years later this tract was sold and 80 acres were bought with the proceeds, the title being taken as before. The profits of the original tract belonged to the husband, prior at least to 1850, and during all the time the wife's earnings belonged to him, and she had no separate estate in either of the last-mentioned parcels of land. Under those circumstances, the 80-acre tract could be divided upon judgment of divorce. Gallagher v. Gallagher, 89 W 461, 466, 61 NW 1104.

See note to 270.57, citing Reading v. Reading, 268 W 56, 66 NW (2d) 753.

See note to 247.26, on division of estate, citing Spalding v. Williams, 275 W 394, 82 NW (2d) 187.

It was error, requiring modification of a judgment, to include separately owned personal property of the wife purchased with her own funds in the property to be divided. Antholt v. Antholt, 6 W (2d) 586, 95 NW (2d) 224.

See note to 247.26, on division of estate, citing Van Erem v. Van Erem, 14 W (2d) 611, 111 NW (2d) 440.

247.36 History: R. S. 1858 c. 111 s. 25; R. S. 1878 s. 2373; Stats. 1898 s. 2373; 1909 c. 323; 1925 c. 4; Stats. 1925 s. 247.36; 1957 c. 535; 1959 c. 595 s. 70.

Legislative Council Note, 1959: Restatement of present law. (Bill 151-A)

When a complaint avers that the wife's dower was cut off by a decree of divorce, without averring for what cause the decree was granted, it will be presumed to have been a cause which cut off her dower unless the contrary be made to appear. Burdick v. Briggs, 11 W 126.

A divorce decree for adultery is a bar to dower. Sec. 2373, Stats. 1898, as amended, effects such an alteration or suspension of the common law as was contemplated by sec. 13, art. XIV, and supersedes the Statute of Westminster 2 (13 Edw. I, ch. 34) under which a husband could bar his wife of dower in case she voluntarily left him and lived in adultery with another and was never received back.

Davis v. Estate of Davis, 167 W 328, 167 NW 819.

247.37 History: R. S. 1849 c. 79 s. 35; R. S. 1858 c. 111 s. 35; R. S. 1878 s. 2374; Stats. 1898 s. 2374; 1911 c. 239; 1913 c. 239; 1917 c. 229; 1925 c. 4; Stats. 1925 s. 247.37; 1931 c. 117; 1947 c. 383; 1959 c. 345; 1959 c. 595 s. 70, 71; 1959 c. 690 s. 20; 1961 c. 505; 1965 c. 480, 625.

Legislative Council Note, 1959: As to (1): The first 2 sentences of par. (a) are a restatement of present s. 247.37. The remaining part of the paragraph merely spells out existing practices for purposes of uniformity. Par. (b) is entirely new. Since it is necessary to have a copy of the divorce judgment to obtain a marriage license this paragraph is designed to enable the county clerk to send copies of the judgment to the parties.

As to (2): Restatement of present law with changes in terminology to conform to other chapter provisions except fees for the family court commissioner or for an attorney acting in his stead are raised from $20 to $50 per day. See note to s. 247.29.

As to (3): The new language to the effect that the judge must advise the parties that they are not to cohabit during the waiting period results from the proposed repeal of present s. 247.39 which provides that such cohabitation is punishable as adultery. This repeal is proposed in recognition of the fact that divorced parties are often reconciled within the first year of their divorce, and although such cohabitation is not penalized it should not be encouraged. Cohabitation after the divorce has become final is, of course, punishable under the criminal code.

As to (4): Restatement of present law except for the inclusion of the family court commissioner. (Bill 151-A)

Where the court ordered that judgment be rendered for the plaintiff against defendant, it was in effect a judgment of divorce and the fact that the clerk failed to enter the judgment did not render a marriage thereafter void, and the court had power after such marriage to enter judgment as of the date of the order for divorce. Zahorka v. Geith, 129 W 498, 109 NW 552.

A divorced wife is not a competent witness for or against her husband during the year next following the entry of judgment. Hiller v. Johnson, 162 W 19, 154 NW 845.

There is no absolute severance of the marriage relation until the expiration of one year from the entry of the divorce judgment; and if either party marries again during that year the remarriage is void, even though effected in another state. During such year the court has absolute control over the question whether the divorce sought shall be granted; and adultery committed during the year is ground for vacating or modifying the judgment. White v. White, 167 W 615, 168 NW 704.

See note to 247.23, citing Towns v. Towns, 171 W 32, 176 NW 216.

The powers granted to control judgments of divorce are broad and should be liberally exercised; and the fact that the wife was mentally incompetent when the action for an absolute divorce was tried is persuasive ground for granting a new trial. Moran v. Moran, 172 W 59, 178 NW 248.

The second sentence of sec. 2364 (1) fixes the status of the parties for determining questions of inheritance, but it does not change title to property held in joint tenancy. Westerlund v. Hamlin, 188 W 160, 205 NW 817.

Although appeal was pending in a divorce suit from that part of the divorce judgment relating to alimony and division of property, the trial court could vacate the judgment, so far as it affected the status of the parties. Where the trial court vacated the divorce judgment without giving the required notice to the parties, and the parties acted in recognition of its validity, the plaintiff by bringing a new action, and the defendant by seeking alimony during pendancy of the proceeding, they waived the irregularity. An order of the circuit court seeking to vacate an order in the divorce case setting aside a judgment of absolute divorce, where the term was over and a year had passed during which the circuit court had control over the judgment, was void for want of jurisdiction, and the plaintiff in the divorce action could not be adjudged in contempt of it. Seyfert v. Seyfert, 201 W 223, 229 NW 636.

See note to 893.22, citing Harris v. Kunkel, 227 W 435, 278 NW 868.

So far as a judgment of divorce affected the status of the parties, the trial court had the power to vacate the same for sufficient cause shown, either on its own motion or on application of either party, at any time within one year from the granting of the judgment, both parties being then living; and the denial of a motion to vacate a default judgment of divorce, because the motion was not properly presented, was not res adjudicata so as to preclude the court from considering a second motion involving the same facts, properly presented within the time prescribed, both parties being then living. Jermain v. Jermain, 243 W 508, 11 NW (2d) 163.

An action for divorce is a statutory action, and the trial court can grant only such relief therein as the statutes prescribe. Vacation of a judgment of divorce a vinculo after the death of one of the parties, so far as the judgment affects the marriage status, is forbidden; and the trial court cannot thereafter vacate the judgment, so far as it affects the marriage status, even though relief is moved for under 269.46 on the ground of mistake, inadvertence, surprise, or excusable neglect, and within the one-year period permitted by that section. But in a proper case and on appeal, the court may modify the judgment as to provisions of final division of property between the parties so as to give the surviving party relief. Hirchert v. Hirchert, 243 W 519, 11 NW (2d) 157.

A judgment granting a divorce to a husband in a state other than that of the wife's residence, on service by publication, destroys the marriage status of the wife, and is binding on the courts of other states, if otherwise valid. Price v. Ruggles, 244 W 187, 11 NW (2d) 513.

The court did not abuse its discretion in vacating, on the application of the wife, a default judgment in favor of the wife, where the husband had married another woman, in

Michigan, within less than one year from the date of the judgment. When a wife, granted an absolute divorce, obtained a vacation of the judgment in order to restore the marital status, she should have been required to restore the husband's property adjudged to her with the divorce, and where this was not done, but a judgment dismissing the action was entered, such judgment should be reversed with directions to reinstate the divorce judgment unless, within a reasonable time to be fixed by the trial court, the wife restores to the husband what she received from him under and by virtue of that judgment. Kilmer v. Kilmer, 249 W 41, 23 NW (2d) 510.

Under 247.37 (1) an attempted remarriage of the wife in Iowa within one year was void in Iowa as well as in Wisconsin and constituted no defense to a charge of adultery. State v. Grengs, 253 W 248, 32 NW (2d) 248.

An order for a hearing, on the merits of the complaint on which a default divorce judgment was entered and on the answer, granted the relief asked by the defendant, opened the default and had the effect of setting aside the divorce judgment; a later portion of the order ordering that the divorce judgment stand until the termination of the hearing was repugnant and erroneous. Angelo v. Angelo, 253 W 275, 34 NW (2d) 128.

On a divorced wife's application, filed after the husband's death, to reopen the divorce judgment and allow the wife additional property on the ground of mistake on her part as to values in entering into a stipulation for division of property, the record supported a finding that there was a failure of proof of any mistake on the part of the wife, who had assisted the husband in the business in which the properties had been accumulated, and was familiar with all of the properties, and had as much knowledge of their values at the time of the divorce action as she had later. Cox v. Cox, 259 W 259, 48 NW (2d) 508.

See note to 238.14, citing Estate of Kort, 260 W 621, 51 NW (2d) 501.

Under 247.37 (2) a motion to vacate a divorce judgment is addressed to the discretion of the trial court. The newly discovered evidence offered in relation to certain conduct of the wife was not such as to require the granting of a new trial, and the trial court's refusal to grant the husband's motion for a new trial was not an abuse of discretion. (White v. White, 167 W 615, Jermain v. Jermain, 243 W 503, and Kilmer v. Kilmer, 249 W 401, distinguished.) Starzinski v. Starzinski, 263 W 104, 56 NW (2d) 784.

See note to 270.50, citing Starzinski v. Starzinski, 263 W 104, 56 NW (2d) 784.

Where the trial court has jurisdiction of the parties and of the subject of the action, the judgment is not void even though the court errs in the determination of questions of law or fact, but steps can be taken for the correction thereof or for a review on appeal within the period prescribed by law. Reading v. Reading, 268 W 56, 66 NW (2d) 753.

The statute does not bar an action to vacate a judgment of absolute divorce commenced after one year from the rendition of the judgment, when such action is based on grounds of fraud or coercion in obtaining the decree, but, transcending any consideration or imposition on the party claiming to have been defrauded or coerced, is the question as to whether a fraud has been perpetrated on the court. Guzzo v. Guzzo, 269 W 21, 68 NW (2d) 559.

The information required by 247.37 (3) need not be given in open court when the decision is made by a judge from another circuit after the trial and when the information was included both in the memorandum decision and judgment and was received by defendant. Wingad v. Wingad, 2 W (2d) 393, 86 NW (2d) 425.

Where, at the hearing on the defendant wife's application to vacate the judgment of divorce so as to permit her to bring in previously uncalled witnesses, it appeared that their testimony would not have negated any of the specific acts of cruel and inhuman treatment by the wife which had been testified to by the plaintiff husband and his witnesses on the trial, and that the testimony of such uncalled witnesses would not have been material on the issues of condonation and recrimination, the denial of the application was not an abuse of discretion. Schreiber v. Schreiber, 2 W (2d) 484, 87 NW (2d) 243.

The trial court can vacate or modify a divorce judgment within one year so far as it affects the status of the parties, even though an appeal is pending as to alimony or property division. The party requesting vacation or modification must show facts justifying it before the court can act. Hooker v. Hooker, 8 W (2d) 331, 99 NW (2d) 113.

When the divorce court, pursuant to 247.37 (2), vacated the judgment of divorce within one year from the date of such judgment, this did not terminate the divorce action and the court did not thereby lose jurisdiction over the marital relation or over the parties, and the court, under the circumstances, could thereafter grant permission to the husband to introduce further pleadings. Roddis v. Roddis, 18 W (2d) 118, 118 NW (2d) 109.

After judgment for legal separation is entered the court may within a year modify the judgment to grant an absolute divorce, but the modified judgment cannot be made retroactive. Time for appeal from the modified judgment runs from its date. Chase v. Chase, 20 W (2d) 258, 122 NW (2d) 44.

A judgment of divorce or legal separation is granted when it is pronounced from the bench. The time for appeal in both cases is one year. (Brackob v. Brackob, 265 W 513, applied) Holschbach v. Holschbach, 30 W (2d) 366, 141 NW (2d) 214.

Under 247.37 (2), Stats. 1967, a judgment which affects the matrimonial status of the parties can be set aside for "sufficient cause" shown, even if the proceedings were free from error, the motion being directed to the discretion of the trial court. Bernfeld v. Bernfeld, 41 W (2d) 358, 164 NW (2d) 259.

See note to 245.03, citing Ex parte Soucek, 101 F (2d) 405.

247.375 History: 1953 c. 495; Stats. 1953 s. 247.375; 1957 c. 173; 1959 c. 595 s. 71.

Legislative Council Note, 1959: As to (1): Restatement of present law except for the inclusion of the family court commissioner. (Bill 151-A)

247.38 History: R. S. 1849 c. 79 s. 31; R. S. 1858 c. 111 s. 31; R. S. 1878 s. 2375; Stats. 1898 s. 2375; 1917 c. 619; 1925 c. 4; Stats. 1925 s. 247.38; 1959 c. 345.

247.39 History: 1959 c. 595 s. 72; Stats. 1959 s. 247.39; 1963 c. 429.

Legislative Council Note, 1959: Present s. 249.39 relating to cohabitation after divorce is repealed. (See note to s. 247.37 (3)) Proposed s. 249.39 incorporates supreme court rule 43a (s. 251.431) which provides that alimony or allowances pending appeal to the supreme court shall be decided upon motion in the trial court. (Bill 151-A)

CHAPTER 248.

Actions Abolished.

Legislative Council Note, 1959: The entire chapter is new. It abolishes the common law action for breach of promise (s. 248.01). Existing causes of action may be filed for 6 months after the effective date of the proposed law (s. 248.04). Thereafter such filing is unlawful (s. 248.03). Contracts arising from claims due to breach of promise are declared void as being contrary to public policy (s. 248.05). However, recovery of property procured by false representations of intention to marry is permitted. (s. 248.06) The chapter provides penalties (s. 248.07) and is to be liberally construed. (s. 248.08)

The action for breach of promise encourages marriages that should not take place and its abolishment is in keeping with the philosophy that legislation should be designed to promote stability in marriage. As a remedy which permits monetary recovery the action sanctions conduct that borders on extortion. An action for deceit may be brought where there has been intentional misrepresentation resulting in monetary loss. (s. 248.06) (Bill 151-A)

Editor's Note: Citations of reports of illustrative cases are as follows: Giese v. Schultz, 69 W 521, 34 NW 913; Salchert v. Reinig, 135 W 194, 115 NW 132; Hanson v. Johnson, 141 W 550, 124 NW 506; Falkner v. Schultz, 160 W 594, 150 NW 424; and Klitzke v. Davis, 172 W 425, 179 NW 586.

248.01 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.01.

Abolition of breach-of-promise actions in Wisconsin. Ninneman and Walther, 43 MLR 341.

248.02 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.02.

248.03 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.03.

248.04 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.04.

248.05 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.05.

248.06 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.06.

248.07 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.07.

248.08 History: 1959 c. 595 s. 73; Stats. 1959 s. 248.08.

CHAPTER 250.

Court of Impeachment.

250.01 History: 1853 c. 22 s. 1; R. S. 1858 c. 114 s. 1; R. S. 1878 s. 2395; Stats. 1898 s. 2395; 1925 c. 4; Stats. 1925 s. 250.01.

Revisers' Note, 1878: Section 1, chapter 114, R. S. 1858, amended so as to be limited to the case of the senate acting as a court. Provisions for administration of oaths, etc., in the senate, as the legislative body is made in the chapter on the legislature.

250.02 History: 1853 c. 22 s. 2; R. S. 1858 c. 114 s. 2; R. S. 1878 s. 2396; Stats. 1898 s. 2396; 1925 c. 4; Stats. 1925 s. 250.02.

Revisers' Note, 1878: Section 2, chapter 114, R. S. 1858, verbally amended in last clause. * * *

CHAPTER 251.

Supreme Court.

251.01 History: 1875 c. 218 s. 5; R. S. 1878 s. 2397; Stats. 1898 s. 2397; 1919 c. 362 s. 31; 1925 c. 4; Stats. 1925 s. 251.01; 1953 c. 606.

251.02 History: 1852 c. 395 s. 5; R. S. 1858 s. 1044; R. S. 1878 s. 2399; Stats. 1898 s. 2399; 1925 c. 4; Stats. 1925 s. 251.02.

251.03 History: 1917 c. 353; Stats. 1917 s. 2399a; 1925 c. 4; Stats. 1925 s. 251.03; 1955 c. 204 s. 70a.

251.035 History: 1959 c. 516; 1959 c. 659 s. 73, 74; Stats. 1959 s. 251.035.

Comment of Interim Committee on State Publications, 1959: Old 35.71 renumbered 251.035 (1). Old 35.72 is renumbered 251.035 (2). Old 35.73 is renumbered 251.035 (3) with a minor verbal change. These sections do not belong in ch. 35. [Bill 617-S]

251.04 History: 1876 c. 284; R. S. 1878 s. 2400; 1885 c. 182; Ann. Stats. 1889 s. 2400; 1895 c. 187; 1897 c. 241; Stats. 1898 s. 2400; 1907 c. 466 s. 3; 1911 c. 580; 1911 c. 664 s. 128; 1913 c. 772 s. 117, 118; 1925 c. 4; Stats. 1925 s. 251.04; 1929 c. 482 s. 9; 1947 c. 9 s. 31; 1947 c. 571; 1959 c. 659 s. 79; 1959 c. 691; 1965 c. 240; 1969 c. 154.

251.05 History: 1868 c. 147; R. S. 1878 s. 2401; Stats. 1898 s. 2401; 1911 c. 107; 1913 c. 722 s. 117; 1925 c. 4; Stats. 1925 s. 251.05.

251.055 History: 1951 c. 319 s. 220; Stats. 1951 s. 251.055.

251.06 History: 1875 c. 218 s. 1; R. S. 1878 s. 2402; Stats. 1898 s. 2402; 1925 c. 4; Stats. 1925 s. 251.06; 1943 c. 571.

251.07 History: 1853 c. 105 s. 1; R. S. 1858 c. 115 s. 2; 1875 c. 218 s. 2; R. S. 1878 s. 2404;