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Mandamus in Election Action

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2) He had failed to provide her with sufficient clothes;

3) He was consorting with a woman not his wife;

4) He would stay away from home at nights, often without the wife's knowledge of his whereabouts;

5) He had suggested that he would procure men for her for prostitution purposes, which under subsection 5, section 18-255, Code of Virginia of 1950, was contempt since adultery is a crime in Virginia (and such a suggestion would be clearly considered as an interference with his wife's probation); and,

6) He had told her that he was tired of supporting her and had made the prostitution suggestion as a possible means for her self-support.

The trial court below held that these matters were full and complete and would support the conviction for contempt. Had some third party, knowing of the wife's probation,[5] solicited her for a career in prostitution, he could be held in contempt. Yet the Supreme Court of Appeals reversed the trial court, finding these evidentiary details insufficient.

It is submitted that the trial court had authority both inherently and in accordance with section 18-255(5), Code of Virginia 1950, to punish summarily any person for disobedience of a court order, and that it was correct in its application of the law to the facts. The Supreme Court of Appeals of Virginia, by its extensive reliance upon statutes inapplicable to the facts and issues presented, was not responsive to those issues and has erroneously reversed the correct result reached by the trial court.

S. J. B.

PROCEDURE—MANDAMUS IN ELECTION ACTION

In two recent cases[1] the Supreme Court of Appeals of Virginia has decided that a writ of mandamus will not lie to order election

[5] Calamos v. Commonwealth, 184 Va. 397, 71 S.E.2d 159 (1945).

[1] Hall v. Stuart, 198 Va. 315, 94 S.E.2d 284 (1956); Whited v. Fugate et. al., 198 Va. 328, 94 S.E.2d 292 (1956).

judges and clerks of a precinct to appear and to count certain disputed mail ballots in a county election, but that mandamus will lie to compel the commissioners of elections to declare the results and to make the proper certification.

The case of *Hall* v. *Stuart* arose after the election of November 8, 1955, when it appeared that one of the candidates lost to his opponent by one vote. This made a dispute which had arisen among the election judges and clerks in Dorton precinct in Russell County particularly important. The dispute concerned the validity of thirty-two mail ballots.

After a one and one-half hour disagreement, the judges decided to set aside the disputed ballots and have the Commissioners of Election pass on their validity. The existence of such an agreement was the subject of conflicting testimony in court, but even if such an agreement had been reached, it would have been illegal and ineffective. The Court of Appeals stated that the duties of the Commissioners of Election are "to take the return as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal."[2]

The losing candidates for offices in the election went into the Circuit Court of Russell County and requested a writ of mandamus to compel the judges and clerks to complete the counting of the thirty-two disputed ballots. The Circuit Court granted mandamus, but on appeal was reversed by the Supreme Court.

The petitioners (for the writ of mandamus) relied heavily on the case of *Moore* v. *Pullem,*[3] which held that the judges of election at a precinct could be compelled by mandamus to discharge the mandatory ministerial duty of counting such of the ballots cast under the absent voter's act as had been deposited by legal voters. However, the Supreme Court did not agree with this argument, but insisted that "that case presented a different situation. . . ."[4] The court distinguished the cases on two grounds: 1) In *Moore* v. *Pullem,* the judges had refused to count *any* of the mail ballots

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[2] Lewis v. Commissioners of Marshall County, 16 Kan. 102, 108, 22 Am.Rep. 275, 279 (1876).

[3] 150 Va. 174, 142 S.E. 415 (1928).

[4] Hall v Stuart, 198 Va. at 326, 94 S.E.2d at 291 (1956).

rather than just disputed mail ballots; and, 2) The petition for mandamus in *Moore* v. *Pullem* was promptly filed before the general results were tabulated. These distinctions, especially the first, seem to be reasonable, as there is certainly a difference between a refusal to count any of the mail ballots and a failure to count only those mail ballots which are disputed by the judges and clerks.

With the case of *Moore* v. *Pullem* clearly distinguished, the Supreme Court continued and, following a well-defined practice, refused to grant the extraordinary legal writ of mandamus unless the petitioners could prove, to the satisfaction of the court, their need for it. Since mandamus is an extraordinary legal remedy, it would seem that the Supreme Court needed only one basis for refusing to grant it, but in this case, the court stated two reasons for its refusal to grant the writ: 1) the act involved the exercise of judgment and discretion, and 2) mandamus will not lie when the party requesting it has another adequate remedy.

The court's first basis for refusal of this writ is clearly based on the assumption that this writ was directed at a discretionary act. The court stated:

> . . . the judges of the election would thereby be compelled to perform a task . . . which involves the exercise of judgment and discretion, not a mere ministerial act within the ordinary function of a writ of mandamus.[5]

If this were actually an act of discretion, there would be no dispute of the court's determination here, as all authorities agree that mandamus will never lie to compel a discretionary act. But was this writ of mandamus sought to command the performance of an act of discretion or was it rather to command the judges to complete the ministerial duty of *exercising* their discretion?

It would seem that this writ was directed at the ministerial act of exercising discretion. In the case of *Lewis* v. *Christian*,[6] decided in 1903, the Supreme Court of Appeals of Virginia held that a duty does not become less ministerial because the officer must determine the existence of certain facts which make it necessary for him to act, and mandamus is the proper remedy to enforce the performance of such a duty. Thus, in applying the court's holding to the

[5] *Ibid.*

[6] 101 Va. 135, 43 S.E. 331 (1903).

present case, it could be argued that the duty of the judges and clerks did not become less ministerial because they had to determine the validity of the mail ballots before they counted them. On the basis of this 1903 case, it seems possible that the Supreme Court could have held this was a ministerial rather than a discretionary act.

The second reason for the court's refusal to grant mandamus seems more justifiable to this writer. An examination of the Code of Virginia reveals the remedy available to the petitioners. Sections 24-430 et. seq. of the Code provide that the returns of an election of this type shall be subject to review and inquiry by a three judge court on the complaint of fifteen or more qualified voters. The Code further provides for the filing and service of the complaint, filing of a counter complaint, taking of depositions, costs, etc. It would seem that most authorities[7] would agree with the court when it said:

> . . . where there is a statutory remedy not only plain and adequate, but by its terms applicable to the situation, and affording a method of settling the dispute according to the principles of justice and right, the extraordinary remedy of mandamus should not be used.[8]

However, it should be pointed out that there are very good arguments on the other side of this question, and it seems quite possible that the Supreme Court could have justified reaching an opposite result in determining this issue. Was this statutory remedy so "plain and adequate" for the appellees that it would justify the refusal of mandamus? In their brief, counsel for the appellees stated, "That the burden of contesting the election . . . is a more elaborate and extensive, and more expensive proceeding (than bringing the action for mandamus)." Unfortunately, this statement was not expanded or explained in their brief, but it seems very possible that the Supreme Court, if they had wanted to do so, could have expanded on this argument and followed it.

The fact that the ten day period[9] in which an action can be brought under the Code provisions had already run on the appellees

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[7] 55 C.J.S. §17, p. 41. See Dovel v. Bertram, 184 Va. 19, 34 S.E.2d 369 (1945); Powell v. Smith, 152 Va. 209, 146 S.E. 196 (1929).

[8] 198 Va. at 325, 94 S.E.2d at 291.

[9] Va. Code §24-430 (1950).

would probably not affect the outcome of this case in any way. The appellees apparently attempted to have the court direct its attention to one narrow issue in this election—the counting of the thirty-two mail ballots. The court, however, chose to ignore the appellee's narrow issue and seems to say that, in order to accomplish their purpose, the appellees should have contested the election according to the Code procedure.

In the same day that the decision of *Hall* v. *Stuart* was handed down, the Supreme Court also rendered its decision in the case of *Whited* v. *Fugate.* In this companion case the winning candidate in the election sought writ of mandamus to compel the commissioners of election to perform their ministerial duties of declaring the results and of making the proper certification, notwithstanding the fact that such certification would have to be made without consideration of the thirty-two contested ballots discussed in the former case.

Here the Supreme Court granted the writ of mandamus. This decision seems to be in keeping with the practice of granting the writ when it is directed at a purely ministerial matter for which no other adequate remedy exists. The court's comment in *Moore* v. *Pullem, supra,* seems very applicable in this case also:

> It cannot be fairly questioned that when public officials charged with a ministerial duty fail to perform it at the time required by law, they can be compelled by mandamus to discharge such duty as soon thereafter as is possible. The neglect of such a duty at the right time does not relieve those at fault from its subsequent performance, if this is essential to preserve substantive rights.[10]

It appears that the case of *Hall* v. *Stuart, supra,* could have been decided either way by the court. This writer takes issue with the court's position on the question of whether this is a ministerial or discretionary duty. Although there are some authorities[11] in support of the court's determination, they are not from this jurisdiction, and if the case[12] from this jurisdiction had been applied, the opposite result might have easily been reached by the court.

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[10] 150 Va. at 198, 142 S.E. at 422.

[11] People ex rel. Griffith v. Bundy, 107 Colo. 102, 109 P.2d 261 (1941); In re Validation of Bonds of McNeill Special Consolidated School District, 331 Mo. 1006, 56 S.W.2d 67 (1932).

[12] See Note 6, *supra.*

Turning to the determination of the existence of another adequate remedy for the appellees, it seems that this was clearly a question for the court which had not been previously determined. The court reached a result which this writer believes it can justify; however, it seems reasonable to say that the court might have reached the opposite result and justified it by an expansion and more thorough examination of the appellee's argument that the statutory remedy was not adequate for this situation.

In the case of *Whited* v. *Fugate, supra,* we seem to have a clear case for the application of a writ of mandamus. Here the court said: "For the reasons stated in the case of *Hall* v. *Stuart, supra,* . . . the petition . . . for a mandamus should have been granted," and with no further discussion granted the mandamus. This would certainly lead one to believe that the court is implying that here is a "clear" situation for the application of mandamus.

These two cases seem to help clarify the court's position on the granting of mandamus. The first case seemed to come close to justifying a need for mandamus, but the argument for it was not strong enough for the Supreme Court. The second case presented a need, sufficiently strong, to have the court grant the writ.

T. H. F.

PROCEDURE—RULE 3:21

In a recent case,[1] the Virginia Supreme Court of Appeals has interpreted for the first time Rule 3:21 of the Rules of Court. The interpretation made by the Court was one of a most restrictive nature and, judging from the facts of the case, may have thwarted justice. It is true that the Rule was given a definitive interpretation, but the binding analysis, as fixed by the Court, was not warranted in the face of the liberal policy which is the trend in this country whenever procedural problems are involved. Rather than proceed under this modern view, the highest Court in Virginia has chosen instead to remain with the conservative element.

In the present case, which arose from an automobile accident, the final judgment was pronounced and entered on March 17,

[1] Harvey v. Chesapeake & Potomac Telephone Co., 198 Va. 213, 93 S.E.2d 309 (1956).