

1916

Legislative Suggestions: Amendment of Section 2863, R.S.

James D. Moran
Marquette University

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

James D. Moran, *Legislative Suggestions: Amendment of Section 2863, R.S.*, 1 Marq. L. Rev. (1916).
Available at: <https://scholarship.law.marquette.edu/mulr/vol1/iss1/7>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

But suppose that the title is not a full equitable title, but that only ninety-five per cent of the payments on a land contract have been paid at the time of the death of the grantee, or seventy-five per cent thereof, or fifty per cent thereof. The equitable title is present but even under the extremely liberal doctrine of our court which it admits is "probably out of harmony with some decisions elsewhere under statutes similar to ours," can it be said that the grantee had a legal estate which would entitle the widow to dower? The practice of purchasing valuable property on land contract is increasing and large tracts of land are now held in that way upon which substantial payments are made. It is obvious that an easy way exists to defeat the right of dower through such contracts and by means of other equitable estates. The statute granting dower should be amended to grant dower in all equitable estates in real property. Perhaps the aid of the various organizations of women in this state should be enlisted to secure this change, but in any event the legislation is needed to supplement and complete the conclusions of the learned article on the rights of women in Wisconsin by Chief Justice Winslow, which appears in this issue.

It has not been the purpose of this article to discuss the merits of the cases to which attention has been directed, for the law is settled on these points. The situation created by these decisions should be remedied at the coming meeting of the legislature of this state.

AMENDMENT OF SECTION 2863.

JAMES D. MORAN, '17.

To the Legislature of the State of Wisconsin, we respectfully submit

A BILL

to amend Section 2863, of the Statutes relating to trial courts decision on facts.

The people of the State of Wisconsin represented in Senate and Assembly do enact as follows:—Section 2863 of the Statutes

is amended to read,—Section 2863.—Upon a trial of a question of fact by the court, its decision shall be given in writing and filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly, as of the term at which the cause was tried, and the judge shall state in his decision separately;

1. The facts found by him; and

2. His conclusions of law thereon.

3. *No judge shall sign findings prepared by counsel, but this shall not be construed to prevent Counsel from filing proposed findings and conclusions of law, and the judge shall have the power to permit or order an argument of Counsel in open Court upon proposed findings and conclusions in order to assist in drafting the proper ones. The judge may also submit tentative findings and conclusions and order an argument on them in order to assist him in drafting the final ones.*

The present statute concise and plain as words could make it would from a layman's viewpoint seem easily enforceable but the legal interpretation given it has made it one of the stumbling blocks of the profession.

The judiciary and the practicing attorneys are jointly to blame for the condition in which we find this statute. The judiciary under the impression that this section infringed upon their constitutional power of review, early indicated that it was to be construed as directory rather than obligatory.¹ By so doing it opened the door to much abuse as to time, manner and sufficiency of findings. The lawyers are at fault for allowing the practice to develop to the extent of their drawing their own findings and merely presenting them to the judge for his signature. Nobody would think of allowing a boxer to referee the contest in which he was a contestant but the practice in law at present appears to be different. There, the winner of the preliminary contest is given every possible chance to attain victory in the decisive battle and the result is an abuse which is becoming unbearable.

¹ *Sayre v. Langton*, 7 Wis. 214.

To remedy this evil, the Law Review takes this means of suggesting the foregoing amendment. In framing the same we have taken into consideration the present condition of the practice by making it discretionary with the trial judge to draw his own findings or to allow them to be drawn by one of the attorneys. If the latter method is pursued, a hearing must be had at which all parties are afforded an opportunity to voice their objections prior to judge's signing or in lieu of such procedure, a stipulation that the findings so drawn are satisfactory is sufficient.

The attention of the legislators, for whom this article is primarily intended and who might consider this suggestion a mere theoretical whim of the Law Review, is respectfully directed to the recent utterances of almost every Wisconsin Supreme Court Justice now on the bench, bearing upon this particular question.

Judge Marshall in *Neacy vs. Board of Supervisors*, 144 Wis. 210, states that "there is no statute respecting the practice, strict compliance with which would be more conducive to good, speedy and certain administration of justice, yet no statute so frequently violated in letter or spirit, or both. The most frequent violations are by general findings not responsive at all to the command of the law that the judge shall state *separately* the facts found by him. That species of findings has been said not to arise to the dignity of an attempt to comply with the statute and to not be entitled to consideration within the rule that findings of fact will not be disturbed on appeal unless against the clear preponderance of the evidence. The abuse in that field has been so persistent notwithstanding frequent suggestions that the making of such findings constitute error which should not be indulged in merely because the rule applicable to the generality of cases that it may be deemed fatally harmful, that it has seemed necessary to indicate—*Damman vs. Damman* post—that such abuse may be fatal to the result."

EFFECT OR WEIGHT GIVEN FINDINGS.

Findings of fact by the trial court will not be disturbed unless contrary to a clear preponderance of the evidence.³

² *Daubner v. McFarlin*, 136 Wis. 515.
In re Kringel's estate, 156 Wis. 94.

In a recent case there arose a conflict as to whether the transaction amounted to a gift or a bailment, and evidence was admitted supporting both views. The trial court found against such gift and the Supreme Court in affirming the trial court's decision adhered to the rule that where there is competent evidence sufficient to support a finding, that court will presume, in the absence of an affirmative showing to the contrary, that the finding rests upon the competent evidence solely.³

NECESSITY FOR AND RESULTS OF FAILURE TO FILE SPECIFIC FINDINGS.

In the case of *Damman vs. Damman*, 144 Wis. 122, the trial court failed to make such findings as are required by Section 2863. Judge Barnes, in commenting thereon, states that such failure constitutes error but does not necessarily lead to reversal. But "in case of such general findings the court is left in a predicament where it may pursue one of three courses (1) to affirm the judgment if clearly supported by a preponderance of the evidence, (2) to reverse if not so supported ordering judgment in accordance with what appears to this court to be the preponderance; or (3) if that course seems to present peril of injustice to remand for further trial and findings. If this court undertakes to determine which way the evidence preponderates, it must take the evidence as it finds it in the printed record and very often this cannot be done with safety." Case reversed and cause remanded with directions to trial court to take further evidence in the case and to make findings of fact and conclusions of law upon the evidence before it in accordance with the requirements of Section 2863.

Where, in an action for breach of contract the court found for plaintiff, it was held error for the trial court to fail to file a finding on an issue of accord and satisfaction, and it appeared that the preponderance of the evidence on such issue was clearly in favor of the defendant, the Supreme Court on reversal, directed judgment dismissing the complaint instead of ordering a new trial.⁴

³ *Hilton v. Rahr*, 155 Wis. 116.

⁴ *Kelm v. Woodbury*, 150 Wis. 499.

OPINIONS BY CIRCUIT JUDGES—FINDINGS
BY ATTORNEYS.

In a recent case⁵ there was a lengthy opinion submitted by the trial court covering all evidence and issues on the trial and embodying his conclusions of law thereon. The opinion ended with the instruction "findings and judgment may be drawn in accordance with the foregoing conclusions." One of the plaintiff's attorneys then drew the so-called findings, using ten (10) printed papers for same in accordance with the direction in the opinion. Chief Justice Winslow reprimanded the trial court for this mode of procedure and wrote a lengthy criticism thereon because as he states "a number of cases have been presented to us recently where the findings have consisted of many pages of mere evidentiary facts, sometimes leaving grave doubt as to what ultimate facts the court really determined thus entailing upon us much tedious and unnecessary labor." He further requests the trial judges, whether they personally draw the findings or not, to see to it in every case that said findings be confined to the ultimate facts as defined in his opinion.

A previous judicial condemnation of this procedure was administered by Judge Marshall in *Neacy vs. Board of Supervisors*, *supra*. In this case the findings were composed of some over 5,000 words and was the work of one of the attorneys. He points out to the circuit judges how a strict compliance with the statutory requirements will lessen, rather than increase the labor performed by many overworked circuit judges, and how much expense, delay and uncertainty in the administration of justice may be saved. In the same case the trial court wrote an opinion which the law does not require expending in preparation thereof several times the work needed to draw findings which the law does require and then was compelled to study somewhat partisan findings drafted by judicial request, composed of thousands of words, devoting work thereto, in order to intelligently sign them, largely in excess of that needed to draft concise findings, composed of the few hundred needed words.

⁵ *Cointe v. Congregation of St. John the Baptist*, 154 Wis. 405.

UNCERTAINTY AND ABSURDITY OF PARTISAN FINDINGS.

The most recent and striking example of this practice is shown in the case of *In re Lynchs Will*.^a The only issue was that of undue influence and probate was refused on that ground. The trial closed on June 29th, 1915, and on October 28th, 1915 (a period of four months), forty-one findings of fact were filed including a finding that the testatrix had not the mental capacity to execute a will. There was no evidence to sustain such a finding, on the contrary, all the evidence shows the testatrix was of sound mind. Judge Vinje in his opinion states "a finding covering that issue * * * undue influence * * * is all that the statute and good practice requires. Instead of that, we have forty-one findings consisting in the main of a synopsis of the evidence favorable to the contestant. Such practice deserves condemnation. The situation would lend color to the surmise that the findings were drawn by contestant's attorneys and not closely enough scanned by the judge at time of signing for we cannot believe that he intended to find lack of testamentary capacity, yet the assertion of that fact is included in both the findings of fact and conclusions of law. "

In order to further impress upon you gentlemen the urgent necessity for the remedial measure we are soliciting, we respectfully direct your attention to the following summary of the points brought out in the foregoing, to-wit:—

(1) Findings of fact will not be disturbed unless contrary to a clear preponderance of the evidence. Note that the rule would be unchanged even though the findings were drawn by the successful attorney.

(2) The present system is working much delay, expense and uncertainty in the administration of justice.

(3) The change we advocate will tend to lessen rather than increase the labor of the circuit court judges.

(4) The Justices of the Supreme Court, individually and collectively, demand a change in the procedure.

(5) JUSTICE demands the change.

^a 166 Wis. 466.