William and Mary Review of Virginia Law

Volume 2 (1954-1956)
Issue 3

Article 4

May 1956

Municipal Corporations (Survey of Virginia Case Law - 1955)

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City License Taxes. (A) Gross Receipts Levy on Telephone Company. The City of Newport News and the Chesapeake and Potomac Telephone Company were unable to agree on terms concerning a new franchise for the telephone company upon the expiration of the one then in existence. The City advertised the franchise and asked for bids but received none. Thereafter, the City imposed a tax on the license of the telephone company of 3% of the gross receipts from local telephone exchange services. The ordinance specifically excluded gross receipts from business done to and from points without the State and with the Federal Government, its officers or agents. The telephone company attacked the ordinance in the courts and raised six issues before the Supreme Court of Appeals.[1]

To the contention that the City lacked the power to impose a tax on the gross receipts of a telephone company, the Court compared Sections 104 and 105 of the City Charter with Section 58-266.1 of the Va. Code (1950).

> The net effect of these sections is to confer upon the City the general power to impose a license tax on a business conducted within its confines, if not withheld from taxation by the legislature, whether or not a license tax is required for the said business by the State.[2]

The Code was said to supplement rather than limit the power of a city to impose a license tax.

The telephone company's argument that the license tax is violative of the constitutional and statutory plan for taxation of public service corporations is refuted. In discussing Sections 58-9 and 58-10, Virginia Code (1950), the tax segregation statutes passed pursuant to Sections 168 and 171 of the Virginia Constitution, the Court says: "Neither section of the Constitution segregates any property or subject to the State for taxation purposes." [3]

Section 58-9 segregates certain classes of property for taxa-

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[1] The Chesapeake and Potomac Tel. Co. of Va. v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955).

[2] *Id.* at 633, 85 S.E.2d at 348.

[3] *Id.* at 634, 85 S.E.2d at 349.

tion by localities. Section 58-10 segregates certain other property for taxation by the State only plus "all other classes of property." The telephone company argued that under the latter section the City was prohibited from imposing upon it a license tax because it was not enumerated in Section 58-9.

> The reservation to the State 'of all other classes of property' not specifically enumerated in the preceding section, is not a reservation 'of all other subjects of taxation', a much broader term. Excise and privilege taxes are not property taxes and hence are not included in the general reservation to the State.[4]

The Court further held that statutory provisions for the taxation of water, heat, light and power corporations[5] and for railway and canal corporations[6] did not evidence any plan for the taxation of the gross receipts of public service corporations by the State. If the legislature had intended telephone companies to be included it would have been a simple matter to include them.

The argument by the telephone company that the tax is violative of the commerce clause of the United States Constitution is quickly brushed aside by the Court, pointing out that the tax is exclusively on receipts from intrastate business which is readily severable from interstate receipts.

An argument that the tax is arbitrary, excessive and discriminatory and a deprivation of the equal protection of the laws is answered by familiar principles of constitutional law. In fixing the amount of a tax the legislature is given wide discretion and this discretion will not be disturbed by the courts unless clearly abusive; and the burden of proving abuse is upon the party attacking it. The fact that only one person or firm falls within a classification is not in itself indicative of discrimination.

Whether or not the annual budget for the City required this tax, the Court refused to consider. Here again, was an area of discretion which the Court would not disturb.

To the argument that the only reason the tax was imposed was to coerce the telephone company to bid on the franchise, the

[4] Fallon Florist v. City of Roanoke, 190 Va. 564, 584, 58 S.E.2d 316 (1950).
[5] Va. Code (1950), §58-603.
[6] Va. Code (1950) §58-519.

Court once again stated a familiar proposition: that nothing is more firmly established than that the Court will not look into the motives of the legislature in determining the validity of the statute.

City License Taxes. (B) Occupational License Tax. The second case concerning a municipal license tax was *City of Richmond* v. *Bosher.*[7] In contrast to the previous case, this involved an occupational license tax. The question presented in the Supreme Court of Appeals was one of construction and not of validity, as in the *Newport News* case, *supra.*

Here, the City of Richmond had enacted a license tax on certain occupations and professions one of which was that of a surgeon; teaching was not included nor was it expressly excluded.

Dr. Bosher was a surgeon who conducted classes at McGuire Veterans Administration Hospital in addition to his own practice. While teaching surgery, he quite naturally performed surgical operations. The City of Richmond contended that Dr. Bosher's compensation for his services at McGuire was taxable, but Bosher objected that he was paid for teaching at McGuire and his teaching incidentally involved performing operations. He did not contend that the City could not tax his salary from McGuire, but did contend that the City had failed to use its power in its taxing ordinance.

The court agreed with the taxpayer, reciting settled principles for its authority. "It is fundamental," said the court, "that a municipal taxing ordinance must specifically define the particular activity which it intends to tax." [8]

After concluding that Dr. Bosher's activities at McGuire were fundamentally teaching, the court quoted:

> In order to authorize a license tax, an act or ordinance must show a plain intent to include the particular license within its terms, and its provisions must not be extended by implication beyond the clear import of the language used so that no one can be held to the payment of the tax unless

[7] 197 Va. 182, 89 S.E.2d 36 (1955).
[8] *Id.* at 184, 89 S.E.2d at 37.

he comes clearly within the terms of the particular act or ordinance.[9]

Time for Taking Appeal. (A) Appeal From Ruling of Local Zone Board. In *Ross* v. *County Board of Arlington, Va.*[10] the Court had before it for the first time Section 15-873, Va. Code (1950), and also the interpretation of the phrase "presented to the court."

One Carroll Wright requested and was granted a variance to a section of the zoning laws on October 6, 1953. On November 5, 1953, plaintiffs challenged the ruling, filing a petition with the Circuit Court seeking a restraining order. The Commonwealth's Attorney filed a motion to dismiss on the ground that the petition had not been "presented to the court" within thirty days as requested by Section 15-873 which reads in part:

> Any person . . . aggrieved by any decision of the Board of Zoning Appeals . . . may present . . . a petition . . . Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board.

The Virginia statute is for all practical purposes identical with the New York zoning statute which was construed in *Barnes* v. *Osborne*[11] and the Court quotes with approval from that case:

> We think the petition was "presented to the court" in the fair sense of section 179-b when (within the time limitation prescribed by that section) the jurisdiction of the court was invoked in accordance with the statutory provisions which regulate the practice respecting motions and orders.

The appellant in the principal case raised the "horrible consequences" cry warned against by Chief Justice John Marshall. He said that should the Court accept the New York construction of the phrase "presented to the court" a petition might lie in a clerk's office many months before the applicant for a variance would be aware of it.

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[9] 53 C.J.S., *Licenses*, §13(b), (1948).
[10] 197 Va. 91, 87 S.E.2d 794 (1955).
[11] 286 N.Y. 403, 36 N.E.2d 638 (1941).

Such an argument, the Court said, can apply to any petition if it is assumed that the clerk will not do his duty and issue process thereon.

Time for Taking Appeal. (B) Appeal From a Ruling of the State Corporation Commission. In *Seaboard Air Line Railroad Company* v. *Board of Supervisors of Chesterfield County*[12] two interesting questions are raised.

The Railroad requested permission from the State Corporation Commission to construct a grade crossing over Route 10, a primary State highway, and permission was granted. The Board of Supervisors filed a suit to enjoin the construction because the Railroad had failed to make application to the Board as well as to the Commission, pursuant to Section 56-57, Va. Code (1950). The Court granted the bill; but before a decree was entered, the Railroad made application. The Board rejected the application and applied to the Commission to inquire into the propriety of the location of the crossing. After hearings, the Commission permitted the crossing but not at grade, rather at separate grades. The Railroad appealed to the Supreme Court of Appeals under Section 56-28, Code of Virginia (1950).

The Board moved to dismiss because the appeal had not been taken within thirty days as required by Section 56-28. The Railroad argued, and the Court agreed, that at the 1950 session of the General Assembly, the Virginia Code Commission was directed to include the rules adopted by the Supreme Court of Appeals and "The rules so adopted shall supersede all statutory provisions in conflict therewith."

Rule 5:1, Section 13, provided that an appeal from a decision of the State Corporation Commission could be perfected any time within sixty days.

The first question raised by this case is beyond the scope of this topic, but query: May Rules of Court for the conduct of cases and times for taking appeals be incorporated into the Code and thereby supersede all other sections in conflict therewith, many of which create rights in themselves?[13]

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[12] 197 Va. 130, 87 S.E.2d 799 (1955).
[13] Va. Code § 30-5 (Supp. 1954).

On the merits of the case, the Court found that from the evidence presented to the Commission, the requirement that the crossing be not at grade but at separate levels was reasonable. The Commission also found, and the Court concurred, ". . . that the construction of the proposed underpass met the requirements of Section 56-363, in that it is 'reasonably practicable' and 'does not involve an unreasonable expense, all the circumstances of the case considered.' "

The second question to be raised is in consideration of Section 56-363, mentioned above. It reads in part:

> Crossing of a railroad or highway by another railroad; . . . It is hereby declared to be the policy of this State that all crossings of . . . a country road or highway by a railroad . . . shall, whenever reasonably practicable, pass above or below the existing structure.

Query: Does this State policy go into effect only when application is made by the county affected or is it the policy of the State even when the county is by-passed, as Chesterfield County was when the Railroad first made application to the Commission for approval of the crossing? That is, why did not the Commission inquire, *ab initio*, into the merits of the application and weigh it in the balance with the announced State policy even before requested to do so by the County? From the chain of events of this case, it appears as though the Commission will allow an application, ignoring Section 56-363 until it is called to its attention by an aggrieved party. The Reports of the State Corporation Commission do not reveal what initial inquiry was made before the original application was approved.

Police Power of a Municipality. Protection of Public Health and Safety. In *Sanitation Commission* v. *Craft*[14] the Court had before it the constitutionality of an Act[15] establishing the Weber City Sanitation Commission and a resolution of the Commission adopted in pursuance of the Act.

[14] 196 Va. 1140, 87 S.E.2d 153 (1955).
[15] Section 6(13), Chap. 523, Act of 1948.

The Commission was established pursuant to the Constitution[16] for the prevention of the pollution of waters in the State due to the discharge of waste and to supply an adequate water supply for the inhabitants therein. Section 6(13) empowered the Commission to require abutting property owners to connect with the system and to refrain from the use and consumption of private subsurface water. The resolution of the Commission required abutting property owners to connect with the system and to stop using private subsurface water "to safeguard the public health and general welfare of the inhabitants" of the district. Craft refused to comply with the mandate of the resolution alleging that he had spent $2500 in constructing a well on his property before the Commission was established and enforcement of the Act would deprive him of his property without due process of law. He further contended that the Commission was not established for the preservation of the general health and welfare of the district but to supply water for convenience and that convenience alone was not sufficient to bring Section 6(13) or the resolution within the purview of the police power.

The Court's answer was in the negative:

> Clearly, the general law as well as section 6(13) of Chapter 523 . . . both sanctioned by the Constitution, and the resolution . . . were enacted for the purpose of promoting the public convenience and general prosperity as well as the public health and safety of the people of the district. Both purposes are embraced within the State's police power.

For this proposition the Court relied upon a United States Supreme Court decision.[17]

Although the quoted paragraph is dictum in the principal case it is in conflict with the dictum of the court in *Southern Railway* v. *Commonwealth*,[18] in which the court said:

> . . . notwithstanding the fact that the State is proceeding under police power, property cannot be taken over nor

[16] Constitution of Virginia, Section 147: "Such public welfare . . . sanitary . . . institutions as . . . the public good may require shall be established and operated by the Commonwealth under such organization and in such manner as the General Assembly may prescribe."

[17] C. B. & Q. R. Co. v. Illinois, 200 U.S. 561 (1905).

[18] 159 Va. 779, 167 S.E. 578 (1933).

expenditures ordered merely to meet demands of convenience . . .

A broad application of police power to municipal ordinances is the tendency; however, the *Southern Railway* case appears to be the only other Virginia case in which "public convenience", per se, is discussed and it is there rejected as an ingredient of the police power.

The case is decided upon the basic theory that the disputed statute is a protection of the public health and the only value of the Court's discussion of the "public convenience" is as dictum.

The contention by the respondent, Craft, that the Act constitutes a special assessment in violation of Section 170 of the Constitution of Virginia is quickly brushed aside with sufficient authority to the contrary.[19]

Veto Power of a Town Mayor. In *Gill* v. *Nickels*[20] the sole question presented to the Court for determination was whether or not, in the absence of any enabling provisions in the statutes or in the charter of the Town of Leesburg, Section 123 of the Constitution of Virginia gives the Mayor a veto power.

The government of the Town is vested in a council composed of a mayor and six members. There is no reference made to the exercise of the veto power by the mayor.

The appellants, members of the Town Council who objected to the veto of an ordinance by the mayor, argued that Section 123 of the Constitution is ambiguous and obscure. They further said that the enactment of Section 15-410 of the Va. Code (1950), which gives the veto power to certain mayors, indicates that the General Assembly has interpreted the Constitution as giving the power only to mayors of a city.

The Court discussed the history of Section 123 of the Constitution and concluded that the language was "plain, broad, compelling and comprehensive." It believed that every indication

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[19] Roanoke v. Fisher, 193 Va. 651, 655, 70 S.E.2d 274, 277 (1952); Hampton Roads Sanitation District Comm. v. Smith, 193 Va. 371, 378, 68 S.E.2d 497, 501 (1952); 43 Am. Jur., *Public Utilities and Services*, §82, page 624.

[20] 197 Va. 123, 87 S.E.2d 806 (1955).

pointed to the inclusion of town mayors as well as city mayors. The Court's interpretation of Section 123 was strict:

> That the legislature has granted town charters, with and without special provisions relating to the veto power of the mayor, has enacted Code Section 15-410, specifically setting out the veto power of mayors of cities, and has passed no general statute relating to the veto power of the mayor of a town, in no way lessens the force and effect of Section 123 of the Constitution. Many Code sections copy or paraphrase certain constitutional provisions, with or without change; but this does not mean that, in the absence of statutory enactment, mandatory requirements of the Constitution are not effective.[21]

William T. Prince

[21] *Id.* at 128, 129, 87 S.E.2d at 810.