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Repository Citation
Max W. Nohl, Powers and Duties of Court Commissioners, 1 Marq. L. Rev. (1917).
Available at: http://scholarship.law.marquette.edu/mulr/vol1/iss4/4

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POWERS AND DUTIES OF COURT COMMISSIONERS

The articles appearing in the Marquette Law Review have been of such unusual merit, that the writer of this article is somewhat in fear that this article will not measure up to the standard set. However, the editor shares the responsibility with the writer and with this consolation this article is submitted. It is intended primarily to be of interest to the young practitioners but may be of interest to other practitioners, law students and even court commissioners themselves. My own experience as a court commissioner leads me to believe that the average attorney may find in this article something which may interest him.

CONSTITUTIONAL PROVISION.

The Wisconsin Constitution provides: “The legislature may provide for the appointment of one or more persons in each organized county, and may vest in such persons such judicial powers as shall be prescribed by law. Provided, that said power shall not exceed that of a judge of a circuit court at chambers.” (Art. 8, Sec. 23.)

They cannot be authorized to exercise jurisdiction in more than one county. (49 Wis. 342.)

STATUTORY PROVISIONS.

Most of the law pertaining to court commissioners in Wisconsin is to be found in the statutes as the powers and duties of court commissioners must be prescribed by the legislature within the constitutional limitation. The statutes are not so well indexed that it is easy to ascertain what provisions are applicable to court commissioners. The writer will attempt to enumerate those provisions that he considers of general interest.

They may take the depositions of witnesses in contested elections of senators or members of the assembly. (Sec. 105.) They have jurisdiction in bastardy cases except in counties containing cities having a population of 150,000 or more. (Sec. 1533 b.)
They have certain powers in voluntary assignment proceedings. (Sec. 1693 et seq.) They may solemnize marriages in the counties in which they are respectively appointed. (Sec. 2331.)

They may during the pendency of divorce actions make orders concerning the care, custody and suitable maintenance of the minor children and require the husband to pay such sums for the support of the wife and minor children in her custody and to enable her to carry on or defend the action and in relation to the persons or property of the parties as they may deem necessary or proper and may prohibit the husband from imposing any restraint on the personal liberty of the wife. (Sec. 2361.)

The circuit judges make the appointments of court commissioners. Each circuit judge may make appointments not exceeding six except in counties having a population exceeding 65,000 where the number may be increased to ten. In Milwaukee County there may be twelve. They respectively hold during the terms of the judges who appoint them unless sooner removed by the courts or judges making the appointments. They must take and subscribe the constitutional oath and file the same duly certified together with the appointments in the office of the respective clerks of the circuit courts. Women may be appointed and act as court commissioners. (Chap. 113.14.)

"Every court commissioner may issue subpoenas for witnesses and attachments and other process to compel their attendance, administer oaths, take depositions and testimony in civil actions when authorized by law or by rule or order of any court having jurisdiction of such actions, and return and report such depositions and testimony; take and certify the acknowledgments of deeds and other instruments in writing, state accounts between parties referred to him by order of court, determine upon the amount and sufficiency of bail, allow writs of habeas corpus, certiorari and ne exeat, alternative writs of mandamus and grant injunctional orders; may exercise within his county the powers conferred by section 2815, and perform such other duties as may be required of him by the circuit court, or as are necessary and proper for the full exercise of the powers hereby granted; and shall also have power concurrent with but not exceeding that of a judge of the circuit court at chambers to punish as for contempt
disobedience of any lawful order made by himself in supplementary and other proceedings and matters properly and lawfully instituted or pending before him; subject, however, to review in all cases by the circuit court as provided by law and the rules and practices of the court. He shall keep a record of all proceedings before him and at the expiration of his term of office shall deposit such record and all papers remaining on file with him in the office of the clerk of the circuit court.” (Chap. 113.15.)

It is significant that the review of the acts of court commissioners must in all cases be by the circuit courts. It appears to the writer that under this provision the legislature intended that there should be no review of the acts of a court commissioner by any other court than the particular circuit court by which the court commissioner was appointed as the court commissioner is in effect but a judge at chambers of such court with certain limited powers.

County judges have all the powers and may perform all the duties of court commissioners as defined in the preceding section. (Chap. 113.16.)

The fees of court commissioners are specified by law. They are too numerous to mention here. (Chap. 113.17.)

They shall not be allowed to give advice to any parties litigant in any matter or action pending before them or which they have reason to believe will be brought before them for decision or draft or prepare any papers or other proceedings relating to any such matter or action except when expressly authorized by law. They must not demand or receive fees for their services except such as are expressly given by law. (Sec. 2582.)

They shall not act or take part in the decision or make any order in any matter or proceeding in which they are parties or in which their rights would be in any manner affected by their decisions or orders, or in which they are interested, or in which their law partners or any person connected with them as employers, employees or clerks or in the law business in any manner shall be interested or appear as parties, agents, attorneys or counsel. (Sec. 2582 a.)

They are personally liable to any party injured for any wilful violation of the law in granting injunctions and appointing re-
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The law partner of any district attorney shall not act as a court commissioner in any case in which the state may be a party. (Sec. 2589.) They have no power to strike out irrelevant, redundant or scandalous matters from pleadings. (Sec. 2683; 84 Wis. 212.)

As the Civil Court of Milwaukee County has no jurisdiction in "Arrest and Bail" actions, court commissioners have no authority to make orders of arrest in such actions if they are instituted in such Civil Court. (Sec. 2688 et seq.; Civil Court Act. Chap. 549, Laws of 1909 as amended.)

They may make orders of injunction. (Sec. 2773.) But such injunctions must not suspend the general and ordinary business of a corporation. (Sec. 2780.) They cannot dissolve injunctions. (Sec. 2781.) They may grant writs of ne exeat. (Sec. 2784.)

They may make orders without notice if they are court commissioners of the county where the action is triable; they cannot, however, make an order to stay proceedings after a verdict, report or finding in any circuit court shall have been made; and they cannot stay proceedings for a longer time than twenty days except on previous notice to the adverse party. (Sec. 2813.) If the order is made without notice it may be vacated or modified without notice by the court commissioner who made it or upon motion, after notice, by such court commissioner and not otherwise. No order made upon notice shall be vacated or modified except by the court. No court commissioner shall stay the execution or effect of any order previously made in the action by any other judge or court commissioner. (Sec. 2814.)

"Where these statutes authorize an order or proceeding to be made or taken by the court it must be done by the court in session; where they authorize an order or proceeding to be made or taken by the presiding judge or the circuit judge, using such words of designation, no county judge or court commissioner can act. Except as so provided or otherwise expressly directed in particular instances such judge or commissioner may exercise within his county the powers and shall be subject to the restrictions thereon of a circuit judge at chambers, according to existing practice and these statutes, in all actions or proceedings in courts of record, but all such orders may be
reviewed by the court. No county judge or court commissioner shall have power to vacate or set aside any judgment of a circuit court.” (Sec. 2815.)

They have the same powers as judges of the circuit court at chambers to allow amendments to pleadings. (Sec. 2830; 28 Wis. 589; contra 4 Ency. P. & P. 338.) They may enlarge the time within which any proceeding in an action may be taken if done before the expiration of the time allowed except that they cannot enlarge the time within which an appeal must be taken; and may also on motion and good cause shown in discretion and upon such terms as may be just, allow any such proceeding to be taken after the time limited by statute or by an order of the court has expired. (Sec. 2831.)

They may sign cognovit judgments. (Sec. 2896.) They are required to set up in conspicuous places in their offices fair tables of their fees. (Sec. 2954.) They must not take any larger fees than are allowed by law of the state. (Sec. 2955.) They are not allowed to demand or receive fees except for services actually rendered. (Sec. 2956.) They must give receipts for fees if required by the persons paying the same. (Sec. 2958.)

They may entertain supplementary proceedings upon judgments after executions thereon have been returned unsatisfied. (Sec. 3030.) Likewise after the issuing of executions and before the return thereof, upon the judgment creditors specifying the property which the debtors unjustly refuse to apply towards the satisfaction of the judgments. (Sec. 3031.) They may issue warrants in such proceedings requiring the sheriff to arrest and produce the debtors. (Sec. 3032.) If there is danger of the debtors leaving the state, they may require the debtors to enter into undertakings that they will attend from time to time. (Sec. 3034.) They may make orders requiring judgment debtors to apply their property not exempt from execution towards the satisfaction of judgments and may forbid transfers or other disposition of their property. (Sec. 3035.) They may punish debtors for contempt for failing to obey orders made in supplementary proceedings. (Sec. 3037.)

The act creating the Civil Court of Milwaukee County, as amended, gives circuit court commissioners the same jurisdiction and powers in proceedings for the collection and enforcement of the judgments, orders and decrees of such Civil Court as they
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now have in proceedings for the collection and enforcement of judgments, orders and decrees of the circuit court. (Chap. 320, Laws of 1913.) The question frequently arises as to whether such supplementary proceedings on the judgments of such Civil Court as are contemplated by said act are proceedings within such Civil Court or the Circuit Court of Milwaukee County. It is the writer's opinion that in such cases the supplementary proceedings are proceedings independent of the actions in which the judgments are entered; that the judgments merely form the basis for the supplementary proceedings; that if such supplementary proceedings are reviewed they should be reviewed by such Circuit Court as proceedings independent of such Civil Court actions. If court commissioners have the power to entertain such supplementary proceedings, then circuit judges at chambers have like powers under the constitutional provision hereinbefore mentioned. If perchance the circuit judge at chambers entertain such supplementary proceedings on judgments of such Civil Court and an attempt is made to review such proceedings in such Civil Court, we have the inconsistent and ridiculous possible situation of having such Civil Court reverse the circuit judges at chambers and on appeal from such Civil Court to such Circuit Court of having the same circuit judges sitting as the Circuit Court reverse such Civil Court. It seems to the writer that the proceedings of court if reviewed must be reviewed by the circuit courts as such commissioners are nothing more or less than circuit court judges at chambers with certain limited powers. However, there is a case in Wisconsin which holds that supplementary proceedings are proceedings within the actions in which the judgments are rendered. (28 Wis. 367.) The writer does not consider the case cited as well considered in so far as such proceedings are entertained by court commissioner on judgments of other courts than the Circuit Court.

Frequently the writer is asked whether supplementary proceedings apply to corporations. The writer considers that they do altho there is a case (18 Wis. 490 decided in 1864) to the contrary. At the time such case was decided the wording of the supplementary proceedings statutes was substantially different. Furthermore Sec. 4971 (12) has been since amended, so as to provide: "The word 'person' may extend and be applied to bodies politic and corporate as well as individuals." (See also 107 Wis. 171; and 17 Cyc. 1411 citing cases supporting the writer's contention.)
There is no power whatsoever in court commissioners to order the parties examined to deliver money or property to the plaintiffs or their attorneys. (47 Wis. 168.) Supplementary proceedings are equitable executions. (Note under Winslow’s Forms No. 2329.) Supplementary proceedings are equitable proceedings. (Vol. 21 Am. Dig. Col. 1942.) They are special proceedings. (Id. Col. 1942 and 1943.) They are strictly equitable proceedings. (12 Wis. 499.)

Supplementary proceedings apply only to the property the defendants have at the time the supplementary orders are served on the debtors and not to property acquired thereafter. (21 Am. Dig., Col. 1961, 1966, 2048, 2049, 2076 and 2077.) Receivers may be appointed although debtors swear they have no assets where their testimony arouse the suspicion that they have assets. (Id. Col. 2032 and 2033.) Failures to appear may warrant the appointment of receivers. (Id. Col. 2035, 2038.) Where there are several supplementary proceedings, the creditor first commencing and obtaining service, if he prosecutes with diligence up to the appointment of a receiver, obtains a prior lien and a bona fide attempt to serve has the same effect as an actual service in so far as subsequent supplementary proceedings’ creditors, who know of the prior proceedings, are concerned. (47 Wis. 649.)

Court Commissioners may issue writs of *habeas corpus*. (Sec. 3409.) If they wilfully refuse to grant such writs, they are liable to the parties aggrieved in substantial sums. (Sec. 3415.) There is no statutory warrant for the admission to bail by a court commissioner in *habeas corpus* proceeding of one rightfully in custody upon a commitment issued by a court of competent jurisdiction after conviction of a criminal offense. (148 Wis. 292.) In case the writ of *habeas corpus* is returnable before a court commissioner, either party may file an affidavit of prejudice and in such case the court commissioner must transmit all papers and records to the nearest court commissioner, except that in counties where two or more circuit judges preside over the circuit court, such papers and records must be transmitted to one of such judges. (Sec. 3433 m.) The decisions of court commissioners in *habeas corpus* proceedings are reviewable on motion in the circuit court and not on certiorari. (120 Wis. 346.)

They may punish by fine and imprisonment or either any neglect or violation of duty or any misconduct by which rights
or remedies of a party in an action or proceeding pending or triable before a court commissioner may be defeated, impaired, impeded or prejudiced in certain specified cases. (See 3477.) When a court commissioner has ordered costs to be paid and a refusal to pay has been shown, the court commissioner may issue a warrant to commit the person until such costs are paid; they may likewise punish for the failure to pay sums required to be paid in divorce actions. (Sec. 3479.)

They may issue subpoenas within the territory within which they have jurisdiction to require the attendance of witnesses and the production of lawful instruments. (Sec. 4053.) They may take depositions, require the attendance of the parties to be examined and the production of books and papers and enforce such orders by contempt proceedings. (Sec. 4096.) They may take other depositions within the state (Sec. 4102) including depositions to perpetuate testimony. (Sec. 4119 a.) They may discharge persons confined for torts upon certain conditions. (Sec. 4308.) Bribery of a court commissioner may be severely punished. (Sec. 4476.) False certificates by court commissioners may be severely punished. (Sec. 4554.) They are authorized to issue process for the apprehension of persons charged with offenses. (Sec. 4775.) Power may be conferred upon them to arrest and examine offenders against the law. (45 Wis. 273.) They may let the person arrested to bail. (Sec. 4778 et seq.) They may commit the person arrested to prison. (Sec. 4785.) They may examine the complainant and his witnesses. (Sec. 4786.) They may bind by recognizance witnesses against the prisoner. (Sec. 4796.) They may commit such witnesses to prison if they refuse to recognize either with or without sureties. (Sec. 4799.) Affidavits of prejudice may be filed against court commissioners in criminal matters. (Sec. 4809.)

REFERENCES.

Under the Wisconsin Statutes certain matters may be referred. The references are usually to persons who are court commissioners; not to them as court commissioners but to them as persons who have experience in judicial matters. Such referees have power to determine the amount of damages in default cases. (Sec. 2893.) Issues involving long accounts, the taking of an account or the determination of questions of fact arising other
than upon pleadings may be referred. (Sec. 2864.) The selection of the referee is left to the parties and if they do not agree it is left to the court. (Sec. 2866.) The referee has power to administer oaths and has otherwise such powers as are necessary to discharge the duties imposed upon him. (Sec. 2868.) Certain requirements in references are prescribed by rules of the circuit courts. (Sec. 21.) Referees may determine damages on appeal bonds. (Sec. 3067.) They may report as to whether it is feasible to partition or plat real estate. (Sec. 3110.) They may sell real estate in partition proceedings (Sec. 3122) in foreclosure proceedings (Sec. 3168) and in other cases (Sec. 3189.) County Courts may refer matters involving the examinations of long accounts. (Sec. 3262.) County Courts may also ascertain the value of premises by a reference. (Sec. 3282.)

**AFFIDAVITS OF PREJUDICE.**

I know of no statutory provision or decided cases which require court commissioners to grant a change of venue where affidavits of prejudice are filed against them except in criminal cases and in *habeas corpus* proceedings.

**REVIEW OF PROCEEDINGS.**

To review the orders of a court commissioner for judicial error, an ordinary motion in the proceeding in the circuit court is proper. The jurisdiction can be challenged by certiorari or by a motion in the proceeding. And to prevent a hearing which is beyond the jurisdiction of the court commissioner to entertain, a writ of prohibition may issue. (120 Wis. 346, 133 Wis. 1.)

**GENERALLY.**

They have only the powers conferred by statutes. (20 Wis. 686.) The powers of a judge at chambers are such only as by long established usage judges have performed for a long time. (7 Wis. 408.) Court Commissioners are officers authorized to assist state courts in the performance of part of their functions with subordinate judicial powers. They cannot review a judicial act of another tribunal. (13 Am. Dig., Col. 1807.) They may grant orders to show cause, extend time to plead, let to bail, grant injunctions and do such other things as a judge may do *ex parte.*
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(Id.) They may set the time to settle bill of exceptions. (Id., 32 Wis. 136.) They must find express authority in the statutes for their powers. (4 Ency. P & P 337) In Wisconsin they have the same powers as at common law, that is as to minor judicial proceedings. (4 Ency P & P 338, 5 Wis. 185, 7 Wis. 643, 20 Wis. 686, 39 Wis. 35.) The general rule is that they have no power to permit amendments of pleadings. (4 Ency P & P 338.) May grant only temporary injunctions. (4 Ency P. & P 356.) A court commissioner is an officer possessing certain minor judicial or quasi judicial powers. He is a subordinate officer of the court. (11 Cyc. 622.) A court commissioner has the power of a judge at chambers, that is as to preliminary, intermediate or ex parte matters not involving the merits of causes, he can do what a judge can do out of term, but not what a court can do out of term. (11 Cyc. 624, 625.)

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