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Editorial Comments

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PROSPECTUS

The editorial staff of the MARQUETTE LAW REVIEW announces that a series of practical articles written by prominent members of the bench and bar of Wisconsin have been secured for Volume 8. Among these are articles on federal practice, on pleading, and on important phases of substantive law.

FUNDAMENTALS

All government springs from the people. There are, however, rights that are inseparable from the individual to whom they attach. Granting that the individual may forbear the exercise of these rights, yet his forbearance cannot deprive other individuals of these rights.

The rights of municipal home rule existed before our Constitution. Courts have repeatedly held this right to be inherent. Dean Schoetz in this issue discusses how the central state Government has been slowly drawing to itself the rights of municipalities under the guise of the police and other implied powers.

The American Bar Association has recommended a closer study of the events that led to the adoption of our Constitution.

We present therefore in this issue a speech by Senator Lenroot wherein he declares that to maintain the genius of our Government the Constitution must remain paramount.

Many factors were brought into play before the Union of the State became more perfect. Alexander Hamilton was the greatest exponent in the fight for a stronger Union. Mr. Williams in this issue describes his struggles and set-backs before his efforts made the adoption of the Constitution a fact. This article is the more valuable since the details of Hamilton's great fight are not readily accessible, hence it presents the fruit of much original research study.

THE SPIRIT OF THE CODE

The present legislature has considered noteworthy changes of the rules of practice in our courts. Directed verdicts in effect have been abolished though the constitutionality of the act may be drawn in question. Special verdicts too were under fire, and as it is maintained by some, properly so. With these proposed alterations questions are raised anew as to the efficiency of the Code constantly exposed as it is to legislative changes.

The Code has to-day many enthusiastic supporters among the members of the bench and bar. But there are on the other hand many who doubt the efficiency of the Code and desire a return to the "admirable" system of the common law. Prominent jurists throughout our country are discussing the practicability of adopting the English Practice Act in our courts. Are we then brought face to face with the problems of a century ago, when the then venerable form of procedure was attacked as wholly inadequate to meet the needs of a new era?

In Saxon times, the ancient chronicler says, pleadings were short and simple. But in the seventeenth century Sir Matthew Hale observed the science of pleading had degenerated from its primitive simplicity, "the length of pleadings, the many and unnecessary repetitions, the many miscarriages of causes have been too much witnessed." But in 1847 New York led the way in reform and in 1856 the legislators of Wisconsin adopted the Civil Code of Procedure, the preamble of the act pithily stating why.

Whereas it is expedient that the present forms of action and pleadings in cases at common law should be abolished; that the distinction between

legal and equitable remedies should no longer continue; and that a uniform course of proceeding in all cases should be established; therefore the people of Wisconsin represented in Senate and Assembly do enact. . . .—Chapter 120, *Laws of 1856.*

But has this ideal been achieved? The early decisions interpreting the Code reveal a misapprehension of its purpose. The courts were prompt to decide that the distinction between law and equity is inherent; that the nature of the action must appear from the pleading. They emphasized that the Code could not change the elements which constitute a cause of action at common law. Obviously an interpretation of the Code in the light of its effect on substantive rights overshadowed the intended change merely in the form of procedure. While it is true that later decisions have done much to restore the original designs of the Code, yet the effects of these decisions have not been wholly eradicated.

The true object of the Code was to simplify lawsuits. The authors of the Code intended that the pleadings should honestly present the rights of the parties. It was the design of the Code to combine the principles of pleading facts according to their legal effect and of pleading in detail the facts upon which the parties based their rights; not the evidentiary facts, not the legal conclusions deducible therefrom, but the ultimate facts upon which the rights of the parties depended. The underlying principle of the Code is that the material facts which constitute the cause of action or defense must be so stated as to advise the opposite party of the true nature and object of the suit, and to enable the court to pronounce the law upon the facts stated.

But in practice this scheme seems not to have worked out. Before the adoption of the Code, the chief grievance was the difficulty for a plaintiff to get into court. To-day after a trial of seventy years, it is too easy for a plaintiff to stay there. Often the plaintiff merely spreads out a set of facts hoping to establish a possible cause of action. Under the liberality of construction and the liberal granting of amendments he can float his putative cause of action clear through the whole process of a trial, when, after taking of all the evidence, he may be first told that as a matter of law he has no cause of action at all. Overallegations, trial strategy, and unpleaded theories are efficient aids; in the meanwhile the defendant seeks cover under the general de-

nial. This all has resulted in prolonging groundless litigation and in clogging the machinery of the courts.

Members of the bench and bar who are attentive to the greater problems in the field of substantive law have suffered these conditions to endure with remarkable tolerance. The State Bar Association of Wisconsin will take up this burning problem at its annual meeting this summer. With the whole-hearted support of the bench and bar some solution will be found not only for the sake of reform in our procedure, but also to secure speedy and substantial justice to those who have recourse to the courts of this community.

JOSEPH WITMER, *Editor.*