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RICHMOND, VIRGINIA

IN THE
Supreme Court of Appeals
of Virginia
AT RICHMOND

Record No. 4259

GROVER C. CRABTREE,
Petitioner

v.

EMERY DINGUS and TROY SALYERS, Adminis-
trators of the Estate of David Crockett Mullins, deceased,
Defendants

M. M. LONG,
St. Paul, Virginia.

GLYN R. PHILLIPS,
Clintwood, Virginia.

HANSEL FLEMING,
Clintwood, Virginia.

A. G. LIVELY,
Lebanon, Virginia.

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Defendants

*To The Honorable Justices of The Supreme Court of
Appeals of Virginia:*

The Respondents, Emery Dingus and Troy Salyers, Administrators of the Estate of David Crockett Mullins, deceased, appear specially to the motion and petition of Grover C. Crabtree to reinstate, reopen and rehear writ of error, Record No. 4259, and object to the filing of said motion and petition, and move to vacate and dismiss the same, because there is no authority in law for filing said motion and petition, and because the Supreme Court of Appeals has no right or authority under the law to con-

sider the matters alleged in said petition or to grant any relief requested by said petition or to reinstate, reopen or rehear the writ of error granted in said case, or to revoke, set aside or in any wise change its order entered in said cause on the 28th day of January, 1954, dismissing said writ of error and supersedeas, and striking the case from the docket, which said order is set forth on page 24 of the said motion and petition of Grover C. Crabtree, and of this the said Emery Dingus and Troy Salyers, Administrators of the Estate of David Crockett Mullins, deceased, pray the judgment of the court.

Emery Dingus and Troy Salyers,
Administrators of the Estate
of David Crockett Mullins, de-
ceased.

By Counsel,

M. M. LONG,
St. Paul, Virginia.

GLYN R. PHILLIPS,
Clintwood, Virginia.

HANSEL FLEMING,
Clintwood, Virginia.

A. G. LIVELY,
Lebanon, Virginia.

ARGUMENT ON SAID OBJECTION AND
MOTION

The pamphlet designated "Record No. 4259" is purely ex parte, and was prepared solely by counsel for Petition-

er, Grover C. Crabtree, without notice to counsel for the Administrators of David Crockett Mullins; and, while it is thought to have left out material matter, it does show that on December 16, 1953, the Clerk of the Supreme Court of Appeals of Virginia, in accordance with the requirements of the law, Code, Section 8-482, notified S. H. and Geo. C. Sutherland, Attorneys for said Grover C. Crabtree, of the amount of the estimated cost for printing the record; that said cost was not paid within the time required by law, and that on account of the failure to pay said cost within the time required by law, the Supreme Court of Appeals, by its order entered on the 28th day of January, 1954, ordered that the said writ of error and supersedeas be dismissed and the case stricken from the docket.

It, therefore, appears that the requirements of the law were fully and completely and correctly complied with, and that the only question upon this motion is whether or not the Supreme Court of Appeals is vested with the authority to reinstate, reopen and rehear said appeal or writ of error. It is respectfully submitted that it has no such authority. Under Rules of Supreme Court of Appeals of Virginia, page 38, section 5:6, under the heading, "Reinstatement of Appeals", it is said:

"The reinstatement of any appeal which shall have been dismissed shall be governed by the provisions of Code, Section 8-499."

Code, Section 8-499 is as follows:

"Section 8-499. When dismissal final; when reinstated.—After the dismissal of an appeal, writ of

error or supersedeas no other appeal, writ of error or supersedeas shall be allowed to or from the same judgment, decree or order. When an appeal, writ of error or supersedeas is dismissed by reason of the non-payment of the writ tax within the time required by law, the court at its first place of session after such dismissal may on motion of any party for good cause shown and upon payment of such tax set aside the dismissal; and there upon the appeal, writ of error or supersedeas may be perfected as though no such dismissal had taken place. A motion under this section shall be made only after reasonable notice to the adverse party or his counsel. (Code 1919, Section 6356.)”

This section provides, as we understand it, that the court may reinstate, under certain circumstances, a writ or error or supersedeas which has been dismissed by reason of the non-payment of the writ tax within the time required by law. No provision is made for the reinstatement of writ of error or appeal dismissed for failure to pay the estimated cost of printing the record within the time required by law. That was the sole reason for the dismissal of the writ of error in this case.

It is, therefore, respectfully submitted that the court is without authority of law to reinstate, reopen or rehear said writ of error, and that the motion and petition to reinstate, reopen and rehear said writ of error should be dismissed, and any relief thereunder should be denied.

Respectfully submitted,

M. M. LONG,
St. Paul, Virginia.

GLYN R. PHILLIPS,
Clintwood, Virginia.

HANSEL FLEMING,
Clintwood, Virginia.

A. G. LIVELY,
Lebanon, Virginia.

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EMERY DINGUS and TROY SALYERS, Adminis-
trators of the Estate of David Crockett Mullins, deceased,
Defendants

*To The Honorable Justices of The Supreme Court of
Appeals of Virginia:*

The said Respondents, Emery Dingus and Troy Sal-
yers, Administrators of the Estate of David Crockett
Mullins, deceased, without waiving their objection to the
jurisdiction of the court to grant any relief upon the
motion and petition of Grover C. Crabtree, being des-
ignated as "Record No. 4259", but relying and insisting
upon same, if held to further answer, say:

F A C T S

The transcript of the proceedings at the trial will clearly show that Mr. S. H. Sutherland did not play a minor role in the trial of this case. He participated actively in the trial, and, as is not unusual with this able and persistent attorney, had the last say of any lawyer in the case, when, on page 300 of the transcript, he informed the court of the desire to move to set aside the verdict, and for permission to state the grounds at a later date.

The matters set forth in the "Record No. 4259" indicate that he took an active part in the preparation of the appeal and in its presentation to Mr. Justice Smith. The designation of the portions of the record desired to be printed appears to have been prepared and forwarded to the Clerk of the Supreme Court of Appeals by Mr. S. H. Sutherland. It is thought that designation should have been included in any presentation of the matter, as well as any letter, if any, accompanying it. However, it is assumed that these papers are in the record in this case, and that they will have, as they doubtless already have had, the consideration of the court.

It is our understanding that this designation is signed by Mr. S. H. Sutherland, or S. H. and Geo. C. Sutherland, as the Clerk of the Court, in the letter set forth on page 18 of the said "Record No. 4259" refers to said designation and is addressed to S. H. and Geo. C. Sutherland. That letter indicates that no copy was sent to any one else.

On the same day, December 16, 1953, the Clerk of the Supreme Court of Appeals notified S. H. and Geo. C. Sutherland, counsel for Grover C. Crabtree, of the esti-

mated cost of printing the record, and of the fact that this amount had to be paid within thirty days. That letter likewise indicates that no copy thereof was sent to any one else.

On January 25, 1954, after the thirty days had expired, Messrs. Kiser, Vicars & Kiser wrote to the Clerk of the Supreme Court of Appeals, inquiring about the estimated cost of printing the record, and a copy of that was sent to S. H. Sutherland. By letter dated February 1, 1954, the Clerk of the Supreme Court, answering the letter of January 25, 1954, wrote Kiser, Vicars & Kiser that the case had been dismissed on account of the failure to pay the estimated cost. A copy of that letter was sent to S. H. and Geo. C. Sutherland.

The correspondence indicates that all of the facts in connection with the case were presented to and considered by the Supreme Court of Appeals prior to its entry of the order of January 28, 1954, dismissing the writ of error, and it is assumed that all matters in connection with the transaction were placed before the court and duly considered.

ARGUMENT

It is respectfully submitted that the court's action was clearly in accordance with the law and rules of procedure, and should not be disturbed.

(1). Was the notice of S. H. and Geo. C. Sutherland, or to S. H. Sutherland, he being counsel for Grover C. Crabtree in this case, a compliance with the statute, Code Section 8-482? It is argued in the brief that this requirement of the statute means that the Clerk must notify all

of counsel for the plaintiff in error of the amount of cost required to print the record. Such an argument is not consistent with the language of the statute, nor is it in accordance with our understanding of what is usually done, or the procedure usually followed.

In this case, the Clerk did the usual and natural thing; he notified S. H. Sutherland, who, as the record shows, was an active counsel of Grover C. Crabtree, and whose interest and activity in the case was manifest and who immediately preceding this notification had designated the portions of the record to be printed. This was undoubtedly an adequate and complete compliance with the statutory requirements, and is in answer to the first question propounded under the heading, "Issues Involved" on page 4 of the brief.

(2). Was this notice and notification prematurely given because the case had not been then legally docketed? It is respectfully submitted the answer to that question is that the case was then legally docketed, and the notice was not prematurely given. The docketing of this case was, as we understand it, in accordance with the law, the rules of the court and the ordinary rules of procedure. Code Section 8-490 provides that upon the granting of a writ of error the case shall be docketed, and then, as we understand it, after it is docketed, the Clerk of the court issues process, and that procedure, as we understand it, is in accordance with the Rules of the court.

In *Burkes Pleading & Practice*, 4th Ed., at page 831, Section 425, it is said:

"After writ of error is granted, it is the duty of the Clerk of the Appellate Court to issue copy of the order allowing the same and to certify the fact of

the allowance thereof to the lower court. The case is docketed by the Clerk of the Appellate Court, and he issues summons against the parties interested, other than the petitioner, that they may be heard, and also issues any supersedeas that may be awarded."

In 1 M. J., page 600, Section 156, it is said:

"The statutes require the appeal to be docketed and in Virginia the causes are heard in the order in which they mature, except that the court may for cause hear cases out of turn."

The authorities cited for this statement is Code Section 8-490 and Rule 3 of the Supreme Court of Appeals.

Rule 3 of the Supreme Court of Appeals, so far as thought to be pertinent, provides:

"(A). *Commencement of Action.*—An action shall be commenced by filing in the Clerk's Office a motion for judgment and by paying the required writ tax and deposit against cost. The action is then instituted and pending as to all parties defendant thereto."

The said rule then provides for the issuance and service of process upon the parties.

It is respectfully submitted that, under the law and under the rules of procedure, a case is properly docketed in the Supreme Court of Appeals at any time after the writ of error is granted, and the argument to the effect that a case can not be docketed until process has been executed and returned is unwarranted and unsound.

It is respectfully submitted that Petitioner, Grover C. Crabtree, is not entitled to any relief sought in his motion and petition to reinstate, reopen and rehear the writ of error in this case, and that his said motion and petition should be dismissed, and the action taken by the Supreme Court of Appeals in its order entered on the 28th day of January, 1954, should be upheld.

Respectfully submitted,

Emery Dingus and Troy Salyers,
Administrators of the Estate
of David Crockett Mullins, de-
ceased.

By Counsel,

M. M. LONG,
St. Paul, Virginia.

GLYN R. PHILLIPS,
Clintwood, Virginia.

HANSEL FLEMING,
Clintwood, Virginia.

A. G. LIVELY,
Lebanon, Virginia.

I, A. G. Lively, of counsel for Emery Dingus and Troy Salyers, Administrators of the Estate of David Crockett Mullins, deceased, do certify that I have this day mailed a copy of the foregoing objection, motion and notes of argument to S. H. and Geo C. Sutherland, Clintwood, Virginia, and to Kiser, Vicars & Kiser, Wise, Virginia, they being counsel of record for the Petitioner, Grover C. Crabtree; and I do further certify that the original is being mailed to Hon. H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia, Richmond, Virginia.

Given under my hand this 19 day of February, 1954.

A. G. LIVELY
Attorney

