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November 17, 2023

Samuel A. Christensen
Clerk of the Supreme Court and Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: ***Clarke v. Wisconsin Elections Commission*, No. 2023AP1399-OA**
Notice of Supplemental Authority for Oral Argument

Dear Mr. Christensen:

I represent the Wisconsin Legislature in the above-captioned matter and will present oral argument on Tuesday, November 21, 2023.

Counsel submits this letter as a courtesy to notify the Court and the parties of an additional authority that counsel intends to address at oral argument—*State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 63 N.W.2d 52 (1954). A copy of the reported decision is attached. The decision is related to 1950s redistricting legislation and litigation discussed in parties' briefs. *See* Memo. ISO Pet. 67 (discussing *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 61 N.W.2d 300 (1953) (per curiam)); Clarke Pet'rs Op. Br. 22 n.2 (same); Johnson Op. Br. 14-15 (same); Dem.-Sens. Resp. Br. 24 (same). *Smith* provides more context for parties' arguments about the 1950s redistricting cycle and is relevant to parties' contiguity arguments and the scope of this Court's remedial authority.

Respectfully submitted,

Electronically Signed by
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ther testified that he addressed a number of public meetings held by the board on the application to rezone; that he felt he was familiar with the subject matter.

From this preliminary testimony by Mr. Krieger it is clear that he acted for or on behalf of the city in the transaction which is the subject of the examination and, under the rule stated above, may be examined under section 326.12, Stats.

The lower court based its conclusion that further examination of the witness should be suppressed on A. Gettelman Brewing Co. v. City of Milwaukee, supra. That was an appeal from an award of compensation for the taking of property in condemnation proceedings and the sole issue to be determined was the value of the property taken. On the trial the court permitted the Gettelman Company to call and examine as adverse witnesses Robert Filtzer, a member of the city board of assessment, John Dvorak, a former city assessor, and Frank Harder, the city real estate agent.

The court applied the rule of law expressed in Re Estate of Briese, supra, and held that it was error to allow the witnesses to be examined adversely. This question was only one of many presented on the appeal, and while the court did not discuss the facts at length in the opinion it appears from the cases and briefs on file here that the three witnesses were called adversely and then the Gettelman Company examined them as expert witnesses on their knowledge of real estate values. This it had no right to do. If the company wished to elicit expert opinion evidence, it should have examined them on direct. The information sought was not such as was acquired by the witnesses in connection with the transaction under consideration, and for that reason their testimony as adverse witnesses was held to be improper. We do not have that situation here.

[3] It was also argued by respondent that to allow Krieger to be examined adversely will amount to questioning the motives of a legislative body, the city council, since it adopted the resolution for condemnation. We wish to point out, however, that where private property is to be taken for public use against the consent of the owner, the question of necessity is not determined by the city council but by a jury. Art. XI, § 2, Wisconsin Constitution.

Respondent objects to the subpoena *duces tecum* served upon Elmer Krieger as requiring the production of certain documents and records which are immaterial and irrelevant to the issue of necessity. We need only say that the question of the materiality or relevancy of any such documents is not before us on this appeal. This can be determined at the examination of the witness.

Order reversed and cause remanded with instructions to permit the adverse examination of Elmer Krieger.

266 Wis. 307

STATE ex rel. SMITH

v.

ZIMMERMAN, Secretary of State.

Supreme Court of Wisconsin.

March 2, 1954.

Original proceeding for judgment declaring a legislative reapportionment act unconstitutional. The Supreme Court, Brown, J., held that where all prerequisites to operation of valid and constitutional legislative reapportionment act had taken place, even though act was not to become effective until a future date, legislature retained no further power to change legislative districts during census period.

Judgment to plaintiff.

1. Declaratory Judgment ⇐329

Where, in proceeding for judgment declaring a legislative reapportionment act

unconstitutional, the only facts pleaded related to effect of act upon a certain county, Supreme Court would only consider the validity of that portion of the act concerning such county. Laws 1953, c. 550; Const. art. 4, § 3.

2. States ⇐27

Under constitutional provision that legislature shall reapportion legislative districts after each federal census, no more than one legislative reapportionment may be made in interval between two federal enumerations. Const. art. 4, § 3.

3. States ⇐27

Where all prerequisites to operation of valid and constitutional legislative reapportionment act had taken place, even though act was not to become effective until a future date, legislature retained no further power to change legislative districts before next census period. Laws 1951, c. 728; Laws 1953, c. 550; Const. art. 4, § 3.

4. States ⇐27

That city, parts of which were contained within different legislative districts, had changed some ward boundaries within its limits did not authorize legislature, which, having passed one legislative reapportionment act was disabled from passing another within the census period, to make alterations in legislative districts involving changes outside the city, even if second reapportionment act had for its purpose recognition of changes in its ward made by city. Laws 1951, c. 728; Laws 1953, c. 550; Const. art. 4, § 3.

5. Constitutional Law ⇐48

Legislation is presumed to be constitutional unless clearly established otherwise and the court is bound to adopt such construction, if possible, as will uphold the legislative act and at the same time preserve the constitution from infraction.

6. States ⇐27

Once the legislature has exhausted its power to reapportion legislative districts by passing one reapportionment act between two federal census, its power to alter boundaries of legislative districts incidental to some other valid legislative act is confined to the area which the act deals with. Const. art. 4, § 3.

This is an original action for declaratory judgment brought in the name of the state upon the relation of Fred M. Smith, a citizen, resident and taxpayer, against Fred R. Zimmerman, secretary of state, for the purpose of obtaining a declaration that ch. 550, Laws of 1953, in so far as it affects Brown county, is unconstitutional and void.

The action is brought pursuant to leave granted. It is stipulated that the petition for leave filed shall stand as the complaint, and the demurrer of the attorney general to the petition shall stand as a demurrer to the complaint.

Following the United States census of 1950 the Wisconsin legislature, obeying the command of sec. 3, art. IV of the state constitution, enacted ch. 728, Laws of 1951, commonly called the Rosenberry Act, apportioning and districting anew the members of the senate and assembly. This act created three assembly districts in Brown county. The first was composed of those wards of the city of Green Bay which were situated west of the Fox river together with two wards which lay east of it. The second district took in all the other wards of Green Bay plus the towns of Allouez and Preble. The remainder of the county formed the third district. Ch. 728, Laws of 1951, was approved by the governor August 3, 1951 and published by the secretary of state August 17, 1951. By its terms it was not to become operative until January 1, 1954 and then only if in a referendum held at the time of the general election in November, 1952 the people should reject a proposal to establish senate or assembly districts on an area as well as a population basis. This proposal was so rejected.

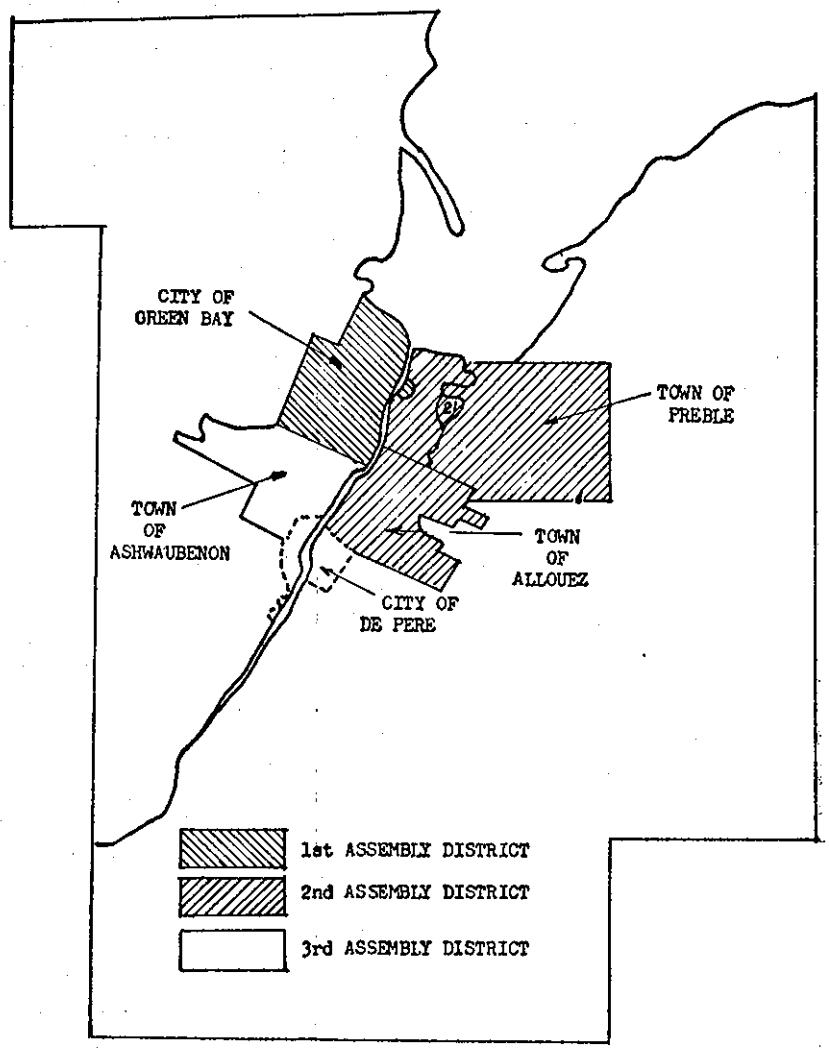
On July 1, 1952, the city government of Green Bay revised its system of wards,

creating two new ones, changing some ward boundaries and renumbering the wards. The city limits remained unchanged.

In 1953 the legislature enacted ch. 550, Laws of 1953, the title of which recited that it related to the correction of errors in the apportionment of assemblymen. It dealt with the assembly districts of six counties, including Brown county. This chapter created a first assembly district for Brown county made up of those wards of the city of Green Bay which were east of the Fox river, together with the town of Preble. The second district was composed of the Green Bay wards west of the river with the addition of the town of Ashwaubenon and those wards of the city of DePere situated west of the Fox river. The third district took in all the county not assigned to the first and second districts. A graphic comparison of the districts as established by the 1951 and 1953 enactments is presented herewith.

BROWN COUNTY

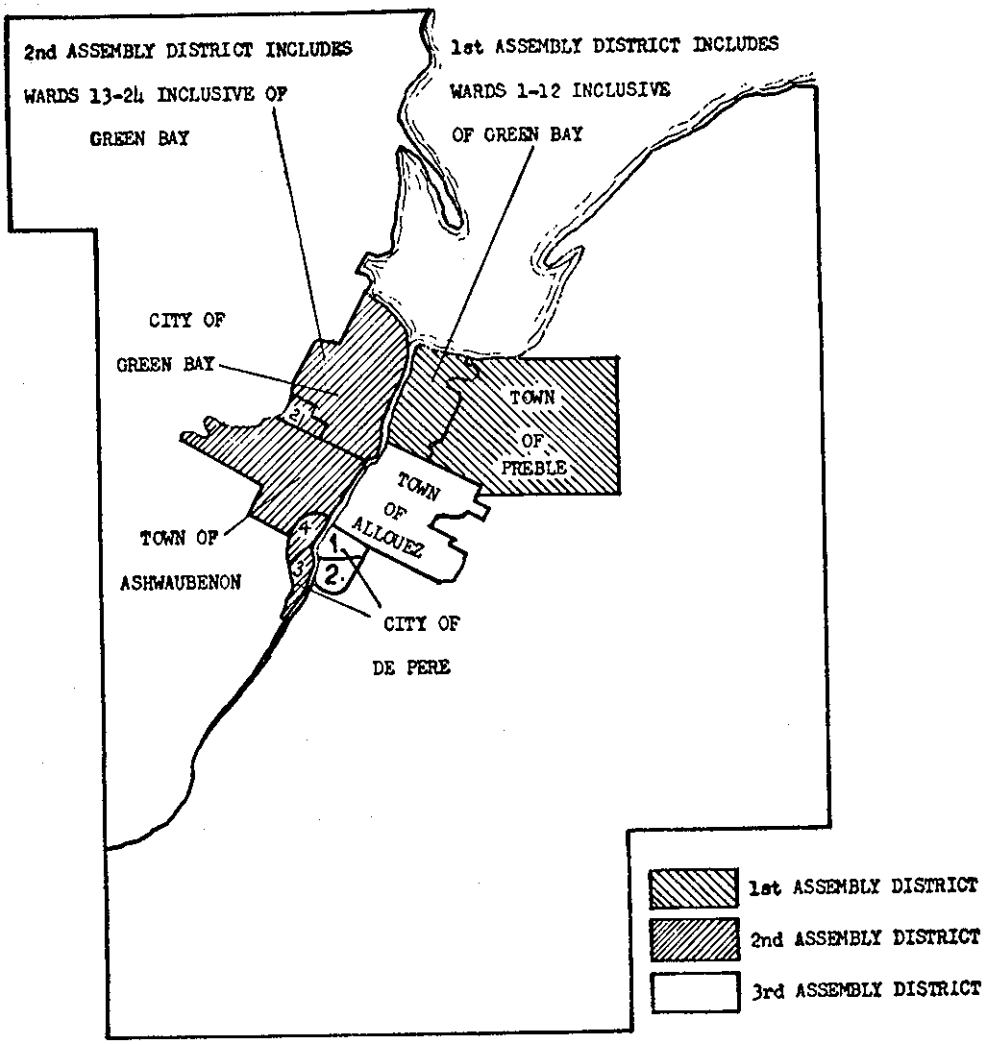
CH. 728, LAWS OF 1951



BROWN COUNTY ASSEMBLY DISTRICTS UNDER CH. 728, LAWS OF 1951.

BROWN COUNTY

CH. 728, LAWS OF 1951 AS AMENDED BY CH. 550, LAWS OF 1953



BROWN COUNTY ASSEMBLY DISTRICTS UNDER CH. 728, LAWS OF 1951, AS AMENDED BY CH. 550, LAWS OF 1953.

Relator's complaint demands judgment declaring ch. 550, Laws of 1953 to be unconstitutional and void *in toto* and, in the alternative, that it is unconstitutional and void in so far as it affects Brown county. It includes a demand that the call for the election of Brown county assemblymen be issued according to the districts set up by ch. 728, Laws of 1951, disregarding ch. 550, Laws of 1953.

Other material facts will be stated in the opinion. No facts are in dispute.

Kaftan, Kaftan & Kaftan, Green Bay, for plaintiff.

Vernon W. Thomson, Atty. Gen., Stewart G. Honeck, Deputy Atty. Gen., Roy G. Tulane, Asst. Atty. Gen., for defendant.

BROWN, Justice.

[1] The substance of the complaint is that sec. 3, art. IV, Wis.Const. permits only one districting and apportionment by the legislature in the period between federal

enumerations, and such a one was accomplished by ch. 728, Laws of 1951, wherefore ch. 550, Laws of 1953, being a second redistricting and apportionment within the same census period, is unconstitutional legislation. The only facts pleaded as to variations between the 1951 and 1953 acts are those which concern Brown county and it is to the part of the chapter affecting that county alone that we direct this decision and opinion.

The part of the constitution involved here reads:

> "*Apportionment.* Section 3. (As amended Nov. 1910) At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding Indians not taxed, soldiers, and officers of the United States army and navy."

[2, 3] It is now settled that without a constitutional change permitting it no more than one legislative apportionment may be made in the interval between two federal enumerations. State ex rel. Thomson v. Zimmerman, 1953, 264 Wis. 644, 661, 60 N.W.2d 416. We do not understand that defendant disputes this but he does submit that up to and including the time when ch. 550, Laws of 1953, was enacted there had been no completed, final, apportionment, notwithstanding the passage of the Rosenberry act in 1951; wherefore the 1953 legislature was free to proceed with modifications of the Rosenberry districts if it chose to do so, at least up to January 1, 1954 when the Rosenberry act became operative as a result of the referendum.

The present defendant has been before us in two previous cases involving the validity of the Rosenberry act and in both he conceded that it met constitutional requirements. State ex rel. Broughton v. Zimmerman, 1952, 261 Wis. 398, 404, 52 N.W.2d 903, and State ex rel. Thomson v. Zimmerman, supra, 264 Wis. at page 649, 60 N.W.2d 416. In discussing the legislature's attempt to change senate districts by ch. 242, Laws of 1953, we stated expressly that under the present state constitution the passage of the Rosenberry act exercised and exhausted the power of the legislature to redistrict during the present interval between censuses except in the cases of districts whose boundaries did not observe the constitutional mandate. State ex rel. Thomson v. Zimmerman, supra, 264 Wis. at pages 661 and 663, 60 N.W.2d 416. There is no claim here that the Brown county apportionment in 1951 did not comply with all constitutional demands. Both houses of the legislature passed the bill, the governor signed it, the secretary of state published it, the legislature adjourned *sine die,* and the citizens of the state by their action in the referendum brought to pass the condition upon which the finality of the Rosenberry apportionment depended. Nothing in the facts now called to our attention disposes us to reverse our statement in the Thomson case, supra, and to hold that the Rosenberry act was *not* completed legislation. In the absence of a successful attack upon its constitutionality (not attempted here), it was a reapportionment, directed by the constitution to be done once and only once following each federal census, which passed beyond the legislature's power of revision at the date of the referendum at the very latest. It is not necessary to decide now whether it so passed at an earlier date. The defendant's contention that the 1953 legislature retained and still possessed any power to redistrict areas already districted in conformity to the constitution by ch. 728, Laws of 1951 cannot be sustained.

[4] Defendant submits another proposal in justification of the 1953 legislation, to wit, that even if the time had passed when the legislature could engage in further districting and apportionment as such, nevertheless the constitution tolerates changes in district boundaries if they are incidental to the exercise of other unquestioned legislative powers. This argument rests on Slau-

son v. City of Racine, 1861, 13 Wis. 398, but defendant seeks to extend it far beyond the facts in that case to establish a principle which was neither presented nor declared there. In the Slauson case, supra, *by action of the legislature,* certain farm area was taken from a township and annexed to the city. Before the annexation the city lay in one assembly district and the farm in another. The owner of the land considered that when his property became a part of the city it would be transferred into the city assembly district and he sought to defeat the annexation by saying that the statute which accomplished it was a second apportionment in one census period and was therefore void. The supreme court agreed that when the legislature annexed the farm to the city the property became part of the city for all purposes and therefore became a part of the city assembly district. But the court held that such change of area from one legislative district to another, was not a reapportionment prohibited by sec. 3, art. IV, Const. but was only an incident to the accomplishment of a valid act passed to effect a different, constitutionally authorized purpose. We said, at page 401 of 13 Wis.:

> "* * * we still think the implied (constitutional) prohibition does not extend to such changes in these districts as may result incidentally from the exercise of the acknowledged power of the legislature to organize counties, towns and cities, and change the boundaries of such as are already organized * * *".

The attorney general relies on a sentence in the opinion, 13 Wis. at page 402, stating:

> "* * * The restriction is upon the power to apportion and organize these districts by laws having that object alone. But it is subject to the power to organize and change the boundaries of the political divisions of the state."

And he points out that ch. 550, Laws of 1953, was not enacted solely to apportion and organize legislative districts but had for its object the recognition of the changes made in its wards by the city of Green Bay.

The Slauson language must be read in connection with the facts which the court was considering and with the rest of what is said in the opinion. It is noteworthy that the statute did not mention assembly districts nor attempt to set their boundaries. It was the court, not the legislature, which said that the boundary had changed as an incident to a valid act which annexed territory to the city. Obviously, no area was considered except that composing the addition to the city. We concluded this part of the Slauson opinion as follows:

> "We are therefore of the opinion that it is competent for the legislature to change incidentally the boundaries of assembly districts, in exercising its power to change the limits of cities, towns, &c.; and that if a part of a town in one district is annexed to a city which constitutes another, unless there be some exception or reservation in the law itself, it becomes a part of such city for all purposes for which the legislature could annex it. So that the previous law constituting that city an assembly district would apply to everything that became absolutely a part of it, just as an incumbrance upon land attaches to subsequent improvements upon it, which become a part of the realty. It follows that we should not hold the law unconstitutional on account of the first objection."

Thus, when the court reached the decisive portion of this section of the opinion its language shows clearly what it meant by changes in legislative district boundaries incidental to other legislation,—namely, those alterations which are confined in their effects to the territory whose municipal affiliation is changed and which necessarily accompany that change, as an incumbrance attaches to improvements made on the incumbered land. That opinion does not require, nor do we think it warrants, extension beyond the facts of the Slauson case, supra, such as defendant urges, to authorize

the shifting of other boundaries in no way involved in the municipal change to which it is alleged in argument to be incidental.

[5] We recognize now, as we have so often in the past, that legislation is presumed to be constitutional unless clearly established otherwise and the court must endeavor to sustain the legislation rather than to invalidate it. "* * * The court is bound to adopt such construction, if possible, as will uphold the legislative act, and at the same time preserve the constitution from infraction." State ex rel. Hicks v. Stevens, 1901, 112 Wis. 170, 173, 88 N.W. 48, 49; State ex rel. Thomson v. Zimmerman, supra, 264 Wis. at page 648, 60 N.W. 2d 416. If the Slauson case does not *require* us to sustain the present act, and we have just said it does not, may we sustain it nevertheless, by accepting the defendant's invitation to extend the conception of "incidental changes" in assembly district boundaries to include territory which lies distant from the area whose municipal status has been changed and which the municipal change did not affect?

[6] We observe at the outset that in the present case the legislature had no part in changing the ward boundaries. It was the city council which did that and it is *that* change to which defendant must claim the alterations in assembly district boundaries are incidental. This, in itself, is a far cry from a change incidental to some other valid act of the legislature. But even if the primary change was by act of the legislature and the change affected external boundaries of the municipality instead of internal ones, as in the Slauson case, supra, our obligation to the constitution, which is superior to our obligation to an act of the legislature, would require us to declare unconstitutional that which was done here. The incidental effect on assembly districts of a legislative change in municipal boundaries of the Slauson type must be confined to the area dealt with in that part of the legislation to which the change in district boundaries is claimed to be incidental. When it extends further the constitutional prohibition on frequent redistricting is nullified, for then by making some minor municipal change the legislature would be empowered to redistrict to an extent limited only by its discretion. In the instant matter the alleged incidents ran all over Brown county altering three assembly districts. The defendant tells us that these were desirable,—not necessary, even, but desirable,—population compensations incidental to the revisions of a few ward boundaries by the city council of Green Bay. It is a small tail to wag so large a dog. There is no logical or legal reason, if so much is possible, why the incidental effects need stop at the county line; nor why the senate districts which commonly embrace several counties should not come in for like "incidental" modification. Annexation and ward revision in cities and villages is a continuous process. If we hold that the legislature, upon observing that such a change has taken place, may make that the starting point for a reconsideration and recreation of legislative districts to a degree not even limited by the boundaries of the property annexed or otherwise dealt with, for all practical purposes the legislature may redistrict the state as often as it chooses, the constitutional prohibition to the contrary notwithstanding.

In State ex rel. Hicks v. Stevens, supra, the Slauson case was cited to this court by parties wishing to sustain an act of the legislature. We said, 112 Wis. at page 172, 88 N.W. 48, that the facts in the two cases were not parallel and we had no disposition to stretch the rules laid down in the Slauson case to weaken the fundamental law. So, here! And in 112 Wis. on page 180, 88 N.W. on page 51 of the Hicks case, in reference to the legislature's power to apportion and the constitution's provision that it may apportion only once in a given period, we used language that is appropriate and controlling now.

> "* * * No doubt, one of the objects of the constitutional provision was to prevent juggling with apportionments. If new counties may be

created and the apportionment rearranged and readjusted to suit legislative whims, the power might be subject to abuse, and the real purpose of the restrictions defeated. Under the construction we feel compelled to adopt, the legislature may meet the growing demands of the increase of population, —may create new counties and endow them with life and vitality as to matters of local administration,—*provided the original legislative districts are not disturbed.* In other words, it is no evasion of the real spirit and purpose of the constitution to permit new counties to be created, even though the designated boundaries may cross the lines of an assembly district, provided that for the purpose of electing the assemblyman the original district is preserved. * * *" (Emphasis supplied.)

The court in the Hicks case declined to overrule the Slauson case on the exact point which Slauson decided, but the opinion makes it clear that the court realized the conflict between sec. 3, art. IV, Const. and the philosophy of the Slauson decision as interpreted by the present defendant, and it refused to concede that even the creation of a county by the legislature could incidentally change the existing assembly districts.

We conclude that ch. 550, Laws of 1953, in its Brown county application, is an apportionment of the county's assembly districts for the second time since the United States census of 1950, and is void as a violation of sec. 3, art. IV of the state constitution.

Defendant's demurrer to the complaint overruled. Judgment granted to plaintiff declaring that ch. 550, Laws of 1953, is unconstitutional and void in its application to Brown county and the call for elections of Brown county assemblymen shall conform to ch. 728, Laws of 1951, until changed according to law.

266 Wis. 186

HICKS et ux.

v.

NEW YORK FIRE INS. CO. et al.

Supreme Court of Wisconsin.

March 2, 1954.

Action to recover for water damage in insureds' residence caused by breaking of radiator, which was part of heating plant, under extended coverage endorsements attached to statutory fire insurance policies which offered coverage for direct loss by explosion. The Circuit Court, Jefferson County, Harry S. Fox, J., entered judgment for insured and insurers appealed. The Supreme Court, Gehl, J., held that finding that damages to insureds' residence were caused by an explosion within insurance policies was not sustained by the evidence.

Reversed and remanded with directions to dismiss.

1. Evidence ⇐571(9)

Heating engineer's testimony, which was based on assumptions that break in radiator was caused by failure of pressure relief valves, failure of aquastat to properly shut off burner, and a deficiency of air in expansion tank of heating system, that in his opinion break was caused by excess pressure, was speculative and conjectural and would not sustain a finding that radiator break was caused by excess pressure.

2. Insurance ⇐665(4)

In action to recover damages sustained in insureds' residence by breaking of radiator of heating plant, under extended coverage endorsement attached to statutory fire insurance policies, which afforded coverage for direct loss by explosion, finding that damages were caused by an "explosion" within policies, was not sustained by the evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Explosion".