Marquette Law Review

Volume 5
Issue 1 *Volume 5, Issue 1 (1920)*

Article 3

Recent Progress in Judicial Administration and Procedure in Wisconsin

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RECENT PROGRESS IN JUDICIAL ADMINISTRATION AND PROCEDURE IN WISCONSIN

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Wisconsin has of late often been referred to as the sociological guinea-pig upon which various social experiments were tried out for the benefit of humanity in general and other states in particular. Remarks of this character have emanated generally from persons of statical disposition, whose equilibrium is disturbed by a prospect of change. It is my firm conviction that Wisconsin, because it has led in the enactment of remedial legislation, is a better state today and in a better position to solve the problems of reconstruction that all the states of this Union must face as the result of the great upheaval through which we have just passed. For one thing, we have the courage to go forward. Our wits are not paralyzed by the thought of change. Our experience has taught us that it is better to anticipate and prepare for needed change rather than oppose it blindly. There was a large, earnest, and sincere group of our citizens who fought many of the advances to the last ditch, but they would not do it again; not even a respectable minority can be found who would advocate the repeal of the enactments relating to the regulation of railroads and public utilities, to compensation for industrial accidents, to the establishment of the civil service, to the levying and collection of income and inheritance taxes, or in the main to other laws relating to the public health, the conservation of our natural resources, and for the promotion of the public welfare generally. There may be differences of opinion as to details and methods, but the general principles embodied in our recent legislation are acceptable to the great majority of our people.

In this general social advance of the last decade or two, the courts of Wisconsin have played an important part. The work of the courts has not been heralded by the blare of trumpets or press-agented after the modern fashion. Because I did not participate in the decision of the cases having to do with the validity or constitutionality of these laws, I feel free to say that the Court met the great questions presented to it openmindedly, fully cognizant of its high duty and great responsibility.

In 1911, having under consideration the Workmen's Compensation Act, Chief Justice Winslow, speaking for the Court, said:

> "Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office. But when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present-day people and conditions?
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> "When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes." *Borgnis vs. Falk Co.*, 147 Wis. 327, 349; 133 N. W. 209. See also *Water Power Cases*, 148 Wis. 124, 134 N. W. 330; and *Income Tax Cases*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164.

While this language was thought by some to be open to misinterpretation, fairly construed it indicates the attitude of the Court toward remedial legislation.

It has been said that in Wisconsin, which very early in its history adopted the code, the code has been applied and interpreted more nearly in accord with its purpose and spirit than in any other jurisdiction. In applying the provisions of the code which provide that "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties" (Sec. 2668), and that "the court shall in every stage of an action disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect" (Sec. 2989), the Supreme Court from an early day (1858) discarded many of the refinements of common law pleading and practice, with the result that our procedure has been gradually simplified, form has given way to substance, and mere technical refinements are not permitted to thwart justice. *Manning vs. School District*, 124 Wis. 84, 102 N. W. 356. For a

time there was a tendency to adhere to some extent at least to the old system, but it did not proceed far enough to substantially mar the general result. While a lawyer trained in common law pleading and practice groans at what he considers the confusion and disorder of our practice, I have never heard it claimed that it results in injustice to litigants.

So far as my knowledge extends, there has never been any controversy between the courts of Wisconsin and its legislature as to the precise boundaries which separate the exercise of judicial power from the exercise of legislative power. The subject has received slight if any consideration, principally because there has been no need for it. *Bashford vs. Barstow,* 4 Wis. 567. Much of the progress attained under the influence of statutory amendments might have been attained by the adoption by the courts of rules of practice. The courts and the legislature have labored together to accomplish the simplification of our procedure and the expedition of judicial business.

Prior to 1913 considerable progress had been made. The legislature of that year adopted a resolution requesting the Supreme Court of Wisconsin to suggest such changes "in the court practice of the state as will simplify it, relieve it of technicalities, and promote the ends of justice, and to report their suggestions to the legislature which convenes in 1915." Pursuant to that request a number of amendments and modifications were suggested, on which I shall touch in detail later.

Starting, then, with the code, liberally interpreted and sympathetically applied, experience nevertheless proved that certain changes would be helpful and would promote the original object and purpose of the code. It is these changes that I propose to discuss briefly and in chronological order.

SPECIAL VERDICT.

Omission of Essential Fact Therefrom Shall be Deemed Determined By the Court in Conformity with its Judgment.

Since 1856 the statutes of Wisconsin have provided for the taking of a special verdict either upon motion of a party, or in the exercise of the discretion of the court upon its own motion. By another statutory provision, there may be a special finding in connection with the general verdict, but the special finding, if inconsistent with the general verdict, controls. (Sec. 2860.) Special verdicts were demanded in a great many cases. If a spe-

cial verdict omitted a finding as to any material issue of fact, and judgment was rendered thereon, the failure to find as to such material fact constituted reversible error, and a great many cases were reversed on account of defective special verdicts. In many of these cases it was perfectly apparent that had the proper questions been submitted to the jury, the jury would have found the issuable fact in accordance with its other findings. In order to remedy this situation the following statute was enacted:

> Sec. 2858m. "Whenever any special verdict shall be submitted to a jury and there is omitted therefrom some controverted request but essential to sustain the judgment, such matter of fact shall be deemed determined by the court in comformity with its judgment and the neglect or omission to request a finding by the jury on such matter shall be deemed a waiver of a jury trial *pro tanto* and a consent that such omitted fact be determined by the court. The finding or determination of such omitted fact by the court may be reviewed on appeal without any exception thereto." *Act of Legislature,* Chapter 346, Laws of 1907.

The result of the enactment of this legislation has been that comparatively few judgments have been reversed by reason of the failure of the trial court to prepare and submit the proper special verdict. Our experience under it has been entirely satisfactory, and new trials, with the consequent delay and expense, have been avoided without detriment to the substantial rights of the parties litigant.

This statute was first construed in *Bratz vs. Stark,* 138 Wis. 599, 120 N. W. 396. The latest reference to it is contained in *De Groot vs. Veldboom,* 167 Wis. 107, 166 N. W. 662. The section does not apply where there is no evidence which would have warranted such a finding. *Kraczek vs. The Falk Co.,* 142 Wis. 570, 126 N. W. 30. The section does not apply where there was a proper request that the question be submitted upon a particular point. *Habhegger vs. King,* 149 Wis. 1, 135 N. W. 166; *Murray vs. Paine Lumber Company,* 155 Wis. 409, 144 N. W. 982.

Other Wisconsin cases construing and applying the statute are: 140 Wis. 503, 122 N. W. 1059; 140 Wis. 615, 123 N. W. 117; 141 Wis. 487, 124 N. W. 489; 142 Wis. 182, 125 N. W. 440; 142 Wis. 186, 125 N. W. 954; 142 Wis. 502, 125 N. W. 947; 142 Wis. 577, 126 N. W. 30; 143 Wis. 82, 126 N. W. 547; 143 Wis. 191, 122 N. W. 758, 126 N. W. 686; 146 Wis. 26, 130 N. W.

955; 147 Wis. 228, 132 N. W. 593; 147 Wis. 396, 132 N. W. 755; 147 Wis. 448, 133 N. W. 830; 148 Wis. 81, 133 N. W. 1117; 148 Wis. 185, 134 N. W. 400; 149 Wis. 118, 135 N. W. 484; 149 Wis. 387, 135 N. W. 860; 149 Wis. 627, 136 N. W. 822; 149 Wis. 660, 135 N. W. 170; 151 Wis. 408, 139 N. W. 195; 152 Wis. 263, 139 N. W. 540; 152 Wis 551, 140 N. W. 305; 155 Wis. 189, 144 N. W. 254; 156 Wis. 229, 145 N. W. 970; 158 Wis. 188, 147 N. W. 1079; 160 Wis. 484, 152 N. W. 187; 160 Wis. 668, 152 N. W. 416; 161 Wis. 422, 154 N. W. 694; 163 Wis. 170, 157 N. W. 765; 163 Wis. 481, 147 N. W. 510; 164 Wis. 362, 159 N. W. 552; 166 Wis. 144, 164 N. W. 825; 166 Wis. 315, 165 N. W. 471; 166 Wis. 359, 164 N. W. 454.

NON-PREJUDICIAL ERROR.

While the provisions of Sec. 2829 "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect," has been in force since 1856, the court came gradually to the proposition that error was presumed prejudicial. This was contrary to the letter as well as the spirit of the code, and the court corrected its error. *Oborn vs. State,* 143 Wis. 249, 126 N. W. 737. Although legislation was not necessary, the situation was called to the attention of the legislature, and the decisions of the court were practically codified by the enactment of Chapter 192, Laws of 1909, creating

> Sec. 3072m. "No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial."

The enactment of this section tended to direct anew the attention of the judiciary to the erroneous interpretation and the consequent misapplication of the code in certain particulars. Of the statute the court said: "It was only intended to declare a public policy as to such administration which it is the duty, as well as the pleasure, of the court to conform to, so far as it reasonably

promotes, or does not unreasonably interfere with, the exercise of their constitutional jurisdiction." The enactment of the section had a revivifying effect, and Sec. 2829 supplemented by Sec. 3072m has been so construed that judgments are not now reversed on account of errors committed by the trial court, unless it affirmatively appears upon an examination of the whole record that such error has affected the substantial rights of the party complaining. *Berger vs. Abel & Bach Co.*, 141 Wis. 321, 124 N. W. 410. Whether or not the error complained of in a particular case has affected the substantial rights of the party complaining, is a matter of judicial determination under the facts and circumstances of each case, and the practitioner is therefore without a definite guide as to when error will or will not be deemed to be reversible error. The statute as enforced has operated so satisfactorily that there has never been any demand for restrictive legislation or any substantial complaint from the bar.

Under this section it has been held that a party cannot urge as error the submission to the jury of an issue not presented by the pleadings, if he made no objection thereto. *Lewandowski vs. McClintick-Marshall Construction Company*, 155 Wis. 322, 143 N. W. 1063. Erroneous instruction as to the burden of proof constitutes reversible error. *Penn. Coal & Supply Co. vs. Schmidt*, 155 Wis. 242, 144 N. W. 283. Where the trial court erroneously withheld from consideration by the jury a severable part of plaintiff's complaint, this constituted immaterial or non-prejudicial error where the jury found that the contract alleged to be the basis of the entire claim was never entered into. *Dalberg vs. Jung Brewing Co.*, 155 Wis. 185, 144 N. W. 198. Where the damages assessed were in the opinion of the trial court and the supreme court too large, it was held that the judgment might be reversed for error which would have otherwise been regarded as non-prejudicial. *Nelson vs. Snoyenbos*, 155 Wis. 590, 145 N. W. 179. For a statement of error regarded as non-prejudicial see *Czapinski vs. Thomas Furnace Co.*, 158 Wis. 635, 149 N. W. 477. The exclusion of evidence which had only remote and inconsequential bearing upon the question at issue, not error. *De Pas vs. Southern Wisconsin R. R. Co.*, 159 Wis. 306, 150 N. W. 408. Where it does not appear that a different result would have been reached, error in denying proper latitude in cross-examination held non-prejudicial. *Greene vs. Agnew*, 160 Wis. 224, 151 N. W. 268. *E. Essley Machine Co. vs. First Trust Company*,

160 Wis. 300, 151 N. W. 814; *Murphy vs. Estate of Skinner,* 160 Wis. 554, 152 N. W. 172. Where upon the evidence the jury could have failed to convict only by wantonly violating their official oaths, error in instructions of court regarded as non-prejudicial. *Ryan vs. State,* 168 Wis. 14, 168 N. W. 566.

Other recent Wisconsin cases construing and applying the section are: 153 Wis. 185, 140 N. W. 1060; 155 Wis. 75, 143 N. W. 1027; 155 Wis. 557, 145 N. W. 227; 155 Wis. 599, 145 N. W. 225; 156 Wis. 36, 145 N. W. 207; 156 Wis. 399, 146 N. W. 481; 156 Wis. 449, 146 N. W. 506; 156 Wis. 588, 146 N. W. 782; 157 Wis. 292, 147 N. W. 360; 158 Wis. 152, 147 N. W. 640, 148 N. W. 1095; 158 Wis. 595, 149 N. W. 484; 159 Wis. 192, 149 N. W. 743; 160 Wis. 171, 151 N. W. 263; 160 Wis. 9, 150 N. W. 977; 163 Wis. 398, 158 N. W. 71; 164 Wis. 44, 159 N. W. 555; 164 Wis. 228, 159 N. W. 726; 165 Wis. 646, 163 N. W. 225; 166 Wis. 144, 164 N. W. 825; 166 Wis. 236, 165 N. W. 20; 166 Wis. 284, 164 N. W. 1007; 167 Wis. 584, 168 N. W. 390; 168 Wis. 145, 169 N. W. 301; 168 Wis. 182, 169 N. W. 285; 169 Wis. 343, 172 N. W. 750; 169 Wis. 408, 172 N. W. 791.

DISCRETIONARY REVERSAL AND ENLARGEMENT OF THE POWERS OF THE COURT TO DEAL WITH MATTERS BEFORE IT BY APPEAL OR ON WRIT OF ERROR.

In spite of the liberal provisions of the code there gradually developed a technical practice, particulary in relation to the matter of objections and reservations of exceptions, and it happened in many cases that reversals were necessary in order to correct mere procedural errors. It also happened that by reason of the failure of attorneys to make seasonable objections or seasonably to file exceptions, the merits of a particular controversy could not be fully considered. In order to meet this situation the following statute was enacted by Chapter 214, Laws of 1913:

> SEC. 2405m. "In any action or proceeding brought to the supreme court by appeal or writ of error, if it shall appear to that court from the record, that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the supreme court may in its discretion reverse the judgment or order appealed from, regardless of the question whether proper motions, objections, or exceptions appear in the record or not, and may also, in case of reversal, direct the entry of the proper judg-

> ment or remit the case to the trial court for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with the statutes governing legal procedure, as shall be deemed necessary to accomplish the ends of justice."

The first case in which this statute was applied illustrates not only the need of the statute but the manner of its application. In an action brought for damages for false representation two questions were submitted to the jury; first, as to the value of the land actually conveyed, and second, as to the value of the lands shown to the plaintiffs. The Supreme Court was of the opinion and the trial court held that the transaction did not amount to a sale but to a joint adventure. The question of whether or not the defendant, one of the parties to the transaction, had discharged his duty, as a joint adventurer, to his colleagues, was not considered or tried; no request was made that the issue be submitted to the jury, and the point was not raised by the appellant in his brief on appeal. The Supreme Court held that there were two questions involved in the case; first, Was the defendant guilty of bad faith in showing the plaintiffs the wrong piece of land; and second, if not, then did he fail to exercise that degree of skill and diligence in locating the land that a woodsman of his supposed skill and experience ordinarily exercises under like circumstances? The court held that the first question had been tried and decided, remanded the case for trial as to the second, upon the evidence then in the record, and such further evidence as might be adduced by the parties. *Knudsen vs. George,* 157 Wis. 520, 147 N. W. 1003.

Other cases applying and construing this section are: 159 Wis. 182, 149 N. W. 740; 159 Wis. 200, 149 N. W. 769; 159 Wis. 355, 150 N. W. 481; 159 Wis. 422, 150 N. W. 489; 159 Wis. 579, 150 N. W. 987; 160 Wis. 205, 151 N. W. 256; 165 Wis. 554, 162 N. W. 664; 165 Wis. 569, 163 N. W. 173; 166 Wis. 144, 164 N. W. 285.

* * *

Pursuant to the resolution adopted by the legislature of 1913 the Supreme Court made certain recommendations in its report to the legislature of 1915. It would be a matter of considerable interest to give the details relating to the report, the manner in which it was received, and the progress through the legislature of the legislation enacted pursuant to it, being Chap. 219, Laws of 1915. The limited space, however, offers no opportunity for

this, and I can only refer very briefly to the laws which eventuated from the joint labor of the court and the legislature.

JOINDER OF PARTIES.

Section 2603 which contains the usual code provision that any person may be made a defendant who has or claims an interest adverse to the plaintiff or who is a necessary party to a complete determination of the question involved, was amended by adding thereto,

> "A plaintiff may join as defendants persons against whom the right to relief is alleged to exist in the alternative, although recovery against one may be inconsistent with recovery against the other; and in all such actions the recovery of costs by any of the parties to the action shall be in the discretion of the court."

This provision has been applied in but one case, *Williams vs. Thrall,* 167 Wis. 410, 167 N. W. 825, so far as the records of the Supreme Court show. It has had, however, a wide application in the circuit court, and operates to prevent miscarriage of justice in cases where the plaintiff, although entitled in law and fact to recover against one of two parties, may by reason of the inconsistency of juries be defeated upon different trials as to both.

INTERPLEADER OF PERSONS LIABLE TO DEFENDANT.

Section 2610 Wis. Stats. relating to interpleader was amended by adding thereto the following:

> "A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order. This section shall be liberally construed in order that, so far as practicable, all closely related contentions may be disposed of in one action, even though in the strict sense there be two controversies, provided the contentions relate to the same general subject and separate actions would subject either of the parties to the danger of double liability of serious hardship."

While under the provisions of this section there may be in effect in one action a double complaint (*Lumbermen's National Bank vs. Corrigan,* 167 Wis. 82, 166 N. W. 650), even that does not operate to prevent the application of the statute. Since the decision in *Ellis vs. Chicago & Northwestern R. R. Co.,* 167 Wis. 392, 167 N. W. 1048, holding that there may be contribution between joint tort feasors, in certain cases, rather interesting situations have presented themselves under the provisions of this statute. In *Bakula vs. Schwab,* 167 Wis. 546, 168 N. W. 378, it was held that in an action against independent tort feasors whose concurring wrongful acts caused the injury, a judgment in favor of one of the defendants but in plaintiff's favor as against the other, is not *res adjudicata* upon the question of the liability of the defendants to the plaintiff in a subsequent action for contribution between the defendants, on the ground that such a case is not within the reason of the rule upon which the doctrine of *res adjudicata* is founded.

The right of trial by jury raises some interesting phases of this statute. In *Miley vs. Heaney,* 163 Wis. 134, 140, 157 N. W. 515, it was held that the practice of pleading by cross complaint and the bringing in of all parties would operate to deprive parties of the right of jury trial in certain instances. It was held, however, that if a jury issue was presented, the court should in its discretion direct that issue to be first tried, and that the section was not open to criticism on that ground.

The section has also been considered in the following cases: 129 Wis. 511, 109 N. W. 558; 130 Wis. 475, 110 N. W. 483; 131 Wis. 378, 111 N. W. 478; 134 Wis. 490, 115 N. W. 138; 139 Wis. 401, 121 N. W. 150; 140 Wis. 287, 122 N. W. 761; 140 Wis. 318, 122 N. W. 730; 141 Wis. 375, 122 N. W. 1023; 143 Wis. 622, 128 N. W. 425; 151 Wis. 269, 138 N. W. 637, 769; 152 Wis. 439, 139 N. W. 1129; 154 Wis. 479, 143 N. W. 162; 154 Wis. 627, 143 N. W. 668; 158 Wis. 312, 149 N. W. 32; 162 Wis. 361, 156 N. W. 1011; 163 Wis. 357, 158 N. W. 85; 164 Wis. 380, 160 N. W. 263; 166 Wis. 347, 165 N. W. 382; 167 Wis. 417, 167 N. W. 825; 168 Wis. 557, 170 N. W. 951.

JOINDER OF CAUSES OF ACTION.

Section 2647 Wis. Stats. was amended by striking out the limitations as to joinder of several causes of action, so that as amended the section now reads:

> "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both. But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately."

This struck out of the section seven provisions enumerating the conditions under which causes of action might be joined, leaving the section as broad as language can make it. The causes of action need no longer relate to the same transaction or to transactions connected with the subject of the action, nor arise out of contract express or implied, or from injury with or without force to person or property or both. Any cause of action, provided it affects all the parties to the action, and does not require a different place of trial, may be joined. This section has been interpreted in *Ehlers vs. Automobile Liability Company,* 166 Wis. 185, 164 N. W. 845, where it was held that an indemnitor might be joined in a suit brought against a person for injury caused by the negligent operation of an automobile. And in *Midland Terra Cotta Company vs. Illinois Surety Company,* 163 Wis. 190, 157 N. W. 785, it was held that a cause of action against a building contractor for the amount due for materials purchased, and against the owner on his express promise to pay therefor if plaintiff would forego a lien, could not properly be joined with a cause of action for the same debt against the contractor and against the surety company which was liable on the contractor's bond. See also 159 Wis. 39, 150 N. W. 411.

WAIVER OF DEFECTS ON APPEAL.

I shall refer only briefly to Section 2836a, which provides that whenever an appeal is attempted to be taken, and a return upon the appeal shall have been made, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction of the appellate court over persons or subject matter, if he does not make seasonable objection by motion before participating in any proceeding in the appellate court. It further provides that upon the hearing of a motion to dismiss, the court shall have power to allow any defect or omission in the notice, undertaking, or other appeal papers to be supplied, and in the event that it shall appear that the court from which the appeal was taken had no jurisdiction of the subject

matter, the appellate court shall remand the case to the proper tribunal, where it shall proceed as if originally begun there, and that in all cases, in every court, where objection to the jurisdiction of the court is sustained, the cause shall be certified to the proper court, provided that it appear that the error arose from a bona fide mistake and not from design.

Under this section an application to the Supreme Court for the exercise of its original jurisdiction was denied but the cause was remanded to the circuit court of the proper county. *State ex rel. Johnson vs. County Boards,* 165 Wis. 164, 161 N. W. 356. In *Dring vs. Mainwaring,* 165 Wis. 356, 162 N. W. 171, where it appeared that the trial court was without jurisdiction of the subject matter, on appeal to the Supreme Court the cause was remanded to the trial court with drections to remit the record to the court having jurisdiction. This case was again before the Supreme Court in 168 Wis. 139, 169 N. W. 301; and the opinion on the second appeal recites in detail how the law was administered.

See also: 161 Wis. 605, 155 N. W. 142; 162 Wis. 95, 155 N. W. 954; 169 Wis. 238, 171 N. W. 956.

MISTAKEN REMEDY OR ACTION

The constitution of the state of Wisconsin declares, in common with the constitutions of many other states that "every person is entitled to a certain remedy in the law for all injury or wrong which he may receive in his person, property, or character." One of the inherent defects of the old system was the uncertainty as to the form of remedy for the redress of a particular wrong. While the different remedies were theoretically adequate, in actual practice the suitor was often in doubt as to the particular remedy which should be invoked in a given instance. One of the objects of the code was to simplify procedure in this respect, and the code accordingly declared that all remedies were divided into, *first,* Actions, and *second,* Special Proceedings; and while the distinction between suits at law and in equity were abolished and but one form of action provided, the adherence to long established principles resulted in many litigants being denied their rights by reason of technical insufficiency of their pleadings when tested according to common law principles. Had the code in this particular been applied as liberally from the beginning as it was generally, such results would have been largely

avoided. To meet this situation the Supreme Court proposed the adoption of Section 2836b. Because it is the most far-reaching of all the amendments, and because it is impossible to restate it in a more condensed form, I state it *in extenso*.

> SEC. 2836b. "In all cases where upon objection taken or upon demurrer sustained or after trial it shall appear to the court that any party claiming affirmative relief or damages has mistaken his remedy, his action, proceeding, cross complaint, counterclaim, writ, or relation shall not be finally dismissed or quashed, but costs shall be awarded against him and he shall be allowed a reasonable time within which to amend and the amended action or proceeding shall continue in that court except in case that court has no jurisdiction to grant the relief sought, in which case the action in whole or in such divisible part in which jurisdiction is lacking shall be certified to some other court which has jurisdiction. Amendments may be made changing any action from one on contract to one in tort, and vice versa, from one at law to one in equity and vice versa, from a special proceeding or action under or pursuant to any writ to any action and vice versa. The judgment in all cases of mistaken remedy shall be repondeat ouster and for costs, the latter in the discretion of the court, but with leave to amend and proceed in that court or some other designated court; or part in that court and part in some other court in one of several actions or proceedings as justice may require."

Speaking of this section, Chief Justice Winslow said:

> "The beneficient effect of this provision can hardly be overestimated. It means that it will no longer be necssary to kick the plaintiff out of the back door of the courtroom (with costs) in order that he may re-enter by the front door in a different garb. It means that we are losing interest in the mere niceties of procedure and gaining interest in the accomplishment of justice 'completely and without denial, promptly and without delay'." *Jilek vs. Zahl*, 162 Wis. 157, 155 N. W. 909.

Other Wisconsin cases referring to this statute are: 162 Wis. 340, 156 N. W. 140; 162 Wis. 482, 156 N. W. 477; 163 Wis. 436, 158 N. W. 254; 164 Wis. 255, 159 N. W. 912; 165 Wis. 450, 160 N. W. 156; 165 Wis. 97, 161 N. W. 367; 165 Wis. 529, 162 N. W. 916; 166 Wis. 593, 166 N. W. 326; 167 Wis. 417, 167 N. W. 822; 168 Wis. 139, 169 N. W. 301; 168 Wis. 534, 171 N. W. 54; 168 Wis. 562, 170 N. W. 951.

WAIVER OF JURY TRIAL BY MOTION TO DIRECT VERDICT.

Reference has already been made to Section 2858m, governing procedure in cases where a special verdict was demanded. Under the practice existing in Wisconsin it was not an infrequent thing for each party at the close of the evidence to move the court to direct a verdict in his favor. Such double motions put upon the trial court the burden of making a correct determination, as the opposite party would have a right of review upon appeal, and if it should turn out, as it often did, that there was a jury question as to one of the litigated issues, the court was likely to fall into error. To remedy this situation the Supreme Court suggested, in accordance with the practice in the federal courts and in the courts of some other states, the enactment of Section 2857a, by which it is provided that in a jury trial, when each party shall without reservation move the court to direct a verdict, such motion shall be considerel as equivalent to a stipulation by the parties, waiving a jury and submitting the entire case to the court for decision upon the facts as well as the law. This section has only been twice before the Supreme Court, and in neither case was its application questioned, nor was there any call for a construction of the statute, if indeed any construction is possible. Where, at the close of the evidence, the plaintiff moved to dismiss the defendant's counter-claim, and the defendant moved for judgment in its behalf, and the dismissal of the counter-claim would have resulted necessarily in a judgment for the plaintiff, it was held under this section that such motions constituted a waiver of a jury trial, and a submission to the court for its decision of the entire case. *Ott vs. Cream City Sand Company,* 166 Wis. 228, 164 N. W. 1005. See also *Jones vs. Citizens' Savings & Trust Company,* 168 Wis. 646, 171 N. W. 648.

I shall not refer to that part of Chapter 219 of the Laws of 1915 relating to costs, as it covers matters which are not of general interest.

ALL PARTIES BROUGHT UP ON APPEAL; MOTION FOR REVIEW BY RESPONDENT.

The last provision of Chapter 219 of the Laws of 1915 to which I shall make reference is that creating Section 3049a. While this statute has not been before the court for consideration, it has

been applied in a large number of cases in practice. Under its provisions parties who are jointly or severally bound by judgment must, in case an appeal is taken by one party, within thirty days take their appeal or their right of appeal is deemed to be waived. It authorizes the Supreme Court at any time after an appeal is taken to bring in additional parties upon its own motion or upon application of one of the original parties; and it also provides that upon an appeal a respondent may have a review of the rulings of which he complains, by serving upon the appellant at any time before the case is set down for hearing in the Supreme Court, a notice stating in what respect he asks for a review, reversal, or modification of any part of the judgment appealed from. Such notice, under the provisions of Sec. 3049a in practical effect operates as a cross appeal. *Birdsong & Company vs. Marty,* 163 Wis. 516, 158 N. W. 289.

Other Wisconsin cases as follows: 162 Wis. 212, 155 N. W. 128; 164 Wis. 33, 159 N. W. 577; 164 Wis. 510, 159 N. W. 750; 168 Wis. 145, 169 N. W. 301; 169 Wis. 135, 170 N. W. 822

DECLARATORY RELIEF.

The most recent amendment to our procedural law is Section 2687m:

> "Equitable actions to obtain declaratory relief may be brought and maintained in the circuit court and in matters of which the supreme court has original jurisdiction in the supreme court, and it shall be no objection to the maintenance of such an action that no consequential relief is sought or can be granted if it appears that substantial doubt or controversy exists as to the rights or duties of parties, and that neither public or private interests will be materially promoted by a declaration of the right or duty in advance of any actual or threatened invasion or right or default in duty. The judgment rendered in such an action shall bind all the parties thereto and be conclusive and final as to the rights and duties involved." Chapt. 242, Laws 1919.

No case has yet arisen under this law. The purpose of the law is plain. To what extent it may be resorted to no one may say. The history of this legislation, together with a statement of its objects and purposes is found in an article by Justice A. J. Vinje, 4 Marquette Law Review, p. 106 (April, 1920).

* * *

Statutes of themselves can accomplish little, and unless legislative enactments reflect the sentiment of the bench and the bar, they fail in a large degree to accomplish their purpose. The significant thing in relation to the progress of judicial procedure in Wisconsin is that it has come about largely through the initiative of judges and the leading members of the bar. The real situation is not fairly indicated by reference to legislative enactments or reported decisions. A large factor in our progress has been the attitude of the bar toward our remedial legislation. Lawyers are less and less insistent upon mere technical practices, and more and more concerned with the trial of their causes upon their merits. Thirty years ago forty per cent of the questions treated in the opinions of the Supreme Court were practice questions; now not over twenty per cent of the questions treated relate to practice, despite the fact that there have been many changes in procedural matters. The public has rightly become very impatient over needless procedural delays. The duty of the bench and bar in this respect cannot be too often emphasized. It was most forcefully presented by Hon. Elihu Root at Chicago in 1916. The conditions of which he spoke somewhat in prospect then are now largely realities. We should endeavor more and more to approach the ideal outlined by Mr. Root (Address Am. Bar Asso., 1914), when a controversy in court will be shorn largely of its technicalities, and resemble more nearly the effort of one neighbor to settle a dispute between two other neighbors. We in Wisconsin believe that it can be done and an orderly administration of the law in accordance with fundamental principles of justice still be maintained. If our efforts and experience contribute to real progress in judicial administration and procedure, it will bring to us added satisfaction.

(Address read before Judicial Section, American Association, July 25, 1920.)