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A Frequent Recurrence of Fundamental Principles

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LEGISLATIVE SUGGESTIONS.

The editorial board solicits contributions to this section. We also invite comment or criticism of any suggestion appearing herein.

"A FREQUENT RECURRENCE OF FUNDAMENTAL PRINCIPLES"

As the final section of the Bill of Rights incorporated in the Constitution of Wisconsin, the framers wrote Section 22 of Art I, as follows:

> "The principles of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

This section contains no limitation on legislative power, no guaranty for the protection of rights, and no grant of power to the Government. From its form one might regard it merely as a hortatory generalization or rhetorical flourish intended as a sort of garnish of the substantial food of the preceding sections.

But it disclosed, perhaps more clearly than any other section, the deep-seated belief which the Constitution makers held in the necessity for a Constitution; and it impressed with force the great truth that sound government must proceed upon sound, unchanging principles of justice and moderation, to which reference should be always made in deciding upon the wisdom of any proposed legislative policy.

Speaking of this section, Marshall, J., in *State v. Redmon*, 134 Wis. 89, 102, took occasion to say:

> "Doubtless, the fathers of the Constitution foresaw the likelihood and danger of the security of personal rights which the fundamental law was intended to firmly intrench, with the judiciary as its defender, being jeopardized at times by excessive regulation of the ordinary affairs of life, and with that in view incorporated in the fundamental law that admonition so full of meaning."

The symmetry and efficiency of our common law in producing justice has been a direct result of the fact that the common law is based upon the fundamental principles of right, from which fundamental principles the course of reasoning always begins, in preparing the way for the correct decision of the case in hand.

The lawyer who depends merely on decided cases as authority for the position he takes in argument, and who, as it often occurs, is bewildered and in doubt when without an authority to direct him, is indeed but poorly prepared for the service he should render. But he who tests every case as it comes to him by the touch-stone of fundamental principles may, and generally does, know the law applicable to the case, and is able to boldly declare it although he has not consulted and does not recall a single authority in its support. This is always assuming that the legislative fiat has not arbitrarily interfered with the natural course of reasoning.

We cannot too often recall the words of the noted English judge who said that if he were asked a question on the common law he would be ashamed not to be able to immediately answer it, but if asked a question on the statute law he would be afraid to answer it without first consulting the words of the statute.

It is quite as important in court procedure, as in the substantive law, to have simplicity and symmetry, — a logical and unified plan, proceeding on a few well defined simple principles, with no special provisions for individual cases. If such a simple plan be provided and the courts be not too much hampered by arbitrary statutory regulation of procedure they can provide for justice as speedy as is consistent with a fair hearing to each interested party and as certain as human faculties can produce.

So much by way of preface to now directing attention to one of the many important instances of the legislature neglecting to have recurrence to fundamental principles.

When in 1856 the Legislature adopted our Code of Legal Procedure it produced a finished product ranking well with the Constitution and with the Common Law. In its simplicity and efficiency and its consistent adherence to a few simple and sound principles the Code is not easily excelled. It is to the credit of successive Legislatures that the Code has been preserved fundamentally intact with but few inroads upon it.

With commendable directness and simplicity the Code provided that thenceforth there should be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which it denominated a civil action; that a civil action in a court of record should be com-

menced by the service of a summons, and the form of such summons was given; that the first pleading should be the complaint, which should contain in addition to the names of the court and of the parties to the action, a concise statement of the facts constituting each cause of action, without unnecessary repetition, and a demand for the judgment to which plaintiff believes himself entitled.

Sections 2600, 2629, 2631 and 2646.

Here is a method of invoking the aid of a court that is so plain that he who runs may read and understand, and when coupled with proper periods of limitation for the commencement of actions it assures to every person his day in court, if he really desires it. No one need stumble, and practically no one ever did stumble in these simple steps of procedure. No Legislator should consider a change of these or any similar fundamentals without first reading Sectoin 22 of Art. I of the Constitution and making sure that he understands the principle which he contemplates disregarding.

Notwithstanding these plain provisions for the commencement of civil actions and the fact that not a word of these statutes have been changed since 1856, we have now many other and more intricate and difficult and wholly unnecessary methods of starting civil actions, all operating to complicate procedure, make litigation uncertain and expensive, and often to deprive a suitor altogether of his day in court. Of the many I purpose speaking of but one such method, but it is one that has left a trail of injustice behind it. I refer to the method of getting into court by way of appeal from the action, or non-action of an auditing board.

This departure from the simplicity of the Code seems to have arisen thus: It was noted that cities, villages, counties, towns and similar governmental divisions by reason of being obliged to act through representatives who can meet only at intervals, and must follow definite procedure, could not act with the promptness and freedom of an individual transacting his own business, and that claims and demands could not be properly passed upon unless formally presented to some auditing board, and provisions for such auditing were wisely made. Then somebody conceived the idea that these public corporations sought to be made the special pets of the government and that claimants against them should be given short shrift and their pathway made narrow and

difficult. To this end there were from time to time enacted provisions that the disallowance of a claim or demand by an auditing board should be a bar to the maintenance of any action to recover thereon, but that the claimant might within a very limited time (usually made twenty days from the disallowance of the claim) appeal to the court and have his day in court, provided he gave a bond with sufficient sureties to prosecute his appeal and pay the costs if defeated. From the necessity of giving a bond to pay costs and of perfecting appeal within a very restricted period there was provided no way of excusing the suitor. It has been often exceedingly hard to know just when the brief period allowed for appeal began. If the claimant appeals too soon or too late, or fails to file a proper bond, or misses any other step in the technical procedure, the court acquires no jurisdiction and the claimant is denied any hearing, no matter how just may be his demand. As against any other class of defendants than that protected by this procedure, no suitor is denied a remedy because he may be too poor to furnish a bond for costs; and there cannot be found elsewhere any other statute of limitation upon the prosecution of a claim or demand based upon a common law right which limits the period for prosecution to twenty days, or any such similar short time.

The first provision for such appeal from an auditing board existed before the Code and related to claims against counties and in a modified form it is now embodied in Section 682-685 of the Statutes. Notwithstanding the form of Section 2629, enacted as a part of the code, which declared that "a civil action in a court of record *shall* be commenced by the service of a summons" the courts continued to take jurisdiction of actions instituted by appeal from the county boards. Later such jurisdiction became assured by amendment and practical re-enactment of the Statutes providing for such appeal.

Next, similar provisions were put into various new special charters of cities which were granted by the Legislature; and finally like provisions were made and still remain a part of the General City Charter Law, Sections 925-58 to 925-60 of Chapter 40a. The latest application of the idea was made to claims against library boards by Section 933a.

As already stated, this class legislation making special pets of municipal and quasi municipal corporations and placing special

burdens upon all others who seek to maintain their rights against such corporations, has left a trail of injustice. In the following cases suitors were not only denied their day in court but were put to the extraordinary expense of carrying their cases all the way to the Supreme Court, merely to find that they could not have a hearing on the merits.

Fleming v. Appleton, 55 Wis. 90.
Watson v. Appleton, 62 Wis. 267.
Koch v. Ashland, 83 Wis. 361.
McCue v. Waupun, 61 Wis. 625.
Telford v. Ashland, 100 Wis. 238.
Mason v. Ashland, 98 Wis. 540.
Seegar v. Ashland, 101 Wis. 515.
State ex rel. Barden, 103 Wis. 297.
Morgan v. Rhinelander, 105 Wis. 138.
Oshkosh W. W. Co. v. Oshkosh, 106 Wis. 83.
O'Donnel v. New London, 113 Wis. 292.
Morrison v. Eau Claire, 115 Wis. 538.
Drinkwine v. Eau Claire, 83 Wis. 428.
Sharp v. Appleton, 134 Wis. 16.
Read v. Madison, 162 Wis. 94.

This collection of denials of justice I find on a very hasty examination of digests and reports, and no doubt it might be greatly added to. There are many other cases wherein claimants became tangled in the technical procedure and after reaching the Supreme Court were sent back to begin all over again.

But the cases thus of record no doubt constitute but a very small share of the instances in which claimants possessing perfectly just claims against such public corporations have been denied any remedy. Many such claimants have left no record, because of finding after the time for appeal had slipped by that it was hopeless to invoke the aid of a court.

Such are the results of neglect of the Legislature in a very limited field to have "recurrence to fundamental principles." The fundamental principle here involved is equality in law to all suitors. The Legislature can not too quickly rectify the mistake.

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