THE JOURNAL.

"ONE COUNTRY, ONE CONSTITUTION, ONE DESTINY."

A. W. BENEDICT PUBLISHER AND PROPRIETOR.

Vol. VI, No. 8.] HUNTINGDON, PENNSYLVANIA, WEDNESDAY, FEBRUARY 3, 1841. [Whole No. 268.

TERMS
OF THE
HUNTINGDON JOURNAL.

The "Journal" will be published every Wednesday morning, at two dollars a year, if paid IN ADVANCE, and if not paid within six months, two dollars and a half.

Every person who obtains five subscribers, and forwards price of subscription, shall be furnished with a sixth copy gratuitously for one year.

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The Huntingdon Journal.

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Leib vs. the Commonwealth.

Sergeant, J.—This case comes before us by writ of error from the Court of Common Pleas of the county of Schuylkill, and three errors have been assigned in this Court in the proceedings and judgment below.

The first error assigned is, that the court below erred in deciding that the court of common pleas had jurisdiction of this case, and in overruling that plea to the jurisdiction. The act of the 4th of June, 1836, after giving to the Supreme Court, in the first section, authority to issue writs of quo warranto in all cases in which the power had been before exercised, proceeds, in the second section, to specify the cases in which they may also be issued by the courts of common pleas concurrently with the supreme court. The first of these cases, and that which is supposed to embrace the power exercised in the present case, is as follows: "In case any person shall usurp, intrude into, or unlawfully hold or exercise any county or township office within the respective county." That is, as I understand it, the usurpation, intrusion, or exercise of the office must be within the respective county—the office must be a county or township office. It is contended that the office of associate judge of the court of common pleas is a county office, and that is the question for decision. The judges of the courts of common pleas exercise a high and extensive portion of the judicial power of the State. In the counties generally throughout the commonwealth, their civil jurisdiction is unlimited in amount and in the nature of the suits. In addition to their original common law jurisdiction, they hear and decide appeals from the decisions of justices of the peace, and sit as courts of the last resort in certiorarias to such justices Many branches of equity jurisdiction are committed to them. By virtue of their offices, as judges of the court of common pleas, they, by the constitution, compose the courts of quarter sessions and orphans' courts, and, with the register of wills, the registers' courts. They exercise large and various jurisdiction in cases of roads, turnpikes, canals, rail roads, apprentice, pauper, insolvent and divorce cases, as well as others confided to them by the common law and acts of Assembly. They are also justices of oyer and terminer and general jail delivery, and have now a limited jurisdiction in writs of quo warranto. The are nominated by the Governor, and, by and with the advice and consent of the Senate appointed and commissioned by him. They receive their compensation from the treasury of the State. The are amenable to the legislature by impeachment, or by address of two-thirds for their removal from office. Any two of them constitute a quorum; and these two may, by the constitution, be the associate judges in every instance, except when they compose a court of oyer and terminer, and then the president must be one. In the exercise of the jurisdiction thus committed to them, it has ever been considered that in their powers and duties as judges, the president and his associates are placed on a footing of equality. While sitting as a court, are on the same constitutional footing, and where they act individually have co-extensive authority. While sitting as a court, they are on the same constitutional footing; and when they act individually their powers are co-extensive within the range of their jurisdictions. This is the principle which was asserted in a case very memorable in the annals of this state, I mean the impeachment of Judge Addison in the year 1803, against whom the leading charge was, his interference with an associate judge, who endeavored to address a grand jury; (see trial of Judge Addison, 86 and 4 Dall. Rep. 225.) The doctrine of the common law is to the same purport, and is thus placed in 4 Burns' Just. 227: "It seemeth certain that the sessions hath no authority to amerce any justice for his non-attendance at the sessions, as the judges of assize may, for the absence of any such justice at the jail delivery. For it is a general rule, that inter pares non est protestas: it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office. to other judges of a superior station, than to the same rank of themselves. And, therefore, it seems to have been holden, that if a justice of the peace who is not of the quorum, shall use such expressions towards another who is of the quorum, for which, if he were a private person, he might be committed or bound to his good behaviour, yet the sessions hath no authority to commit him or bind him to his good behaviour. And yet it seems to be agreed that if the justice give just cause to any persons to demand the surety of the peace against him, he may be compelled, by any other justice, to find such security; for the public peace requires an immediate remedy in all such cases." There have been occasional laws under which the president of one district has been designated to hold courts in a county out of his own district, and his preference there has been made essential; but this is an exception to the general rule and usage.

If such be the character and grade of an associate judge of the court of common pleas under our constitution and laws, it seems to us his office cannot be considered as intended by the legislature to be embraced within the quo warranto jurisdiction given to that court by the act of the 4th of June 1836, over persons exercising a county office. On the contrary, we think the court of common pleas of each county is to be considered as a state court and the office of an associate judge of that court a state office. It is true the office is exercised within a county, but that circumstance does not make it a county office. The officers of the heads of department, such as the Secretary of the land office, Surveyor General, Auditor General and State Treasurer, are exercised at Harrisburg, within the county of Dauphin, yet they are clearly state not county offices. It is also true that the constitution and laws, in speaking of the courts of common pleas, term them at different times, the courts of common pleas "in each county," "of each county," and "within each county." But the phraseology seems to refer to the geographical limits within which the duties of each are to be exercised, and not to the nature or grade of the office. And what may illustrate this is, that in the constitution of 1776, chap. 2, sec. 15, they are denominated "courts of common pleas of the state of Pennsylvania;" and if the latter form of this expression has been dropped in later forms of government and laws, it has probably been for the sake of brevity; for the office has, under all our constitutions, remained essentially the same, In the 9th section of the schedule of the amended constitution of 1838, the term is "associate judges of the state.'

What then are the descriptions which are comprehended within the words "county and township offices?" It seems to me we have the explanation of these words by the legislature itself, in an act passed not long before the act of 14th June 1836, and composing part of the same revised code. The act of 14th April 1834, is in terms an act relating to counties and townships and *county and township officers.* It first recognizes the existing counties—makes them and townships, bodies corporate—the corporate powers to be exercised by the *commissioners* and *supervisors,* —gives directions where are to be kept the offices of the several *prothonotaries, clerks* of the court of quarter sessions and orphans' courts, *registers* and *recorders,* and also of the *commissioners, auditors, treasurer* and sheriff of the several counties—provides for the election of *auditors,* for auditing the accounts of the *commissioners, treasurers,* sheriffs and coroners of each county. It is of this description of officers, that the class is composed who are considered by the legislature as county and township officers. Whether they embrace all or not, it is unnecessary to say: but certainly the description afforded by this law shows, that they embrace classes of officers inferior in grade and consequence to the associate judges of the court of common pleas.

Other reasons might be suggested of great weight and moment, founded upon a consideration of the propriety and policy of vesting such a jurisdiction in two of the judges of this court over a third: but it seems not necessary to dwell longer on this point. We are of opinion, that an associate judge of a court of common pleas is not a county officer within the meaning of the section of the act of 14th June 1836, and therefore the court of common pleas of Schuylkill county, had not jurisdiction in the case before us.

The decision of this error would be sufficient to dispose of this case: but as both parties have requested us to give an opinion on the other points, and they have been fully argued before us, and as the matters envolved are of great importance, and this decision will dispense with the necessity of another proceeding and another argument on the same questions, we shall proceed to the other errors assigned.

2. The second error—that the court erred in deciding, that the writ was made returnable in term, and in overruling the plea in abatement, and in rendering judgment of respondeat ouster—we are opinion is not sustained. The term continued by adjournment till the 17th April 1840, when the writ was returnable.

3. The third error assigned is, that the court erred in sustaining the demurrer and in rendering judgment of ouster against the defendant.

This brings up the principle question in the case, the right of the respondant to the office; and it depends upon the construction of the schedule of the amended constitution of 1838, and the two acts of assembly passed under it—the first on the 20th June 1839, and the second on the 7th March 1840. The clauses of the constitution itself were chiefly prospective: they were to apply after such an interval should have elapsed, as was necessary to ascertain that the amendments had been adopted, and if adopted, would give time for the new system to go into operation, and this time was fixed by the schedule for the first day of January 1839. The object of the schedule was, to provide for the intermediate time, and for the officers in being, whom it was the policy of the framers of the amended constitution not to remove at once from office, but to fix certain periods for their removal, which would be correspondent with the spirit of the changes about to be introduced in the tenure of office. The judges of the different courts of the State, were, by this schedule, distributed into four classes—and all of these, it is observable, are placed on a different footing, and the provision in respect to them are distinct in their language and operation. By the first of the clauses on the subject, the judges of the supreme court are disposed of. They were comparatively few in number, and easily adjusted by the convention itself. They were, therefore, at once graded, and the rule for such grading was declared to be, the date of their commissions, and the judges to whom it related were to be those who might happen to be in office on the first day of January 1839, not at all regarding at what previous time their commissions had been issued. In the next clause are contained the presidents of the courts of common pleas and associate law judges of the first judicial district, who were more numerous and diversified. As to these, it was directed, that they should be taken as they existed "at the adoption of the amendments to the constitution," and that there might be no inconvenience felt from a sudden and general vacancy in the offices of such as had held for ten years and upwards, these were divided into two classes, the first class to embrace those whose commissions bore the oldest date. The remaining judges were to hold for ten years from given dates. The succeeding class were composed of recorders, and of mayors of criminal courts; and the provision as to them was, of those "now in office"—the oldest in date to expire in the year 1841, and the others every two years thereafter, according to their respective dates.

When however the convention came to the fourth class of judges, consisting of the other associate judges of the state, they deemed it expedient to adopt another system in regard to them, entirely different from that which they had pursued in regard to the judges of the supreme court, the presidents and law associates of the first judicial district and the recorders and mayors of criminal courts; and that was not for themselves definitely to fix the classification, but to commit that matter to the legislature, with certain directions and limitations. These associate judges were much more numerous than the others, being in number about one hundred. Merely to direct that they should govern themselves in their term of holding by the dates of their commissions, would have imposed on these judges a difficult and perplexing task, to ascertain their comparative appointments at the office of the executive department. To classify them by name would require more leisure and opportunity than the convention had, and besides, was a detail unfit for the business of a constitution. The convention therefore determined to commit to the legislature, at their first session, the classification of these judges by name, so that they would be notified by a public act of the tenure of their offices, the convention contenting itself with marking out the principles on which such classification should be made be the legislature. It is therefore provided in the 9th section of the schedule as follows:

"The legislature at its first session under the amended constitution, shall divide the other associate judges of the state into four classes. The commissions of those of the first class shall expire on the 27th day of February 1840; of those of the second class on the 27th day of February 1841; of those of the third class on the 27th day of February 1842; and of those of the fourth class on the 27th day of February 1843. The said classes from the first to the fourth, shall be arranged according to the seniority of the commissions of the several judges." And that there might be no difficulty made as to what was meant by the first general assembly, spoken of here, and also in the 12th section of the Schedule, the 4th section of the Schedule enacts, that "The general assembly which shall convene in December 1838, shall continue its sessions as heretofore, notwithstanding the provisions in the 11th section of the first article, (which requires the general assembly to meet on the first Tuesday of January in every year,) and shall, at all times, be regarded as the first general assembly under the amended constitution," Accordingly, the legislature, at its first session under the amended constitution, passed the act of the 20th June 1839, classifying the associate judges under the foregoing authority. That act recites the requisition of the constitution, and enacts by section 1, that John Parker, and seventy-four others named therein, should constitute the first class, whose commissions should expire on the 27th day of February 1840. Section 2, enacts, that John Cummins and twenty three others should constitute the second class, whose commissions should expire on the 27th day of February 1841. Section 3, enacts that Mathew Patton, and twenty-three others should constitute the third class, whose commissions should expire on the 27th February 1842. And section 4, enacts that George Smith and twenty-four others (amongst whom, is the respondent Samuel D. Leib) should constitute the fourth class whose commissions should expire on the 27th February 1843. Under this act of assembly, then, the respondent, being placed by the legislature in the fourth class, had a right, by the terms of the act, to hold his office until the 27th February 1843, and if the question depend on this act alone, there would be no difficulty.

But at the subsequent session of the legislature of the year 1840, viz: on the 7th March 1840, another act was passed, changing this classification, and making a new one, by the terms of which, the respondent was to be placed in the first class and his commission was to expire on the 27th of February 1840; and the main question arises from the collision of these two acts of the legislature, rendering it necessary to determine which of them is to be the rule by which the associate judges are to be regulated in the tenure of their office. The two acts are totally irreconcilable with each other, and one or the other must be the exclusive guide on the subject.

The act of the 7th of March 1840, is entitled an act supplementary to and explanatory of an act to classify the associate judges of the state. It recites that whereas the legislature did pass the act to which, this act is a supplement, on the 20th of June 1839, in pursuance of the provisions of the amended constitution, requiring that the legislature, at its first session under the same, should divide the associate judges of the state, into four classes, to be arranged according to the seniority of their commissions; and whereas the legislature, in said act, made no distinction between the judges whose commissions bore date prior to the adoption of the amendments of the constitution, and those whose commissions bore date subsequent to said adoption of said amendments; and whereas it is the true intent and meaning of the amended constitution, that the expiration of the commissions of the associate judges should be graded according to the priority of date at the adoption of the said amendments on the 9th of October 1838; therefore section 1, enacts that Joseph S. Morrison in the room of John Dicky and twenty-five others (amongst whom is the respondent, Samuel D Leib) shall constitute the first class, whose commissions shall expire on the 27th day of February 1840. Section 2, enacts that Jonathan Stevens and twenty-six others named, shall constitute the second class, whose commissions shall expire on the 27th day of February 1841. Section 3, enacts that Joseph Bishop and twenty-five others shall constitute the third class, whose commissions shall expire on the 27th day of February 1842. And section 4, enacts that George Weiser and twenty-five others shall constitute the 4th class, whose commissions shall expire on the 27th day of February 1843.

The great point of difference between the classification of these two acts, is this, that the act of the 20th of June 1839 arranges the associate judges according to the priority of the dates of their commissions, as they stood on the first of January 1839. Whereas the act of the 7th of March 1840 arranges them according to the priority of their dates, on the 9th of October 1838, the alleged period of the adoption of the constitution. The court below was of opinion that an associate judge, appointed by the governor alone, after the adoption of the amendments to the constitution, (as was the case of the respondent,) held his commission only until the 1st of January 1839, that it then expired, and that such judge could not be constitutionally classified at all by the legislature amongst the associate judges by either of the acts in question.

Amidst so great a discordance of sentiment in those who have been called upon to express an opinion on the subject, we have considered with much attention all the different views presented, and we think that the court below erred in their opinion, that the commission of the respondent expired on the 1st of January 1839. The provision of the 9th section of the schedule, in relation to associate judges, is altogether different from that of the 7th section of the Schedule, respecting president judges, on which the case of the commonwealth v. Collins, 8 Watts, 342 was decided. In the latter, the language is express, that the president judges who shall have held their commissions "at the adoption of the constitution," shall continue for specified periods. Of course there was no room for doubt, that only such presidents were provided for, and those appointed after the adoption of the amended constitution, and before the first of January 1839, not being saved, fell with the former system of appointment. But there are no such words in the 9th section, relating to the associate judges, nor do we think it would be justifiable to introduce them into it. The 9th section of the Schedule, in its terms, comprehends, generally, the other associate judges of the state, without restriction or qualification; and the difference of language manifest a different intention in the framers of the amended constitution That no such general intention in the convention to exclude associate judges of this discription from the right to continue on the same footing as those appointed before the adoption of the constitution, ought to be presumed, we think is apparent from the provision in regard to the judges of the Supreme Court. In this provision they have disregarded the time at which the commissions might have issued, whether before or after the adoption of the constitution, and looked only to the date of their commissions on the first of January 1839. If this was expressly allowed in regard to the judges of the Supreme Court, why should it be presumed, in the absence of all enactment to that effect, to be meant to apply to the associate judges?

If this be so, then the respondent's name was properly introduced into the legislative acts, and the question is, whether the 1st of January 1839 is to be considered as the date when the commissions of the associate judges were to be graded, the period of the adoption of the constitution. And we are of the opinon that it was the former. The reasons for this opinion are, that there is no express enactment in the 9th section of the Schedule confining it to the adoption of the amended constitution. as is the case with the president judges. It is a fair presumption, that if the convention had intended that period, they would have expressed it as they have in other instances. These judges, therefore, fall within the 3d section of the Schedule, which declares, that the clauses, sections, and articles of the constitution which remain unaltered, shall continue to be construed and have effect as if the constiution had not been amended. There is no alteration made in respect to these associate judges, founded on the time of their appointment, whether before or after the adoption of the constitution. We must then refer to the first of January 1839, from which period the 2nd section of the Schedule declares that the alterations and amendments in the constitution shall take effect, and from which time the new regulations in respect to them were to begin. We think that this date was intended to be preserved and regarded as to all matters not otherwise expressly provided for by the constitution or schedule, as was intimated in the opinion of this court, delivered by Mr Justice Kennedy in the Commonwealth v. Collins, 8 Watts 342.

It has been urged on the argument here, as a conclusive reason why the time ought to be restricted to the adoption of the constitution, that as the classification was to be made by the first session of the general assembly under the amended constitution, and it was declared that should be the general assembly which should convene in 1838, which met on the 4th of December 1838, they could at once have proceeded to classify the judges without waiting for the 1st of January 1839. When, however, we look at the provisions of the amended constitution on this subject, this argument seems to fail; for the direction of the 4th section of the schedule is, that the general assembly which shall convene in December 1838, *shall continue its sessions as heretofore:* which is imperative upon it to continue beyond the 1st of January, and would enable it to make the classification after the first of January 1839, as well as before, provided it was during that first session; so that the proper time of making it must depend on the other provisions of the constitution.

Then, on comparing the classification made by the act of the 20th June 1839, with a list of the associate judges reported to the legislature in January 1839, by the Secretary of the commonwealth, it appears that the classification embraces all those in office under commissions issued before the 1st of January 1839, and classifies them according to the seniority of their commissions, as directed by the Schedule. It is alleged that there are mistakes in the spelling of some of the names, as Gebhart for Gearheart, &c. But if it is apparent from other circumstances, as the similarity of sound, that the same person is meant, then, according to the established legal principle, the mere difference of spelling is not material. In nearly all, it is presumed, that names are correct, and the classification appears totally with the seniority of commissions, except that such of the associate judges in this list are omitted as were appointed after the 1st of January 1839; as for instance, Samuel Yohe, of Northampton county, Joseph Saeger, of Lehigh county, and Thomas Jones, of Chester county. It is very clear, and is now conceded on the argument here, that these Judges, being appointed after the amended constitution had gone into operation, by the governor, with the approval of the senate, they are entitled to hold for five years from the dates of their respective commissions, and could not be reduced in their term by any legislative act.

If then the legislature, at its first session under the amended constitution, and in accordance with its provisions, passed an act classifying the associate judges, it seems to us that the power vested in the legislature on the subject was exhausted and could not constitutionally be exercised or interfered with by a succeeding legislature: It is not an ordinary act of legislation in which one legislature has no power to bind its successors, it is rather the discharge of ministerial authority than the exercise of a legislative power; for if the principles be given that associate judges in office on the 1st of January 1839 are to be included, and that they are to be divided into four classes, according to the seniority of their commissions; the performance of the duty is pretty much a mechanical act, requiring the exercise of no discretion. And if even there were a discretion in the matter, it is given to the general assembly at its first session and no other. It is a delegation to that specific body of a portion of the sovereign power of the people, entrusted by them to the convention establishing a fundamental law permanent and indefeasable as the constitution itself, partaking of its eminent character, and intended to govern the conduct of the people and of the constituted authorities, as long as the judges remain to whom it is applicable.

There was obvious reasons why this classification should be made at the session of 1839. One-fourth of these commissions were to expire on the 7th of February 1840; and it was not only expedient that these judges should know, sometime before hand, the duration of their offices, but if it were left till a subsequent session, as the general assembly was to commence its session on the first of January 1840, there might not even be time to get the bill through the legislature before one-fourth of the commissions shou'd expire. We have seen this occur in the act of the 7th March, 1840, under which some of the associate judges could not be apprised of the expiration of their offices till after the event had actually taken place, and they had sat as judges in the meanwhile.

After the legislature, therefore, at its first session had discharged the duty, another legislature could not change and and remodel the classification, or interwith it at all. To do so would be inconsistant with the constitution and fraught with inconvenience and hazard to the community. If a second legislature had this power, a third legislature would pos-