Practice: Judgments: Power of Trial Court to Set Aside After Expiration of Term

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Formerly, where a business was carried on by a husband and wife, the presumption was, the business was owned by the husband and a co-partnership did not exist. But where a husband knowingly holds himself out as a partner with a wife, he is estopped to deny the existence of a partnership.

Section 6.015 Wisconsin Statutes holds "women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract . . . . and in all other respects. The various courts, executive, and administrative officers shall construe the statutes where masculine gender is used, to include feminine, unless such construction will deny to females the special protection and privileges which they now enjoy for the general welfare."

This section seems to be a blanket provision whereby a married woman may contract as a feme sole. This construction permits a married woman to contract with whom she may choose. Thus a married woman in Wisconsin, under this section, has the right to contract with her husband as a co-partner in a business.

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In *Fishbeck v. Mielens*¹ it is held that a valid judgment cannot be set aside after the term at which it is entered except under the provisions of Section 269.46 Statutes. After the end of the term and within the expiration of one year after the moving party had notice of the judgment, the circuit court may correct mistakes in the entry thereof, conforming it to the judgment pronounced, but it cannot modify or amend the judgment. *(Ibid.)*

The very recent case *Delaware L. & W. R. Co. v. Rellstab*² decided by the Supreme Court of the United States throws an interesting light on the power of the District Court to set aside a judgment on the ground of perjured testimony after expiration of the term. In December, 1921, one Ginsberg recovered judgment against the petitioner in this case for injuries to himself and a minor son and for the death of another son, caused by a collision at a crossing, between the plaintiff's truck and one of the petitioner's trains. The trial and the giving of judgment took place in the District Court. Later, on the evidence of two important witnesses, husband and wife, the judgment was set aside because said witnesses had committed perjury. A new trial was had and judgment was rendered for the defendant, the present petitioner. The judgment was entered on June 21, 1923. Plaintiff appealed but the Circuit Court of Appeals³ affirmed the judgment on March 21, 1924. The witnesses who had testified for the plaintiff at the first trial testified for the defendant at the second, and after the term of the District Court in which the foregoing steps had been taken had expired, without being extended in any form, the husband, under affidavit, stated that the testimony given by him at both trials was false and that in fact he knew nothing of the matter. With this disclosure, the trial judge, the Honorable John Rellstab, was applied to,

¹ 162 Wis. 12, 154 N.W. 701.
² 72 L. ed. 228.
³ 296 Fed. 439.
and after hearing testimony in open court, he made an order on May 9, 1925, wherein he purported to set aside the judgment that had been affirmed by the circuit court of appeals. Petitioners thereupon applied to the circuit court of appeals for a writ of mandamus to reinstate the judgment but that court held that it had no jurisdiction in the case. 4

The Supreme Court of the United States reversed the holding of the circuit court of appeals and held that the writ prayed for should issue. The court says:

However strong may have been the convictions of the district judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. The power of the court to set aside its judgment on this ground ended with the term.

The court cites Re Metropolitan Trust Company, 5 wherein it was held that mandamus is the proper remedy where a Federal circuit court has exceeded its power by vacating a judgment after the term. The court, in the case under discussion, held that the District Court was without jurisdiction to vacate the judgment and that mandamus was the proper remedy and that the circuit court of appeals had power to issue such a writ. The court said that the Circuit Court of Appeals was an appellate court and as such had the power to require its judgment to be enforced. Re Potts. 6 In McClelland v. Carland 7 it was held that mandamus may be issued by a circuit court of appeals in aid of its appellate jurisdiction. The court concluded the decision by saying again that the District Court “made an unwarranted attempt to set aside a judgment which it had no jurisdiction to touch.”

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Practice: Special Verdict: Contributory Negligence.

A decision of great importance and interest has been recently handed down by the Supreme Court of the State of Wisconsin in reviewing the case of Berrafato v. Exner. 1 There were two separate and distinct actions brought by two plaintiffs against the defendant Exner, to recover damages sustained as a result of an automobile collision on a highway. The plaintiff Berrafato was riding in the automobile which was then and there owned and operated by the Plaintiff Harvey, and sustained personal injuries by reason of the collision. The cases were tried together and one verdict was returned covering the issues in both cases.

The jury found in answering the questions in the special verdict, that the defendant's excessive speed and failure to yield one-half of the roadway constituted the proximate cause of the collision. However, there was a manifest inconsistency in the verdict relating to the negligence of the two plaintiffs. The jury found that Berrafato, who was a passenger and had nothing to do with the driving or managing of the car, was guilty of negligence in his failure to keep a proper look-

4 15 F. (2d) 137.
1 Berrafato v. Exner, 216 N.W. 165; Harvey v. Exner, 216 N.W. 165.