Φ—

1— The Constitution does not confer judicial functions on the clerks of the superior court, except in the matters specifically stated therein.

II— The ~~Courts cannot be always~~ Judges must be absent from ~~open~~ each county more than half the year—

Therefore the courts cannot be at all times open for the

1st The return of summons

~~2 The filing of the complaint~~

3d The filing of the demurrer or answer

~~4" The trial of issues of law~~ The filing of the demurrer or reply.

This is the argument of the decision. We admit the premises without hesitation, ~~but the conclusion does not follow. The transaction of the business which constitutes the subject matter of this appeal does not require the presence of any Judge whatever~~ fully and fairly. We admit and have always contended that the constitution gives no judicial power and authority to the clerk beyond that which is specifically and expressly granted therein. We contend that no jurisdiction can be authoritatively and indefeasibly be conferred by any implication whatever. That the argument of necessity drawn

X — ~~"upon~~ from the 28" Section of Article IV taken in connection with Section —, of the same entirely fails. We accept in its fullest and broadest significance the construction placed upon the latter section by the court and we admit of course the very evident fact set forth in the opinion that the Judges of the Supreme Court cannot be at all times present ~~in the~~ each of the Counties.

CHAUTAUQUA COUNTY NY HISTORICAL SOCIETY 2013

McAdoo
o
Benton

Reviewed

II

CHAUTAUQUA COUNTY NY HISTORICAL SOCIETY 201

a-

In our opinion, the ~~court~~ decision of the court is based upon an entirely erroneous view of the subject-matter presented in the appeal. The constitution in the section under consideration provides that the Superior Courts shall be at all times open for the transaction of all business, except the trial of issues of fact requiring a jury." What is the "business" of the court? It ~~may be~~ is all embraced under the following heads—

1st The ~~issue of summons~~ institution of an action, which ~~2" The return of same~~ Embraces

a— The issue of summons
b— The return of summons
c— The filing of the complaint
d— The filing of the answer or demurrer of the defendant.
e— The filing of the reply or demurrer of the plaintiff.

2nd The making up of the issue

3d Provisional Remedies

4th The trial (which may be either ~~by a jury~~ 1st By a jury, or 2d By the court.

5th— Proceedings subsequent to judgment

6th— Special Proceedings——

The words of the Constitution then, taken in their plainest and most usual significance declare that the court shall be always open for all these classes of its business, except subdivision 2 of class 4.

CHAUTAUQUA COUNTY HISTORICAL SOCIETY 2013

(c)

The decision of the Court consists of two postulates

1st The constitution confers no judicial powers upon the Clerk except those expressly named—

2nd Section 28th of Article 4th means that the Superior Courts shall be at all times open for the transaction of business not requiring only the presence of the Judge—

upon which is formulated the argument which fully expressed would be as follows:

1st. The Act of March 22d 1809 declares that the courts shall be open only at the regular terms for the return of summons and the making up of issues.

2nd The return of summons and the making up of issues, require the presence of the Judge

Therefore—The Act of March 22nd is not unconstitutional—

CHAUTAUQUA COUNTY NY HISTORICAL SOCIETY 2015

6- The Act of March 22d 1869 - suspending certain provisions of the Code of Procedure, makes all summons returnable at a term of the court only, and directs the defendant to appear and plead only at the term. In other words it declares the court to be closed except during the regular terms to all the business embraced in subdivision 2 class 1 - and to all the business of class 2.

The question then is, are the words of Section 28 Article VI of the Constitution to be given the import which plainly and naturally attaches to them, or is it necessary to modify and vary that import, in order to make it harmonize and accord with other provisions of the same instrument. If it is not, evidently, the most plain and natural construction must be placed upon it. If it is, the necessity must be clear distinct and definite, which would compell a modification of terms of such ordinary unequivocal and exhaustive character as those of this section. If "a Statute should not be declared void except in a clear case," as the court say, it is evident that the necessity which would warn the force of such terms of unmistakable import as compose this section, must be clear and unavoidable, for the Constitution "is supported by the presumption of intelligence" as well as the Statute -

C — and its misconstruction should certainly be as securely guarded against.

In order to appreciate fully the question at issue it is necessary to ~~keep~~ bear carefully in mind, what part of the business of the Court it is that portion of the act of March 22 which under consideration declares ~~shall~~ be transacted only during the regular term. It is

1 — Return of Summons

~~2 — Filing of complaint~~

3 — Filing answer or demurrer

4 — Filing reply or demurrer

CHAUTAUQUA COUNTY NY HISTORICAL SOCIETY 2013

1 "It seems to be a provision taken from the Constitution of a State which appoints a Judge of the Superior Court for every County." There it may work well enough. But it must be trimmed down in some way to make it fit well in a constitution which appoints only one Judge of a Superior Court for Districts of seven or eight Counties."

Perhaps no more remarkable passage than the above is to be found in any reported decision of any court.— "It seems to be a provision taken from the Constitution of a State which appoints a Judge of the Superior Court for every County." The quick assumption that the constitution was made not for the State, but was a jumble of odds and ends, thrown together by the Convention which framed it without knowledge or consideration of the needs of the people or aim of its own purpose and aims in so doing, is not a little remarkable in the mouth of a court whose duty it is to construe an instrument and not to frame one, to declare what was the intention of the framers of the Constitution and not to prescribe what it ought to have been! Unfortunately however this assumption is not only not sustained but is so broadly negatived by the facts in the case as to render the idea almost ludicrous — Confining our attention now to the Fourth Article which alone is under consideration in this decision, we shall find that it actually bears less analogy to the Constitution of any other State than is usual in the judicial articles of different constitutions. If there ever was an article shaped and moulded peculiarly for the purpose for which it was designed it is this. With the exception of the first section scarcely a similarity can be found between any of its sections and the provisions of any other State constitution.

One of the sharpest struggles which occurred in the convention was over this very article, and so far from being adopted from any other state, with the single exception of that portion which changes the mode of procedure by abolishing the distinction between actions at law and suits in equity, it is absolutely unique in its provisions. — The system of courts, which has been so derided, as an "importation from New York" &c, an idea which the ~~re~~ venerable chief justice seems to have caught, may without hesitation be pronounced to fully unlike ~~any~~ the judicial organization of any other State. It was from a sort of compromise between opposing ideas in regard to the matter. The pressure against the old county courts in the convention was overwhelming. Strongly enough too, considering the outcry which has since been made over their abolition that pressure came almost entirely from the ~~east~~ eastern North Carolinians. Only two men from out of the State was in favor of interfering with these courts. They regarded it as dangerous in the extreme to change the ~~plan~~ of system at that time. It is probable that most of them ~~were~~ preffered a different system in the abstract but they feared the effects of too much change. ~~So the~~ Several of them openly opposed it. On the other hand scarcely a man opened his mouth, or cast his vote in favor of the old system. It seemed to be a settled fact from the first, that the county courts were regarded as a nuisance by a vast majority of the members. Of the three plans for a judicial organization which were submitted by members of the judiciary committee, neither of them embraced these courts, nor was their continuance even considered a possibility, in its deliberations. It had no friends in the convention and until it was dead no one dreamed how dearly it was prized by the bar and the people. Its funeral obsequies were more brilliant than its life

On account of this deep-rooted antipathy any approach to any sort of county court was impossible - The attempt to introduce a system of county courts similar to that of New York was one of the most beaten measures proposed in the convention - What this system is we shall consider hereafter. The system which was finally adopted was born from the necessities of the hour and is purely sui generis in its character.

Especially is this true of the section under consideration. It has no parallel in the Constitution of any state of the union. Its avowed purpose was to facilitate the business of the courts. The learned judge who has ~~given~~ uttered his dissent to this decision was a special advocate of the measure, declaring that it would result in getting twelve months work out of every Supreme Court judge. The accumulation of business in the courts under the old system was the chief argument in favor of ~~their abolition~~ its abolition. It was used with unsparing severity by the advocates of a change and never failed to convince and carry a majority of the convention. Having provided that suits pending in the courts should be tried ~~by~~ under the former practice, it was not thought that any material harm would result so far as what were termed "old debts" were concerned, and there was a universal desire to expedite matters for the future. From this feeling sprung the ~~present~~ section now under consideration.

But the learned judge whose opinion we are considering, has made a serious error in supposing that this section was "taken from the constitution of a state which appoints a judge of the Supreme Court for every county." There is

no such state in the American union!

There are fifteen or sixteen states in which the ~~courts~~ superior courts are always open for the making up of issues, and nearly all the business embraced by the terms of this section - but in not one of them is a judge of the court of superior jurisdiction appointed in every county. In New York there are County judges, but they are not judges of the Supreme Court (which is the equal in grade of ~~ours~~ our Superior Court) and have no more to do with its business than the justices of the peace of a ~~town~~ rural township. They have only jurisdiction of petty criminal offenses and appeals from justices and a few other matters of minor import. They have nothing to do with the ~~making~~ return of summons the filing of pleadings, or making up of issues in any manner form or sense, in the court of superior jurisdiction - there, as in this State, the judicial districts are composed of several counties, the only difference being that four judges are appointed for each who travel in succession, no one ever holding two successive terms in the same county. These terms are usually of two weeks duration and no judge of any kind or grade has anything to do with the return of process or the making up of issues in that court. The same is true of the other states referred to with modifications adapted to their special needs. These states embrace every grade and class of character, some are commercial, some agricultural, some maritime some inland, some thickly and some sparsely inhabited. They extend from New York to Oregon - In none of them states has the filing of a summons in the office of the clerk ever a judicial act or such a return to the court, attained the dignity of an expression, even in argument before, much less in a decision of, a Supreme Court.

3— "But it must be trimmed down in some way, in order to make it fit in a constitution which appoints only one judge of a Superior Court, for seven or eight counties."

It is not exactly clear from any previous reasoning, why the learned judge considers it so absolutely clear that he must apply this "trimming down" process, which he seems to use so liberally upon the Constitution. He has previously laid it down in this decision, as a maxim that — "no court should declare a statute to be void, except in a clear case." Let us see if this court is equally scrupulous in regard to the Constitution itself. Let us see, if this can in any manner be denominated "a clear case". The ~~following~~ preceding sentence states the construction of the 28th Section Article IV, which is adopted and acted upon by the court in this decision, viz: "One way is to construe it to mean that the courts shall be at all times open, for the transaction of ~~all~~ such business as can be done in the absence of the judges, for instance, issuing writs of summons, taking undertakings for appeals, special proceedings for arrests, injunction &c."

Suppose we accept as correct — as with a single modification we believe it is — this construction, which the learned judge puts upon the section in question, what follows! Cannot "writs of summons" be returned in the absence of the judge "as well as issued"! What is the return of summons! It is the filing as a part of the record of the court, of a "writ of summons" on which the Sheriff has endorsed his action thereunder. The summons is a command for ~~him to appear~~ the defendant to appear and answer the complaint. Now appear!

6

Not in propria personæ. Such appearance would not be a compliance with any system of procedure. But he must appear and answer upon the records of the court. He must enter his plea, put his defence upon record either by entering a minute of his plea upon the docket, as under the old system, or by placing it in full upon the record, by filing his written pleading, as under the new. For ~~any of its concomitants~~, the return of summons or any of its concomitants then, including the appearance and answer of the defendant, how does "the presence of a judge" become necessary! Suppose the summons is made returnable to the term, and the defendant required to appear and answer at that time, what then? Is the judicial mind at all cognizant of such return, appearance or answer? Let us see. The summons under the old system was never returned into open court, and in point of fact was usually filed in the clerks office days or weeks before. On the old "Appearance Docket," what judge at the "appearance Term" knew who had appeared, what was the character of the returns on the various writs, or even the number of writs? The asking of judgments by default, under some systems, might inform him that a portion of the defendants had not appeared, and the demand for alias writs might show him that some had been returned "not executed". Beyond this, the judge was as ignorant as to the return, appearance and pleading of the various defendants, as the jury whose duty it may become to try the issues of fact therein.

7 - By the summons issued in this action the defendant was commanded to appear and answer at the office of the Clerk of the Superior Court and answer the complaint. This form of summons did not confer, of itself, any jurisdiction upon the Clerk at all. It was the ~~summons~~ order of the Court Commanding the defendant to file his answer with the official and legitimate custodian of the records of the Court. It is true that the judge of the Court was not personally there present nor cognizant of the fact of such filing. Neither would he usually be if returns in term, or if appearance were required at the term.

But to take another instance. Is the return of summons by the Sheriff or the filing of the answer of the defendant in the office of the clerk, an exercise of any judicial power or discretion whatever, as is conceded by the Court in the matter of undertakings, ~~upon~~ upon appeals, arrests, injunctions &c? Is it any more a judicial act than the filing and docketing of an appeal from a justice of the Peace or any other one of his usual clerical duties? Evidently not. Granting then that the construction put upon this section of the constitution this decision is clearly erroneous. It is not necessary that the judge should be present to constitute an appearance before the court, and he very rarely is conscious of present at such appearance in any court or under any system of procedure