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Supreme Court of Appeals
Richmond, Va.

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Record No. 5216

PETITION FOR WRIT OF MANDAMUS

In the
Supreme Court of Appeals of Virginia
at Richmond

HENDERSON KIRK, ET AL.,

v.

HONORABLE E. T. CARTER, JUDGE, ETC., ET AL.

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5216

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Friday the 2nd day of September, 1960.

HENDERSON KIRK, ET AL., Petitioners,

against

HONORABLE E. T. CARTER, JUDGE, ETC., ET AL., Respondents.

Upon a Petition for a Peremptory Writ of Mandamus

On the first day of the session came Henderson Kirk, E. K. Geisler, Carl H. Evans, L. C. Martin, R. E. Orr, F. M. Kirk, C. R. Tomlinson, Kenneth E. Light, W. B. Stewart, Ralph B. Parsons, Earl C. Johnston, Worley A. Moore, Paul B. Robbins, Thomas E. Brown and Peggy Jo Cox, by counsel, and presented to the court their petition praying that a peremptory writ of mandamus do forthwith issue, directed to the Honorable E. T. Carter, the Honorable Gus E. Mitchell, Jr., and the Honorable William S. Jordan, judges appointed by the Chief Justice of the Supreme Court of Appeals to hear and determine a certain suit instituted in the Circuit Court of Lee County, Virginia, contesting the election of Arthur T.

Burchette to the office of clerk of the Circuit Court of Lee County and the election of certain other officials of Lee County, requiring and commanding them to reinstate on the docket the complaint of the petitioners and to proceed to hear and determine the cause presented by the complainants against Arthur T. Burchette, Jess K. Newman, Creed Chadwell and William C. Fugate, and for other relief.

Thereupon came the respondents, by counsel, and obtained leave to file their answer and briefs.

And it appearing to the court that copies of the application have been served on the respondents, it is ordered that the cause be docketed; that the respondents file their answer on or before September 15, 1960; that the record be printed; that the petitioners file with the clerk 25 printed copies of their brief on or before September 26, 1960; and that the respondents file with the clerk 25 printed copies of their brief on or before October 6, 1960, and the cause is continued.

RECORD

* * * * *

PETITION FOR MANDAMUS.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your Petitioners, all of whom are citizens and qualified voters of Lee County, Virginia, respectfully represent as follows:

1.

That on the 3rd day of November, 1959 an election was held in Lee County, Virginia and following said election and within ten (10) days thereafter, your petitioners instituted an election contest in the Circuit Court of Lee County, Virginia under the procedures set out in Chapter 16 of the Code of Virginia, contesting the election of Arthur T. Burchette to the office of Clerk of the Circuit Court of Lee County, Virginia; Creed Chadwell, to the office of Sheriff of Lee County, Virginia; William C. Fugate to the office of Commonwealth Attorney for Lee County, Virginia; Jess K. Newman to the office of Treasurer of Lee County, and Ikey S. Parkey to the office of Commissioner of the Revenue for Lee County; that for their grounds of contest the complainants did allege that 2,895 fraudulent votes were cast by absentee ballot and in violation of the provisions of Chapter 13 of the Code of Virginia, and they further did allege numerous other violations of the laws of the State of Virginia and that fraud was practiced in said election; that the contestees filed an answer to the suit in the nature of a general denial of the charges made against them, and they did file a counter complaint along with their answer, which answer and counter complaint, was filed within 10 days after service of copy of the complaint upon them; at the same time four (4) of the said contestees filed a joint and separate motion to dismiss the complaint, and for their grounds for said motion to dismiss stated as follows: "because no copy of the complaint filed in the Clerk's Office of this Court on the 12th day of November, 1959 has ever been served upon anyone of the above named defendants since said election contest was instituted and begun by the filing of said complaint in said Clerk's Office."

2.

That the Chief Justice of the Supreme Court of Appeals of Virginia in accordance with Section 24-431 of the Code of Virginia appointed Hon. E. T. Carter, Judge, Hon. William S. Jordan, Judge, and Hon. Gus E. Mitchell, Jr., Judge, as a court of inquiry to hear and determine said election contest filed by petitioners; that in order to advise said court of the facts on which Arthur T. Burchette, Jess K. Newman, William C. Fugate and Creed Chadwell based their joint and separate motion to dismiss a stipulation signed by both the counsel for petitioners, and the counsel for the four (4) aforesaid contestees, was filed in said suit and copies were presented to the three aforesaid judges, said stipulation is as follows:

"On the afternoon of November 12, 1959, five copies of the Complaint were delivered to J. W. Blair, special officer of Lee County, Virginia, by attorneys for the complainants. Mr. Blair was instructed to serve these copies upon the five defendants in person. The officer left the attorney's office in Jonesville, Virginia, and went immediately to the Courthouse for Lee County, where he proceeded to deliver to four of the defendants a copy of the Complaint. At the time of the delivery of the Complaint to Arthur T. Burchette, Clerk, Mr. Burchette raised the question with Officer Blair that there was no such action pending and no such Complaint had ever been filed in his office. Later that afternoon, the Complaint was filed in the Clerk's Office for Lee County, Virginia, but this was after the service of the Complaint on the defendants, Arthur T. Burchette, Jess K. Newman, William C. Fugate and Creed Chadwell."

3.

On the 13th day of June, 1960 the Honorable defendants, as Judges of the Statutory Court, dismissed the contest action as to Arthur T. Burchette, Jess K. Newman, William C. Fugate and Creed Chadwell on the technical grounds that these four contestees were served with a copy of the complaint before the complaint was filed in the Clerk's Office of the Circuit Court of Lee County, Virginia, notwithstanding the fact that both the filing of the complaint and service of an exact and true copy of the complaint on each said contestees occurred on the same day and within ten days after the election and that the 4 contestees had filed their answer to the complaint. The court declined jurisdiction and outlawed the complaint upon a mere preliminary question or point of

procedure, and dismissed the complaint without ever hearing it, and ended the contest of an alleged fraudulent election and false return without ever going into an investigation or hearing the merits of the complaint as to four (4) aforesaid contestees.

Wherefore and forasmuch as your petitioners are otherwise without sufficient and adequate remedy, they pray that a peremptory writ of mandamus may be issued by this Honorable Court directed to the said E. T. Carter, Judge, Gus E. Mitchell, Jr., Judge, and William S. Jordan, Judge, commanding them to re-instate the complaint of the Petitioners upon the docket, and to proceed to hear and determine the cause presented by the complainants against Arthur T. Burchette, Jess K. Newman, Creed Chadwell, and William C. Fugate upon the merits and the proofs according to law.

HENDERSON KIRK
E. K. GEISLER
CARL H. EVANS
L. C. MARTIN
R. E. ORR
F. M. KIRK
C. R. TOMLINSON
KENNETH E. LIGHT
W. B. STEWART
RALPH B. PARSONS
EARL C. JOHNSTON
WORLEY A. MOORE
PAUL B. ROBBINS
THOMAS E. BROWN
PEGGY JO COX

GLEN WILLIAMS
Jonesville, Va.

HUGH P. CLINE
Norton, Va.

R. C. SHANNON
Appalachia, Va.

Counsel for Petitioners.

State of Virginia,
County of Lee, to-wit:

This day *Henderson Kirk, E. K. Geisler, Carl H. Evans,*

L. C. Martin, R. E. Orr, F. M. Kirk, C. R. Tomlinson, Kenneth E. Light, W. B. Stewart, Ralph B. Parsons, Earl C. Johnston, Worley A. Moore, Paul B. Robbins, Thomas E. Brown, and Peggy Jo Cox, the above named Petitioners, personally appeared before me, Curtis Flanary, a Notary Public in and for the County and State aforesaid, in my said County, and made oath that the things and matters stated in the foregoing Petition are true to the best of their knowledge and belief.

Given under my hand this the 1 day of Aug., 1960.
My commission expires July 24, 1963.

CURTIS FLANARY
Notary Public.

* * * * *

NOTICE.

To Hon. E. T. Carter, Judge; Hon. G. E. Mitchell, Jr., Judge, and Hon. William S. Jordan, Judge:

You are hereby notified that on the 31st day of August, 1960 at 10:00 A. M. of that day, we will make application to the Supreme Court of Appeals of Virginia at Staunton, Virginia, for a writ of mandamus on a petition verified by oath, a copy of which said petition is served herewith and attached hereto.

HENDERSON KIRK, ET ALS.
By Counsel.

GLEN M. WILLIAMS
Atty., Jonesville, Va.

R. C. SHANNON
Atty., Appalachia, Va.

HUGH P. CLINE
Atty., Norton, Va.

I, the undersigned, hereby waive service on me of the within notice and petition for mandamus and accept service this the 15th day of August, 1960 to have the same effect as though served by the Sheriff of my County.

E. T. CARTER.

I, the undersigned, hereby waive service on me of the within notice and petition for mandamus and accept service this the 17 day of August, 1960 to have the same effect as though served by the Sheriff of my County.

GUS E. MITCHELL, JR.

I, the undersigned, hereby waive service on me of the within notice and Petition for Mandamus and accept service this the 12 day of August, 1960 to have the same effect as though served by the Sheriff of my County.

W. S. JORDAN.

* * * * *

DEMURRER.

Come now the defendants, The Honorable E. T. Carter, The Honorable Gus E. Mitchell, Jr., and The Honorable William S. Jordan, and say that the petition filed in This Honorable Court against them is not sufficient in law, and for grounds of said demurrer state:

I.

The petition shows on its face that the motion to dismiss the election contest which petitioners and others had filed in the Circuit Court for Lee County, Virginia, came on to be heard before the three defendants who had been duly designated as a Statutory Court to hear and determine said election contest. That the motion to dismiss said contest complaint was duly heard in open Court upon a stipulation of fact agreed to by counsel representing all parties, in lieu of the testimony of witnesses. That in passing upon this motion, the three defendants heard, as the Statutory Court were required to consider the facts and the law applicable to election contest cases as set forth in the statutes as well as the general statutes with reference to the service of process. The decision upon this question of law and fact was a question of judicial discretion and the application of facts to the law.

II.

Because the petition is an effort to have This Honorable Court reviewed, the decision of the Statutory Election Con-

test Court by using a petition in mandamus where the statutes do not permit a petition for appeal or writ of error.

III.

Because there was nothing ministerial in the action or decision of these defendants in passing upon the motion to dismiss the complaint filed for the contest of said election.

Respectfully,

The Honorable E. T. Carter,
The Honorable Gus E. Mitchell, Jr.,
and
The Honorable William S. Jordan
By Counsel.

FRED B. GREER
LEWIS M. MULLINS
EDGAR BACON
Counsel for Defendants.

I certify that I served the above pleading by mailing true copies of same to Glenn M. Williams, Attorney, Jonesville, Virginia; R. C. Shannon, Attorney, Appalachia Virginia, and Hugh P. Cline, Attorney, Norton, Virginia; Counsel of Record for the petitioners on this 10 day of September, 1960.

FRED B. GREER,, Attorney.

* * * * *

ANSWER.

Come now the defendants, The Honorable E. T. Carter, The Honorable Gus E. Mitchell, Jr., and The Honorable William S. Jordan, and in answer to the Petition for Mandamus filed against them, say:

I.

These defendants are Circuit Judges of the Commonwealth of Virginia, and as such were duly designated by the Chief Justice of This Honorable Court as a Statutory Court to hear and determine an election contest case pending in the Circuit Court for Lee County, Virginia.

II.

In the said election contest case, several pleadings were filed by the contestees, among which was a motion to dismiss the complaint as to four of the officers whose election was contested because there was no proper service of the process upon these said officers as required by statute. Upon the question raised by said motion, there was an agreed statement of facts or stipulation entered into by the counsel representing both parties and duly filed in the papers in the suit. Upon this motion and stipulation of facts counsel for both parties filed with these defendants memorandum brief setting forth their understanding of the applicable law as these facts apply to same. Later, after conferences with counsel for both sides in the said election contest case, this Statutory Court duly convened in the courtroom of the Circuit Court for Lee County, Virginia, at Jonesville, Virginia, to hear and determine the question presented on the motion to dismiss and on this question alone. That at the time this cause was so set for hearing counsel for both sides stated to this Statutory Court that they did not want to summons witnesses when the motion might dispose of the case, and, therefore, they wanted the Statutory Court to convene and hear the case on this motion first.

III.

Pursuant to request of counsel, the Statutory Court did convene, and in open Court heard oral argument in addition to the written briefs filed by counsel for both parties, upon the question of fact and law presented by the motion and stipulation. After due deliberation and consideration of the questions of law and fact, this Statutory Court unanimously decided that there had not been any proper service of the contest complaint as to four of the office holders whose election was contested, and thereupon sustained the motion to dismiss the election contest complaint as to said four office holders. The said election contest complaint is still pending as to Ikey Parkey, the Commissioner of the Revenue in Lee County, Virginia.

IV.

Defendants show unto This Honorable Court that the decision which they reached was after due deliberation and consideration of all of the applicable statutes and general law called to their attention by counsel for both sides and that

said decision represented their composite judicial discretion as to the right and justice of the motion.

V.

These defendants are advised and, therefore, allege that it is not the function of a writ of mandamus to compel an inferior tribunal to change its judicial opinion, nor is it the function of a writ of mandamus to undo an action which has been already performed. It appears that the object of the petition in mandamus in this case is to obtain a review of the Statutory Court's action on said motion when the statutes with reference to an election contest case do not permit a petition for an appeal or writ of error.

IN CONSIDERATION WHEREOF, defendants pray that no writ of mandamus be issued and that the petition for same may be dismissed and that they may recover their costs in this behalf expended.

Respectfully,

The Hon. E. T. Carter,
The Hon. Gus E. Mitchell, Jr.
and
The Hon. William S. Jordan
By Counsel.

FRED B. GREER
EDGAR BACON
LEWIS M. MULLINS
Counsel for Defendants.

State of Virginia,
County of Scott, to-wit:

Personally appeared the undersigned E. T. Carter, Judge, who, being duly sworn, stated that the matters and things set forth in the above answer are true to the best of his information and belief.

E. T. CARTER.

Subscribed and sworn to before the undersigned Notary Public on this 10 day of September, 1960.

My commission expires 12-14-63.

E. T. CARTER, JR.
Notary Public.

I certify that I served the above pleading by mailing true copies of same to Glenn M. Williams, Attorney, Jonesville, Virginia; R. C. Shannon, Attorney, Appalachia, Virginia; and Hugh P. Cline, Attorney, Norton, Virginia, Counsel of Record for the petitioners on this 10 day of September, 1960.

LEWIS M. MULLINS, Attorney.

A Copy—Teste:

H. G. TURNER, Clerk.

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