

3104

195-302

# Record No. 4186

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**ATLANTIC GREYHOUND CORPORATION**

v.

**CITY OF WINCHESTER**

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FROM CORPORATION COURT OF CITY OF WINCHESTER.

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## 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.

H. G. TURNER, Clerk.

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

195VA 302

## RULE 5:12—BRIEFS

**§1. Form and Contents of Appellant's Brief.** The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

**§2. Form and Contents of Appellee's Brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

**§3. Reply Brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

**§4. Time of Filing.** As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of said fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

**§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.

**§7. Effect of Noncompliance.** If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.



IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND.

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**Record No. 4186**

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VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 26th day of May, 1953.

ATLANTIC GREYHOUND CORPORATION,  
*against* Plaintiff in Error,

CITY OF WINCHESTER, Defendant in Error.

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From the Corporation Court of the City of Winchester.

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This is to certify that upon the petition of Atlantic Greyhound Corporation a writ of error and *supersedeas* has been awarded by one of the Justices of the Supreme Court of Appeals of Virginia to a judgment rendered by the Corporation Court of the City of Winchester on the 23rd day of March, 1953, in a certain action at law therein depending wherein the said petitioner was plaintiff and the City of Winchester was defendant, upon the petitioner, or some one for it, entering into bond with sufficient surety before the clerk of the said corporation court in the penalty of three hundred dollars with condition as the law directs.

## RECORD

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## STIPULATION.

It is stipulated and agreed by and between counsel for the applicant, Atlantic Greyhound Corporation, and the City Solicitor for the City of Winchester that the facts pertaining to these applications are as follows:

For the year 1947 and subsequent years involved, Atlantic Greyhound Corporation was assessed with and paid under protest a license tax for the privilege of operating a bus terminal in the City of Winchester, Virginia, which tax was imposed by ordinances of the City of Winchester which, with the exception of the year 1947, were as follows: "BUS TERMINALS. For each motor passenger bus terminal, depot, station or other like place operated in the City of Winchester for the accommodation of passengers, the tax shall be \$500.00." For the year 1947 the ordinance was the same except that the amount of the tax was \$250.00. These applications are directed to correcting the assessment of those taxes as being erroneous and securing refunds of such taxes.

Atlantic Greyhound Corporation is a common carrier of passengers by motor vehicle engaging in intra-state commerce under authority of certificates of convenience and necessity issued by the State Corporation Commission of Virginia and in interstate commerce under certificates of convenience and necessity issued by the Interstate Commerce Commission. It transports passengers between Winchester, Virginia, and other point and places, and through Winchester, Virginia, on trips between other points and places. It engages in no intra-city transportation in the City of Winchester.

page 15 } It leases a parcel of real estate briefly described as 16-18 North Braddock Street which it operates as a bus terminal in connection with and incidental to its business as a common carrier and not for profit.

Atlantic Greyhound Corporation permits other common carriers of passengers, namely, Capital Greyhound Lines, Blue Ridge Transportation Company, Potomac Motor Lines

and Virginia Stage Lines to use the facilities of the terminal. The other carriers, except Capital Greyhound Lines, pay ten per cent of ticket sales at the terminal for the privilege of picking up and discharging passengers there. The expense of operating the terminal is pro-rated between Atlantic Greyhound Corporation and Captial Greyhound Lines after deducting from the total expense of operation and the receipts from the other carriers and the facilities hereinafter mentioned on the basis of ticket sales.

Atlantic Greyhound Corporation permits the Union News Company to operate restaurant facilities in the terminal and receives for this ten per cent of the gross receipts plus \$30.00 per month as a contribution to the cost of utilities. Union News Company pays to the City of Winchester an annual merchants license tax and an annual restaurant license tax both of which are based upon gross receipts.

Atlantic Greyhound Corporation permits the American Locker Company to maintain parcel lockers for the convenience of passengers, operated on the coin-in-slot principal, and receives therefor sixty per cent of the gross receipts. American Locker Company pays the City of Winchester an annual license tax of twenty-five cents per locker.

The expense of operation of the terminal exceeds the receipts from all of the above sources.

The assessments and the amounts paid thereon are as follows:

Date of Assessment	Date of Payment	License Tax	Fee	Penalty	Total
Jan 1 1947	Apr 14 1947	\$ 250.00	\$0.75	\$ 25.00	\$ 275.75
Jan 1 1948	May 28 1948	500.00	0.75	50.00	550.75
Jan 1 1950	Apr 4 1950	500.00	0.75	50.00	550.75
Jan 1 1951	Jul 17 1951	500.00	0.75	50.00	550.75
Jan 1 1952	Jan 28 1952	500.00	0.75		500.75
		\$2,250.00	\$3.75	\$175.00	\$2,428.75

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WM. M. BLACKWELL  
Of Counsel for Atlantic Greyhound Corporation

DABNEY W. WATTS  
City Solicitor for City of Winchester, Va.

Winchester, Virginia  
May 19, 1952

Filed in Clerk's Office of Corporation Court for City of Winchester, Va., May 23, 1952.

CORINE BARNETT RILEY, Dp. Clerk.

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\* \* \* \* \*

(1)

The first question posed is whether or not prior to 1951 Winchester had the power to impose the Bus Terminal License Tax in question.

If the city charter did not authorize the tax the ordinance imposing the same would be invalid. The general law does not authorize cities and towns to impose such a license tax.

The city charter contains no specific authority for the imposition of such a tax and unless its language can be construed to confer upon the city the general power of taxation, limited only by the Virginia constitution and the general laws of the State, the tax is unauthorized.

It is fundamental that there is no inherent power of taxation in a municipality. The power does not exist except by express grant. The grant itself must clearly and unmistakably evidence the intent of the legislature to confer the power: *Green v. Ward*, 82 Va. 324; *Whiting v. West Point*, 89 Va. 741; 38 A. L. R. p. 17, 1324.

page 18 } The only pertinent language of the Winchester Charter is the following:

Sec. 1. "Body politic and corporate; name."

\* \* \* "and as such shall have, exercise and enjoy all the rights, immunities, powers and privileges, and be subject to all the duties and obligations incumbent and pertaining to said city as a municipal corporation;" \* \* \* "and except as prohibited by the Constitution of Virginia or restricted by this charter, the City of Winchester shall have all municipal powers, functions, rights, privileges and immunities of any name or nature whatsoever," \* \* \*

Sec. 2. "Enumerated powers not exclusive."

"The enumeration of particular powers by this charter

shall not be held or deemed to be exclusive, but, in addition to the powers enumerated therein, employed thereby, or appropriated to the exercise thereof, it is intended that the City of Winchester shall have, and may exercise, all powers which, under the Constitution of Virginia it would be competent for this charter specifically to enumerate. All powers of the city, whether express or implied, shall be exercised in the manner prescribed by this charter, or, if not prescribed therein, then in the manner provided by ordinances or resolutions of the council."

There are several Virginia cases involving the construction of municipal charters to determine whether the "general taxing power" has been conferred.

The provisions of the charters concerned are all substantially the same in that the city is empowered to raise by taxes the necessary funds in such manner as the council shall deem expedient, in accordance with the laws and constitution of the state. *Ould v. Richmond*, 23 Gratt 464; *Norfolk v. Norfolk Landmark Company*, 95 Va. 564; *Newport News etc. Elect. Co. v. Newport News*, 100 Va. 318; *Fallon v. Roanoke*, 190 Va. 564.

page 19 } There is no language in the Winchester charter which is comparable to the charters of Richmond, Norfolk, Newport News and Roanoke, and, in my opinion, the fact that the Legislature excluded such provision in the Winchester charter must be taken as some evidence of the intent.

There is nothing in the language of the Winchester charter which, under the rule of strict construction, could be taken to confer upon the city the power to impose any taxes other than those authorized by the general laws. Sec. 58-266.1 of the Virginia Code does not authorize the tax nor do any of the other general laws. Therefore, prior to the enactment of Virginia Code Sec. 56-337.1, the license tax was unauthorized and Winchester had no power to impose the tax before 1951.

(2)

The second question is whether Code Sec. 46-65 (56-337.1) authorizes the imposition of the tax under the factual situation existing.

It is admitted that the Atlantic Greyhound Corporation operates the bus terminal in connection with and as one of the incidents of its business as a common carrier, and that the terminal is not operated for profit.

The city contends, however, that the fact that other carriers



are permitted to use the facilities for their pas-  
 page 20 } sengers eliminates the claimant from the excep-  
 tion contained in the statute. It is urged that the  
 language of the exception should be construed to mean that  
 the terminal must be exclusively for the business of the op-  
 erator and incidental to its business to the exclusion of all  
 others. This contention is supported to some extent by the  
 fact that the other exceptions of the statute plainly contem-  
 plate situations where the carrier is concerned only with its  
 own passengers or property, which may be indicative of the  
 legislative intent to exempt only those who limit their activi-  
 ties to their own businesses.

The fact that the operation is not profitable would, of  
 course, not be controlling. Even if the purpose were not to  
 realize monetary profit as a result of the direct revenues from  
 other carriers, the incidental profits occurring as the result  
 of increased sales might far exceed the amount expended by  
 the operator for the expenses of the venture.

It seems to me that the primary purpose of the exemption  
 is to exclude carriers which maintain relatively small termi-  
 nal facilities for their own passengers. Otherwise, the license  
 tax could never apply to terminals operated by a common  
 carrier, no matter how large the business, if the purpose were  
 not to realize profit from the other users, no matter how great  
 the indirect profit to the carrier as the result of  
 page 21 } increased businesses might be. It would be well  
 nigh impossible to determine whether the terminal  
 business itself were being operated for profit or not.

Accordingly, I am of the opinion that the claimant is not  
 exempt from the license tax in question for the year 1951 and  
 the subsequent years.

ELLIOTT MARSHALL, Judge.

Filed in Clerk's Office of Corporation Court for City of  
 Winchester, Va., Jany. 7th, 1953.

CORINE BARNETT RILEY, Dp. Clerk.

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## ORDER.

This day came the applicant, Atlantic Greyhound Corporation, by counsel, and the City of Winchester, by its Solicitor, who defends in its behalf, upon the original petitions and amendments thereto, filed with leave of Court, upon examination of the Commissioner of the Revenue of said City as a witness, heard *ore tenus* in open Court, and other facts in issue having been stipulated by agreement of counsel and submitted upon written briefs for consideration and determination by the Court.

Whereupon, the Court doth certify that the Commissioner of the Revenue for the City of Winchester, Virginia, testified upon examination in open Court that a license tax pursuant to the ordinances of the City of Winchester was assessed against the applicant, Atlantic Greyhound Corporation, in the sum of Two Hundred Fifty Dollars (\$250.00) for the year 1947, and that this license tax was paid under protest by the applicant on April 14, 1947, together with a penalty in the sum of Twenty-five Dollars (\$25.00) and the prescribed fee for the issuance of such license in the sum of seventy-five cents (75c); that a license tax in the sum of Five Hundred Dollars (\$500.00) was assessed against the applicant for the year 1948, and that the said sum was paid under protest by the applicant on May 28, 1948, together with a penalty in the sum of Fifty Dollars (\$50.00) and the prescribed fee for the issuance of said license in the sum of seventy-five cents (75c); that a license tax in the sum of Five Hundred Dollars (\$500.00) was assessed against the applicant for the year 1949, which the applicant paid under protest, together with a penalty in the sum of Fifty Dollars (\$50.00) and the prescribed fee for the issuance of said license in the sum of seventy-five cents (75c); that a license tax in the sum of Five Hundred Dollars (\$500.00) was assessed against the applicant for the year 1950, and was paid under protest by the applicant on April 4, 1950, together with a penalty in the sum of Fifty Dollars (\$50.00) and the prescribed fee for the issuance of such license in the sum of seventy-five (75c); that a license tax in the sum of Five Hundred Dollars (\$500.00) was assessed against the applicant for the year 1951, which the applicant paid under protest July 17, 1951, together with a penalty in the sum of Fifty Dollars (\$50.00) and the prescribed fee for the issuance of such license in the sum of seventy-five cents (75c); that a license tax in the sum of Five Hundred Dollars (\$500.00) was assessed against the applicant for the year 1952, which was paid under

protest by the applicant on January 28, 1952, together with the prescribed fee for the issuance of such license in the sum of seventy-five cents (75c); that a license tax in the sum of Five Hundred Dollars (\$500.00) was assessed against the applicant for the year 1953, which was paid under protest by the applicant January 21, 1953, together with the prescribed fee for the issuance of such license in the sum of seventy-five cents (75c); and that the Court doth further certify that the other facts in issue were proved as set forth in the Stipulation of Facts filed herein by the agreement of counsel; and

Whereupon, after due consideration, the Court is of the opinion that the City of Winchester had no authority by reason of its charter or any general law of the Commonwealth of Virginia to enact ordinances for the years 1947, 1948 and 1950, imposing a license tax upon operators of bus terminals within the City of Winchester, Virginia, and that the applicant, Atlantic Greyhound Corporation, is entitled to recover the sums paid to the City of Winchester, Virginia, pursuant to such license ordinances, including penalties and interest paid; and the Court is of the opinion further that

page 25 } subsequent to the enactment by the General Assembly of Virginia of Section 56-337.1 of the Code of Virginia, the City of Winchester was authorized and empowered to enact ordinances imposing a license tax for the privilege of operating bus terminals within the City of Winchester for the years 1951 and thereafter when such terminals are not operated by a common carrier as an incident to its business of being a common carrier and for the convenience of its passengers; and that in addition to the operation of its terminal for the convenience of its passengers and as an incident to its business and not for profit, the applicant herein operates its terminal for other purposes which takes it out of the scope of Sections 46-65 and 56-337.1 of the Code of Virginia of 1950, as amended; and

Thereupon, the Court doth adjudge and order that the ordinances of the City of Winchester, Virginia, imposing a license tax for the privilege of operating a bus terminal within said City for the years 1947, 1948, 1949 and 1950 are invalid and of no effect, and the Atlantic Greyhound Corporation shall be exonerated from the payment of such license taxes for the years 1947, 1948 and 1950, and shall recover of the said City, and the City shall refund to the said applicant, such sums, including fees and penalties paid to said City pursuant to such ordinances imposing a license tax upon the applicant for the privilege of operating a bus terminal within said City for the years 1947, 1948 and 1950, to-wit: the sum

of Two Hundred Seventy-five Dollars and seventy-five cents (\$275.75), including fee and penalty for the year 1947; the sum of Five Hundred Fifty Dollars and seventy-five cents (\$550.75), including fee and penalty for the year 1948, and the sum of Five Hundred Fifty Dollars and seventy-five cents (\$550.75), including fee and penalty for the year 1950; to which ruling of the Court the City, by its Solicitor, objected and did note its exception.

The Court doth further adjudge and order that the ordinances of the City of Winchester, Virginia, imposing a license tax for the privilege of operating a bus terminal within the said City for the years 1951, 1952 and 1953, page 26 } are valid and in full force and effect, and the said applicant shall not recover of the said City any sums paid to said City pursuant to such ordinances for the years 1951, 1952 and 1953, to which ruling of the Court the applicant, Atlantic Greyhound Corporation, objected and did note its exception.

Attorneys for applicant having indicated their desire to apply for a writ of error from the ruling of the Court, it is adjudged and ordered that execution on this judgment is suspended for a period of sixty (60) days from the date hereof to enable applicant to apply for a writ of error.

Enter.

ELLIOTT MARSHALL, Judge.

\* \* \* \* \*

Filed in Clerk's Office of Corporation Court for City of Winchester, Va., March 23, 1953.

CORINE BARNETT RILEY, Dp. Clerk.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

Atlantic Greyhound Corporation hereby gives notice of its intention to appeal to the Supreme Court of Appeals of Virginia from the final decree of the Corporation Court of the City of Winchester entered in the above styled cause on the 23rd day of March, 1953, and assigns the following errors:

1. The Court erred in holding that in addition to the operation of its terminal for the convenience of its passengers and as an incident to its business and not for profit, the applicant herein operates its terminal for other purposes which takes it out of the scope of Sections 46-65 and 56-337.1 of the Code of Virginia of 1950, as amended.

2. The Court erred in holding that the City of Winchester could lawfully assess a license tax against Atlantic Greyhound Corporation for the operation of its terminal in the City of Winchester, Virginia for the year 1951 and subsequent years.

ATLANTIC GREYHOUND CORPORATION

By WM. M. BLACKWELL  
Of Counsel.

\* \* \* \* \*

Filed in Clerk's Office of Corporation Court for City of Winchester, Va., March 24, 1953.

CORINE BARNETT RILEY, Dp. Clerk.

A Copy—Teste:

H. G. TURNER, C. C.

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