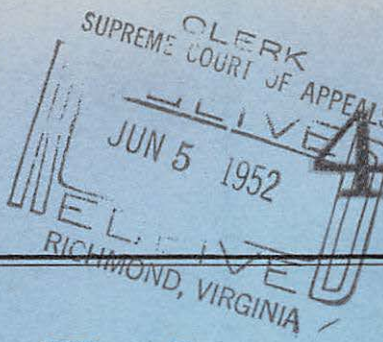

In The Supreme Court of Appeals of Virginia

ALAN L. DEAN, ET AL.,

Petitioners,

vs.

ROCCO PAOLICELLI, ET AL.,

Respondents

ANSWER OF RESPONDENTS TO PETITION FOR APPEAL

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RESPONDENTS' REPLY BRIEF

To the Honorable Chief Justice and Honorable Justices of the Supreme Court of Appeals of Virginia:

By agreement of counsel, and upon authority of this Court, the petition for a writ of error filed by the petitioners Alan L. Dean et als. for an appeal, and the answer filed thereto by Rocco Paolicelli et als., opposing the granting of said appeal, would be heard as if the case were on appeal. Therefore, the respondents in this case will divide their brief into two parts. The first part will deal with reasons why the petition should not be granted; and the second part will deal with the respondents' assignments of cross-errors as if the appeal had been granted.

It is our understanding that if the petition for an appeal is denied by this Court it is the purpose of the Court to write an opinion as if the case were before the Court on appeal.

PART I: REASONS WHY APPEAL SHOULD NOT BE GRANTED

The respondents, Rocco Paolicelli, Howard W. Sharpe, Harvey A. Williams, Eli Luria, Raymond A. Miller, and James E. Millar, in answer to the petition for appeal filed herein, say that the appeal ought not to be granted for the following reasons:

First, counsel for respondents would like to say that the answer herein is going to be brief because of the opinion filed by Honorable Walter T. McCarthy, Judge of the Circuit Court of Arlington, who decided the case which opinion is part of the record in this case.

In that opinion, Judge McCarthy ably set forth the reasons for his decision after an exhaustive independent search of the authorities, some of which were supplemental to those relied on by the respondents in the lower Court, and all of which will be relied upon in this Court by the respondents.

This case narrows itself down to one fundamental question, and that is:

Should the Chairman of the County Board and Clerk of the County Board execute illegal warrants, and should the County Treasurer pay money on those illegal warrants to the defendant Alan Dean, because, *ipso facto,* he is not a legal County Board Member of Arlington County, in that he is a Federal employee, drawing a large salary and receiving other emoluments from the Federal Government?

Section 2-27, Chapter 4, of the Code of 1950, in part provides:

> "No person shall be capable of holding any office or post . . . who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the Government of the United States, who is in the employment of such government, or who

receives from it in any way any emolument whatever, and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, *ipso facto* vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city or town thereof."

The genesis of this statute goes back to the Session of the General Assembly of the fall of 1788. The Court, I am sure, knows full well that there was considerable heated and acrimonious debate in the Virginia Constitutional Convention of 1788, which Convention lasted 23 days. The Court knows that the advocates for ratifying the Federal Constitution were led by George Washington, who directed the proceedings from Mount Vernon, through his lieutenants John Marshall, James Madison and others. The opposition to the ratification of the Federal Constitution was led by Patrick Henry and George Mason, principally because there was, or they thought there was, in that Constitution the all encompassing power of the Federal Government, which, if not restrained by the Bill of Rights, which was then in the First Constitution of Virginia of 1776, would ultimately destroy the liberty and the freedom of the American people, and rend asunder the rights of the States, which the States had attempted to reserve to themselves in the Federal Constitution. On the promises of George Washington, communicated to Henry and Mason by his lieutenants, Marshall and Madison, that he, Washington, and the other advocates for the ratification of the Federal Constitution, that the Bill of Rights would later be put into it, it was then, and only then, that George Mason and Patrick Henry assented to the ratification of the Federal Constitution by the Constitutional Convention for the Commonwealth of Virginia; and even then, on these promises and concessions, it was ratified by a very close

vote. These amendments were proposed by the Virginia Legislature in November, 1788. They were passed and later adopted by the necessary number of States, and became the first ten amendments to the Federal Constitution and what is known as the Bill of Rights.

Section 14 of the Bill of Rights of the Constitution of Virginia says:

> ". . . That no government separate from or independent of the government of Virginia ought to be erected or established within the limits thereof."

That section of the Bill of Rights, along with Section 2-27 of the Code of Virginia, sought to prevent the very thing that has taken place in Arlington County. In Arlington County we have the spectacle of a so-called Non-Partisan Government, with three members, a majority, Federal employees. That also holds true with the School Board. These two bodies appropriate the money and spend the money, and conduct the governmental philosophy of the local government. In doing so, they have their own organization of Federal Employees, and their policy is influenced and dictated by the superior Federal office holders in Washington. In the course of four years, in which they have gained control of the County Board, they have raised the taxes five times, have been responsible for floating twenty million dollars, or more, of bonds, and not satisfied with this, are now arguing for more taxes and more bonds—"Like father, like sons."

The Court knows that during those 23 days in June, 1788, in which the Federal Constitution was debated, taken apart and examined by the most learned men of the English speaking people in existence at that time, or at any time before, and who have not been excelled since, when the debate was ruthless and sometimes at the cost of crushing and destroying life-long friendships among those who had

launched this new government in America, both upon the battlefields from Quebec to Kings Mountain and Yorktown, and in the halls of legislation.

As a result of that fight on the question whether or not to ratify the Federal Constitution, it was proposed in the Legislature in November, 1788, under the guiding hand of Patrick Henry, an Act which was entitled:

> "An Act to disable certain officers under the Continental Government from holding offices under the authority of the Commonwealth."

This Act was passed on the 8th day of December, 1788, and was as follows:

> "I. Whereas the good people of this Commonwealth in convention assembled did, on the twenty-fifth day of June last, ratify a constitution for the government of the United States of America, the operations of which will soon commence;
>
> "II. And whereas it is adjudged expedient and necessary that all those who shall be employed in the administration of the said government ought to be disqualified from holding any office, or place whatsoever, under the government of this Commonwealth;
>
> "Be it therefore enacted by the General Assembly, that the members of the Congress of the United States, and all persons who shall hold any legislative, executive, or judicial office, or other lucrative office whatsoever, under the authority of the United States, shall be ineligible to, and incapable of holding any seat in either house of the general assembly, or any legislative, executive or judicial office, or other lucrative office whatsoever, under the government of this Commonwealth:
>
> "Provided, nevertheless, that such disqualification shall not extend to militia officers, or the magistrates of county courts."
>
> 12 Henning's Statutes at Large, p. 694.

This statute, as the Court knows, has been amended from time to time, to include generally other classes of Federal employees and those persons who receive emoluments from the Federal Government which are set forth in Section 2-29, of Chapter 4. And among those exceptions is Sub-Section 11, which provides:

> "To prevent any United States Government employee, otherwise eligible, from holding any office under the government of any county in this State having a population in excess of three hundred inhabitants per square mile according to the last United States census, or any city or county adjoining any county having a population in excess of two thousand inhabitants per square mile."

The respondents herein say that that section is unconstitutional because it is not a general law, and it violates the Constitution of Virginia. The petitioners urge and put forth the untenable argument that Sub-Section 11 is Constitutional but that Section 2-27 is unconstitutional.

Now, the reason that counsel for petitioners advance the theory that Section 2-27 is unconstitutional is because they say it is in conflict with Section 32 of the Constitution of Virginia; and, this is the sole fundamental question which they rely upon in asking this Court to grant them an appeal and reverse the judgment of the lower Court.

Section 32 of the Constitution provides:

> "Every person qualified to vote shall be eligible to any office of the State, or in any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except further that the requirements of this section as to residence and voting qualifications shall not apply to the persons to fill posi-

tions or posts requiring special technical or professional training and experience.

"Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

Now, Section 56 of the Constitution says:

"The manner of conducting and making returns of elections, of determining contested elections, and of filling vacancies in office in cases not specially provided for by this Constitution, shall be prescribed by law, and the General Assembly may declare the cases in which any office shall be deemed vacant where no provision is made for that purpose in this Constitution."

I need not suggest to this Honorable Court, who are the interpreters of the Constitution of Virginia, that when this Court passes upon a constitutional question it takes the whole Constitution into account, and not just one section of it. In other words, when a constitutional question is before this Court, the Court is presumed to know the whole Constitution, and in short, the Court goes to bed with the Constitution. When a constitutional question is passed on by this Court, certainly it means that all constitutional questions have been reconciled and taken into consideration.

Surely, under Section 56 of the Constitution, the Legislature had authority to enact Section 2-27 of the Code, supra; it also had authority to do so under Section 14 of the Bill of Rights, supra, of the Virginia Constitution. Section 2-27 of the Code says that the office is *ipso facto* vacant, as is the case here of the petitioner Alan L. Dean, who is employed by the United States Government.

So where does it leave us at this point? It is this:

Section 2-27 has been passed on as constitutional by this Court in at least four cases, maybe in five; and in each case

the language of Section 32 was not only in the Constitution of 1902, but in the Constitution of 1867. The Constitution of 1867 had the same language as Section 32 of the Constitution when the Court rendered its opinion in the case of *Bunting* v. *Willis,* 27 Gratt. 144, decided in 1876, in which it held that a person elected sheriff, who was then in the employment of the Federal Government, could not qualify as sheriff because he was holding an office of profit and emolument under the Federal Government.

In addition to the case of *Bunting* v. *Willis,* there is the case of *Commonwealth* v. *Rouse,* 163 Va. 841, and *Lynchburg* v. *Suttenfield,* 177 Va. 212; and in addition to those cases, there is *Gallalee* v. *Calvert,* 1 Va. Dec. 561, in which Judge Lewis wrote the opinion for the Court, and which was generously discussed and analyzed by Judge McCarthy.

Certainly it would seem to be almost on the ridiculous side to think that over a period of nearly 80 years that this Court, made up of many judges, most of whom have departed this life, would make a mistake in all of these cases, in holding Section 2-27 to be constitutional and forgetting all about, and completely overlooking Section 32 of the Constitution of Virginia, which is so strenuously relied upon by counsel for the petitioners. If that were true, that would be one of the strangest interludes with which the Court has ever been confronted.

We now come to the question of whether Sub-section 11, of Section 2-29, supra, is constitutional or unconstitutional. The petitioners for this appeal say that it is constitutional. The respondents say that it is unconstitutional, because it is a special and local law, and the only thing that attempts to take it out of special and local legislation is the so-called population classification.

Judge McCarthy in his opinion, in holding this section unconstitutional because it is special and local law, in viola-

tion of the Constitution of Virginia, relied upon the cases of *County Board of Supervisors* v. *American Trailer Company,* 193 Virginia, p. 72, and cases cited therein, and *John Locke Green, Treasurer* v. *County Board of Arlington County, Virginia,* reported in 193 Va. p. 284, and cases cited therein.

In this connection, what is reasonable about the statute in saying that in a county of this State having a population in excess of 300 to the square mile, or in a city or county adjoining any county having a population in excess of 2000 inhabitants per square mile, Federal employees may hold any office under the Government of such a city or county? What is the distinction between the governmental needs of a county having such population qualifications, to-wit, 300 per square mile, and those of a county next to it having, say, 275 persons per square mile, which would permit Federal employees to hold office in the former, but would leave them ineligible to hold governmental office in the latter? It is like saying that Black Angus cattle can be raised only in a county with a density of population of 300 per square mile, or fox terrier dogs can be kept in such a county, whereas in other counties with a different population quotient they are prohibited. On the face of it, the exception shows conclusively that the statute is arbitrary and unreasonable, and was passed purely for the benefit of Arlington County.

When this case is stripped of all of the ramifications of confusing issues advanced by counsel for the petitioners, it resolves itself down to the foregoing simple legal points which I have attempted to outline to the court briefly.

Touching specifically upon petitioners' first assignment of error, it is noted that counsel for petitioners complain that if the judgment of the Circuit Court takes effect as a final judgment, not less than three (a majority) of the five members of the County Board of Arlington would ipso

facto lose their offices, because three members of the Board are Federal employees. Counsel for petitioners are much exercised about the so-called "disruption and confusion" in the county government. It might be suggested to this Honorable Court that such disruption and confusion is brought about because of the incompatibility of holding Federal jobs by day and County jobs by night. The remedy could very easily be had, simply by the three illegal members resigning their positions as Board members. But rather than do this, they are perfectly willing, in addition to the tremendous tax load and debt load that they have helped incur, to continue the "disruption and confusion" in county governmental affairs—to stay in office at any cost.

The contention of the petitioners that Section 2-27 is a special act by reason of the amendments thereof is an argument through which they lift themselves up by their own bootstraps, apparently contending that if they did a wrong a sufficient number of times, it thereby becomes all right. They cite no authority for this contention.

If this method of passing special acts were allowed to be used, it would circumvent the purposes of Section 64 of the Constitution. In addition, if this rule were applied to the laws concerning the selection of juries in Virginia, the amendments of such laws would result in our having special laws in regard to the selection of the juries of Virginia.

In Corpus Juris Secundum, Vol. 67, p. 149, it is stated:

> "Where the constitution or statutes declare that persons holding one office shall be ineligible for election or appointment to another office, either generally or of a certain kind, the prohibition has been held to incapacitate the incumbent of the first office to hold the second, so that any attempt to hold the second is void."

Also, it is stated:

> "Where, however, it is the holding of two offices at the same time which is forbidden by the constitution

> or statutes, a statutory incompatibility is created similar in its effect to that of the common law, and as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited operates ipso facto absolutely to vacate the first."

In that connection, supplementing that judicially recognized principle of law is the case of *Shell, Judge,* v. *Cousins and Others,* reported 77 Va. 328. In that case, an elected Sheriff accepted a second office, and the Court held that he vacated the Sheriff's office.

Digressing for a moment, counsel for the respondents feel almost certain that a petition for a mandamus filed in this Court brought against Honorable Walter T. McCarthy, Judge of the Circuit Court of Arlington County, would lie to compel him to fill the vacancies and issue writs of election, because the three incumbents are ipso facto disqualified, incapable and ineligible to hold the offices, as they are Government employees. We believe that the case of *Smith* v. *Kelley,* 162 Va. 145, will support this contention. Also the case of *Shell, Judge,* v. *Cousins and others,* supra, and the case of *Frantz* v. *Davis,* 144 Virginia 320, are in point to support a petition for mandamus to fill vacancies.

With respect to the right of the Legislature to enact legislation to fill vacancies and to say what offices are vacant, under authority of Section 56 of the Constitution, the cases of *Frantz* v. *Davis,* supra, and *Fugate* v. *Weston,* 156 Va. 107, are in point.

Along this line of reasoning is the case of *Burke* v. *Hinton,* 77 Va. p. 1, in which the Court said:

> "The Constitution of Virginia, Article 5, Section 2" (this was in the Constitution of 1867, now carried into the Constitution of 1902 as Section 56) "authorizes the Legislature to prescribe the manner of filling all vacancies in office, and to declare when an office is vacant, in cases not specifically therein provided for, and makes no exception as to the office of judge."

Specifically, regarding counsel's petition for appeal in behalf of the petitioners, under Assignment of Error No. 2: Generally speaking, we have no quarrel with the abstract principles of law stated, and concede that the Legislature has the authority to pass legislation where it is not restricted by the State Constitution, the Federal Constitution, or Acts of Congress and Treaties made pursuant thereto.

Under Assignment of Error No. 3, in which counsel for the petitioners set forth argument and authority, counsel for respondents have hereinabove dealt with the subject matter, and to continue the argument would be repetitious, boring to the Court, and fruitless.

In the words of the learned trial judge, when he completed his opinion:

> "It seems to me that that settles this case, and it seems—I do not want to be too dramatic about it, but it seems strange that, in passing this way, we finally terminate on the case of Gallelee, because that seems to take us right back where this whole thing started:
>
> "For it was the man from Galilee who said: 'No man can serve two masters . . .' Matthew 6-24"

Respectfully submitted,

ROCCO PAOLICELLI,
HOWARD W. SHARPE,
HARVEY A. WILLIAMS,
ELI LURIA,
RAYMOND A. MILLER, and
JAMES E. MILLAR,
Respondents,
By Counsel.

JOHN LOCKE GREEN,
Counsel for Respondents.

I hereby Certify that on this 22nd day of May, 1952, a copy of the foregoing answer to the Petition of Alan L.

Dean and others for an appeal was mailed to William J. Hassan, Lawrence W. Douglas, and Edmund D. Campbell, at their office addresses, Court House Square, Arlington, Virginia.

JOHN LOCKE GREEN.

PART TWO OF BRIEF

Assignment of Cross-errors by Respondents

Assignment of Cross-error No. 1

The appellees assign as cross-error the failure of the Court to overrule the defendants' demurrer and enter judgment for the complainants on the day the cause was argued, to-wit, March 20, 1952, because of the following:

In Paragraph 2, Subparagraph b, of the appellees' bill of complaint, it is charged that the defendant Dean violated Section 14 of the Constitution of Virginia, which is as follows:

> "Section 14. That the people have a right to uniform government, and, therefore, *that no government separate from or independent of, the government of Virginia, ought to be erected or established within the limits thereof.*"

This is a matter of fact as well as law, and when the appellant Dean filed his demurrer he admitted all facts; therefore, having admitted these facts, and being a Federal Government employee, participating in and formulating the governmental operations of Arlington County, as charged in the bill of complaint, there was a government separate and independent of the government of Virginia operating in Virginia. In his demurrer he filed no denial of the allegations in regard to the aforesaid Section 14; therefore they should be taken as confessed as to him, and the demurrer

should have been promptly overruled as to him, and the trial Court should have entered an order consistent with the law and the pleadings in this cause.

Argument

Section 14 of the Constitution, which is part of the Bill of Rights, was put into the first Constitution of 1776. The obvious purpose of this section at the time it was adopted by the Constitutional Convention of 1776 was to prevent any influence of outside government in the government of Virginia. Certainly it can be said with all reasonableness that where three members of the County Board are Federal employees, and they make up a majority of the County Board, and three members of the School Board are Federal employees, and they make up a majority of the School Board, and between the two they set the levy, appropriate the money, and spend the money, and take their governmental philosophy from Washington, this would seem to violate the spirit of Section 14. If this were not so, what would be the purpose of Section 14 in the Constitution? It might just as well not be there.

To carry the conclusion a little further, and it would be not too remote to do so under the present conditions: Suppose the Federal Government had a great number of Federal employees in every County of Virginia, and that in addition to holding their positions under the United States government they held positions in the State government, and that a conflict between the laws and the policies of the two governments took place, and that the Federal government became paramount. Certainly it must be said that there would be an independent government established within the limits of Virginia other than the State government.

Assignment of Cross-error No. 2

Appellees assign as Cross-error No. 2 the action of the Circuit Court in dismissing the appellees' petition to strike out the petition of the appellant, the County Board of Arlington County, for leave to intervene in this cause. The appellees assign this cross-error on the ground that the County Board is not a necessary party to this suit, as the suit is not against the County Board as a body corporate, but only goes to determining the illegal acts of the defendants as individuals, and has no concern with the rights and liabilities of the County Board as a body corporate.

Moreover, permitting the County Board to become a party to this suit permits the appropriation of public funds to pay counsel fees for the private lawsuit of the appellants.

Argument

The only authority that a County Board of Supervisors, and this includes Arlington County, have for filing a suit is to protect some property right, or tax right, or some right which the County has as a body corporate. Clearly it shows from its face that this is not a suit in which the County Board is involved as a body corporate, but only concerns the illegal acts of certain members, and principally whether defendant Dean has a right to sit as a member of the County Board. Counsel for respondents find no rights accruing to Arlington County as a body corporate except what is given to it by statutory authority.

Assignment of Cross-error No. 3

The appellees assign as cross-error the failure and refusal of the lower Court to enter the decree offered by the appellees which would give full and complete relief in accordance with the prayer of the bill of complaint of the

appellees. In failing and refusing to enter the aforesaid decree presented by the appellee, the Court only declared Section 2-27 of the Code of Virginia, 1950, to be constitutional, and Section 2-29, Subsection 11, to be unconstitutional, which is merely a declaratory judgment, and no relief thereby has been given in the case.

Argument

The Court will note from the record that the respondents sought to have the lower Court enjoin the illegal acts of Dean, Cox and MacPherson with respect to using and paying public money to Dean illegally. There is ample authority for the lower Court to have entered a decree restraining Cox and Simpson from executing illegal warrants, and MacPherson, the Treasurer, from paying money illegally to Dean.

The case of *Bull* v. *Read,* 13 Gratt. 86, is the leading case on this subject. This was a case to try the constitutionality of a statute passed March, 1852. The suit was brought by the plaintiff and 16 others, to enjoin Read and others, who were School Commissioners, from setting up the school district and making the levy provided by the bill under which they proposed to act. Judge Lee, in this case, said:

> "The mode of suing in this case and the jurisdiction of the Court have both been called in question, but as I think, upon insufficient grounds. The act in question is one necessarily affecting all the inhabitants of the district named who in respect of persons or property were liable to taxation under its provisions; and as they were many in number but had a common interest, it was allowable according to settled practice for some to file a bill on behalf of themselves and other inhabitants similarly situated. . . .
>
> "Hence the court of chancery will interpose by its injunction to prevent the threatened wrong and provide a remedy which shall at once reach the whole mis-

chief and secure the rights of all, both for the present and the future; and its jurisdiction in such cases would seem to be well defined and fully sustained by authority."

Also, in the case of *Branton, Com'r* v. *Southern Fertilizing Company et al.,* 77 Va. 335, the Court said:

"The mode of suing adopted in this case, and the general jurisdiction of a court of equity in such a case as this are well settled by numerous authorities.

"That equity has jurisdiction to enjoin illegal acts of an officer attempted to be done, *colore officii,* see High on Injunctions, Section 796; and to enjoin action under an invalid requirement, see Goddin v. Crump, 8 Leigh, 120."

See also Johnson et al. v. Drummond, etc., 20 Gratt. 419.

Assignment of Cross-error No. 4

The appellees assign as cross-error the action of the lower court in entering the order presented by the appellants, because said order did not give full and complete relief as prayed for in the bill of complaint as filed by the complainants.

Argument

As will be seen by the bill of complaint, there are several principles involved in this case. The respondents contend (1) that the lower Court should have restrained the signing of illegal warrants, and restrained the illegal payment of money to defendant Dean; and (2), under the lower Court's decision that Section 2-27 was constitutional, and Section 2-29, Sub-section 11, was unconstitutional, because it was special legislation, the Court should have given full relief and entered the decree as presented by the respondents, or the complainants in the Court below.

Conclusion

For the reasons set forth, the respondents say that the judgment of the lower Court ought to be sustained, and full relief rendered by this Court.

Respectfully submitted,

ROCCO PAGLICELLI,
HOWARD W. SHARPE,
HARVEY A. WILLIAMS,
ELI LURIA,
RAYMOND A. MILLER,
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