

JOURNAL OF THE SENATE

THURSDAY, August 23, 1973.

The chief clerk makes the following entries under the above date.

BILLS INTRODUCED

Read first time and referred:

Senate Bill 723

Relating to police and firemen collective bargaining agreements and pension contributions.

By Senator Dorman, by request of the City of Racine, Racine Firefighters Local 321, and Racine Police Benevolent Association.

To Joint Survey Committee on Retirement Systems.

PETITIONS AND COMMUNICATIONS

Senate Petition 143

A petition in the form of a resolution as adopted by the City of Two Rivers to authorize a cost analysis of the operation of municipal facilities.

By Senator Martin.

Read and referred to the joint committee on Finance.

Senate Petition 144

A petition in the form of a resolution adopted by the Brown County Board of Supervisors in opposition to the abandonment of a line of railroad as set forth in ICC Finance Docket No. AB-49, extending from milepost 271.27 near Thompsonville, Michigan in a northwesterly direction to the end of track near Elberta-Frankfort, Michigan and extending across Lake Michigan.

By Senator Martin.

Read and referred to the committee on Governmental and Veterans' Affairs.

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State of Wisconsin
Department of State

August 21, 1973.

To The Honorable The Senate

Gentlemen:

I have the honor to transmit to you, pursuant to s.13.67 (2), a list of the registered lobbyists for the period beginning on August 7, 1973, and ending on August 21, 1973.

Yours very truly,
ROBERT C. ZIMMERMAN
Secretary of State

Name, Address and Occupation of Lobbyist -- Name and Address of Employer -- Subject of Legislation -- Date of Employment.

Steven O. Kimborough, Student, P.O. Box 1342, Madison, Wisconsin--United Council of U. W. Student Governments, Box 63, Union South, Madison, Wisconsin--Students--August 20, 1973.

State of Wisconsin
Department of Justice
Madison, Wisconsin

August 17, 1973.

To the Honorable The Senate
State Capitol
Madison, Wisconsin

Dear Senators:

Senate Resolution 13 (1973) requests my opinion:

“* * * as to the constitutionality of section 59.12 of the statutes in regard to the appointment rather than the election of county surveyor.”

The material provision in sec. 59.12, Stats., relating to abolishment of county surveyor as an elective office was created by ch. 499, Laws of 1969.

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As a duly enacted statute it is entitled to the presumption of constitutionality, and in case of a court test it may be incumbent on me as Attorney General to defend the law. It would therefore be improper for me to render an opinion on the constitutional issues involved at this time.

The statute has been before the Circuit Court for Iron County in the case of *Peter J. DeRubeis v. Eino S. Nevala, County Clerk for Iron County* (1970). I am enclosing a copy of the Memorandum Opinion on Judge Lewis J. Charles upholding the constitutionality of the statute. From information I have, no appeal was taken from the decision.

Sincerely yours,
ROBERT W. WARREN
Attorney General

CAPTION:

Section 59.12, Stats., providing that county board can appoint land surveyor to perform duties of county surveyor, rather than having such officer elected, is presumed constitutional.

MEMORANDUM OPINION AND ORDER

The Wisconsin legislature, by Chapter 499 of the Laws of 1969, provided as follows: "59.12. A County clerk, treasurer, sheriff, coronor, clerk of circuit court, district attorney, register of deeds and surveyor, who shall be a registered land surveyor, shall be elected in each county for full terms at the general election held in each even numbered year. The regular term of office of each such officer shall commence on the first Monday of January next succeeding his election, and shall continue 2 years and until his successor qualifies. In lieu of electing a surveyor in any county, the county board may, by resolution designate that the duties under ss. 59.60 and 59.635, be performed by any registered land surveyor employed by the county."

Pursuant to the above chapter the Iron County Board of Supervisors adopted a county ordinance in substance conforming to the amended Sec. 59.12, Wis. Stats., which ordinance purported to withdraw the office of the county surveyor from the electoral process and have the duties of that office performed by any registered land surveyor employed by Iron County.

Peter DeRubeis, a resident of Iron County, Wisconsin, has circulated nomination papers for county surveyor on the Republican ticket. He has demanded that the county clerk of Iron County place his name on the ballot to be voted on for the office at the

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upcoming September primary election. The county clerk refused to do so. This special proceeding, an application for a peremptory writ of mandamus, wherein the relator asks for an order requiring the county clerk to place his name on the primary ballot, followed.

It is first contended by the relator that Chapter 499, Laws of 1969, did not abolish the office of county surveyor in Iron County. We agree with the attorney-general of the state of Wisconsin, who in an opinion in letter form dated May 7, 1970, addressed to the district attorney of Iron County, stated:

"I construe this to mean that the county can in effect abolish the elective office for a time and appoint a registered land surveyor as county surveyor."

"In lieu of" means "instead of", and instead of electing a county surveyor a registered land surveyor may be appointed by the county board of Iron County to perform the duties of that office.

But the underlying question is whether the statutory authority given by the legislature to county boards is constitutionally permissible. Article VI, Sec. 4, of the Wisconsin Constitution reads in part:

"Sheriffs, coronors, registers of deeds, district attorneys, and all other county officers except judicial officers and chief executive officers, shall be chosen by the electors of the respective counties once in every two years."

On this alone, rigorously applying the doctrine of *noscitur a sociis*, it could be held that a county surveyor, being a county officer, must by virtue of the cited section of the constitution be elected by the voters each two years. We find the following in *State ex rel. Williams vs. Samuelson*, 131 Wis. 499, 111 NW 712:

"At the time of the adoption of the constitution there was a county system of government with the ordinary principal heads, such as sheriffs, coronors, district attorneys, county treasurers, county surveyors, registers of deeds, county commissioners, and clerks of such commissioners, who performed substantially the duties now performed by county clerks. The constitution was adopted largely with reference to that situation."

"Now we find that the framers of the constitution, dealing with the existing conditions and contemplating the continuation of its general features, provided that certain of the existing heads of county governments should be elected by the people, vis., sheriffs, coronors, register of deeds, and district attorneys, leaving the other heads to be provided for, as well as minor county officers, in such way as the legislature might provide, and

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in respect thereto sec. 9, art. XIII. which has never been changed, was adopted to cover the subject in the words heretofore quoted, viz.:

“All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct.”

Originally, in the Constitution of 1848, the phrase “other county officers” did not appear: “Sheriffs, coroners, register of deeds and district attorneys shall be chosen by the electors of the respective counties, once in every two years and as often as vacancies happen.” Art. VI, Sec. 4, Wis. Constitution of 1848. Thus the office of county surveyor, in 1849, was subject to the following:

“All constitutional officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors, or other county authorities, as the legislature shall direct.” Art. XIII, Sec. 9, Wis. Const. of 1848.

Until 1882, quite plainly, the office of county surveyor could be made the subject of an election by the electors or he could be appointed by the county board of supervisors. In 1882 Article VI, Sec. 4, was amended so that it now reads, in its pertinent parts, as before set forth in this memorandum opinion.

The question is, then did the people by adopting the constitutional amendment of 1882 to Article VI, Sec. 4, intend to provide that thenceforward county surveyors should be among the number of those county officers that must be elected each two years. With respect to such constitutional amendment of 1882, our Supreme Court had this to say:

“Later, in 1882, sec. 4 art. VI, of the constitution was amended so as to conform thereto by adding after the words “district attorneys” the words “and all other county officers except judicial officers,” thus including county clerks and superintendents of schools, leaving sec. 9, art. XIII, as before, referring to certain county officers whose election was provided for in the constitution, pointing quite plainly to sec. 4, art. VI, and other county officers whose electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct, and leaving the legislature free

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to create other officers to be "elected by the people or appointed, as the legislature may direct." State ex rel. Williams vs. Samuelson, supra.

Conceding that county surveyors are, at least in name, county officers, we believe that such office is one of those classified in Williams as "other county officers whose selection was not provided for..." Thus there are county officers whose office existed at the time of adoption of the constitution, and who are not required by the constitution, as amended in 1882, to be elected to such office. County surveyors, we believe, are among their number. For the impact of that office upon county governmental process is minimal. This is well expressed in Pethoud vs. Gage County, 83 Neb. 497, 120 NW 154.

"He has no part in the management of the county or its affairs. He can aid no other officer of the county in the matter of contracts, or official services. He is not one of the cogs in the wheel that turns the affairs of the county. He is simply an official designated by law to do a certain class of work for the public. In name he is a county officer, but in the sense in which the term is used in the section of the statutes above quoted he is not a county officer. His office brings him within the technical letter of the statute, but his official functions leave him clearly without its spirit and purpose."

Counsel argue that in the case of Milwaukee County the office of county surveyor was abolished by constitutional amendment was that it having found necessary to resort to that process in Milwaukee County a like constitutional amendment is required here. We are not convinced of the validity of this argument. It is probable that the office of county surveyor in Milwaukee County was abolished by constitutional amendment, rather than by statute, so as to avoid the mandate set forth in Art. IV, Sec. 23 of the constitution:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as possible." See State ex. rel. Melms vs. Young, 172 Wis. 197, 178 NW 481.

The peremptory writ of mandamus applied for by the relator is denied, and the application for such writ is dismissed. An order in conformity with the foregoing memorandum opinion may be prepared by counsel for the respondent and forwarded to this court for signature.

Dated this 28th day of July, 1970.

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BY THE COURT:
LEWIS CHARLES
Circuit Judge

EXECUTIVE COMMUNICATIONS

State of Wisconsin
Office of the Governor
Madison, Wisconsin

August 20, 1973.

To the Honorable, the Senate:

The following bills, originating in the senate, have been approved, signed and deposited in the office of the Secretary of State:

Senate Bill	Chapter No.	Date Approved
701 -----	115 -----	August 20, 1973.

Sincerely,
PATRICK J. LUCEY
Governor

AMENDMENTS OFFERED

Senate amendment 2 to **Senate Bill 522** by Senator Frank.

Senate substitute amendment 1 to **Senate Bill 598** by Senator Krueger, by request of the Snowmobile Recreational Council.