
 Magruder vs. Tuck.

circuit showing that the petitioner had received the greatest number of votes for judge of that circuit, in the language of the Constitution, he should "be declared to be elected," and receive a commission from the Governor for the office to which he has been elected.

This Court will, therefore, reverse the order of the Court below dismissing the petition of the appellant, and direct a *mandamus* to be issued as prayed.

Petition dismissed.

(Decided June 28th, 1866.)

DANIEL R. MAGRUDER vs. WILLIAM H. TUCK,

QUALIFICATION OF JUDGE: OATH OF OFFICE,—WHEN TO BE ADMINISTERED: ARTICLE 68, SEC. 10 OF THE CONSTITUTION OF 1864, entitled, "Official Oaths" indicates that the commission is a prerequisite to the qualification of an officer where the law or Constitution requires one to be issued.

No clerk of Court has authority to qualify a person elected before he has been commissioned, for, in the absence of a commission, there would be no sufficient evidence of an election or appointment.

APPEAL from the Circuit Court for Anne Arundel county:

Petition filed by the appellant on the 13th of February, 1866, praying for an order requiring the appellee to show cause, by a day certain, why a writ of *mandamus* should not issue commanding him to surrender up and deliver possession of the office of Circuit Judge of the Second Judicial Circuit of the State of Maryland to the petitioner. The case

Magruder vs. Tuck.

is stated in the opinion of this Court. The appeal is from an order of the Court below, (REVERDY JOHNSON, Jr., Special Judge,) dismissing the petition for *mandamus*.

The cause was heard before BOWIE, C. J., BARTOL, GOLDSBOROUGH, and WEISEL, J. Being submitted on the arguments reported in the preceding case of *Magruder vs. Swann*.

Thos. S. Alexander and Alexander B. Hagner, for the appellant:

Wm. Price and Frank H. Stockett for the appellee:

BOWIE, C. J., delivered the opinion of this Court:

In the preceding case of the *Appellant vs. Thomas Swann, Governor of Maryland*, all the points made in the present case have been considered and decided with the exception of the objection peculiar to this, that the petitioner, not having received his commission from the Governor, could not be legally qualified by the clerk of Calvert county, and until so commissioned and qualified was not entitled to the possession of the office.

It will be seen from the decision in the case *vs. the Governor*, that the Constitution requires a commission to be issued to the person elected to the office of judge. No clerk has authority to qualify a person before he has been commissioned.

The 10th sec., Art. 63, entitled "official oaths," indicates that the commission is a prerequisite where the law or Constitution requires one to be issued: "Any person, whether elected or appointed to office, who shall decline or neglect to take and subscribe the oaths prescribed by the Constitution or by law or ordinance, for the period of thirty days from the day when the commission of such officer has been received at the office of the respective clerks, or in those cases in which no commission is sent to the clerks, or within thirty days after receiving his commission or notice of his appoint-

 Laupheimer vs. Rosenbaum et als.

ment, shall be deemed to have refused acceptance of said office. In the absence of such a commission, the clerk could have no sufficient evidence of an election or appointment, and consequently no right to administer the oaths of office. For this reason the petitioner must fail in his application for a *mandamus* in this case, and the order of the Court below will be affirmed.

Order affirmed.

(Decided June 28th, 1866.)

JACOB LAUPHEIMER vs. JOSEPH ROSENBAUM, *et als.*

PLEADING IN EQUITY: EVIDENCE: INJUNCTION.—H. and D., merchants of Baltimore, executed to M., on the 18th of February, 1861, a deed of trust of all their property of every kind, to be sold, and the proceeds applied to the payment of their debts in the manner specified in said deed. M. took possession of the property and converted it into money. On the 11th of August, 1862, some of the creditors filed a bill in the Circuit Court of Baltimore city to set aside said deed of trust, whilst others of said creditors issued attachments and procured them to be laid in the hands of the trustee, M. Pending these proceedings in equity and these attachments a new bill was filed in the same Court, by some of the preferred creditors in said deed of trust against the grantors, the trustee and other creditors, setting forth and exhibiting the deed of trust, alleging the possession of the trust funds by M. "which have remained for some time in his hands, owing to the other proceedings." These other proceedings in equity and by attachment are then referred to by the names of the complainants and plaintiffs, with a general statement that the object of the equity proceedings was to set aside the deed of trust. The prayer of the bill was that the funds should be brought into Court for distribution, that the questions arising under the former bill and attachments should be litigated under this bill, and for an injunction to stay