

A Historical Review of the Immemorial Duties of Wisconsin Registers of Deeds

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The question at the center of this paper is what are the immemorial duties of county register of deeds in Wisconsin? However, more specifically the question with more practical application is what powers, rights, and duties of Wisconsin registers of deeds are constitutionally protected from legislative intrusion?

Unfortunately it is not possible to simply come up with a definite list that lays out all of the constitutionally protected immemorial duties of the register of deeds, or any constitutional officer. The Wisconsin constitution does not explicate the duties or roles of the register of deeds (or for that matter any of the administrative constitutional officers). The language of the Wisconsin constitution establishes the county registers of deeds as constitutional officers under Art. VI, Sec. 4, and provides nothing else regarding the powers, rights, and duties of the office. Because the Wisconsin Constitution does not provide a list of the constitutional duties of the register of deeds, the ultimate determiner of whether a duty of the register of deeds is immemorial and protected by the Wisconsin constitution from legislative intrusion will be the courts.

Because there is not reported case law in the state regarding the immemorial constitutionally protected duties of the register of deeds there is no direct guidance as to how the courts will address the issue. However, it is likely that the courts would analogize the standard developed for evaluating the constitutionally protected rights, powers, and duties of the sheriff, similarly a county constitutional officer and established in the same section of the constitution as

the register of deeds.¹ Ultimately, any court determination will be based on an analysis of the specific power, right, or duty of the register of deeds at issue, but, by analogy with the courts' previous determinations regarding the duties of the sheriff, and a review of the historic duties of the register of deeds, it is possible to obtain a clearer picture of those duties of the register of deeds for which it is more probable that the court would characterize them as constitutionally protected immemorial duties.

Accordingly section one of this paper begins with a review of the standard Wisconsin courts have used to determine the constitutionally protected immemorial powers, rights, and duties of other county constitutional officers, namely the sheriff. This standard focuses on duties that the county officer had at the time of the writing of the constitution, as well as an analysis of whether or not those duties are a defining characteristic of the office. Utilizing the standard and terminology that the courts have used, section two of this paper then provides a view of the historical duties of the register of deeds beginning under the laws of the Northwest Territory, the Michigan Territory, and the Territory of Wisconsin. Section three reviews the history of the Wisconsin constitutional conventions, with the elimination of the office of the register of deeds under the first constitution of 1846, and ultimately the re-establishment of an independent register of deeds as a county constitutional officer during the debates of the 1848 convention. Section four provides a brief overview of the duties of the register of deeds under the early laws of the state. Finally, examining the duties and obligations that have been placed on the register of deeds and through practical examples the paper concludes that the immemorial duties of the county register of deeds likely to be determined to be protected by the constitution are to record and secure all deeds and any other writings presented to the register of deeds for recording, generally including land patents, mortgages, plat maps, sheriffs certifications of sale or

¹ Wis. Const. Art. VI, Sec. 4.

foreclosure, as well as those instruments authorized by law to be recorded in the office, for instance marriage and vital records.²

Introduction

The focus of this paper is immemorial duties of a constitutional officer, the register of deeds. And so the paper attempts to provide a historic background for analyzing those powers, rights, and duties of the register of deeds that may likely be determined to be constitutionally protected immemorial powers, rights, and duties of the register of deeds.

Immemorial duty, however, is not an easily defined term. Ultimately, whether or not a duty of a constitutional officer is immemorial or not is a determination that is made by the courts. Wisconsin courts have developed a standard under which a particular duty of a county constitutional officer (the sheriff) is examined to determine whether it is immemorial. To this point no reported case that this author was able to locate has examined the immemorial duties of the register of deeds.

A review of the case law involving the powers, rights, and duties of the sheriff suggests that those duties determined by the courts to be immemorial are not always easily distinguishable from other duties of a county constitutional officer.

Another type of duty of a constitutional officer is a statutory duty. The statutory duties of a county constitutional officer are more easily delineated: they are those duties required of an

² An Act of the Wisconsin Legislature in 1852 delegated the duty of registering and maintaining custody of all marriage and certain other vital records to the register of deeds of the respective counties. Since that time the legislature has often amended those instruments that the register of deeds has the statutory duty to record and maintain. For instance, as discussed in more detail below, the creation of the state bureau of vital records in 1907 established another office in which the state legislature has placed certain duties regarding vital records, including maintaining the original of various vital records. Laws of Wisconsin 1907 ch. 469, sec. 1022-1 (“For the complete and proper registration of births, deaths, marriages, accidents and divorces, for legal, sanitary and statistical purposes, there shall be and hereby is created and established a state bureau of vital statistics.”).

officer as defined by the Wisconsin statutes. In other words the legislature, through the passage of a law, directs the officer to take on a particular duty as defined in the statute.

While immemorial duties are often discussed in contrast to the statutory duties of a constitutional officer, these two “types” of duties are not mutually exclusive. Therefore, that an officer has a statutory duty to perform a task, for instance in the context of the register of deeds, to record a deed and maintain an index in a particular form, does not mean that that duty, or at least a more general form of that duty, is not also an immemorial duty. A statutory duty may also be an immemorial duty. And that immemorial duty may be protected at base from legislative intrusion by the powers, rights, and duties vested in the county constitutional officer by the Wisconsin constitution.

Similarly that a constitutional officer performs a particular power or duty that is not prescribed by statute does not necessarily make that action a constitutionally protected immemorial duty. While it is generally stated that a constitutional officer has the powers and duties to perform those acts necessary to carry out their core duties, those ancillary actions (many times administrative in nature) have not necessarily also been considered by the court to be constitutional protected immemorial duties of the constitutional officer. Accordingly, those actions may potentially be statutorily prescribed, even if at the present the legislature has not taken the opportunity to prescribe (or proscribe) those actions of the county constitutional officer.

The practical implication of a determination that a duty is immemorial as opposed to strictly statutory is that core immemorial duties that define the office of the constitutional officer likely may not be interfered with by the legislature through the creation of new or amended

statutes. A constitutionally protected immemorial duty may only be shifted, eliminated, or changed through an amendment to the Wisconsin constitution.³

On the other hand the practical implication of a determination that a duty is statutory only, or a duty not constitutionally protected, is that it may be shifted, amended, or eliminated by the state legislature through the passage of a new law at any time. However, statutory duties established by the state legislature may not be overridden or restrained by county government. Accordingly the county legislature cannot shift, amend, eliminate, or restrain those statutory duties established by the state legislature of a county constitutional officer unless that authority is provided by the statutes.

A Standard for Determining Whether a Duty of a County Constitutional Officer is Immemorial and Protected From Legislative Intrusion by the Wisconsin Constitution

The issue of whether an action falls within the constitutional powers, rights, and duties of a county constitutional officer was recently taken up by the Wisconsin supreme court in Kocken v. Wisconsin Council 40, 2007 WI 72, 301 Wis. 2d 266, 732 N.W.2d 828. The specific issue in that case was whether a sheriff's decision to enter into a contract for the preparation of meals for jail inmates fell within the constitutional powers, and duties of the sheriff such that that decision was not subject to legislative limitations, namely a collective bargaining agreement in that case.

The court, in a decision written by Chief Justice Abrahamson, determined that "the Sheriff's hiring and firing of personnel to provide food service to the county jail is not a time immemorial, principal, and important duty that characterizes and distinguishes the office of

³ An amendment to the Wisconsin Constitution requires the passage of the identical proposed amendment in two consecutive sessions of the legislature. The proposed amendment is then placed on the ballot for popular vote. A majority of the voters must approve the amendment. Wis. Const. Art. XII, Sec. 1.

sheriff, and as such, is not within the Sheriff's constitutional powers.”⁴ The Kocken decision, however, was decided by a closely split (4-3) court. The minority of the court, in a dissent written by Justice Roggensack, concluded that “the constitutional powers and duties of the sheriff include the care and custody of prisoners in the county jail, which duty encompasses the duty to feed them.”⁵

In the Kocken case, as with any issue involving the interpretation of the powers and duties derived from the Wisconsin constitution, the court began with the language of the constitution. The Wisconsin constitution establishes the office of the sheriff in Art. VI, Sec. 4. The language of the constitution also establishes how sheriffs are to be elected and the length of their term, places restrictions on holding other partisan offices, creates a requirement for the giving of security, and provides for their removal by the Governor, as well as the processes for filling any vacancy.

Similarly, the Wisconsin constitution establishes the office of the register of deeds in Art. VI, Sec. 4, providing for a term of office and method for election. As with the sheriff the constitution provides for removal of a register of deeds by the governor, Art. VI, Sec 4(4), and providing a method for filling vacant offices, Art. VI, Sec. 4(5). The constitutional language, however, is silent as to any specific duties of the register of deeds, just as the court in Kocken determined that the sheriff's duties, rights, and powers were not delineated.⁶

But, in 1870 the Wisconsin supreme court addressed an issue involving the constitutionally protected duties of the sheriff, concluding that the framers of the constitution

⁴ Kocken, 2007 WI 72, ¶ 4.

⁵ Kocken, 2007 WI 72, ¶ 78 (Roggensack, J. dissenting).

⁶ Kocken, 2007 WI 72, ¶ 33.

anticipated that the sheriff would have "those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted."⁷ It is those duties that are "part and parcel of the duties from time immemorial belonging to it by law" that are protected by the constitution from legislative intrusion.⁸

In 1870 the court described the constitutional protection of the immemorial duties of the sheriff as follows:

And it seems to us unreasonable to hold, under a constitution which carefully provides for the election of sheriffs, fixes the term of office, etc., that the legislature may detach from the office its duties and functions, and transfer those duties to another officer. In this case it is said that the legislature has attempted to take the largest share of the duties of sheriff, in point of responsibility and emolument, and to commit it to an officer selected by the county board of supervisors. If the legislature can do this, why may it not deprive the sheriff of *all* the duties and powers appertaining to his office, and transfer them to some officer not chosen by the electors? It would certainly be a very idle provision of the constitution, to secure to the electors the right to chose their sheriffs, and at the same time leave to the legislature the power to detach from the office of sheriff all the duties and functions by law belonging to that office when the constitution was adopted, and commit those duties to some officer not elected by the people. For this would be to secure to the electors the right to choose a sheriff in name merely, while all the duties and substance of the office might be exercised by and belong to an officer appointed by some other authority.

Brunst, 26 Wis. at 414-415 (emphasis in original). Simply stated, the Brunst court created a standard that looked to the historic nature of the powers, rights, and duties of the officer as it existed when the constitution was adopted.

The court continued to develop this standard in a case in 1920, concluding that the constitutionally protected powers, rights, and duties of a constitutional office (again the sheriff) were limited to those "immemorial principal and important duties that characterized and

⁷ State ex rel. Kennedy v. Brunst, 26 Wis. 412, 414 (1870).

⁸ Brunst, 26 Wis. at 413-14.

distinguished the office.”⁹ In that case the court determined that hiring decisions are not a power peculiar to the office of sheriff, or in other words personnel decisions such as hiring and firing are not a defining duty of the office.¹⁰ The court concluded that the alternative would too severely bind the legislature from changing mundane and administrative tasks, requiring a constitutional amendment “to change the duties of the sheriffs in the slightest degree, and in this respect ‘the state would be stretched on a bed of Procrustes.’”¹¹

In evaluating this case law, as well as additional cases applying these standards, the supreme court in Kocken identified criteria for identifying a sheriff’s constitutionally protected powers, rights and duties: “certain immemorial, principal, and important duties of the sheriff at common law that are peculiar to the office of sheriff and that characterize and distinguish the office are constitutionally protected from legislative interference.”¹² However, the court determined that the legislature is not prohibited from changing the powers, rights, and duties of the sheriff if those powers, rights, or duties are “mundane and common administrative duties,” or those that “neither gave ‘character’ nor ‘distinction’ to the office.”¹³

Breaking down this standard the powers, rights, and duties of a county constitutional officer likely to be determined to be constitutionally protected are those that: [1] are immemorial duties of the officer at common law, that is the duty was the officers at the time of the drafting of the constitution in 1848, [2] the duty is a “principal, and important” duty of the officer at

⁹ State ex rel. Milwaukee County v. Buech, 171 Wis. 474, 482 (1920).

¹⁰ Buech, 171 Wis. at 482.

¹¹ Id.

¹² Kocken, 2007 WI 72, ¶ 39.

¹³ Kocken, 2007 WI 72, ¶ 40.

common law, and [3] the duty is peculiar to the office in that it characterizes or distinguishes the office from other constitutional offices.¹⁴

On the other hand, those types of powers and duties not protected by the constitution from legislative intrusion generally include “internal management and administrative” duties.¹⁵ While many duties that are “administrative” in nature may have been an immemorial duty of the officer at common law, the supreme court determined that ignoring “an analysis of whether the duty at issue is mundane and commonplace and whether it is an internal management and administrative duty is to ignore or misread our case law and to risk over-constitutionalizing the powers of the office of the sheriff, in contravention of the framers’ intentions.”¹⁶ And so, although some powers and duties of the register of deeds were “ever present aspects of the constitutional office,” that is immemorial duties of the office, it is necessary to determine if those duties are common administrative duties that are not protected by the constitution from the intrusion of legislative action.¹⁷ Only those duties that are not “mundane and commonplace,” “internal management and administrative” powers and duties, and instead are core functions of the specific office which are peculiar to and distinguish the office, are protected from legislative intrusion by the constitution.

The first step in the analysis is a historical review of the powers, rights, and duties of the officer in 1848. This first step is generally straightforward: did the officer have the particular power, right, or duty at issue when the Wisconsin constitution was adopted in 1848. The second

¹⁴ Recently this “well settled law” was summarily stated by the court of appeals: “a sheriff may not be restricted in whom he or she assigns to carry out his or her constitutional duties if he or she is performing immemorial, principal, and important duties characterized as belonging to the sheriff at common law.” Ozaukee County v. Labor Assoc. of Wisconsin, 2008 WI App 174, ¶17, 315 Wis. 2d 102, 763 N.W.2d 140.

¹⁵ Kocken, 2007 WI 72, ¶ 42.

¹⁶ Id.

¹⁷ Id.

step in the analysis is more complex and extremely fact dependant requiring an exhaustive examination by the court of the power, right, or duty involved in any particular dispute. This is apparent in reviewing the court’s decision in Kocken, in which the members of the court were split 4-3 in the outcome of the case. The split was based upon the justices differing views on whether the duty to feed prisoners falls within the sheriffs duties of care and custody of prisoners in the county jail such that the legislature cannot intrude in the sheriff’s actions in discharging that duty, and whether this duty was a “mundane” “administrative” decision.

The minority of the court in Kocken examined the issue in a way that provided more expansive constitutional protection for the powers, rights, and duties historically vested in the office of the sheriff, as well as those duties necessary to carry out the officer’s core immemorial functions.¹⁸ The dissent separated the case law concerning what powers, rights, and duties of the sheriff are constitutionally protected into two categories: “(1) those *involving the sheriff’s choice about how to perform a specific task* within the ambit of one of the sheriff’s constitutional duties when another entity is attempting to change the sheriff’s choice and (2) those dealing with *a general power possessed by other elected officials*, such as the power to dismiss a previously appointed employee.”¹⁹

The dissent reasoned that the common law powers and duties of the sheriff also included those powers necessary to carry out those duties.²⁰ Further, the dissent concluded that the choice of the means by which to feed prisoners in the county jail falls within the powers necessary to

¹⁸ Kocken, 2007 WI 72, ¶ 78 (Roggensack, J. dissenting).

¹⁹ Kocken, 2007 WI 72, ¶ 103 (Roggensack, J. dissenting) (emphasis in the original).

²⁰ Kocken, 2007 WI 72, ¶ 90 (Roggensack, J. dissenting).

perform the undisputed constitutionally protected immemorial duty of the sheriff to care for and maintain custody over inmates in the county jail.²¹

The dissent further suggested that the analysis of whether the duty is “mundane” or “commonplace” is inappropriate. The dissent stated: “We have already concluded that the constitution preserves to the office of sheriff those duties that were traditionally performed by the sheriff even if they were not uniquely performed by the sheriff.”²² The dissent’s analysis of the issue presents a different standard: “if the job falls within the scope of a constitutional power and duty of the sheriff at common law, the sheriff’s choice about to how to perform that job cannot be regulated by a collective bargaining agreement.”²³ However, the majority of the court did not agree, and so as the law in Wisconsin stands, the analysis includes both a historical review of the duties of the sheriff (and presumably other county constitutional officers), as well as an analysis of whether the duty is one that defines the office or is mundane, common, or administrative in nature.

Ultimately when an issue arises regarding a power, right, and duty of the register of deeds it will likely, although not certainly, be examined by the courts using a similar analysis as has been used to examine the powers, rights, and duties of the sheriff.²⁴ Accordingly first, it is

²¹ Kocken, 2007 WI 72, ¶ 105 (Roggensack, J. dissenting).

²² Kocken, 2007 WI 72, ¶ 108 (Roggensack, J. dissenting) citing Manitowoc County v. Local 986B, 168 Wis. 819, 829, 484 N.W.2d 534 (1992).

²³ Kocken, 2007 WI 72, ¶ 109 (Roggensack, J. dissenting).

²⁴ Because this standard has not yet been used by the courts in a published opinion in relation to the duties of the register of deeds, it is not entirely clear if a court would utilize this same standard in examining the duties of the register of deeds. The supreme court recently made a determination regarding the constitutionally protected powers and duties of the clerk of circuit court in exercising an amount of discretion in performing the duties of their office that did not utilize the same standard. N. Air Services, Inc. Link Snacks Global, & Link Holdings, Inc. v. Jay E. Link, 2011 WI 75. The majority of the court determined that prospectively the clerk of circuit court did not have the discretion to accept filings after the close of regular business hours. Link Snacks, 2011 WI 75, ¶110 (Ziegler, J. concurring). In making this determination the court did not apply the involved standard that has been utilized in

imperative to examine the history of the office of the register of deeds. Was the particular duty a historical power, right, or duty of the register of deeds at the time the constitution was adopted? Then, look to the nature of the duty. Does it characterize and distinguish the office? Is it a defining role of the register of deeds, or is it a task commonly performed by all administrative officers, that is a “mundane” or “internal management and administrative” duty? If the latter, as the law currently stands it likely is not protected from legislative intrusion by the constitutional powers of the register of deeds. If the former it is likely that courts would determine that those duties are constitutionally protected immemorial duties of the register of deeds and accordingly the register of deeds authority to perform the task would be constitutionally protected from limitation by legislative authority.

However, given the recent split decision on this issue, and the changed make-up of the supreme court it is important to keep up-to-date on the continued examples lying on the ill-defined boundaries in this area of the law. It is possible that the current court may be more sympathetic to the argument that a particular duty or right historically assumed by a constitutional officer should be constitutionally protected from legislative intrusion, especially in those cases involving limitations created by collective bargaining agreements.

A Historic Look at the Role of County Registers of Deeds in Wisconsin: From Settlement to the Territory of Wisconsin

examining the constitutional protections of the powers, rights, and duties of the sheriff. *Compare* Link Snacks, 2011 WI 72, ¶¶ 129-133 (Ziegler, J. concurring) *with* Kocken, 2007 WI 72, ¶¶ 30-76.

The clerk of circuit court, however, is established as a constitutional officer in Art. VII, Sec. 12 of the Wisconsin Constitution, as opposed to the register of deeds office which is established under Art. VI, Sec. 4, the same article and section as the sheriff.

In the territory that became the United States deeds for land were originally made in the various forms of the settling country. However, the specific method of transference was not as important in the colonies as it was, for instance, in England. This is because early colonial legislatures required public recording of deeds regardless of the form used to transfer land.²⁵ While required public recording of deeds throughout England was not instituted by the United Kingdom parliament until the twentieth century (and then not even completely),²⁶ the need for public registering of deeds in the colonies arose early on because of the high volumes of land transfer, and greater level of fraud that was observed.

With the requirement of public recording came the duty of some office or body to receive and record the instruments. Early on this duty was placed upon the courts, specifically judges, as well as the governor of the colonies. As mandatory public recording of deeds became commonplace the colonial legislatures continued to clarify the laws regarding public recording making the necessary information more consistent, and transferring the duties of receiving and recording the writings to ever more specialized officers, in some instances the register of probate, clerk of circuit courts, or county clerk. In many of the states and territories the refinement and addition to the public recording duties led to the creation of a specific officer in each county that had the duty to record all deeds, mortgages, and other like writings as directed by law. In the territory that ultimately became Wisconsin this officer had the title of register of deeds.

In the territory that was to become Wisconsin the first law establishing a county office of record was passed in 1795. In that year the governor and judges of the Northwest Territory

²⁵ As an early example, Virginia in the Act of 1656 required all deeds to be publically recorded within six months of transfer at the county courts, or before the Governor and Council.

²⁶ See, Land Registration Act of 1925, and Land Registration Act of 2002.

passed a law establishing an office of record in every county in the territory.²⁷ Adopted from the Pennsylvanian code the law stated:

Sect. I. There shall be an office of record, in each and every county: which shall be called and stiled, *the Recorders' Office*, and shall be kept in some convenient place in the said respective counties: and the recorder shall duly attend the service of the same, and at his own proper costs and charges, shall provide parchment, or good large books of royal or other large paper, well bound and covered; wherein he shall record, in a fair and legible hand, all deeds and conveyances which shall be brought to him, for that purpose, according to the true intent and meaning of this law.

...

IV. Every mortgagee of any real or personal estates, in this Territory, having received full satisfaction and payment of all such sum and sums of money as are really due to him, by such mortgage, shall, at the request of the mortgage, enter satisfaction upon the margin of the record of such mortgage, recorded in the said office; which shall, forever thereafter discharge, defeat and release the same; and shall, likewise, bar all actions brought or to be brought thereupon.

...

VI. There shall be appointed a recorder in every county now or hereafter, to be erected. But, before any of the said recorders enter upon their respective offices, they shall become bound to the governour and his successors, with one or more sufficient sureties, in a bond for fifteen hundred dollars; conditioned for the true and faithful execution of his office, and for delivering up the records and other writings, belonging to the said office, whole, safe and undefaced, to his successor in the said office. Which said respective bonds, shall be filed in the secretary's office, and there safely kept, in order to be made use of for making satisfaction to the parties that shall be damnified or aggrieved, as is or shall be, in such cases directed by law,

...

X. Every recorder shall keep a fair book, in which he shall immediately make an entry of every deed or writing, brought into his office to be recorded; mentioning therein the date, the parties, and the place where the lands, tenements or hereditaments, granted or conveyed by the said deed or writing, are situate; dating the same entry on the day in which such deeds and writings, in regular succession; according to their priority or time in being brought into the said office' and shall also immediately give a receipt to the person brining such deeds, or writing, to be recorded, bearing date on the same day with the entry, and containing the abstract aforesaid: for which entry and receipt, he shall take or receive no fee or reward, whatever. ...

An office of record was maintained in the territory through the formation of the territory of Michigan. In 1835, an office of the register of deeds was established by the legislative council

²⁷ The Laws of the Northwest Territory, 1788-1800, 197-198, Trustees of the Illinois State Historical Library (1925).

of the Territory of Michigan.²⁸ Prior to this date the laws of the Territory of Michigan required that deeds be recorded in the office of the register of probate. The Territory of Wisconsin, established in 1836, retained the office of the register of deeds by continuing the laws in force.²⁹

In 1839 the territorial government of Wisconsin passed a comprehensive act providing for the election of registers of deed in each respective county and defining their duties and powers.³⁰ This act provided for a term of two years and for elections by the qualified voters of each county to elect their county register of deeds. The territorial government provided for specific obligations of the registers of deed in discharging their duty to receive and record all deeds and other papers offered for recording:

...

Sec. 7 Every register of deeds shall keep a book, each page of which shall be divided into six columns, with titles or heads to the respective columns in the following form, to wit: [example of required headings]

Sec. 8 The register shall enter in the said book all deeds and other instruments left to be recorded, and all copies left as cautions, or notices of liens, in the order in which they are received, noting in the first column the day, hour and minute of reception, and the other particulars in the appropriate columns; and every instrument shall be considered recorded at the time so noted. He shall also certify, upon said instrument recorded by him, the time when it was received, and the number of the book and the page where it is recorded.³¹

²⁸ Laws of the Territory of Michigan, Vol.3, 1360, available at <http://books.google.com/books?id=3AGcAAAAMAAJ&pg=PR20&dq=1835+laws+of+michigan+territory&hl=en#v=onepage&q=1835%20laws%20of%20michigan%20territory&f=false>.

²⁹ Organic Acts for the Territories of the United States, Territory of Wisconsin Chap. LIV, Sec. 12, pg. 63, available at <http://books.google.com/books?id=EOg9AAAAIAAJ&pg=PA57&dq=laws+territory+of+wisconsin+1836&hl=en#v=onepage&q=laws%20territory%20of%20wisconsin%201836&f=false>.

³⁰ Statutes of the Territory of Wisconsin: passed by the Legislative Assembly, 100-101, available at <http://books.google.com/books?id=nplhAAAAMAAJ&pg=PA33&dq=1839+laws+of+territory+of+wisconsin&hl=en#v=onepage&q=1839%20laws%20of%20territory%20of%20wisconsin&f=false>.

³¹ *Id.*

As will be discussed below the statutory duties prescribed in this Act of 1939 were in large part carried through into statehood with the prescribed statutory duties of and form of the register of deeds index being similar. The territorial Act also provided authorization for the register of deeds to appoint deputy registers. “Sec. 9 The register of deeds in the several counties of this territory, are hereby authorized to appoint deputy-registers, and may revoke their appointments at pleasure; and shall be responsible for the acts of their deputies.”³²

While the original records of the various register of deeds offices are collected and available for review,³³ a summation of the early records and role of the register of deeds in Wisconsin is best expressed through the words of a pioneering Wisconsinite immersed in the history of the State. In a writing entitled “Early Records of the Register of Deeds Office”, Mrs. G.W. Dexheimer, state historian, presents a history of the register of deeds office at Prairie du Chien.³⁴ While the focus of her piece is presenting “interesting things shown in the records relating to the History of Prairie du Chien and Crawford County,” the writing presents an early state historians review of the role played by the office of the register of deeds in an early settlement of the lands that became Wisconsin.

The document begins with a review of the earliest records of land titles in the Crawford County Register of Deeds office, “[f]rom the report of the Commissioners who were appointed to investigate the condition of Land Titles at Prairie des Chiens.” That report determined that in

³² Id.

³³ The historic collections are available for review at the Area Research Centers around the State. For example, the historic records of the Brown County register of deeds, dating back to the 1820s, is available at the Green Bay Area Research Center at the University of Wisconsin-Green Bay, while the records from the Crawford County office, dating back to the early 1800s, are available at the Platteville Area Research Center at the University of Wisconsin-Platteville, and the records.

³⁴ Writings of Mrs. G.W Dexheimer 1820-1877, available at the Archives of the Wisconsin State Historical Society, SC 1274, in Madison, WI.

Wisconsin the history of early records of land titles and deeds is complicated by the settlement of the lands by both the French and the British. However, more important to the focus of this paper, extended excerpts from Mrs. Dexheimer's piece, which is available in original in the Archives of the State Historical Society in Madison, WI, provide vivid context to the role and duties of the register of deeds in recording various instruments prior to and through the attainment of statehood in Wisconsin. These examples provide a synopsis of the historic duties of the register of deeds through the practical review of what it is the office received and recorded.

The earliest instruments in Mrs. Dexheimer's review date from the time when Crawford County was a part of the Territory of Michigan. The review extends through the time in which the lands became the Territory of Wisconsin, 1836, and through early statehood. The most useful aspect of this history is the comprehensive description of the documents for which it was the duty of the register of deeds to record and retain, namely deeds, mortgages, lands patents, as well as essentially any other documents presented to the register of deeds (or probate prior to 1835).

...

At the time the early instruments which are recorded here, were made, Crawford County was in the Territory of Michigan. Prairie du Chien was in the Territory of Michigan until the year 1836 when a part of this Territory was made the Territory of Wisconsin.

The first instrument to be recorded in Book "A" of Deeds is a land contract between James Fraser of Drummonds Island in the Province of Upper Canada and Joseph Rolette Merchant, of Prairie des Chiens, the consideration is named in pounds, shillings and pence and the instrument is dated August 7th, 1820, the date of recording is not given. The description of land states that it is bounded on the East by a place called "the Bluffs" and on the West by the Slew commonly called the "Marais of the Laird."

The first mortgage found of record is from Michael Brisbois to the American Fur Company, dated December 26, 1822. The Certificate of Registration is signed by Alexis Bailley, Register of Probate, Pro tem. In an instrument dated January 11, 1822, made by John W. Johnson, Judge of Probate for Crawford County,

Territory of Michigan, he states that he cannot attach his official seal as there has been no seal yet provided for Crawford County.

...

Another interesting instrument reads: "To Jonathan Carver, a chief under the most might and potent George the Third, King of the English and other Nations, the fame of whose courageous warriors have reached our ears, and had been more fully told to us by our good brother Jonathan aforesaid, whom we rejoice to see come among us, and bring us good news from his Country. We, chiefs of the Nawdowissies who have heretofore set our seals do, by these presents, for ourselves and heirs forever in return for the many presents and other good services done by the said Jonathan to ourselves and allies, five, grant and convey to him, the said Jonathan, and to his heirs and assigns forever the whole of a certain tract of land bounded as follows: From the Fall of St. Anthony running on the East bank of the Mississippi River nearly Southeast as far as the south end of Lake Pepin, where the Chippewa River joins the Mississippi and from thence eastwardly five days travel, counting twenty English miles per day, and from thence six days travel at twenty English miles per day, and from thence again to the Fall of St. Anthony, reserving for ourselves the sole liberty of hunting and fishing on said land not planted and improved. Dated at the Great Cave May first, 1767. The instrument is signed by two Indian Chiefs, Aawnopawatin, signed with his mark, his mark being the turtle, and Otchtongoomliiskcaw, signed by this mark, his mark being the snake. According to the Certificate attached and certified under the seal of the Secretary of State, per James Madison, the original of this instrument is on file in the office of the Secretary of the Senate of the United States.

An Act to incorporate the Borough of Prairie du Chien, is the title of another instrument, dated September 17, 1821, by which it is enacted by the Governor and Judges of the Territory of Michigan, that all the citizens of this Territory inhabitants of the Borough of Prairie du Chien be and they are ordained, constituted and declared to be forever on body corporate and Politic, in fact and in name, by the name of "the Warder, Burgesses and Freeman of the Borough of Prairie du Chiens" ...

Another instrument is between Patsay, a woman of color, and Mrs. Street. The instrument recites that said Patsay agrees to go with Mrs. Street to Prairie du Chien, as her servant, that she was sold at sheriff sale as the property of M. Street, to Dr. Alexander Posey, and that her going with Mrs. Street is of her own free will and not through the compulsion of said Posey or any other person.

The name of the first Railway Company found mentioned was the "Milwaukee and Mississippi Railroad Company" and it was in existence in 1855, and in February 1861 its road between Milwaukee and Prairie du Chien was sold to the Milwaukee and Prairie du Chien Railroad Company, who in turn sold to the Chicago, Milwaukee & St. Paul Railway Company, in December 1867. ...

In the year 1865 there were a great many leases made on lands in the town of Seneca, Eastman, Wauzeka and Clayton, these leases were for a period of 20 years and gave the right to search for and mine minerals, fossil or oily substances. They were given principally to Samuel P. Langdon, The Kickapoo River Oil and

Mining Company and the Crawford County, Wisconsin Petroleum and Mining Company also had leases.

The dates of the Plats of the several villages of the county and the order in which they were platted is as follows...

Many of these Villages were in existence a number of years before plats were made and recorded.... There have, of course, been additions to these Plats since the originals were made.

...

The names of the Registers of Deeds up to 1870 are as follows: Joseph Brisbois, Register of Probate Pro tem, 1826; B.W. Brisbois 1834; Thos. P. Street 1838; A.C. Rogers 1841; Joseph Brisbois 1845; Theo. Bugbee 1849; I.P. Perret Gentil 1851; Ira B. Brunson 1852; Otto Georgii 1861; Jac Raffauf 1863 and James S. Burton 1869.

I find the record of one death in the year 1840, that of Julia Caroline Perret-Gentil, the daughter of I. Pierre Perret-Gentil; and two deaths in 1846, those of Zelma Perret-Perret-Gentil and Albert Ritson. There are nine births for the years 1837, 1839, 1841, 1842, 1845, 1848, 1850, and 1852. There are no more births or deaths of record until the year 1876.

The marriage records are more complete, the first marriage of record being that of Charles LaPointe and Mary Rock, on February 3rd, 1820, they were married by J.W.Johnson, Justice of the Peace, in presence of Michael Brisbois, Joseph Roette, Thomas McNair and other of their friends. ...

In an instrument dated August 30th, 1840 Beverly Waugh, Bishop of the Methodist Church in America "under the protection of Almighty God with a single eye to His Glory" appoints David King for the office of Deacon of said Church. There are also of record the Ordination of several ministers, dated from 1841 to 1861. ...

Among the Wills of record are those of William Beaumont, owner of Beaumonts Addition to Prairie du Chien; Ira B. Brunson who was at one time County Judge, Register of Deeds and County Surveyor of Crawford County. Jane F. Dousman, wife of Hercules L. Dousmand Sr. and James H. Lockwood whose name appears so frequently in the early records.

...

Those are only a few of the interesting things shown in the records relating to the History of Prairie du Chien and Crawford County.³⁵

While not a comprehensive listing, this historic window provides an excellent example of the records dutifully recorded and retained by the register of deeds beginning in the territorial time period through early statehood. These duties derived from the laws of the territory, beginning with the requirement of public recording in the early colonies, which were extended to

³⁵ Id.

the laws of the Northwest Territory, through the laws of the Territory of Michigan, and the Territory of Wisconsin.

Stated simply this history suggests that at the time Wisconsin attained statehood the register of deeds in the respective counties of the Territory was recording in a fair book all deeds and other writings presented for recording. The review of territorial legislation also suggests that the register of deeds had a duty to appoint a deputy, as well as maintain an index in a particular statutorily defined manner.

The Wisconsin Constitutional Conventions: The Elimination (Almost) and Resurrection of the County Register of Deeds as a Constitutional Officer

Wisconsin has had two constitutional conventions; the first in 1846 produced a constitution that was not adopted by the people of the State. While Wisconsinites rejected the first constitution, there was a continued push for statehood and a second constitutional convention was convened in 1848. This second convention produced a constitution largely similar to that produced by the convention in 1846 in regard to the structure of government and the officers that were established.³⁶ One exception to this similarity is the office of the register of deeds.

The constitution of 1846 eliminated the position of the county register of deeds, assigning the duties of the register of deeds to the clerks of the circuit court. In a debate on the report of the judiciary committee delegate Marshall M. Strong moved for an amendment adding: “The clerk of the circuit court shall perform all the duties of the officers of register of deeds and of the

³⁶ While the structure of the government established by both constitutions was largely similar, the constitution of 1848 did not contain many of the controversial issues included in the constitution of 1846, namely woman’s property rights, African American suffrage, and left the issue of the establishment of banks to a popular vote.

clerk of the board of supervisors.”³⁷ Unfortunately, the records of the Wisconsin constitutional conventions are limited, and there is no indication of the debates on this amendment. However, the amendment was accepted, in part, by the convention. The original resolution of the amendment indicates that assigning both the duties of the register of deeds and the clerk of the board of supervisors to the clerk of circuit court was put before the convention. The resolution shows that the clerk of the board of supervisors was crossed out.³⁸ Accordingly, the duties of the clerk of circuit court were amended to include those duties previously performed by the register of deeds as indicated by the constitution resulting from the 1846 convention. Article VII, Section 13 of the constitution of 1846 stated: “The clerk of the circuit court shall perform all duties of the office of register of deeds.” The county constitutional officers established in the Administrative article of the 1846 constitution were limited to sheriffs, coroners, and district attorneys.

There was substantial popular debate on the topic of the proposed constitution of 1846. At least one significant article contained a reference to the transfer of the duties of the register of deeds to the clerk of circuit courts. In the views of “Old Crawford Forever”- No. 5 dated March 23 1847:

Another bad feature of this article on the judiciary is amalgamating the office of clerk of the circuit court with that of register of deeds, section 13, and then securing to the incumbent a salary of \$1,500 a year before he is required to pay anything into the county treasury. The professed object of this scheme was to get funds in the treasury to assist in paying public expenses. But the plan itself is a failure because there are but few counties in which the fees of office in both offices will reach to \$1,500 per annum. And where they do one man can attend well and truly to all the duties of both. Besides it is not democratic to place so

³⁷ See, Milo M. Quaife, *The Convention of 1846*, 528, Publications of the State Historical Society of Wisconsin Collections, Vol. XXVII, Constitutional Series, Volume II (1919).

³⁸ Original resolutions of the Convention of 1846 available at the Archives of the Wisconsin State Historical Society, Series 185, in Madison, WI.

many offices and so much income into the hands of one man, while there are so many aspirants who need some share of the spoils.³⁹

This commentary suggests the practical purpose of having the clerk of circuit court absorb the duties of the register of deeds; attempting to bring more money into the county treasury.

Assumedly the argument was that one officer as opposed to two officers performing the duty of two officers would mean fewer fees needed to pay officers' salaries and more money in the treasury. "Old Crawford Forever", however, aptly supplies the opposing view.

The members of the convention of 1848 began anew on a constitution for Wisconsin, however, the early drafts of the administrative article regarding county constitutional officers that were submitted by the committee on the executive, administrative, and legislative provisions of the constitution were similar to the 1846 constitutional language, and proposed establishing the same officers as the constitution of 1846: sheriffs, coroners, and district attorneys.⁴⁰ The duties of the register of deeds remained with the clerks of circuit court in the early reports.

But, on Wednesday December 22, 1847 the journal of the convention indicates a resolution was made by Mr. Pentony: "Resolved, That the committee on the judiciary be instructed to inquire into the expediency of having the clerk of circuit courts and office of register of deeds separate offices."⁴¹

Again, the records of the conventions do not provide documentation of the debate over the resolution. Nor is there a preserved copy of the report of the judiciary committee on the resolution. However, the records do provide a subsequent resolution that requested reports from

³⁹ Milo M. Quaife, The Struggle of Ratification, 1846-1847, 664, Publications of the State Historical Society of Wisconsin Collections Vol. XXVIII, Constitutional Series, Vol. III (1920).

⁴⁰ Milo M. Quaife, The Attainment of Statehood, 226, Publications of the State Historical Society of Wisconsin Collections Vol. XXIX, Constitutional Series, Vol. IV (1928).

⁴¹ Milo M. Quaife, The Attainment of Statehood, 229, Publications of the State Historical Society of Wisconsin Collections Vol. XXIX, Constitutional Series, Vol. IV (1928).

the clerks of circuit courts of various counties to the committee on the judiciary on the volume of case filings, amount of fees collected, as well as other workflow information.⁴² While there is no indication that Mr. Pentony's resolution and this resolution seeking information from the clerks of circuit courts were related, it would appear that the information requested was to determine the workload, as well as compensation of the clerks of circuit courts, which would have been useful information in making a recommendation as to whether it would be expedient to add substantial duties to the office of the clerks of circuit courts.

Ultimately, the report of the judiciary committee recommended separating the two offices.⁴³ And an amendment to the Administrative article was introduced: "Section 4. Suggest insertion of 'register of deeds' after 'coroners'"⁴⁴ This amendment was accepted by the convention. The resulting section of the administrative article of the constitution in large part mirrored the county officers section of the Michigan Constitution.⁴⁵

Accordingly, since the adoption of the Constitution of 1848 by the people of Wisconsin, the county register of deeds has been recognized as a constitutional officer, deriving authority directly from the constitution and not limited solely to legislative acts. While the preserved records of the constitutional conventions do not provide a debate on the policy determinations made by the drafters in enveloping the duties of the register of deeds with those of the clerk of circuit courts, or what prompted the shift back to including the register of deeds as an

⁴² Original resolutions of the Convention of 1848 available at the Archives of the Wisconsin State Historical Society, Series 187, in Madison, WI.

⁴³ Milo M. Quaife, *The Attainment of Statehood*, 251, Publications of the State Historical Society of Wisconsin Collections Vol. XXIX, Constitutional Series, Vol. IV (1928).

⁴⁴ Milo M. Quaife, *The Attainment of Statehood*, 715, Publications of the State Historical Society of Wisconsin Collections Vol. XXIX, Constitutional Series, Vol. IV (1928).

⁴⁵ See, Constitution of Michigan of 1835, Art. VII, Sec. 4 available at <http://www.legislature.mi.gov/documents/historical/miconstitution1835.htm>.

independent constitutional officer during the debates of the second convention, the record does support the conclusion that the drafters of the Wisconsin constitution made a researched, debated, and ultimately an explicit determination that the structure of government in Wisconsin should include an independent register of deeds for each county, elected by the voters of each county, to perform those duties historically performed by the register of deeds in the territory. Wisconsinites agreed.

The Early Statutory Duties of the Register of Deeds

The Revised Statutes of 1849 expanded on the constitutionally established office of the register of deeds, directing more specific duties of the register of deeds. First, the legislature established a requirement to file a bond with the county treasurer prior to assuming duties as the register of deeds. Further, the first state legislature required the register of deeds to appoint a deputy,⁴⁶ and established specific duties for the register of deeds including the form in which the register was required to keep a general index of recordings.

The laws of 1849 established numerous statutory duties of the register of deeds, however, as previously mentioned, the duties were not novel, and appear to be consistent in large part with maintaining the statutory duties of the office of the register of deeds as had existed in the territory prior to statehood. The 1849 statutes stated:

The register of deeds shall have the custody of, and shall safely keep and preserve all the books, records, deeds, maps and paper deposited or kept in his office; he shall also record or cause to be recorded correctly, and in a plain and distinct hand writing, in suitable books to be provided and kept in his office, all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office, and left with him for that purpose, and shall perform all other duties required of him by law.⁴⁷

⁴⁶ “The register of deeds shall appoint a deputy...” Wis. Rev. Stat. (1849), Chap. 10, Sec. 119.

⁴⁷ Wis. Rev. Stat. (1849), Chap. 10, Sec. 121.

The revised statutes of 1849 also provided that the register of deeds “shall make correct entries in said index of every instrument or writing received by him for record...”⁴⁸

These statutorily defined duties of the register of deeds established by the first state legislature provide an indication of the immemorial powers and duties of the register of deeds at the advent of statehood. The duties, enunciated and expanded on by the early statutes, continued those duties that the register of deeds had had prior to the attainment of statehood.

Further, these early statutory duties are indicative of those duties that define the office of the register of deeds. Maintaining custody of, and recording all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office, and maintaining a general index are those duties that characterize and distinguish the register of deeds. Similarly, although seemingly not unique to the office of the register of deeds, appointing a deputy and maintaining responsibility over the actions (or inactions) of those appointments likely falls within the immemorial duties of the office.⁴⁹

Although the Revised Statutes of 1849 are just that, statutes, the duties established by the first state legislature may arguably lend support in determining those duties of the register of deeds that were established prior to statehood, and characterize and distinguish the office of register of deeds. In the words of the standards utilized by the Wisconsin courts: these early

⁴⁸ Wis. Rev. Stat. (1849), Chap. 10, Sec. 124.

⁴⁹ An early treatise on the law of deeds provides a review of historic court decisions holding that presenting the deed at the recorder’s office is sufficient for filing and that the register of deeds maintains responsibility over the office regardless of whether the officer directly receives the instrument: there is no requirement “ascertain who was the recorder de jure. It was sufficient to ascertain who was in possession of the records and discharging the duties of the office.” Robert Devlin, A Treatise on the Law of Deeds, Vol. 1, Sec. 701, pg. 730 (1887) quoting Cook v. Hall, 1 Gilm. (6 Ill.) 575.

statutory duties mirror those duties “part and parcel of the duties from time immemorial” belonging to register of deeds.

In the revised statutes of 1858, the legislature expanded the instruments authorized by law to be recorded by the register of deeds. The legislature placed the duty of registering marriages, births, and deaths upon the register of deeds.⁵⁰ The legislature prescribed that the registry of vital records be kept in separate books, and “to secure uniformity, precision, and greater dispatch” the legislature provided a detailed form for the registry.⁵¹

In the revised statutes of 1878 the legislature again explicitly provided for expanded duties of the register of deeds. Again the legislature refined the duties of the register of deeds, establishing a list of ten specific duties defined by statute.⁵² And again the legislature prescribed a uniform method for keeping a general index (although adding an additional column).⁵³

These early statutes maintained, although continually refining and updating, the duties of the register of deeds in large part as they were maintained under the laws of the Territory of Wisconsin prior to the attainment of statehood. Though the duties of the register of deeds established by the early legislatures are statutory duties, as explained above that does not mean that those duties are not also immemorial duties “part and parcel” to the office of the register of deeds (or officer performing those duties) and therefore protected by the constitution. In fact, the early statutes provide support for those duties that are part and parcel to the register of deeds office, and those that are more likely to be determined immemorial and constitutionally protected.

⁵⁰ Wis. Rev. Stat. (1858), Chap. 110, Sec. 1.

⁵¹ Wis. Rev. Stat. (1858), Chap. 110, Sec. 10.

⁵² Wis. Rev. Stat. (1879), Chap. 37, Sec. 758.

⁵³ Id.

For instance, in the first legislative session the legislature delineated specific duties that apply to the core functions of the register of deeds. The statutory language, however, does not suggest that the legislature is establishing a new “statutory” duty, and instead indicates the legislature’s attempt to more specifically direct the register of deeds in performing duties immemorial to the office, namely receiving and recording deeds and other papers such as “mortgages, maps, instruments and writings authorized by law to be recorded in his office.”⁵⁴

Accordingly, while the legislature set forth specific duties to be discharged by the register of deeds, the legislature was not encroaching on the immemorial duties of the register of deeds. The legislature did reiterate the duties of the register of deeds likely inherent in the constitutional establishment of the office of the register of deeds, that is to record deeds, mortgages, maps, instruments, and other writings. However, this reiteration did not limit or encroach upon those core duties of the register of deeds. The legislature instead reiterated those duties and expanded those duties, as well as provided clarity and uniformity to the office through more specific statutes. These early statutory duties were the duties of the register of deeds prior to the attainment of statehood, and remain to this day the core function of the office, as exemplified by the history of the office, and the statutory reiteration of these duties.

The legislature can and has expanded (and retracted again in some instances) on these core immemorial duties. The statutory duties of the register of deeds have been consistently adjusted by the legislature over time, adding additional responsibilities for receiving and recording information, as well as removing responsibility for certain documents, and adapting the forms used by the register of deeds to name just a few. Because the focus of this paper is on

⁵⁴ Wis. Rev. Stat. (1849), Chap. 10, Sec. 121.

the immemorial constitutional duties of the register of deeds, this paper will not provide an extended history of those statutory duties here.⁵⁵

One interesting example, however, of the establishment of a statutory duty as it relates to the immemorial constitutional duties of the register of deeds is the legislatures prescribed form in which registers of deeds shall keep a general index. These statutes, which existed prior to the attainment of statehood, ensure uniformity of records. Although potentially appearing to encroach into a core immemorial duty of the register of deeds, to record deeds, etc., this statutory duty affects an administrative aspect of the office, namely the form that must be used to maintain a general index. Accordingly, under the standard likely to be used by the courts in evaluating this type of legislative action, the action likely would be determined to not be an encroachment of the immemorial functions of the register of deeds, but instead an example of a statutory duty affected a “mundane” “administrative” aspect of the office.

In conclusion, the history of the early statutory duties of the register of deeds suggests that while the legislature continually expands, and occasionally retracts, the statutory duties of the register of deeds, the recording of deeds, mortgages, maps, instruments, and other “writings authorized by law” is constant. That consistent statutory history is indicative of the immemorial nature of these duties. Although it would appear that the legislature has the authority to encroach (or expand on) some aspects of the “common administrative” task of recording, in that the legislature prescribes a forms and mechanisms for recording, the role of the register of deeds as custodian and recorder of these core documents is likely to be determined a immemorial duty protected by the constitution from legislative intrusion. In other words, it is likely to be

⁵⁵See, WRDA_Brown Co files_historic duties.pdf, for a more extensive history of the statutory duties of the register of deeds in Wisconsin.

determined by the courts that the legislature cannot delegate those core duties to another officer without an amendment to the Wisconsin constitution.

Application and Examples

Bringing it all together, this analysis suggests that there are certain functions of government that have been secured to an independent office of the register of deeds by the Wisconsin constitution. And so, these functions cannot be encroached upon by the legislative branch, either state or county. For instance, the obvious core immemorial duty of the register of deeds is recording and maintaining deeds and mortgages. While the legislature may suggest or attempt taking that duty away from the register of deeds and making that the duty of the clerk of circuit courts (as was attempted by the first constitutional convention), or alternatively a centralized state administrative agency, it would seem that under the standard previously utilized by the courts for defining the duties of the sheriff, the legislature would not have the authority to eliminate or encroach upon that immemorial duty of the register of deeds.

Any attempt to amend or remove this core function of the register of deeds would very likely be deemed immemorial and constitutionally protected by the courts. Accordingly, any change would require a constitutional amendment. This argument is well supported by the fact that the drafters of the constitution explicitly determined it appropriate to maintain an independent register of deeds to carry out the duties historically held by that office prior to statehood as opposed to consolidating those duties with the duties of the clerk of circuit courts.

That, however, is an obvious example, and others provide less clarity and do not provide as confident a prediction of how a court would examine and decide the issue. One example that was presented as a question by the sub-committee is the register of deeds powers and duties in

hiring a deputy. More specifically can the power to hire and fire the chief deputy register of deeds be encroach by legislative action, such as by a collective bargaining agreement.

Under the laws of the Territory of Wisconsin the register of deeds had the power to hire (and fire) deputy registers of deeds at their pleasure. This was a historic right of the register of deeds at the time the Wisconsin constitution was ratified. Accordingly, under the standard the court has utilized there is a strong argument that the power of a register of deeds to hire a deputy is immemorial.

Yet, based on published Wisconsin case law discussed above, it also seems likely that the register of deeds' power to hire a deputy is not wholly immune from legislative intrusion. It is very likely that the courts would determine that the legislature may direct and provide limitations on the "mundane" and "common administrative" actions of hiring and firing. Employment decisions are not a core function of the register of deeds in the sense that it characterizes and distinguishes the office. And so, it would appear likely that the courts would determine that the legislature may restrict "administrative" employment decisions of a register of deeds, even those employment decisions applicable to the chief deputy of the register of deeds.

However, that it might be determined that the state legislature can encroach on process for hiring and firing determinations of the registers of deeds in regard to their chief deputy, it is an entirely distinct issue as to whether the county government may encroach in these determinations. The specific subjects the county may impose limitations on in relation to county constitutional officer's actions, including the hiring and firing of the chief deputy, brings up the interplay of state statutes and county legislative action.

Recent court of appeals cases have addressed the issue of county legislative actions as it relates to chief deputies of county constitutional officers. What appears clear from these cases is

that the register of deeds statutory authority to appoint and discharge deputies, at least a “chief” deputy, may not be impinged by the county’s actions in regulating their employees through collective bargaining.

In Crawford County v. Wisconsin Employment Relations Comm’n, 177 Wis.2d 66, 79, 501 N.W.2d 836 (1993) the court of appeals concluded that “while the county has the authority to establish the pay and regulate other conditions of employment of its employees, and thus the authority to bargain collectively with the union on those subjects, that authority does not extend to bargaining away the statutory power of the clerk of court and register of deeds to appoint and discharge deputies.” More recently, in Oneida County v. Wisconsin Employment Relations Comm’n, the court of appeals determined: “The issue in this case is whether chief deputies in the offices of clerk of court, county clerk, county treasurer and register of deeds are excluded from a collective bargaining unit as a matter of law. We hold they are not...”⁵⁶

The focus of the Oneida County case was what subjects the county had the authority to bargain over in relation to the chief deputies of county constitutional officers. As the court of appeals stated in analyzing prior case law, “deputies were subject to the collective bargaining agreement in all respects except those that conflicted with the statutory powers of appointment and removal.”⁵⁷ The Wisconsin statutes provide certain county constitutional officers with the authority to appoint a deputy who serves at the pleasure of the officer.⁵⁸ Accordingly, while these “chief” deputies are not exempt from the application of collective bargaining agreements

⁵⁶ Oneida County v. Wisconsin Employment Relations Comm’n, 2000 WI App 191, 238 Wis.2d 763, 618 N.W.2d 891.

⁵⁷ Oneida County, 2000 WI App 191, ¶ 14 *citing* Crawford County v. Wisconsin Employment Relations Comm’n, 177 Wis.2d 66, 501 N.W.2d 836 (Ct. App. 1993).

⁵⁸ *See e.g.*, Wis. Stat. § 59.43(3) establishing a statutory duty of the register of deeds to appoint one or more deputies “who shall hold office at the register’s pleasure.”

entered by the county in all respects, the court of appeals determined that the elected county constitutional officer's power to appoint and discharge the chief deputy at the officer's pleasure was exempt from a collective bargaining agreement entered by the county.⁵⁹ This is because state law supersedes county legislative action. The authority of the county constitutional officers to appoint and discharge their deputy at their pleasure is statutorily based and the county cannot encroach on that statutory authority.

This example suggests the complexities of a challenge to any of the particular powers, rights, or duties of the register of deeds. While the power to hire and fire a chief deputy may not fall within the standard the court has utilized for determining constitutionally protected immemorial duties of county constitutional officers because employment decisions like hiring and firing are "mundane" and "administrative," the further interaction of state statutory law and county legislative action comes into play.

This previous example leads to another challenging example. While it seems clear that the court has determined that the register of deeds has the statutory authority to appoint and discharge a chief deputy at their pleasure, the language of the Crawford County case suggests that it is also clear that "the county has the authority to establish the pay and regulate other conditions of employment of its employees."⁶⁰ And so, the question has suggested by the subcommittee then becomes: can the county legislature effectively thwart the statutory authority of a county constitutional officer to appoint a deputy by regulating the pay and conditions of employment, for instance by withholding any funding to compensate a deputy?

⁵⁹ Oneida County, 2000 WI APP 191, at ¶ 16.

⁶⁰ Crawford County, 177 Wis. 2d at 79.

The Wisconsin statutes give substantial authority to the county board in regard to regulating the conditions and salaries of the offices of elective county officers. The county has authority to:

- a. Provide, fix or change the salary or compensation of any office, board, commission, committee, position, employee or deputies to elective officers that is subject to sub. (1) [which includes the register of deeds] without regard to the tenure of the incumbent.
- b. Establish the number of employees in any department or office including deputies to elective officers.
- c. Establish regulations of employment for any person paid from the county treasury.

Wis. Stat. § 59.22(2)(c)1.a-1.c. Interpreted in isolation this statutory language seems to provide the county board with the authority to fix the salary of the deputies of county constitutional officers at whatever level they choose without limitation, as well as establish the number of deputies a county constitutional officer may have, again without limitation. However, statutes are not read in isolation and must be interpreted in light of other statutes. Specifically in this case the Wisconsin statutes establish the register of deeds authority and obligation to appoint one or more deputies. Wis. Stat. § 59.43(3).

Courts interpret statutes to give effect to all of the words of the legislature. Accordingly, while in isolation Wis. Stat. § 59.22(2)(c)1.b may suggest that the county board could establish the number of deputies to the register of deeds as zero, read in conjunction with Wis. Stat. § 59.43(3), which requires the register of deeds to appoint at least one deputy, it would appear that the intent of the legislature was to provide authority to the county board to establish the number of the deputies so long as the number of deputies is at least one. If the county board established the number of deputies to the register of deeds as zero then the register of deeds would be unable

to discharge the statutory directive to appoint at least one deputy, a seemingly contradictory (and arguably absurd) result.

Similar logic may be used to begin addressing the issue of the county's authority in setting the salaries of the register of deeds, or deputy register of deeds. However, establishing the number of deputies is definite, in that establishing the number of deputies as zero seemingly directly conflicts with the register of deeds duty to appoint at least one deputy. The issue of compensation is not as clear-cut.

A review of Wisconsin case law and attorney general opinions regarding the county's authority to establish the salary of constitutional officers as well as their deputies bears out this less than definite boundary. In short it is very likely that the courts will only intrude on the authority of the county in setting the salary of a county constitutional officer or a deputy if the salary is unreasonably low and arbitrary such that it effectively frustrates the constitutional or statutory powers and duties of the constitutional officer.

The most cited case on this issue is Schultz v. Milwaukee County, 250 Wis. 18 (1947), along with a companion case Schmidt v. Milwaukee County, 250 Wis. 23 (1947). In those cases Milwaukee County had passed an ordinance attempting to reduce the salary of the coroner to \$50 per month, and the deputy coroner's salary to \$0 to effectively eliminate that position.⁶¹ This action was taken in anticipation of the passage of state legislation establishing the position of medical examiner, which would drastically reduce the duties and obligations of the office of the coroner. While the supreme court acknowledged the county board's statutory authority to set the salary of the county coroner and the deputy coroner the court determined: "it is clear that an

⁶¹ "The question upon this appeal is whether the county board may, in anticipation of expected statutory amendments justifying such action, fix a nominal salary for the office of coroner, although the coroner would perform the full duties of the office until the coming into effect of changes provided for by the proposed statutory amendments." Schultz, 250 Wis. at 20.

unreasonable exercise of that power resulting in a reduction of the salary way below a fair minimum, if permitted, would amount to an abolishment of the office. This a county board would have no right to do.”⁶² This established a test of reasonableness for the county’s attempt to reduce the salaries of the county constitutional officer, or their deputies.

The court further laid out a test for determining the reasonableness of a salary. The court stated: “The test of reasonableness must be gauged by the duties prescribed by law, not weighted with a possible but uncertain change by legislative action.”⁶³ Accordingly in that case until the duties of the coroner were statutorily changed as anticipated the coroner was duty bound to perform duties previously compensated at \$5,000 per year, and so a salary of \$50 per month was unreasonable and so the court concluded that the county’s ordinance was void.⁶⁴

In the companion case, Schmidt, the court addressed the same ordinance as it pertained to the salary of the deputy coroner. Similarly the court deemed the ordinance void. Again acknowledging the county’s authority to fix or change the salaries of the deputy coroner, as well as to abolish, create or establish special offices other than elective offices, the court still deemed the entire ordinance void.⁶⁵ “The attempted abolition of the office of deputy coroners was so related to the main subject matter of the ordinance as to be an inducement to its accomplishment. For that reason the ordinance must be held invalid as a whole. It was an indirect attempt to bring

⁶² Id. at 21.

⁶³ Id.

⁶⁴ The court, however, explicitly pointed out that had the anticipated statutory changes been in place prior to the county passing the ordinance setting the salary and the coroner’s election “we would have a different problem.” Id. at 23.

⁶⁵ Schmidt, 250 Wis. at 25-26.

about a result under which the county, for a time at least, would have been without necessary services.”⁶⁶ Again the court acknowledged that had the anticipated statutory scheme been in place at the time the ordinance was passed the issue would have been much different, in large part because the statutory change eliminated the provisions providing for a deputy coroner in counties having a population of 500,000 or more whenever a medical examiner was appointed. However, because the deputy coroner was still provided for by statute at the time the ordinance was passed the court determined that the attempted abolition of the position by reducing the salary to \$0 was void.

In other words, it is unreasonable to set a salary at \$0 for a position that performs necessary statutory duties. Because the deputy coroner was a position required by statute, and so an office the provided necessary services, the county did not have the authority to eliminate it, either directly or indirectly by defunding it. The statutes require the register of deeds to appoint a deputy, and so similarly it is very likely that the courts would conclude that any attempt by a county to indirectly eliminate that position would be unreasonable, and so beyond the county’s authority.

A more recent case in the court of appeals addressed the issue of the county’s control over approval and payment of services provided by county constitutional officers. In Wisconsin Prof. Police Assoc v. Dane County, 149 Wis. 2d 699,710, 439 N.W. 2d 625 (Ct. App. 1989), one issue addressed by the court was the county’s ability to be restrained from approving purchase orders entered by the sheriff. The court of appeals provides a succinct discussion of the basic powers of the county that is instructive to this discussion:

[I]t would be destructive of government itself if a public governing body, through the exercise of its budgetary and fiscal controls, could render impossible the

⁶⁶ Id. at 26.

performance of the duties which devolve upon a constitutional officer because of the officer's constitutional status. This principle was recognized in Schultz v. Milwaukee County, 250 Wis. 18, 26 N.W. 2d 260 (1947), where the court concluded that the county board could not set the salary of the coroner so low that it would amount to a *de facto* abolishment of the office.

In 35 Op.Att'y.Gen. 474, 475 (1946), the attorney general opined that Schultz and Brunst “can ... be considered as negating any implied power on the part of the county board to effect any change in the substance of the sheriff's constitutional powers while preserving to him the shadow of such powers but without the manpower or appropriation necessary to carry the same into effect.”

The attorney general has also opined that a county may not intrude upon the powers and duties conferred upon constitutional officers through the exercise of its organizational and administrative powers. Op.Att'y.Gen. No. 25-88 (May 23, 1988). The attorney general said that the county could not exercise its budgetary authority so unreasonably and arbitrarily as to effectively frustrate the constitutional powers and duties of such officers. Id.

Wisconsin Prof. Police Assoc., 149 Wis. 2d at 710-11.

As the court of appeals cites in its opinion, Wisconsin Attorneys General have been asked to provide formal opinions on questions related to this central issue of the scope of the county's authority. The answers have been consistent: the county board does not have the power to effect change in the constitutional (or statutory) powers of a constitutional officer through the exercise of budgetary or organizational authority.

Yet, an opinion of the Attorney General does suggest that the county board has the authority to eliminate a position under a county constitutional officer that is not provided for by statute or the constitutional authority of the officer. In 49 Op. Att'y Gen., 26 (1960), the question was whether the county board could reduce the salary of an undersheriff during the term of office of the sheriff, and whether the position of undersheriff could be abolished. The Attorney General concluded that while the county board does not have direct power to hire or fire individual deputies (or the undersheriff), the county board can abolish positions that they

have previously created. In the instance of the undersheriff that position was not constitutional; it was statutorily created in Wisconsin.⁶⁷ However, in 1945, the legislature recreated the statutes related to the sheriff and the undersheriff was no longer statutorily required in any county (previously in counties over 500,000 appointment of an undersheriff was discretionary).

Accordingly the Attorney General reasoned that because the undersheriff was not a constitutional or statutory officer, the county board, when properly convened, could decrease without limit the salary of an undersheriff without regard to the tenure of the appointing sheriff.⁶⁸

The Attorney General distinguished the reduction in the salary of or elimination of the position of undersheriff from the supreme court's conclusion in Schultz and Schmidt in relation to the coroner and deputy coroner stating: "These cases are distinguishable on the ground that the county board has the power to abolish the office of undersheriff...." The county board did not have such authority in regards to the coroner and deputy coroner on the other hand because those positions were established by the constitution and statutes, respectively.

And so, it would seem that the county board establishing a salary of \$0 for the deputy of the register of deeds under the authority of Wis. Stat. § 59.22(2)(c)1.a, is practically no different than establishing zero as the number of deputies for the register of deeds under the authority of Wis. Stat. § 59.22(2)(c)1.b. Either would be unreasonable as contrary to the explicit statutory

⁶⁷ "It is of historical origin, but is statutory in Wisconsin." 49 Op. Atty. Gen at 26.

⁶⁸ Id. at 30. The Attorney General cited Kewaunee County v. Door County, 212 Wis. 518, 523, 250 N.W. 438 (1933) in support of this conclusion: "Courts will not interfere with the actions of county boards within the powers conferred upon them by statute 'on the ground that they are characterized by lack of wisdom or sound discretion;' they will interfere only in cases of fraud or arbitrary action; and county boards 'have a wide or at least a reasonable discretion' when so acting."

language that requires the register of deeds to appoint a deputy or deputies and therefore beyond the authority of the county.⁶⁹

The statutes require the register of deeds to appoint one or more deputies to ensure that the duties of the register of deeds are performed when the register of deeds is not available to perform those duties. The statutes establish particular duties of the register of deeds. Just as the supreme court concluded in Schmidt that the county board did not have the authority to effectively abolish the position of deputy coroner, it is likely that the courts would conclude that the county board does not have the authority to abolish the position of deputy register of deeds. Under the current statutory scheme setting the deputy register of deeds salary at zero would similarly be “an indirect attempt to bring about a result under which the county, for a time at least, would have been without necessary services.”⁷⁰

This issue at the crossroads of the county’s authority over salaries and the constitutional and statutory duties of the register of deeds is not a question of the historic and immemorial duties of the register of deeds, or the historic duties of the register of deeds in appointing a deputy or deputies. Until 1901 the register of deeds, and his deputies, were compensated through the fees collected by the office. In 1901 the Wisconsin legislature empowered county boards to change from a fee system of compensation to a salary system of compensation.⁷¹ Upon opting for salary system, county boards had (and continue to have) authority over designating the number of deputies, as well as setting the salaries for the register of deeds, and deputies.

⁶⁹ Every register of deeds shall appoint one or more deputies, who shall hold office at the register's pleasure. Wis. Stat. § 59.43(3).

⁷⁰ Schmidt, 250 Wis. at 25-26.

⁷¹ Wisconsin session laws of 1901, chap. 410.

Accordingly, this issue is focused on the statutory scheme, which currently requires the register of deeds to appoint at least one deputy register of deeds. Because the statutes require the appointment of only one deputy, it would appear that the county board has the authority to establish, and therefore abolish, any additional number of deputy's in an office and to fix and establish those salaries. And so, although a review of the case law suggests that the positions and salaries of the register of deeds and one "chief" deputy are protected from "unreasonable and arbitrary" reduction or effective elimination that constitutional and statutory protection likely does not extend to additional deputies.⁷²

Changing course, another specific question arising from the sub-committee involves the register of deeds duties in relation to recording and maintaining vital records. This question provides a similar example of the complexities of examining the immemorial and statutory duties of the office. Recording and maintaining vital records involves the interplay of county officials, the register of deeds, and in some instances city officials, as well as the Office of Vital Statistics, a state office under the direction of the Department of Health. The interplay and role of each actor in relation to vital statistics is laid out by the legislature in the Wisconsin Statutes, chapter 69.

As previously stated, the legislature had created the statutory duty of recording and maintaining marriages, births and deaths, and assigned that duty to the county registers of deeds in the revised statutes of 1858.⁷³ A historic review of the recording of these vital statistics, coupled with the statutory assignment of this duty in 1858 suggests that recording and

⁷² However, the courts have acknowledged the Attorney General's conclusion that the county cannot use its "budgetary authority so unreasonably and arbitrarily as to effectively frustrate the constitutional powers and duties of such officers," Wisconsin Prof. Police Assoc., 149 Wis. 2d at 710-11, and so there may be strong arguments that support the need for additional deputy resources to effectively discharge the constitutional powers and duties of the register of deeds, especially in county's that have high workloads.

⁷³ See, Revised Statutes of Wisconsin, 1858, ch. 110, sec. 1.

maintaining vital records was not an immemorial duty of the county register of deeds. This is suggested by the lack of such duty in territorial law, as well as the seemingly inconsistent county to county records of marriages, births and deaths maintained by registers of deeds prior to the establishment of a consistent statutory duty. Because it would appear that recording and maintaining vital statistics was a purely statutory duty of the register of deeds, an examination of the interplay between the state Office of Vital Statistics and the role of the register of deeds requires an examination of the history of the statutory scheme.

In 1907 the Wisconsin legislature deemed it necessary to establish a state bureau for maintaining the registration of “births, deaths, marriages, accidents and divorces....” In doing so the legislature provided the state board of health authority over the bureau: “The state board of health is hereby empowered to make, promulgate and enforce such rules and regulations as may be considered necessary to carry out the provisions of this act....”⁷⁴ This new system of vital records registration established that the duty of collecting statistics should be borne by the health officer of every board of health of cities in the state, and the town or village clerk in towns and incorporated villages. The register of deeds was not delegated duties in the statutory scheme for registering and maintaining vital statistics in 1907.

The statutory scheme has been amended over time and as it stands now the register of deeds has an explicit statutory duty under Wis. Stat. § 69.07.⁷⁵ The county register of deeds shall be the place for filing vital records except when a birth or death occurs in a city that is a registration district. This duty requires the register of deeds to accept for filing, sign and date

⁷⁴ Laws of Wisconsin 1907, ch. 469, sec. 1022-3. Available at, http://books.google.com/books?id=S_KuAAAAMAAJ&pg=PA258&dq=laws+of+wisconsin+1907+ch.+469&hl=en#v=onepage&q&f=false, pgs. 258-275.

⁷⁵ The legislature again established explicit duties of the register of deeds in relation to the receiving and recording of vital records in 1943. See, Laws of Wisconsin 1943, ch.503, sec. 57.

original vital records presented in his or her office, as well as make, file, and index a copy of the vital record prior to delivering the originals to be maintained by the Office of Vital Statistics. However, the state registrar continues to have the authority to direct the system of vital statistics and administer and enforce the laws regarding vital statistics.⁷⁶

The legislature has specifically delegated the authority over the system of vital statistics to the state registrar, yet, just as a county board cannot override or amend a state statutory duty, a state agency may not override or amend a statutory duty established by the Wisconsin legislature. Accordingly, because the state legislature has explicitly established the county register of deeds as the place for filing vital records (except for births and deaths in a city that is a registration district) the state legislature would have to amend the law to take this statutory duty away from the registers of deeds. The office of vital statistics, and the state registrar, although delegated authority to direct the system of vital statistics, cannot establish a system for filing vital statistics that is contrary to the legislature's explicit designation of the place for filing vital records: the county register of deeds.

Finally, another specific example from a question presented by the sub-committee is the independence of the office of the register of deeds, and whether the historic duties of the register of deeds provides support for ensuring one register of deeds per county. Historically, from prior to the attainment of statehood through today, a register of deeds for each county has been required by law in Wisconsin. And while at the founding of our state the establishment of a register of deeds (and the other state officers) in each respective county was explicit in the constitution, an express amendment to the constitution has made one county, one register of deeds, no longer constitutionally protected.

⁷⁶ Wis. Stat. § 69.03(1)&(2).

The Wisconsin constitution as is in force at the present states: “Beginning with the first general election at which the president is elected which occurs after the ratification of this paragraph, district attorneys, registers of deeds, county clerks, and treasurers shall be chosen by the electors of the respective counties, or by the electors of all of the respective counties comprising each combination of counties combined by the legislature for that purpose, for the term of 4 years....” Wis. Const. Art.VI, Sec. 4(1)(c). Accordingly the language of the constitution, as amended, explicitly provides the legislature with the authority to combine counties for the purpose of electing particular county constitutional officers including the register of deeds.

At this time the legislature has not utilized this authority in regards to the register of deeds. The statutes provide: “Beginning in 2008 and quadrennially thereafter, a register of deeds, county clerk, and county treasurer shall be chosen at the general election by the electors of each county for the term of 4 years.” Wis. Stat. § 59.20(2)(a). However, as the language of the constitution plainly states, the legislature is vested with the authority to combine counties for the purpose of electing certain county officers, including the register of deeds.

Again the complexity of any particular issue regarding the inherent powers, rights, and duties of the register of deeds is apparent from this example. Under the language of the original constitution, and given the historic one county, one register of deeds structure prior to statehood, there would have been a very strong constitutional argument against an attempt by the legislature to encroach in the independence of the county register of deeds office by combining counties for the purpose of electing a single register of deeds. Now, however, as the constitution is amended, the legislature has express constitutional authority to combine counties for this purpose.

Conclusion

As these examples suggest, many issues arise when addressing the constitutional and statutory protections of any specific power, right, or duty of a county constitutional officer such as the register of deeds. It is not possible to anticipate the myriad of permutations that could arise when a court is faced with making a determination regarding any particular power or duty.

And so, instead of attempting to establish a delineated listing of constitutionally protected immemorial rights of the register of deeds this paper attempts to provide groundwork, beginning with Wisconsin courts' previous determinations that have developed a cognizable standard for which powers, rights, and duties of a sheriff⁷⁷ may be constitutionally protected: "certain immemorial, principal, and important duties of the sheriff at common law that are peculiar to the office of sheriff and that characterize and distinguish the office are constitutionally protected from legislative interference."⁷⁸ This paper then attempts to provide a historical background of the duties of the register of deeds beginning early in the history of the territory, with a particular focus on the role of the register of deeds just prior to and soon after the attainment of statehood. Additionally the paper attempts to provide the tumultuous history of the office of the register of deeds through the two constitutional conventions, which ultimately resulted in a researched, debated, and explicit determination by the constitutional convention delegates to establish the register of deeds as an independent constitutional officer.

Ultimately, while it is not practical to provide a list, comprehensive or otherwise, of the immemorial duties of the register of deeds that are constitutionally protected, based on the

⁷⁷ As stated above, while this standard has not been applied to an analysis of which powers, rights, and duties of the register of deeds are constitutionally protected, it is seemingly likely that the court would apply this same standard to other county constitutional officers established under Art. VI, Sec. 4 of the Wisconsin constitution if the issue is ever presented to the courts.

⁷⁸ Kocken, 2007 WI 72, ¶ 39.

historic duties of the register of deeds those immemorial duties likely to be determined by the courts as immune from legislative encroachment are the duties to record and secure all deeds and any other writings presented to the register of deeds for recording. Further, those ancillary duties of the register of deeds that distinguish the office and are necessary to discharge these core duties are likely to be determined to be constitutionally protected.

This historic review of the powers, rights, and duties of the register of deeds provides a strong basis for the continued independence of the county register of deeds to perform at base the duties of recording and securing all deeds and any other writings presented to the register of deeds for recording, generally including land patents, mortgages, plat maps, sheriffs certifications of sale or foreclosure, as well as those instruments authorized by law to be recorded in the office, for instance marriage and vital records.