
Volume 40
Issue 2 *Dickinson Law Review - Volume 40,*
1935-1936

1-1-1936

Powers and Duties of Associate Judges Unlearned in the Law

Spencer R. Liverant

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Spencer R. Liverant, *Powers and Duties of Associate Judges Unlearned in the Law*, 40 DICK. L. REV. 84 (1936).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol40/iss2/3>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

POWERS AND DUTIES OF ASSOCIATE JUDGES UNLEARNED IN THE LAW

SPENCER R. LIVERANT*

Associate judges, unlearned in the law, are purely creatures of statute. There is no common law authorizing their existence. Although they existed previously, the Judiciary Act of Apr. 14, 1834, P. L. 333, is the first to define their powers to any degree:

"Section 19. The Courts of Common Pleas of the several counties of this Commonwealth, except the county of Philadelphia, are hereby declared to consist of a president judge and *two associate judges.*"
(Italics added).

Art. V, Sec. 2 of the Constitution of 1838 continued the associate judges as they existed under the Judiciary Act of 1834. Art. V, Sec. 5 of the Constitution of 1874, however, abolished the office of the associate judge, unlearned in the law, in counties forming separate judicial districts.

Art. XVIII, Schedule 16, of the Constitution of 1874 fixes the term of associate judges at five years. This has been lengthened to six years by Schedule 1 of the constitutional amendments of Nov. 2, 1909, providing, *inter alia*:

"In the case of officers elected by the people, all terms of office fixed by act of Assembly at an odd number of years shall each be lengthened one year . . ."

The letter of this provision applies only to terms of office fixed by acts of Assembly while terms of associate judges were fixed by the Constitution. However, the intent of this amendment, and of Art. VIII, Sec. 3 of the Constitution, as amended the 4th day of Nov., 1913, providing for the election of judges of the courts for the several judicial districts on the municipal election day, such elections to be held in the odd-numbered year, and further providing that all judges for the courts of the several judicial districts, whose term of office may end in an odd-numbered year, shall continue to hold their office until the first Monday of January in the next succeeding even-numbered year, clearly show that the term of associate judges is now six years.

The salary of these judges, unlearned in the law, is fixed by the Act of May 5, 1915, P. L. 258, Sec. 1, at \$5.00 per day for each day they may be employed in the discharge of their official duties; the salary, in no event, to be less than \$600.00 per annum. The statute also allows mileage. But the associate judge

*A. B., Dickinson College, 1931; L. L. B., Dickinson School of Law, 1933; Professor of Law, Dickinson School of Law, 1933-1934; Member of Pennsylvania Bar.

cannot claim a day's compensation for each day he happens to execute a paper: Salary of associate judges—Op. Dep. Atty. Gen., 13 Dauph. 235 (1910); Salaries of associate judges — Op. Dep. Atty. Gen., 20 Dist. 396, 38 County Court 243 (1910).

Because Sec. 9 of Art. V of the Constitution of 1874 provided that judges of the courts of common pleas, *learned in the law*, shall be judges of the courts of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphans' court, the question arose whether the effect of the Constitution was not only to limit associate judges to districts comprising more than one county, but to limit their powers to the common pleas court. This question was set to rest in the well considered decision of *O'Mara v. Commonwealth*, 75 Pa. 424, 432 (1874) in which the court stated:

"It would rather seem that the 9th section were framed in view of the provision for judges learned in the law, including the provision for additional (law) judges by the legislature, in all the separate districts and the great cities of the Commonwealth, *while the places to be filled by the associates unlearned in the law were overlooked, upon the supposition that they would continue as theretofore, in all the counties where the office itself continued.*" (Italics added).

What are and what have been the functions of associate judges has always been a puzzling question in this Commonwealth. Aside from the power given the associates to sit in the conduct of the courts, and to hold certain of the courts, the statutes give no indication of just what services these judges, unlearned in the law, are to render. Even decisions are of little help, confined as they are to particular questions with an occasional reference to the general powers of these judges.

The chief function of these judges appears to be to take formal judicial action in the absence of the president judge; thus it is said in *O'Mara v. Commonwealth*, 75 Pa. 424, 432 (1874):

"The greatest use for the associates is found in their local knowledge, and presence in the counties where the president is not a resident, enabling them to attend to matters of bail, security, appointments of view-ers, appraisers, guardians, committees and other matters required to be done in the Quarter Sessions and Orphans' Courts. Where the president judge resides in the district, as all judges learned in the law must, who have separate districts, consisting of single counties, the necessity for associates unlearned in the law does not exist. But the necessity for these associates remains in all districts composed of two or more counties, and in them the office is continued."

Another chief function of these judges is to act in advisory capacity. As is pointed out in *Glamorgan Iron Co. v. Snyder*, 84 Pa. 397 (1877):

"For many purposes the associate judges of the several counties of the Commonwealth have formed a most useful class of public officers. In the absence of the president judge, their services have been almost indispensable where formal judicial action in vacation has been required in the current practice of the courts. Wherever two or more counties have constituted a district, their local knowledge has been found to be an essential aid in adjusting questions relating to the values of property, to appointments of minor officers, to bail, and to the selection of viewers, appraisers and inquests in the orphans' court and in the court of quarter sessions. In the minor details of the business of the court of common pleas also, president judges have been able to rely safely on their judgment, integrity and business experience."

The associates being members of the court would appear to have the right to join in exercising the court's general powers. They may, therefore, join in deciding issues involving questions of fact, and, in so doing, may out-vote the president judge:

Huntingdon County Line, 8 Pa. Super. 380, 391 (1898);
Branch's License, 164 Pa. 427 (1894);
Kabrer's License, 12 County Court 12 (Lawrence County 1892);
Sperring's Application, 7 Pa. Super. 131 (1898).

They are given the right by statute, where a quorum is not present, or the court is interrupted by sickness, death or absence of any of the judges, to adjourn the court from day to day: Act of Apr. 14, 1834, P. L. 333, Sec. 63. They are equally bound to see that actions shall be fairly and expeditiously held as required by the Act of Feb. 21, 1806, P. L. 334, 4 Sm. L. 270, Sec. 22. They would appear to have the right to join in fixing the number of regular terms of the several courts and the times of holding same, since the Act of Mar. 18, 1875, P. L. 28, Sec. 1, as amended by the Act of Apr. 27, 1927, P. L. 420, Sec. 1, vested this power in "the judges of the several courts throughout this Commonwealth."

Although the associates have equal voices in questions of fact arising before the courts in which they sit, they may not interfere in the purely legal business of the court. This question arose in *Glamorgan Iron Co. v. Snyder*, 84 Pa. 397 (1877) and the Courts said:

"In the conduct of jury trials, they (the associates) have usually not sought to interfere, and usually their interference has not been invited. The purely legal business of a court of original jurisdiction must be subject to the control of a single judge, if efficiency, promptitude, and official responsibility are worth maintaining. If the deliberately formed purpose of a president judge may be thwarted and over-

turned by action on the part of his associates which must necessarily be ill-considered and may often be prejudiced, rules of law will be subordinated to individual caprice. The president judge is the constitutional head of the court, under responsibilities to the community which a court of review can always enforce, and hedged around by duties and obligations for the performance of which no other guaranty is needed than his regard for his own professional reputation. The fact that in Pennsylvania there has been no failure in the due discharge of those duties and obligations, is adequate proof that *the exercise of supervisory and appellate jurisdiction by associate judges is, to state the conclusion in the mildest form, entirely superfluous.* (Italics added).

It follows that associates have no power to decide questions of law: *Syracuse Pitt. Hole Co. v. Carothers*, 63 Pa. 379 (1869). One of the most recent attempts by associate judges to do so was scathingly denounced in *Commonwealth v. Lenhart*, 241 Pa. 129 (1913):

"They (the associates) were elected as judges unlearned in the law, and, if men of ordinary intelligence, ought to have known that it was never contemplated by the Constitution that they should ever set up their judgment against that of the head of the court on a matter of law. They were never intended for any such purpose, and we have so said in the rare instances of judicial impropriety of which they are guilty."

This question has arisen most frequently in relation to the powers of associates to grant motions for new trials in the courts of common pleas. It is well settled by the decisions that the action of the president judge in this regard is paramount and final. However, in *Van Vliet v. Conrad*, 95 Pa. 194 (1880), the action of the associates in granting a motion for new trial where the matter was referred to them by the president judge was upheld. In *Reiber v. Boos*, 110 Pa. 594 (1885), the court indicated that, in the absence of the president judge, the associates might, of their own volition, grant a motion for new trial. In view of the definite statement by the Supreme Court in *Commonwealth v. Lenhart*, *supra*, denying the right of associates to interfere in questions of law, it is doubtful whether the associate judges would have the power indicated in the *Reiber* case.

That the major functions of the courts are intended to be under the guidance and control of judges learned in the law is substantiated by the statutes providing for special courts where the president judge is unable to hold such courts by reason of disqualification or sickness:

Act of Apr. 14, 1834, P. L. 333, Sec. 37;

Act of Apr. 4, 1843, P. L. 131, Sec. 8;

- Act of Apr. 22, 1856, P. L. 500, Sec. 1;
 Act of Apr. 2, 1860, P. L. 552, Sec. 1;
 Act of May 1, 1861, P. L. 494, Sec. 1.

In such cases the president judge may call in a judge learned in the law to act in his stead:

- Acts above cited, and
 Act of Apr. 10, 1849, P. L. 619, Sec. 1;
 Act of Apr. 18, 1853, P. L. 567, Sec. 26;
 Act of May 5, 1864, P. L. 829, Sec. 1;
 Act of May 2, 1871, P. L. 247, Sec. 1.

The calling in of the substitute judges learned in the law is not, in any of these cases, made conditional on the absence of the associate judges or either of them. It is, therefore, a reasonable implication that the associates are not intended to exercise the major functions of the court in the absence of a judge learned in the law.

A specific duty imposed by statute on associate judges is that of hearing complaints by the taxable inhabitants of the county against any justice of the peace in the county as provided in the Act of Jan. 14, 1804, P. L. 16, 4 Sm. L. 107, Sec. 1.

POWER AND DUTY TO HOLD COURTS

The power and right of associate judges to sit in courts and to hold courts is one that is open to considerable question in a number of particulars. For that reason, each court is separately dealt with in this article.

COURTS OF COMMON PLEAS

Although the Supreme Court has stated that associate judges are less needed in the courts of common pleas than in courts of quarter sessions of the peace or orphans' courts, *O'Mara v. Commonwealth*, 75 Pa. 424, 432 (1874), their statutory rights to hold this court appear to be very broad. The Act of Apr. 14, 1834, P. L. 333, Sec. 20, provides:

"The president and associate judges of the Courts of Common Pleas, or any two of them, or the presiding judge, in the absence of his associates, shall have power to hold the said courts, and to hear and determine all causes, matters and things cognizable, therein according to the constitution, laws and usages of this Commonwealth." (Italics added).

Undoubtedly, the associate judges may sit with the president judge in the conduct of the court of common pleas. It is in this fashion they can aid the administration of justice in an advisory capacity and in rendering their opinions on

questions of fact. It is likewise settled that the president judge may himself hold the court without the associates: *Tracey v. Pendleton*, 23 Pa. 171 (1854). But may the associate judges hold the court without the president judge? The statute appears clearly to give them this power. Yet they have been held, as pointed out above, to have no jurisdiction over purely legal matters. The reasonable conclusion is that the powers of associates to hold a court of common pleas without the president judge is limited to those matters where questions of law are not to be decided and there are no jury trials; in other words, primarily, to courts of current business or of formal judicial action.

COURTS OF QUARTER SESSIONS OF THE PEACE

The Act of Apr. 14, 1834, P. L. 333, Sec. 43, provides:

"The judges of the court of Common Pleas of each county, any two of whom shall be a quorum, shall compose the court of Quarter Sessions of the Peace thereof."

The Act of May 9, 1889, P. L. 172, Sec. 1, provides:

"The president judge of the court of common pleas, in such county not forming a separate judicial district, in the absence of the associate judges, shall have power to hold the courts of quarter sessions of the peace and oyer and terminer and general jail delivery of such county, and hear and determine all causes and matters and things cognizable therein, according to the constitution, laws and usages of this Commonwealth."

The right to hold courts of quarter sessions of the peace seem to be exactly similar to that of the right to hold the court of common pleas, and the same reasoning would forbid the associate judges from holding courts of quarter sessions of the peace without the president judge, except such as to dispose of current matters, or to take only formal judicial action, e.g. the granting of a liquor license: *Sperring's Application*, 7 Pa. Super. 131 (1898).

COURTS OF OYER AND TERMINER AND GENERAL JAIL DELIVERY

The Act of 1889, *supra*, applies as well to courts of oyer and terminer and general jail delivery. The Act of Apr. 14, 1834, P. L. 333, Sec. 58, provides *inter alia*:

"A court of Oyer and Terminer and general jail delivery shall be holden four times, annually, in every county . . . and it shall be the duty of the president judge of the court of Common Pleas of such county, with the associate judges thereof, or one of them . . . to hold such court."

It is obvious that the associate judges may sit in a court of oyer and terminer and general jail delivery with the president judge. By the Act of 1889, *supra*, the president judge may hold such court without them. May the associate judges hold such court without the president judge? The statutes do not confer that right upon them, and the decisions emphatically state that they have no such right: *Commonwealth v. Ickhoff*, 33 Pa. 80 (1859); *Forest v. Commonwealth* 33 Pa. 338 (1859); *In the Application of the President Judges of the 8th and 10th Districts*, 64 Pa. 33 (1870); *Commonwealth v. Collom*, 1 Pa. Super. 542 (1896). In the last mentioned case, even a court of oyer and terminer and general jail delivery held by the associates with a member of the bar as *amicus curiae* was held invalid.

By the Act of Apr. 14, 1834, P. L. 333, Sec. 60, associate judges or either of them, in the absence of the president judge, have the power to open a court of oyer and terminer and general jail delivery and to adjourn the same to some day when a quorum of the court can attend, or *sine die*.

ORPHANS' COURTS

The Act of June 7, 1917, P. L. 363, Sec. 1 (c), defines the right of holding orphans' courts:

"The orphans' court of each county, except in the counties where separate orphans' courts are or shall be established by law, shall be composed of the judge, or judges, when there are more than one, of the court of common pleas thereof; but any one judge learned in the law shall have power to hold the court, and hear and determine all matters and things therein cognizable."

Thus the associate judges may sit in this court; the president judge alone may, but the associate judges alone may not, hold such court: *Mauck's Estate*, 41 County Court 683 (Clinton County 1914).

SUMMARY

The power of the associate judges unlearned in the law may be summarized as follows:

- (1) The associate judges may take formal judicial action and dispose of current business of the court in the absence of the president judge;
- (2) When a quorum is not present, or when the court is interrupted, the associate judges, or either of them, may adjourn the court from day to day;
- (3) The associate judges, or either of them, may sit with the president judge in the conduct of the court of common pleas, court of quarter sessions of the peace, court of oyer and terminer and general jail delivery, and orphans' court. In such cases, their function is chiefly advisory;

(4) The associate judges, or either of them, have the right to join in the exercise of the general powers of the court, such as in fixing of the regular terms of the courts;

(5) When sitting with the president judge, the associate judges have equal voice on question of fact, and may out-vote the president judge on such questions;

(6) When sitting with the president judge, the associate judges have no voice on purely legal matters, on questions of law, or in the conduct of jury trials;

(7) The associate judges may hold courts of common pleas and courts of quarter sessions of the peace in the absence of the president judge, but such courts must be limited to current business or formal judicial action.

York, Pa.

Spencer R. Liverant