

1-12-42 0  
1750  
179-340 Ca

# Record No. 2495

---

---

In the  
Supreme Court of Appeals of Virginia  
at Richmond

---

**W. J. GANDY**

v.

**COUNTY OF ELIZABETH CITY**

---

FROM THE CIRCUIT COURT OF ELIZABETH CITY COUNTY.

---

---

## RULE 14.

¶5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two 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 printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records. The record number of the case shall be printed on all briefs.

---

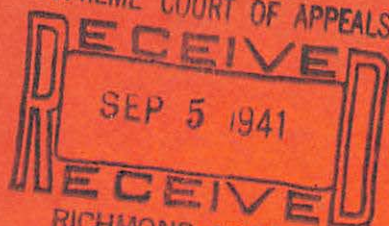
The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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

179 VA 340

CLERK  
SUPREME COURT OF APPEALS



RICHMOND, VIRGINIA

## INDEX TO PETITION

(Record No. 2495)

	Page
Petition . . . . .	1*
The Case . . . . .	2*
The Facts . . . . .	4*
Assignments of Error . . . . .	16*
Argument . . . . .	19*
Assignment One, Grounds 1, 2 and 3 . . . . .	19*
Assignment One, Grounds 4, 5 and 11 . . . . .	21*
Assignment One, Grounds 7 . . . . .	24*
Assignment One, Grounds 9 . . . . .	34*
Assignment One, Grounds 10 . . . . .	35*
Assignment One, Grounds 13 . . . . .	37*
Assignment One, Grounds 15 . . . . .	41*
Assignment Two . . . . .	54*
Assignment Three . . . . .	55*
Conclusion . . . . .	55*
Averments of Counsel . . . . .	56*
Certificate of Counsel . . . . .	57*

## Authorities

Constitution of Virginia, Sections 50, 52, 58, 39, 65, 63, 168 . . . . .	21*
Acts General Assembly of Virginia 1908, page 3; 1936, page 581 . . . . .	4*
Code, 1936, Section 5938, 2743, Chapter 109 . . . . .	7*
1938 Supplement to Code, Section 2743b . . . . .	23*
Tax Code 296 . . . . .	34*
Waters of the State (Embrey), page 1, <i>et seq.</i> . . . .	5*
Journal of House of Delegates, 1938, pages 138, 148, <i>et seq.</i> . . . .	22*
Journal of House of Delegates, 1932, pages 98, <i>et seq.</i> . .	23*
<i>Wooding v. Leigh</i> , 163 Va. 785, 802; 177 S. E. 310 . . . .	19*
<i>Comth. v. Iverson Brown</i> , 91 Va. 762; 21 S. E. 359; 28 L. A. R. 110 . . . . .	19*
<i>Guthrie v. City of Guthrie</i> , 175 U. S. 528; L. Ed. 796 and 798 . . . . .	22*
<i>Woodall v. Darst</i> , 77 S. E. 236 and 238 . . . . .	22*
36 CYC. 991 . . . . .	22*

<i>Leary v. Aldermen of Jersey City, et als.</i> , 208 Fed. Rep. 854 . . . . .	25*, 29*
<i>Missouri v. Kansas</i> , 213 U. S. 7629 Supp. Ct. 417, 53 L. Ed. 706 . . . . .	26*
<i>Tallahassee Falls Mfg. Co. v. State</i> , 194 Ala. 554; 69 So. 589 . . . . .	25*
Section 2743b of the Code, 1936 . . . . .	23*
<i>Smith v. Kelly</i> , 174 S. E. 844 . . . . .	37*
<i>Williams v. City of Richmond</i> , 14 S. E. 2nd 287-291 . . . . .	38*
<i>Calder v. Bull</i> , 1 U. S. 648 . . . . .	41*
<i>Cummings v. Mo.</i> , 18 Law Ed. 356-364 . . . . .	42*
<i>Bradley v. City of Richmond</i> , 66 S. E. 873 . . . . .	44*
19 R. C. L., page 901, Sec. 201 . . . . .	44*
<i>State v. Omaha</i> , 113 Ia. 30; 84 N. W. 983, 86 A. S. R. 357 . . . . .	44*
Desty on Taxation, page 277, 275 . . . . .	47*
<i>Day v. Roberts</i> , 101 Va. 248, 251 . . . . .	47*
<i>Robinson v. City of Norfolk</i> , 108 Va. 60 . . . . .	48*, 50*
<i>Campbell v. Bryant</i> , 104 Va. 509 . . . . .	48*
<i>McCormack v. Patch</i> , 53 Nev. 36 . . . . .	49*
<i>San Francisco v. Liverpool, etc., Ins. Co.</i> , 74 Col. 113; 5 A. S. R. 425 . . . . .	50*
Notes 52 Am. Dec. 331 and 4 L. A. R. 809 . . . . .	50*
<i>North Hudson Reg. Co. v. Hoboken</i> , 41 N. J. Law 71 . . . . .	51*
Cooley on Taxation 587 . . . . .	51*
<i>Royall v. Va.</i> , 116 U. S. 572; 29 L. Ed. 735, 738 . . . . .	51*
17 R. C. L. 532 #50 . . . . .	52*
<i>Louisville, etc., R. Co. v. Baldwin</i> , 85 Ala. 619; 7 L. A. R. 266 . . . . .	52*
<i>Lawrence v. Anderson</i> , 75 S. C. 62; 55 S. E. 136; 7 L. A. R. 885 . . . . .	52*
Cooley on Constitutional Limitations, 283, 713 . . . . .	53*
<i>Ould v. Richmond</i> , 23 Gratt. 464; 14 Am. Rep. 139 . . . . .	53*

IN THE  
**Supreme Court of Appeals of Virginia**  
AT RICHMOND.

---

**Record No. 2495**

---

W. J. GANDY, Plaintiff in error

*versus*

COUNTY OF ELIZABETH CITY, Defendant in error

---

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS

---

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

Your petitioner, W. J. Gandy, respectfully represents that he is aggrieved by a final judgment of the Circuit Court of the County of Elizabeth City entered on the 5th day of March, 1941, in a certain prosecution for a Misdemeanor—Violation of a County Ordinance of Elizabeth City County, instituted and maintained against him by the County of Elizabeth City, Virginia, wherein he filed his demurrer to the warrant with the grounds thereof set out in writing; which demurrer was overruled by the Court; Whereupon, the accused, your petitioner, pleaded not guilty to said warrant and upon trial he was found not guilty of engaging in business in violation of Section 54 (b) (music machine), but guilty of engaging in certain businesses in violation of Section 61 (b), concerning automobiles (merchant's tax), Section 80 (mercantile tax), and Section 7 (j) alcoholic beverage tax, of "An Ordinance of Elizabeth City County, Virginia, imposing a license tax on business and professions", as charged in the

warrant, and upon such findings, your petitioner was adjudged to pay to the County of Elizabeth City, Virginia, a fine of Five (\$5.00) dollars for each offense set out in said warrant of which he was found guilty, or a total fine of Fifteen (\$15.00) dollars and the costs of the prosecution against him.

A transcript of the record with the original exhibits and proceedings of the trial is herewith presented, to which reference is made, and which is asked to be taken and read as a part of this petition.

2\*

## \*THE CASE.

On the 21st day of May, 1940, C. C. Frost, (who is the Commissioner of the Revenue of the County of Elizabeth City), made complaint under oath before C. M. Seward, a Justice of the Peace for the County of Elizabeth City, that your petitioner, W. J. Gandy, ("Oak Park Tea Room") of said County, on said 21st day of May, 1940, "did unlawfully violate the following sections of an ordinance of Elizabeth City County, Virginia, imposing a license tax on business and professions, to-wit:

"1. Section 61 (b) of certain automobiles (merchant's tax)";

"2. Section 80 (mercantile tax)";

"3. Section 7 (j) alcoholic beverage tax";

"4. Section 54 (b) music machine".

Upon this complaint a warrant was issued by the said Justice of the Peace directing the arrest of your petitioner on the charges contained therein. The warrant was executed on the 21st day of May, 1940, by E. W. Covington, a County officer of Elizabeth City County, and after several continuances in the Trial Justice Court, on the 3rd day of October, 1940, your petitioner was tried on said warrant by John H. Bowen, Trial Justice of Elizabeth City County. Your petitioner, W. J. Gandy, at said trial, was adjudged guilty as charged in said warrant and adjudged to pay a fine of Ten (\$10.00) dollars and costs, from which judgment your petitioner appealed to the Circuit Court of Elizabeth City County (R., p. 59).

On the 5th day of March, 1941, your petitioner was again tried on the aforesaid warrant by the Circuit Court of Elizabeth City County, at which time the defendant filed his demurrer to the said warrant with the grounds therein set out

in writing, which demurrer being overruled by the Court, the defendant excepted to the ruling of the Court on said demurrer and pleaded not guilty to the warrant, and with the consent of the Attorney for the Commonwealth, waived his right of trial by jury and submitted all questions of law 3\* and fact to the Court for trial. And the Court \*having heard the evidence introduced on behalf of the County of Elizabeth City, the defendant, by counsel, moved the Court to strike out the evidence of the County and dismiss the warrant in this proceeding, which motion the Court overruled, to which action of the Court the defendant duly excepted (R., p. 134).

And thereupon the Court having heard the remainder of the evidence introduced on behalf of the defendant, adjudged the defendant to be guilty as charged in count No. 1 under Section 61b and fixed his punishment at a fine of Five (\$5.00) dollars therefor, and did further find the accused, your petitioner, guilty as charged in count No. 2 under Section 80 and fixed his fine therefor at Five (\$5.00) dollars and did further find the accused, your petitioner, guilty as charged in count No. 3 under Section 7J and fixed his fine at Five (\$5.00) dollars therefor, as in the said warrant set forth, aggregating a total in fines of Fifteen (\$15.00) dollars (R., p. 65).

Whereupon, the defendant, your petitioner, by counsel, moved the Court to set aside its findings because the same was contrary to the law and the evidence and other reasons assigned in said motion. But the Court overruled the said motion and entered final judgment against your petitioner (R., p. 135). It is to this final judgment that a writ of error and *supersedeas* is prayed for.

4\*

#### \*FACTS.

It is respectfully requested of the Court, that it will take judicial notice of the following unusual facts concerning the County of Elizabeth City, including its original boundaries; the composition of the surface of its area; the taking therefrom of that portion of its area which now is included within the present boundaries of the Counties of Norfolk, Princess Anne and Nansemond, and particularly its remaining present area and the composition of its surface; the peculiarity of the establishment of its magisterial districts from the 30th day of March, 1908, the date the town of Hampton, a municipal corporation wholly within its boundaries, was declared by the Court to be a city; the Act of the General As-

sembly approved the 23rd day of January, 1908, (see subsection 15 thereof, page three (3) *et seq.*, Acts of 1908), whereby, notwithstanding Hampton was made a city, it also retained its status as a magisterial district of the said County of Elizabeth City until January 1st, 1940, and the Act of the said General Assembly of Virginia, approved the 27th day of May, 1936, (See Acts, 1936, page four, 581), made effective by an election held in the City of Hampton therein provided for, which act so approved, operated to divest said City of Hampton of all of its status and relations as a magisterial district of said County of Elizabeth City on and after January 1st, 1940.

The Court is further requested to note the area and population of the two municipal governments, and the large  
 5\* number of U. S. \*Government Reservations within the said County, and as well the United States Census Reports of population of the County and each of the municipalities and U. S. Reservations therein for the year 1930, all of which have a great bearing on the determination of this case, and are as follows:

Under date of April 10, 1606, James the First, of England, granted "Letters Patent" to Sir Thomas Gates and others for two several Colonies and Plantations in Virginia, to be called and known as the "First Colony". (See "Waters of the State", by Embrey, page 1.)

That in 1636, when the County of New Norfolk was formed from the County of Elizabeth City and was composed of all of its land lying on the south side of James River, there must have been then established at some place in the James River, also now known as Hampton Roads, a line of division or boundary line between the County of Elizabeth City remaining as such on the north side of the river, or Hampton Roads, and the County of New Norfolk established on the south side of said river or Hampton Roads, and upon the location of that line this case depends to determine the area of the present County of Elizabeth City and consequently to determine its population per square mile of area and in turn thereby to ascertain whether the Act under which the County Ordinance upon which this case was founded is applicable to the County of Elizabeth City.

The "Newport News" and "Hampton Sections" of the U. S. Geodetic Survey Map shows thereon a dotted line  
 6\* running approximately east \*and west just south of the "Rip Raps" or "Fort Wool", located in the water at

the entrance from Chesapeake Bay to Hampton Roads, as the boundary line between the said counties as it will be noted therefrom that the words "Norfolk County" are on the south side of the said line and the words "Elizabeth City County" are on the north side of the line. (See Defendant's Exhibit No. 1 filed with the record.) The Oyster Inspector of the State Commission of Fisheries of Virginia appointed for Norfolk County exercises exclusive authority of the oyster and fishing rights on the south side of Hampton Roads, extending therein out to the thread of the stream, and the Oyster Inspector of the said Commission appointed for the County of Elizabeth City exercises similar authority over the north side of said Hampton Roads out to the thread of the stream or channel. (See testimony Reudiker, R., pp. 112 and 113.)

From the aforesaid Geodetic Survey Maps of the Newport News-Hampton Area, (See Defendant's Exhibit No. 1 filed with the record) there are two reasonably large creeks or rivers making wholly into the land area of Elizabeth City County from the waters of Hampton Roads, namely: "Hampton Creek" or river and "Mill Creek" or river, and also one large river known as "Back River", making into the land between the Counties of York and Elizabeth City, from Chesapeake Bay, the far greater portion of which river lies within the County of Elizabeth City, and over which last mentioned river the Oyster Inspectors of the Counties of York and Elizabeth City exercise similar authority, as do those of Norfolk and Elizabeth City Counties hereinbefore set out.

That the Oyster Inspector of Elizabeth City \*County exercises authority over the waters of Chesapeake Bay, for more than a mile from the shore of Elizabeth City County, towards Northampton County, on the Eastern Shore; and the Circuit Courts of Elizabeth City County and Northampton Counties have concurrent jurisdiction over waters of Chesapeake Bay opposite their respective shores to the opposite shores, and similarly the Courts of Norfolk and Elizabeth City County have concurrent jurisdiction over the waters of Hampton Roads (See Sec. 3958 of the Code of Virginia, 1936), but that the Corporation Courts of the City of Norfolk have no jurisdiction over said waters of Hampton Roads. (See Sec. 5938 of the Code of Virginia, 1936.) Hence, it will also be necessary to ascertain what the area of these bodies of water included within the boundaries of Elizabeth City County is, in order to determine its population, per square mile of area, there being some persons in said county and others who live on the "Rip Raps" or "Fort Wool" and who are included in the 1940 U. S. Census as being in the County of Elizabeth City.

The Population Bulletin of Virginia of the Fifteenth Census of the United States, for the year 1930 (which was in effect when the aforesaid ordinance of the county, upon which this case is founded, was adopted), set out on pages 1120-1125 thereof, shows that Elizabeth City County had a total population of 19,835 inhabitants; that the "Land area was 53 square miles"; that its population per square mile was 374.2 inhabitants. That said population of 19,835 inhabitants\* of Elizabeth City County includes therein, the population of the Town of Phoebus, a municipal corporation in said county, having 2,956 inhabitants (See p. 1125 of the aforesaid Census Bulletin for the year 1930), and also includes the population of Fort Monroe, a U. S. Military Post with a population of 1,730 inhabitants, as shown by certificate of Bureau of U. S. Census of 1930; (See defendant's Exhibit No. 4, R., p. . . . .); Langley Field, a U. S. Military Aviation Post, with a population of 1,354 inhabitants, as shown by the same certificate for 1930 and the National Soldiers' Home for Disabled Volunteer Soldiers (now Veterans Administration Facility), with a population of 2,435 inhabitants (as shown by the same certificate for 1930), of which town and U. S. Reservations, the town of Phoebus is exempted by the ordinance itself from the effect and operation of said ordinance of Elizabeth City County), and the U. S. Reservations or Army Posts and Reservations are controlled and operated entirely by the United States and the U. S. War Department. Hence, if the aggregate populations of which said town and U. S. Military Posts as shown by U. S. Census Report and certificate for 1930 aforesaid are deducted from the population of Elizabeth City County, as also shown by said Census Report for 1930, there is left a population in said County, which is affected by said ordinance, of only 11,360 inhabitants, or 214.3 inhabitants per square mile of the land area only, in said County of Elizabeth City not including any water surface in said County at all, as the true population of the County which is affected by the said County Ordinance.

\*Pursuant to an Act of the General Assembly of Virginia approved March 27th, 1936, as shown on page 581, Acts of Legislation, 1936, and its approval by a four-fifths majority, and more, of the qualified voters of the City of Hampton voting at an election, the said charter amendments as set forth in said Act of the General Assembly of Virginia being adopted by said qualified voters as in said Act provided for, the said City of Hampton was by said Act declared to be separated from any connection whatsoever as a magisterial district of the County of Elizabeth City at the

hour of midnight on the 31st day of December, 1939, and thereafter, beginning with the first day of January, 1940, was no longer a magisterial district of the said County of Elizabeth City, and from that day, the property owners have not been required to pay any further taxes to the said County nor had they any connections whatever with such County except to vote for or against certain County officers in general elections as provided by law, and were not theretofore or thereafter included in the population of said County of Elizabeth City, as it is shown by U. S. Census Bulletin for 1930, (Exhibit No. 5, R., pp. . . . .), and by official sheet of the Sixteenth Census of the United States, (County's Exhibit No. 4, R., pp. . . . .), where it is shown that the population of the City of Hampton is there listed for both 1930 and 1940 along with other cities of the State, and is not included with the listed population of the County of Elizabeth City.

In further connection with the boundaries of Elizabeth City County and its consequent area and population per 10\* square mile of area, \*which are material to the determination of this case, the attention of the Court is respectfully called to the testimony of J. B. Sinclair, Civil Engineer since 1903, (set out on pages 115 *et seq.*, to and including page 130), from which it appears that the actual highland area of said County, including the recent fills made at Langley Field and Fort Monroe, (as set out on R., pages 118 and 119 of said evidence of J. B. Sinclair) is 53.8 square miles and with the town of Phoebus and the U. S. Government Reservations included therein, it has a population of 368.68 per square mile.

The area of the County of Elizabeth City with the areas of Hampton Creek, Mill Creek and the southerly portion of Back River and its tributaries, including Harris Creek, which are within the County of Elizabeth City, (as shown by Defendant's Exhibit No. 1—Hampton and Newport News Quadrangles of U. S. Geodetic Survey of the record) is 60.8 square miles and with the town of Phoebus and U. S. Reservations included therein, it has a population of 326.23 per square mile.

With the area of the City of Hampton, containing one square mile, (See 1930 U. S. Census Bulletin, p. 1125, County's Exhibit No. 4 with the record), added to the last above mentioned area of the County, and the population of the City of Hampton of 6,382 added to that of the County of 19,835, the population of the County and City will be 26,217; the joint area of both the City and County, including the aforesaid

creeks and rivers therein, will be 61.8 square miles and the population thereof would be 424.21 per square mile.

11\* \*With one-half of the body of water—Hampton Roads —lying between the Counties of Elizabeth City and Norfolk, ascertained by measuring one-half of the distance from the shore of Elizabeth City County to the shore of Norfolk County, which water contains an area of 8.5 square miles, included in the area of said County and added to its area, as last above ascertained, then the true area of the County will be 69.3 square miles and with the town and U. S. Reservations aforesaid included therein, the said County would have a population of 300.7 per square mile.

With the area of one-half the water in Chesapeake Bay between the shore of Elizabeth City County and the easterly shore of Chesapeake Bay, the area of which is approximately 77 square miles, the total area of the County of Elizabeth City is 146.3 square miles, and has therein, as heretofore stated, a population of 177 per square mile (J. B. Sinclair testimony, R., pp. 122, 123).

With the population of the City of Hampton included with the population of the County of Elizabeth City, thereby making a total population of 26,217, the County,—including Hampton,—has a population of 179 per square mile based on an area of 146.3 square miles.

By Bulletin sheet of 1940 U. S. Census which was released on January 9th, 1941, more than a year after the ordinance under which this prosecution was instituted, was adopted, and put into effect, the following computation is made:

With the land area only, of Elizabeth City County, as corrected by the two fills at Langley Field and Fort Monroe, which gives the County an area of 53.8 square miles (See testimony J. B. Sinclair, Civil Engineer, R., pages 118 and 119), and the population of the town of Phoebus, in said County, of 3,053 persons, (See Census Bulletin, County's Exhibit No. 4, evidence, pages 7, 8 and 9); the population of Fort Wool of 3 persons; the population of Fort Monroe of 3.086 persons; the population of Fort Monroe U. S. Quarantine Station of 6 persons; the population of Veterans Administration Facility of 1,406 persons, and the population of Langley Field of 4,752 persons, all of which last five mentioned areas are U. S. Military Reservations, governed and controlled by Federal laws and the U. S. War Department, and are wholly within the County of Elizabeth City, (See certificate of Bureau of U. S. Census, Defendant's Exhibit No. 4, pages 44 and 45 of evidence, Record, pp. 115 and

116),—the first four mentioned being in Chesapeake District and the last one mentioned being in Wythe District of said County, the population of Elizabeth City County shown by said U. S. Census Bulletin for 1940, when the above municipality exempted by the ordinance itself and U. S. Reservations controlled by the United States have been deducted therefrom, will be reduced to only 19,497, and which will produce to said county only a population of 362.8 per square mile of area under the 1940 U. S. Census.

\*The population of the County of Elizabeth City, as 13\* shown by the United States census of 1930, gives the population of Elizabeth City County as 374.2 per square mile. The United States census for 1940 had not been published up to the time of the passage of the Act of the Legislature and the ordinance hereinafter referred to and on which this prosecution is based.

On January 31, 1938, House Bill No. 196, now known as Section 2743b of the Code of Virginia, was introduced in the House of Delegates by the Delegate from Elizabeth City County and the City of Hampton (see Journal of the House of Delegates, 1938 session, page 138). Said House Bill No. 196 was referred to the Joint Committee on Special, Private and Local Legislation and by that Committee returned to the House of Delegates with the following report endorsed thereon:

“The Joint Committee on Special, Private and Local Legislation respectfully reports that in their opinion the object of the *with* bill cannot be reached by general law or court proceedings. (Signed) Maitland H. Bustard, Chairman.”

(See House Journal and Documents of Virginia, 1938, page 148.) Whereupon, said House Bill No. 196 was referred to the Committee of the House of Delegates on Counties, Cities and Towns with the endorsement aforesaid thereon, and having been considered by the said Committee on Counties, Cities and Towns, the same was reported and passed by the House of Delegates and Senate of Virginia, and on March 2nd was approved by the Governor and became a law as set forth in Section 2743b of the 1938 Supplement to the Code of Virginia, and is the law on which the ordinance assessing license taxes in Elizabeth City County and hereafter referred to is based and on which this prosecution is founded.

On the 6th day of November, 1939, the Board of Supervisors of Elizabeth City County adopted an ordinance of said County imposing a license tax on various and sundry businesses and occupations done and pursued within the limits of

the County of Elizabeth City, outside of the corporate limits of Hampton and Phoebus (See \*County Ordinance, 14\* County's Exhibit No. 1 of the record).

After the adoption of said Ordinance by the Board of Supervisors a notice of a hearing by the Judge of the Circuit Court of Elizabeth City County to determine the action of said Court in approving or disapproving the same was made and the hearing was set for the 23rd day of December, 1939, the notice of such hearing was published for two successive weeks, to-wit: on the 8th and 15th day of December, 1939, in a newspaper with general circulation in the County of Elizabeth City, as required by Section 2743 of the Code of Virginia. (See testimony of S. M. Gibson, Deputy County Clerk, pages 82 and 83 of the record.) Said ordinance, after its adoption, as hereinbefore set out, was amended by the Board of Supervisors at a meeting held on the 22nd day of December, 1939 (See testimony S. M. Gibson, pages 74 and 75 of the record). After such amendment the ordinance was certified by R. E. Wilson, Clerk, and delivered to the Judge of the Circuit Court for a hearing as provided for in Section 2743b of the 1938 Supplement to the Code of 1936. The Judge of the Circuit Court approved said ordinance on March 14th, 1940, by an order of Court entered on said day *nunc pro tunc* as of February 27th, 1940, and ordering that the same should be effective on February 27th, 1940 (See County's Exhibit No. 2).

Said ordinance so adopted and approved was not published in a newspaper having general circulation in Elizabeth City County in accordance with the provisions of Section 2743 of the Code of Virginia. (See testimony S. M. Gibson, Deputy County Clerk, pages 82 and 83 of the record.)

The Commissioner of the Revenue of Elizabeth City County on the first day of April, 1940, assessed and levied license taxes in the County of Elizabeth City, outside of the corporate limits of Hampton and Phoebus, pursuant to said ordinance for the entire calendar year beginning January 1st, 1940. (See testimony C. C. Frost, Commissioner of the Revenue, pages 96 and 97 of the record.)

On the first day of January, 1940, the defendant and your petitioner herein, \*W. J. Gandy, was engaged in conducting a business that required a retail merchant's license, a restaurant license, a license to sell wine and beer on and off premises and a music machine license at 3512 Kecoughtan Road, in Wythe Magisterial District, Elizabeth City County, Virginia. (See testimony Frost, page 94 of the record); for proper conduct of which business said defendant, Gandy, purchased a State license for the year 1940 to transact

business as a retail merchant, as a restaurant operator and for a music machine and for the sale of wine and beer on and off premises. (See testimony of Frost, R., page 95.)

Said Gandy having refused in April, 1940, to pay the County license assessed against him by said Commissioner of the Revenue under the County Ordinance (See R., page 96, testimony of Frost), said Commissioner of the Revenue made complaint on May 21st, 1941, to C. M. Seward, a Justice of the Peace for Elizabeth City County, and obtained a warrant against the defendant, which is the warrant filed in this case, and upon being brought to trial on October 3rd, 1940, upon said warrant before the Trial Justice of Elizabeth City County, said defendant, Gandy, filed his demurrer to said warrant with the grounds thereof therein set out in writing, but which said demurrer was overruled, and upon his plea of not guilty, was found guilty as charged in the warrant and adjudged to pay a fine of Ten (\$10.00) dollars therefor. Whereupon, said W. J. Gandy, your petitioner, appealed from the said judgment of the Trial Justice Court to the Circuit Court of Elizabeth City County and on the 5th day of March, 1941, was tried by said Circuit Court upon the aforesaid warrant, at which trial of said appeal the defendant filed his demurrer to said warrant with the grounds set out in writing, and which demurrer was overruled by the said Circuit Court, and upon his plea of not guilty was found guilty and sentenced to pay a fine of Fifteen (\$15.00) dollars, as set forth in said order (R., pp. 65, 66).

16\*

#### \*ASSIGNMENTS OF ERROR.

(1) The Court erred in overruling the petitioner's demurrer filed in this cause on the following grounds, to-wit:

1. That the ordinance on which the warrant was based is invalid and unconstitutional in that the title to the Act of the Legislature, pursuant to which said ordinance was based embraced more than one object.

2. That the title of the Act of the Legislature on which the ordinance was based does not express its subject in terms broad enough to cover this proceeding.

3. The Act of the Legislature pursuant to which the ordinance was passed has been revised and amended with reference to its title contrary to the provisions of Section 52 of the Constitution.

4. That the Act of the Legislature upon which the ordinance was based in pursuance thereof was a special, private and local law.

5. That the Act of the Legislature under which the ordinance was based is invalid in that the Legislature did not have the power to amend a general law so as to have the effect of special, private or local law.

6. The Act of the Legislature on which the ordinance was based is unconstitutional and invalid as the Legislature did not have the power to delegate its legislative powers to administrative arms of the State.

7. The Act of the Legislature pursuant to which the ordinance was passed is ambiguous and does not apply to Elizabeth City County, Virginia.

8. The Act of the Legislature on which the ordinance was passed was contrary to the provisions of Section 39 of the Constitution.

9. The Act of the Legislature pursuant to which the ordinance was passed is contrary to the provisions of Section 50 of the Constitution of Virginia.

10. The Act of the Legislature pursuant to which the ordinance was passed \*is contrary to the provisions of Section 17\* tion 63 of the Constitution of Virginia.

11. The Act of the Legislature pursuant to which the ordinance was passed is contrary to the provisions of Section 64 of the Constitution of Virginia.

12. The Act of the Legislature pursuant to which the ordinance was passed is contrary to the provisions of Section 110 of the Constitution of Virginia.

13. The warrant is invalid in that it is based on an ordinance passed pursuant to an Act of the Legislature which legislation did not intend to authorize Boards of Supervisors in counties to pass such ordinances.

14. The warrant is invalid because it is based upon an ordinance which was passed pursuant to an act of the Legislature which does not plainly create a power to impose a tax.

15. The warrant is invalid and insufficient because it is based on an ordinance which is unconstitutional and invalid in that:

(a) The said ordinance has the effect of an *ex post facto* law;

(b) Said ordinance has never been published as provided by law.

(c) Said ordinance is invalid in that it creates a tax for revenue and is not uniform to all of the same class in its operations, contrary to the provisions of Section 168 of the Constitution of Virginia.

(d) Said ordinance is invalid in that its provisions are re-

pugnant to provisions of Section 136 of the Tax Code of Virginia.

(e) Said ordinance is invalid in that it refers to another law to create a tax.

(f) The ordinance is unlawful and invalid in that it creates a tax that is not necessarily contrary to the provisions of Section 188 of the Constitution.

16. The warrant is invalid in that under the terms of the ordinance itself, no license tax was legally assessable or payable until February 1st, 1941.

18\*     \*(2) The Court erred in refusing to sustain petitioner's motion to strike out the evidence for the County and dismiss the warrant, as shown in Bill of Exceptions No. 3.

(3) The Court erred in overruling petitioner's motion to set aside its findings and award him a new trial, as shown in Bill of Exceptions No. 4.

19\*

#### \*ARGUMENT.

Assignment One, Grounds 1, 2 and 3 thereof. Section 52 of the Constitution provides that "No law shall embrace more than one object which shall be expressed in its title".

The act complained of (Section 2743b, set out in the 1938 Supplement to the Code, 1936) does not express one object clearly, but rather attempts to couch in inadequate words vast hidden powers claimed to be given to Boards of Supervisors of certain counties, which are in no wise restricted nor specific.

Chap. 55—"An Act to amend and re-enact an act entitled 'An act to invest in boards of supervisors of counties adjoining and abutting any city, within or without this State, having a population of 125,000 or more, as shown by the United States census, and in boards of supervisors of counties adjoining any county which adjoins and abuts any such city and has a density of population of 500 or more to the square mile, the same powers and authority now vested in, or hereafter conferred upon, common councils of cities and towns, and to repeal an act entitled an act to invest in boards of supervisors of counties adjoining and abutting a city with a population of 125,000 or more inhabitants, as shown by United States census, the same powers and authority now vested or hereafter conferred upon common councils of cities and towns, approved March 4, 1920, and any and all acts amendatory

thereof'. approved February 27, 1932, so as to confer like powers on boards of supervisors of counties having a density of population of 475 or more to the square mile. (H. B. 196.)”

A legislative title is that part of an act by which it is known and distinguished from other acts, and the title to the act sets the bounds of the act. (See: *Wooding v. Leigh*, 163 Va. 785, 802; 177 S. E. 310.)

And, as said by Judge Reily in referring to Sec. 52 of the Constitution in the case, *Commonwealth v. Iverson Brown*, 91 Va. 762; 21 S. E. 357; 28 L. R. A. 110:

“The provision of the Constitution is a wise and wholesome one. Its purpose is apparent. It was to prevent the members of the Legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation; to prevent, etc.”

20\*     \*It is recognized by the petitioner that if there is doubt as to the sufficiency of the title it must be resolved in favor of the sufficiency. But, can it be said that the title of this act expresses a single object and that it is clear from the title what that object is? Cities have charters varying in great degrees. Is it meant that the Boards of Supervisors referred to therein are to have the powers and authorities of all cities and towns of this State, wherever situated? In short, what is the object of the act? We submit that there are many varied objects intended to be covered by the title of the Act, but we submit that it is not clear, but misleading and certainly cannot be construed as being broad enough to authorize the levy of a tax, for just as the act levying a tax must be specific (Sec. 50, Constitution), so, too, must the act authorizing such tax be specific.

21\*     \*ASSIGNMENT ONE, GROUNDS 4, 5 AND 11  
THEREOF.

Section 2743b set out in 1938 Supplement to Code, 1936,—the authority upon which the Board of Supervisors of Elizabeth City County adopted the county ordinance complained of (See County Exhibit No. 1 R.) assessing license taxes as shown therein,—is unconstitutional in violation of Section 39 of the Constitution:

“39. *Departments to be distinct.—Except as hereinafter*

*provided, the legislative, executive and judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."*

It is obvious, from the provisions of Chapter 109 of the Code, defining the duties of the Boards of Supervisors, that the functions of Boards of Supervisors are wholly executive, and that the Legislature was prohibited from giving any such Boards of Supervisors any *legislative* functions whatever except as were thereafter (in said Constitution) provided.

Section 65 of the Constitution appears to be the only provisions thereafter provided in the Constitution, whereby Boards of Supervisors can be authorized by the General Assembly to exercise any such legislative functions whatever.

"65. Powers of local and special legislation may be conferred by General Assembly, *by general law* on supervisors and councils."—"The General Assembly may, by *general laws*, confer upon the boards of supervisors of counties, and the councils of cities and towns, *such powers of local and special legislation* as it may, from time to time, deem expedient, *not inconsistent with the limitations contained in this Constitution.*"

The said Act—Section 2743b, 1938 Supplement to the Code of 1936,—was introduced in the House of Delegates of Virginia in the 1938 session and designated H. B. 196 (R., p. 13). Referred to the Joint Committee on Special, Private and Local Legislation, and reported from that Committee with the following report endorsed thereon:

22\*      \*—"The Joint Committee on Special, Private and Local Legislation respectfully reports that in their opinion the object of the within bill cannot be reached by general law or court proceedings. (Signed) Maitland H. Bustard, Chairman."

(See Journal House of Delegates, 1938, p. 148.)

The law was passed by both Houses of the General Assembly with the above endorsement thereon, as set out in the facts of this case (R., p. 13) and was, therefore, considered and enacted by the General Assembly of Virginia as a

special law; wherefore, it is submitted that by the above quoted Sections of the Constitution it only had authority to enact such legislation by general laws and that the s. Act is unconstitutional and void.

In support of the above construction, in the case of *Guthrie v. City of Guthrie*, 173 U. S. 528, 43 L. Ed. 796 and 798, it was said by the Court:

“It is claimed that it violates the Act of Congress, Chapter 818, prohibiting the passage of local or special laws in the territories. That Act, among other things, provides that when a general law can be made applicable, no *special* shall be enacted in any of the territories of the United States by the territorial legislatures. \* \* \* .” “Whether a general law can be made applicable to the subject matter in regard to which a special law is enacted by a territorial legislature is a matter *which we think rests in the judgment of the legislature itself.*”

The Court also said in the case of *Woodall v. Darst*, 77 S. E. 236 to 268, quoting from 36 C. Y. C. 991:

“It is the general doctrine that the legislature is the sole judge whether a provision by a general law is possible under a provision in the Constitution to the effect that no special law shall be enacted in all cases where a *general law can be made applicable.*”

Hence, the legislature can only give powers to Boards of Supervisors under general law and yet in so far as this act is concerned, the legislature itself has determined that the subject cannot be reached by general law, and it is submitted that the law upon which the County Ordinance complained of was adopted, is \*unconstitutional and invalid.

23\* It is further respectfully submitted that the law above complained of is also unconstitutional under the provisions of Section 64 of the Constitution because the Act set out as Section 2473b of the Code of 1936 was passed in 1932 as H. B. 43 by the General Assembly as a general law, (See Journal of House of Delegates, 1932, p. 98, *et seq.*), and, according to the above recited authorities, therefore, was a general law. It was repealed by the Act adopted in 1938,—Section 2743b in the 1938 Supplement to the Code of 1936,—which is the Act herein complained of which has just been shown to be a special law.

Section 64 of the Constitution provides:

"General Assembly shall enact general laws in cases mentioned in the preceding section, and wherever general laws will apply; amendment or partial repeal of general law shall not enact special tax; restrictions as to laws.—In all cases enumerated in the last section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws. Any general law shall be subject to amendment or repeal, *but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of the enactment of, a special, private, or, local law.*" \* \* \*

It is, therefore, clearly apparent that this case is exactly within the language of the prohibition contained in Section 64 of the Constitution and that, therefore, Section 2743b of the 1938 Supplement to the Code of 1936 is unconstitutional and void.

#### 24\* \*ASSIGNMENT ONE, GROUNDS 7.

The act complained of is ambiguous and does not apply to the County of Elizabeth City in that it purports to be applicable to the Boards of Supervisors of three classes of counties, namely:

A. "Counties adjoining and abutting any city, within or without this State, with a population of 125,000 or more as shown by United States census."

This class of counties is clearly defined, but obviously it cannot apply to the County of Elizabeth City, because the evidence in this case shows clearly that a portion of the area of Elizabeth City County is contained in the waters of Hampton Roads, notwithstanding its exact boundary line between that county and the County of Norfolk apparently is not clearly defined; but we submit that the following facts and authorities, to-wit:

It is submitted to be conclusive, from the facts recited in this case, (1) That all of the waters, including Hampton Roads, as well as the land contained within the boundaries as shown in said statement of facts, was granted to the Colony of Virginia by three grants, made, respectively, in 1606, 1609, and 1611-12; That by Section 9 of Code, 1936, the boundaries set out in those three grants were accepted and fixed by the General Assembly of Virginia in 1776, as the boundaries of the State, except for portions of the area used to form the

State of West Virginia and other States, in said Act mentioned; hence, the waters of Hampton Roads are owned by the Commonwealth of Virginia. (See Section 3573, Code of Virginia, 1936; also see R., pp. 5-6.)

(2) That the waters of Hampton Roads were originally, when the counties of Virginia were first formed, in 1634, contained wholly within the County of Elizabeth City. (Record, pp. 5 and 6.)

(3) That New Norfolk County was formed from Elizabeth City County in 1636 and contained all of the land South of Hampton Roads—then called \*James River or "The 25\* River". (Record, pp. 5 and 6.)

(4) That the land and water remaining in Elizabeth City County contained all of the area of the original county or shire of Elizabeth City, which was not included in New Norfolk County, when it was formed. (Record, pp. 5 and 6.)

Therefore, in view of the hereinafter submitted authority, it is respectfully contended that county boundary line between the Counties of Elizabeth City and Norfolk is in the waters of Hampton Roads and at least extends therein to the center or to the thread of the stream thereof. (R., Defendant's Exhibit No. 1, also testimony of F. E. Rudiger. Record, pp. 110 to 114.)

This contention is sustained by the following authorities: In the case of *Leary v. Mayor and Aldermen of Jersey City, et als.*, 208 Fed. Rep. 854, instituted to settle a dispute over the jurisdiction of a municipality of the State of New Jersey to tax submerged lands, which lie under the water of New York Bay, decided by the U. S. Circuit Court of Appeals, Third Circuit, August 22nd, 1913.

Judge Buffington, delivering the opinion of the Court, said (p. 957):

" \* \* \* The law will take judicial notice of the universal and unvarying practice of our States to subdivide their entire territory into counties, and the counties into municipal districts. Indeed, the existence within a State of any portion of its territory without county or municipal relation is unheard of."

In case of *Tallahassee Falls Manufacturing Company v. State*, 194 Ala. 554, 69 So. 589.

This case was decided in 1915. The question in the case was whether or not the dividing line between Tallapoosa and Elmore counties is located at the middle or thread of the Tallapoosa river or in the western margin or bank of that

stream, and it was held by the Court "*that the boundary line between counties bordering on a navigable river is the middle or thread of the river*".

Sayre, J., in delivering the opinion of the Court in that case, referred to the language of Mr. Justice Holmes in rendering the opinion of the Supreme Court of the United States in the case of *Missouri v. Kansas*, 213 U. S. 7829 Supp. Ct. 417, 53 L. Ed. 706, in which case Mr. Justice Holmes said:

"Whatever might be the interpretation of the act taken by itself and applied between two long settled communities, we think that the circumstances and the history of the steps that led to it show that the object throughout was that expressed by the memorial: as we have said, not to gain some square miles of wilderness, but to substitute the Missouri river for an ideal line as the western boundary of the State so far as possible \* \* \*. That this was understood by Missouri to be the effect of the act is shown by a succession of statutes declaring the boundaries of the river counties in this part. They all adopted the middle of the main channel of the river; beginning with the act that organized the county of Platte, approved December 31, 1838, Missouri laws 1838, pages 23-25, and going through the revised statutes of 1855 \* \* \*. The construction is cotemporaneous and long continued and we regard it as clear. It is confirmed by the cases of *Cooley v. Golden*, 52 Mo. App. 229, and *St. Joseph and G. I. R. Company v. Devereus*, 41 Fed. 14, both of which cases noted that the act extended the boundary to the river and not merely to the bank.

"It follows upon our interpretation that it is unnecessary to consider the evidence as to precisely where the line, as surveyed, ran \* \* \*. If the understanding, both of the United States and the State, had not been a wholesale adoption of the river as a boundary, without any niceties, still as the cession 'to the river' extended to the center of the stream, it might be argued that, even on Missouri's evidence, there probably was a strip ceded at the place in dispute. But, from the view that we take, such refinements are out of place. The act has to be read with reference to extrinsic facts, because it fixes no limit except by implication. We are of the opinion that the limit implied is a point in the middle of the Missouri opposite the middle of the mouth of the Kaw."

show conclusively that where there are two counties, the lands of which are on opposite sides of a river, or any other waterway, the boundary line between them runs along the

thread of the stream of such river or waterway, and, therefore, that the boundary line between the Counties of Elizabeth City and Norfolk aforesaid is the thread of the stream or center of the channel running through Hampton Roads, and from which it follows that the County of Elizabeth City does not adjoin Norfolk, a city in this State with a population of 125,000, the boundary line of which is in Hampton Roads, near the U. S. Naval Base, along Port Warden line therein and in the Elizabeth River. (R., Deft.'s \*Ex. No. 6.)

27\* The Court's attention also respectfully is called to the fact as shown in the last mentioned exhibit that none of the area of Elizabeth City County could have been taken into the City of Norfolk by the annexation proceedings therein shown, as said annexation proceedings were instituted by the City of Norfolk only against Norfolk County and the County of Elizabeth City was not made a party thereto.

28\* \*(b) "Counties adjoining any county which adjoins and abuts any such city (with a population of 125,000) (as shown by United States census), and has a density of population of five hundred or more per square mile."

The definition of this, the second class of counties, to which the Act purports to apply, is ambiguous, vague, and uncertain because it does not clearly state whether the county which so abuts such a city is required to contain a population of 500 per square mile, or the county which adjoins a county which abuts the city is required to contain a population of 500 per square mile.

It is true that the County of Elizabeth City abuts the County of Norfolk, which in turn adjoins and abuts the City of Norfolk, which has a population of 125,000; but neither the County of Norfolk nor the County of Elizabeth City contain a population of 500 per square mile (see County's Exhibit No. 5,—U. S. Census Bulletin for 1930), wherein it is shown on p. 1125 thereof that the population of Norfolk County is 80.6 per square mile of land area, and on page 1120 of said Census Bulletin that the population of Elizabeth City County is 374.2 per square mile of land area and that from the calculations made by J. B. Sinclair, Civil Engineer, made including the water surface of said County of Elizabeth City in its area, the population per square mile of said County is much reduced (see testimony of J. B. Sinclair, R., pp. 119 to 124).

Hence, it is obvious that the second class of counties to which the law applies does not include in its definition the County of Elizabeth City, and the law is, therefore, not ap-

plicable to said County of Elizabeth City as a city of the second class therein mentioned.

(c) "Counties having a density of population of 475 or more to the square mile."

The definition of this, the third class of counties to which the Act purports to apply, is also ambiguous, vague and uncertain as it does not state what area of the counties is to be considered in calculating their respective population per square mile.

There are many counties in the State which are 29\* bounded on one or more sides by \*rivers or waterways of some character. Such boundaries extend into such rivers to the thread of the stream as has been already shown.

The areas of such counties are many more square miles than those shown in the U. S. Census Bulletin, and it is probable that is the reason why such Census Bulletin shows therein only the *land* area in square miles (see County's Exhibit No. 5, R., pp. . . .), and does not include therein the water area as a part thereof; but some counties have a greater area than that which consists of land.

Certainly, all of the land, waters, bays, inlets, harbors, havens, etc. (R., p. 5), included in its boundaries are part of the area of the State of Virginia, and the U. S. Circuit Court of Appeals, Third Circuit, in the case of *Leary v. Mayor and Aldermen of Jersey City, et als.*, 208 Fed. Rep. 854, wherein Judge Buffington stated that:

"The law will take judicial notice of the universal and un-failing practice of the States to sub-divide their entire territory into counties and the counties into districts. Indeed the existence within a State of any portion of its territory without county or municipality relation is unheard of. The *locus in quo* abutted the upland property that was part of the township of Greenville, before that municipality was annexed to Jersey City",

so waterways are also a part of those counties which border on such waterways and being such, so much of the surface of such waterways as are within the boundaries of such counties are a part of the area thereof and should be accordingly "reckoned" with in calculating the population per square mile or area of such counties.

However, even taking only the land area of the county as is done in the said U. S. Census Bulletin for 1930, the population per square mile of land area is only 374.2 (County's

Exhibit No. 5, R., p. . . .), and accordingly does not have a population of 475 per square mile, as required by the Act, however, the waters wholly within its boundaries are a part of the area as well as the land and in this case the area of Elizabeth City County includes the waters of Hampton Roads from the shores of Elizabeth City County to the thread 30\* of the stream or center thereof in Hampton Roads \* (See Hampton and Newport News Quadrangles Geodetic Survey, Defendant's Exhibit No. 1, R., pp. . . .), and the waters of Chesapeake Bay opposite the said shores to the channel or thread of the stream of the bay (See Coast and Geodetic Chart No. 1222, Defendant's Exhibit No. 1, R., pp. . . .), according to the language of Mr. Justice Holmes in his opinion delivered in the case of *Missouri v. Kansas*, 213 U. S. 7829, Supp. Ct. 417, 53 L. Ed. 706, hereinbefore set out in this case (See p. 32 this record) clearly shown to be as much a part of the area of Elizabeth City County as the land therein and to get the true population per square mile the calculation should be made on that basis accordingly (See evidence J. B. Sinclair, C. E., pages 118 to 130 R.).

✓ Counsel for petitioner further maintains that the population of the town of Phoebus, the Kecoughtan Veterans Facility, Fort Monroe and Langley Field, U. S. Military Reservations and Army Posts wholly within said county (See R., pp. . . ., Defendant's Exhibit No. 4), should be deducted from the population of the said County of Elizabeth City before calculating the true population per square mile of the said county to determine the applicability of the law to the County of Elizabeth City. The town of Phoebus is exempted from the provisions of the Act as interpreted in said County Ordinance by the Ordinance itself and the inhabitants of the Army Posts and Veterans Facility in the County are governed by U. S. law and orders of the War Department,—they are not engaged in any private business and are accordingly not affected by said County Ordinance adopted under said Act.

Further, it is respectfully submitted that if the Act complained of is applicable to Elizabeth City County because it adjoins and abuts Norfolk County, which in turn abuts and adjoins the City of Norfolk, when the Census Bulletin for 1930 before herein referred to does not give to either of said counties a population of as much as 475 per square mile, 31\* then the said Act also applies to the counties of \*Arlington, adjoining the City of Washington; the counties of Henrico and Chesterfield, adjoining the City of Richmond, and to the county of Norfolk, adjoining the City of Norfolk, they being counties of the first class hereinbefore set out, and

it also applies to the county of Fairfax, adjoining Arlington county, the counties of Hanover, King William, New Kent, Charles City, Prince George, Dinwiddie, Amelia, Powhatan and Goochland, adjoining the counties of Chesterfield and Henrico, and to the counties of Nansemond, Princess Anne, Warwick and Elizabeth City, adjoining the county of Norfolk, as counties of the second class of counties, none of which, however, except Arlington county has a population of 475 per square mile, as shown by said 1930 Census Bulletin hereinbefore referred to. Hence, the Act is vague and uncertain in its language and application.

It is further submitted that there are apparently no counties in this State except Arlington and possibly Fairfax which come within the provisions of the said Act, as being within either of the three classes of counties therein mentioned and hereinbefore referred to, as shown by the Census Bulletin for the year 1930, which was in effect when the said Act was passed, and also when the County Ordinance complained of was adopted by the Board of Supervisors of Elizabeth City County thereunder. The 1940 census was not taken until the year 1940 and the bulletin, showing the same census, was not released for information and guidance until January 9th, 1941. (See County's Exhibit No. 4 of this record.)

The Act complained of is so vague and uncertain that its provisions in the general terms thereof, may cause a chaotic and discordant status among all the cities and towns of this State, as the powers of (all) cities and towns which exist now or which may hereafter be enacted are given to the Board of Supervisors of those counties which come within the scope of the said Act. There is no *situs* specified for the action of such Boards of Supervisors, hence, such Boards being clothed with all of the powers conferred upon (each and all of)

32\* the councils of \*cities and towns of this State by law, and/or by their numerous charters now or hereafter made by such law; such Boards of Supervisors of such counties may go into any, every or all of the cities and towns of this State and there issue bonds or borrow money and levy city taxes for the payment of the loans thus made by them; repay the same; appoint certain officers of such cities and towns; amend and alter the by-laws and regulations and in fact, discharge all and every of the powers, duties and functions which the councils of any or all of such cities and towns, without consulting the people thereof, contrary to all of the provisions and principles of the Constitution of the United States; the Constitution of the State of Virginia and to the detriment and destruction of all natural statutory laws of self-government, freedom and liberty of this land.

The law does not, however, state that such Boards of Supervisors shall have the power and authority over their counties or elsewhere, but merely, that they have such powers with no situs therein stated. This alone is sufficient to show that the said law is vague and uncertain.

The Act aforesaid apparently gives vast powers to such Boards of Supervisors, but nowhere therein does it include the right and authority for them to direct how the population of any of the counties of this State shall be calculated, either on a square mile basis, which would require them to determine the extent of the boundaries of such counties and the area thereof, nor does it authorize such Boards of Supervisors to include the population of any city or cities lawfully declared to be such under the provisions of Section 116 of the Constitution which lie wholly within such county as a part of the population of the county itself, as apparently was done by the Board of Supervisors of Elizabeth City County in its endeavor to include the population of the City of Hampton shown by U. S. Census Bulletin for 1930 as a city separate and apart from said County (See County's Exhibit No. 33\* 4 with this record), \*in order to boost the population of said county per square mile from 374.2 as set forth in said Census Bulletin for 1930 (County's Exhibit No. 4 with this record) to a population of 475 per square mile as required of a county to be included within the scope of said Section 2743b of the 1938 Supplement to the Code of 1936 in order for the provisions thereof to be applicable thereto. Hampton is a city under the provisions of Section 116 of the Constitution; under the laws of the State; under the order of the Circuit Court of Elizabeth City County entered March 30th, 1908 (See Defendant's Exhibit No. 2 with this record); under the charter of said city and is so shown in said United States Census Report. It was made a magisterial district of the county by Section 15 of an Act of the General Assembly of Virginia as shown on page 3 of the printed Acts for 1908, which Act is repealed and the only provision for the said city remaining a magisterial district of the county was as included in the provisions of the charter of said city. The charter of said city was amended by Act of the General Assembly of Virginia (See Acts 1936, page 581), whereby its status as a magisterial district was abolished to become effective January 1st, 1940, which Act was duly approved and confirmed by an election of the qualified voters held for that purpose in said city as therein provided for. In fact the only power that the Board of Supervisors ever had over such city as a magisterial district of the county was to levy a county tax on the property therein to meet the proportion of the county ex-

penses payable by such city in lieu of the payment thereof per capita of population as is provided for by Section 2904 of the Code of Virginia.

In view of all of the foregoing facts and circumstances, counsel for petitioner respectfully submits that the said Act is vague, uncertain in its language and direction and does not apply to the County of Elizabeth City for the reasons above set out.

34\* \*ASSIGNMENT ONE, GROUNDS NINE.

The Act complained of is in violation of Section 50 of the Constitution because it is a law which has been construed by the Board of Supervisors of Elizabeth City County as its authority to impose a license tax, when it fails to specifically state such tax therein, and further because the law as enacted and stated requires that a reference be made to other laws or municipal charters of cities or towns to impose and levy the tax thereunder. (See language of said Section.)

Section 50, Constitution of Virginia: "Enactment of laws; tax laws shall specifically state the tax and require a vote of majority of members. \* \* \* "

"Every law imposing, continuing or reviving a tax shall specifically state such tax, and no law shall be construed as so stating such tax, which requires a reference to any other law or any other tax. \* \* \* "

From which it is apparent that said Section 50 of the Constitution provides that "any law imposing a tax must not of necessity have to refer to another law to ascertain the tax and must specifically state the tax.

The authority for cities and towns to impose license taxes is specifically granted. (See Section 296, Tax Code.) But there is no such grant of authority to Boards of Supervisors to levy such license taxes in either their county or in any city or town of this Commonwealth—the powers of Councils of which it might be clothed with under the said Act.

Hence the said Act complained of is contrary to said Section 50 of the Constitution of Virginia and consequently void.

35\* \*ASSIGNMENT ONE, GROUNDS 10.

The law complained of is unconstitutional with regard to the provisions of Section 63 of the Constitution entitled "Powers of the General Assembly and limitations thereon" because it is therein provided, among other things, as follows:

“ \* \* \* The General Assembly shall *not enact any local, special or private law* in the following cases:

- (1) “For the punishment of crime; \* \* \* ”
- (5) “For the assessment and collection of taxes, except as to animals which the *General Assembly* may deem dangerous to the farming interest. \* \* \* ”
- (7) “Exempting property from taxation. \* \* \* ”

It is respectfully submitted that the aforesaid Act set out in Section 2743b of the 1938 Supplement to the Code of 1936 is a special, private and local act, as hereinbefore stated: That notwithstanding which, the Ordinance of the Board of Supervisors of Elizabeth City County also complained of in this case provides punishments for the crime established as such in the Ordinance itself. The warrant in this case issued is a criminal warrant and the judgment of the Court rendered thereon is the punishment fixed by that Court for the offense therein in said ordinance stated, and is the case 36\* here. \*Hence, said special Act of the General Assembly

which constitutes the authority under which the said Ordinance was adopted, not only operates to fix the punishment for the crime therein set out, but the Ordinance also defines the crime therein as of January 1st, 1940, when said Ordinance was not effective until February 27th, 1940, which is *ex post facto* in violation of Sec. 58 of the Constitution of Virginia.

It is further submitted that the provisions of the aforesaid special law as put in operation by the County Ordinance aforesaid, provides “for the assessment and collection of taxes except as to animals which the General Assembly may deem dangerous to the farming interests”.

It is further respectfully submitted that the said County Ordinance adopted by the Board of Supervisors of Elizabeth City County under the provisions of said Section 2743b, 1938 Supplement to the Code operates by its own language to exempt the property in the town of Phoebus—wholly within and a part of the County of Elizabeth City—from the license taxes imposed by it upon persons and other interests in other portions of the County; the said town of Phoebus being a part of the unit of government of the taxing authority affected by said Ordinance. Wherefore, in consideration of all of the foregoing it is respectfully submitted that the said act upon which said Ordinance is founded is in conflict with the provisions of Section 63 of the Constitution of Virginia and accordingly void and of no effect.

37\*

## \*ASSIGNMENT ONE, GROUNDS 13.

It is contended that it was not the intention of the Legislature when Section 2743b of the Code was originally passed nor when the amendment was passed that the Boards of Supervisors should pass such an ordinance, nor are they authorized to do so, for as the Supreme Court of Virginia said in *Smith v. Kelly*, 174 S. E. 842a-844, when Section 2743b was under consideration in another case and before amendment:

"If a literal meaning is given to the above language, the 'county board' or the 'county board of supervisors', as the case may be, of any county adopting either of the plans and organizations permitted would be endowed with all the power formerly exercised by the old boards of supervisors plus all powers given by general law to the council of a city. A casual examination of the different chapters of the Code granting powers to municipalities shows clearly that the General Assembly did not intend to give to such a county all the powers, duties and responsibilities thus granted to municipalities. Among such powers is found not only the right and duty to construct and maintain streets and sidewalks, but a liability to persons injured by the negligence of the municipality in failing to properly perform its duties in this regard. Another power granted to municipalities is the right to issue merchant licenses and franchises to public service corporations and the like. All such powers of the municipality are usually exercised through the council acting for and in behalf of the corporate body. Surely the General Assembly  
38\* did not intend in the \*language quoted to clothe the county board with such duties and responsibilities."

And as was said in *Williams v. City of Richmond*, 14 S. E. 2nd, 287-291:

"It is a well recognized principle that the test of the validity of an ordinance is not what has been done but rather what may be done—citing *Richmond v. Model Steam Laundry*, 111 Va. 758, 69 S. E. 932. \* \* \*

And if this act is upheld there is no end of duties, powers and liabilities which counties must assume.

And as also said in *Smith v. Kelly*, *supra*:

"There is a fundamental distinction between municipal corporations and county organizations, 'Municipal corporations proper are called into existence, either at the direct so-

licitation or by the free consent of the people who compose them. Counties are local subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State

39\* at large, \*for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy.' *Hamilton County v. Mighels*, 7 Ohio St. 109, 118, 119; *Fry v. Albemarle County*, 86 Va. 198, 9 S. E. 1004, 19 Am. St. Rep. 879; *Rober v. McWhorter*, 77 Va. 223."

And when the Legislature amended and re-enacted 2743b after this decision by the Supreme Court of Appeals of Virginia, it may be safely assumed that the Legislature intended the results as stated by the Court therein, and the language of the Court in so rendering its decision in the case of *Smith v. Kelly*, subsequent to the enactment of the amendment to said law is presumed to have been within the knowledge of the Legislature when said amendment was made, and when, long continued use in the absence of legislation evincing a dissent the courts will adopt that construction. And if counties are "local subdivisions of a state" as therein expressed why should the legislature not have imposed the taxes directly rather than causing the same to apply only to certain of its subdivisions, particularly when such subdivisions receive no more benefits than the remaining sections of

40\* the State? Would \*not the Legislature also have made the boards of supervisors assume the responsibility had it intended any such interpretation of the act as has been placed on it by Elizabeth City County?

It is accordingly submitted that the Legislature did *not* intend to restrict the County Board by "all the powers conferred by general law on city councils" to the organization and methods of the exercise of power by a city council or to

include within the terms all powers granted by general law to the municipalities, or the obligation incident thereto.

41\*           \*ASSIGNMENT ONE, GROUNDS 15.

Having dealt with the invalidity and unconstitutionality of the act of the Legislature on which this license tax was based we now come to point out some of the reasons it is contended that the ordinance imposing the tax is invalid.

First, the defendant and petitioner herein is charged with carrying on a business without a license in Elizabeth City County on May 21, 1940, but the tax levied is from January 1, 1940, the Ordinance, however, under the order of court did not become effective until after February 27, 1940, and actually was not approved until March 14, 1940, whereas the Commissioner of Revenue levied the license for the whole year of 1940. And if the Commissioner of Revenue had seen fit might have charged your petitioner any time from January 1, 1940, under the terms of the ordinance—now an *ex post facto* law is “Every law that makes an action done before the passing of the law and which was innocent when done criminal and punished such action”.

See 1 U. S. 648, *Calder v. Bull*. Hence, had your petitioner been carrying on his business in January, 1940, and even February, 1940, then ceased doing business under the terms of this ordinance, he is guilty of a violation even though the same was not approved until as of February 27, 1941.

The date of the offense charged does not determine the constitutionality of the act, we must consider what effect the act could have, and when it could have been called into play according to its terms.

And here your petitioner according to the ordinance of the County of Elizabeth City, Virginia, imposing License taxes for the fiscal year beginning January 1st, 1940, and for 42\*   \*each year thereafter, as amended; and providing penalties for the violation thereof”, and also, Section 120 of said ordinance—

“Whenever an annual license is required in this county the same shall be procured and paid for unless otherwise provided on or before the first of February of each year. Any person, etc., failing to pay same within thirty days, etc., shall incur a penalty of 5% which shall be added to the amount required”,

incurred a penalty of five per cent (5%) by doing business from January 1, 1940, and February 1, 1940, notwithstanding—

ing the fact that such ordinance imposing such penalty had not become effective or passed until after that time.

And as Mr. Justice Field said in *Cummings v. Mo.*, 18 Law Ed. 356-364, when referring to certain clauses of the Missouri constitution:

“The objectionable character of these clauses will be more apparent if we put them in the form of a legislative act. Thus, if instead of the general provisions of the constitution, the convention had provided as follows ‘Be it enacted that all persons who have been in armed hostility to the United States shall upon conviction thereof not only be punished as the laws provided at the time the offenses charged were committed, but shall also be thereafter rendered incapable of holding any of the offices, trusts, etc.,’ \* \* \* no one would have any doubt of the nature of the enactment. It would be an *ex post facto law* and void, for it would add a new  
43\* punishment for an old offense. So, too, \*if the convention had passed an enactment of a similar kind with reference to those acts which do not constitute offenses \* \* \*. It would be an *ex post facto law* because it would impose a punishment for an act not punishable at the time it was committed.”

So we submit that hereto your petitioner on January 1st, or 2nd, or 3rd was not subject to a license tax nor punishable for not having taken out the same, yet the ordinance as approved made him and all others similarly situated not only guilty of a violation, but liable to a punishment of 5% penalty. And that accordingly the ordinance has the effect of an *ex post facto law* and is invalid.

The ordinance complained of is also invalid or at least has not become effective and hence this prosecution is improper because in the chapter dealing with Boards of Supervisors of the Code of Virginia under section 2743 entitled “Powers of local nature conferred on Boards of Supervisors” after enumerating certain powers vested in Boards, we find “For carrying into effect these and their other powers, the boards of supervisors may make ordinances and by-laws and prescribe fines, etc., \* \* \*. No such ordinance or by-law shall be passed until after notice of an intention to propose the same for passage shall have been published for two successive weeks prior to its passage, etc., \* \* \*, and no such ordinance or by-law shall become effective until after it shall have been published in full for two successive weeks in a like newspaper”.

44\* \*The Board of Supervisors of Elizabeth City County apparently recognized the force of this section because there is nothing in 2743b requiring such publication, and yet, the intention to propose the license ordinance was published for two weeks (See Record, pp. 82 and 83). But there has never been published the ordinance itself (See Record, pp. 82 and 83, Evidence Gibson, Dep'y Clerk).

The petitioner here, as all others in Elizabeth City County, had notice of the intention to propose such an ordinance, but your petitioner and others had no notice of the ordinance actually being passed and its contents until demand was made for the tax and after the penalty had accrued under the same.

And as was said in *Bradley v. City of Richmond*, 66 S. E. 873: "The object of requiring publication was to give notice of the ordinance and of its penalty before the penalty was inflicted."

And see 19 R. C. L., page 901, Section 201. "It is required by statute in some states that ordinances enacted by a municipal council shall be set forth in some newspaper published within the municipality. *Such a requirement is mandatory* and unless an ordinance is published in accordance with law it is void." Citing *Gay v. Engebretsen*, 158 Cal. 21, 139 A. S. R. 67; *State v. Omaha, etc.*, 113 Ia. 30, 84 N. W. 983, 86 A. S. R. 357; *Atchison Ry. Co. v. Baker*, 79 Kan. 183, 21 L. R. A. (N. S.) 427.

And as was said in *State v. Omaha, etc.*, 113 Ia. 30, 84 N. W. 983, 86 A. S. R. 357: "In our opinion, the publication was one of the steps necessary to make this a valid ordinance. The provision about publication is not directory only, but compliance with it is essential to the validity of an ordinance".

45\* \*So it is contended here that the publication pursuant to statute was mandatory and until had the ordinance did not become effective.

46\* \*It is further contended by petitioner that in addition to the foregoing grounds of invalidity that the ordinance is invalid and unconstitutional in that it is contrary to Section 168 of the Constitution of Virginia:

"Taxable property; taxes shall be uniform as to class of subjects and levied and collected under general laws.—All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. The general assembly may define and classify taxable subjects, and, except as to classes of prop-

erty herein expressly segregated for either State or local taxation, the general assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied."

It may be stated in outset that petitioner recognizes that courts including the Supreme Court of Virginia make a distinction as between a pure license tax and a tax for revenue insofar as it is necessary that it be uniform under section 168 of the Constitution of Virginia. But it is submitted here that first the tax levied by this ordinance is not uniformly laid by the very terms of the ordinance:

"BE IT ORDAINED by the Board of Supervisors of the County of Elizabeth City, Virginia, under authority vested in the said Board of Supervisors by virtue of Section 47\* \*2743b of the code of Virginia (Acts of Assembly, 1938, page 107, Chapter 55), that for the year commencing January 1st, 1940, and each subsequent year thereafter, until further provisions are made, the following occupations, employments, professions and business transactions shall be deemed privileges, and shall not be pursued and done within the limits of the County of Elizabeth City, outside of the Corporate limits of Hampton and Phoebus, without license, and the payment annually of the tax on each designated occupation, employment, profession or business, respectively,—  
\* \* \* ."

Certainly the town of Phoebus is an integral part of Elizabeth City County, and certainly the people of Phoebus benefit as much from the revenue derived from the levying of this tax as do the other citizens of Elizabeth City County, because under the uses to which the funds are to be put (See Record, pp. 83 to 85) these funds go into the general funds of Elizabeth City County to pay salaries and other expenses of officers of the County as a whole and are neither used solely for benefit of the districts affected, nor is the amount collected necessary for the issuance of the license and supervision of the businesses.

Secondly, that notwithstanding the name "License Tax" this is no more than a tax for revenue (See Record, pp. 83 to 85), and as Mr. Desty in his Book on Taxation, page 277, says: "And further a license tax imposed for revenue purposes is a tax no matter what name it may be disguised under". And if it be a tax for revenue it must be uniform. See *Day v. Roberts*, 101 Va. 248, 251, 43 S. E. 362, 363.

48\* \*When Judge Buchanan said: "Constitutional provisions similar to the one, etc., have frequently been before the courts, the settled construction placed upon them is that uniform taxation requires uniformity not only in the rate of taxation and in the mode of assessment upon the taxable valuation, but the uniformity must be co-extensive with the territory to which it applies. If a tax is imposed by the State it must be uniform over the whole state, if *by a county*, city or town or other subordinate district the tax must be uniform throughout the territory to which it is applicable." Citing numerous cases.

Territorial limits as used in Section 168 is defined as the actual boundaries of each sub-division as they are fixed by law. *Robinson v. City of Norfolk*, 108 Va. 14, 60 S. E. 763.

And as was said in the case of *Campbell v. Bryant*, 104 Va. 509, 52 S. E. 638, wherein the charter of the town of Madison Heights exempted the persons residing within the territorial limits of the town from the payment of certain taxes to the County of Amherst—

The Court said: "This court has held that a town is a part of the county for all purposes of taxation, and that the legislature has no power by reason of the constitutional inhibition mentioned (Section 168, Constitution of Va.) to exempt the taxable persons and property in a town situated within the limits of a county and forming a part thereof from county levies; that a part of a county cannot be made to bear all the burden of taxation for county purposes; and that the uniformity required extends not only to the rate and mode of assessment, but also to the territory to be assessed,  
49\* and when a tax is levied by a county \*it must be uniform throughout the county \* \* \* ."

Certainly if the Legislature as above stated cannot exempt parts of a county from taxation it cannot give that power to a county as the Board of Supervisors of Elizabeth City County has done here.

Taxing occupations outside the City for the benefit of those living within the city is in effect taking the property of the citizens for the use of the community of which the outside citizen forms no part.

A law which would attempt to make one person in a given number of persons under the guise of local assessment pay a general revenue for the public at large would not be an exercise of the taxing power but an act of confiscation. See *Desty*, page 275, and *McCormack v. Patch*, 53 Mo. 36.

With the foregoing premises that a tax must be uniformly

laid we come to the question—Does this licensing ordinance levy a “tax” as that word is used in Section 168 of the Constitution?

We submit that it does.

There are in general three kinds of taxes: (a) License taxes, (b) special or local assessments, (c) Taxes or Taxes for Revenue.

A license tax is one imposed on the privilege of exercising certain callings, profession or vocation.

As to a license tax it is said that “where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license properly im-

50\* posed \*by virtue of the Police Power \* \* \* .” 17 R. C. L., Sec. 7, page 479.

A tax does not imply a license. There is no necessary connection between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed, license is a tax only where revenue is the main purpose for which it is imposed. See *San Francisco v. Liverpool, etc., Ins. Co.*, 74 Cal. 113, 5 A. S. R. 425; Notes, 52 Am. Dec. 331, and 4 L. R. A. 809.

It is recognized, as we have heretofore stated, that license taxes as such are not restricted to uniformity, etc., but when the so-called “license tax” is clearly a tax for revenue, it is no longer a license tax, but a tax and must conform to the requirements of such. As for instance the taxes here aside from the testimony of the members of the Board that such funds were needed for revenue, a vague perusal of the fees as set forth in the ordinance shows that such fees are neither necessary for regulating the business or for issuing the licenses.

And as was said by the Supreme Court of Virginia in *Robinson v. City of Norfolk*, 108 Va. 14, 60 S. E. 762, 764:

“The distinction between the police power and the taxing power is clearly drawn by the authorities and citing 22 Am. Eng. Enc., L. P. 917, the difference is thus defined, ‘The police power must also be distinguished from the taxing power and the distinction is this, that the taxing power is exercised for raising revenue and is subject to certain limitation, while the police power is exercised only for the purpose of

51\* promoting the public welfare and \*though this end may be attained by taxing or licensing occupations, yet the object *must always be regulation and not the raising of revenues*.’”

And also quoted by the same court was the case of *North Hudson Reg. Co. v. Hoboken*, 41 N. J. Law 71:

“The exaction of license fees for revenue purposes is the exercise of the power of taxation. The distinction between the power to license and the Police Regulation and the same power as a revenue measure is of the utmost importance. If granted with a view to revenue the amount of the tax if not limited by the charter is in the discretion of the authorities. If given as a *police power it must* be exercised as a means of regulation only and cannot be used as a source of revenue.”

And as said by Cooley on Taxation, 587:

“Only those cases where regulation is the primary purpose can be especially referred to the police power.”

And this court further said in the Robinson case, *supra*:

“To construe a general taxing ordinance as a police ordinance it must be shown that the tax collected thereunder is devoted to the expense incident to carrying out its provisions. Otherwise there would be nothing to distinguish a revenue ordinance from a police ordinance.”

So it is here an ordinance passed admittedly for Revenue purposes and for sums in excess of the amount needed to carry out its provision.

And as the Supreme Court of the United States, by Mr. Justice Matthews, said in *Royall v. Va.*, 116 U. S. 572, 29 L. Ed. 735, 738, that the party complying with the statutory conditions is entitled as of right to the license is conclusive that the payment is a *tax* laid for revenue and not an exaction for purposes of regulation.

“The occupation which is the subject of the license is lawful in itself and is only prohibited for the purpose of the  
52\* license that is to \*say prohibited in order to compel the taking out a license, and the license is required only as a convenient method of assessing and collecting tax. Such a license fee was held to be a tax by this court in the case of *Brown v. Maryland*, 12 Wheat. 419 (25 U. S. Bk. 6, L. Ed. 677)” and others.

And as said in 17 R. C. L. 532, #50:

“A vital distinction exists between the power to tax occupation under the form of a license which by reason of the character of the occupation is subject to Police Regulation and the power to tax what are termed useful trades and employments under the guise of a license. It is well settled that the license required of useful employment can carry with it only such fee as is necessary to pay expenses of licensing, etc. \* \* \* Whereas the exaction of license fees for revenue purposes is the exercise of the power of taxation, and as such comes within the provisions of the Constitution limiting the exercise of that power.”

See: *Louisville etc. R. Co. v. Baldwin*, 85 Ala. 619, 7 L. R. A. 266; *Lawrence v. Anderson*, 75 S. C., 62, 55 S. E. 136, 117 A. S. R. 885.

Special Assessments: It is not considered that this is either a special or local assessment so this type of tax will not be discussed.

A license is issued under the police power but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation.

And the charter must plainly show an intent to confer that power or the municipal corporation cannot assume it: See Cooley on Constitutional Limitations, 283.

Every burden which the State imposes upon its citizens with a view to revenue either for itself or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions is levied under the power of taxation, whether imposed under the name of tax or under some other designation. *The license fees which are sometimes required to be paid \*by those*  
53\* *who follow particular employment, are, when imposed for purposes of revenue, taxes.*

See Cooley on Constitutional Law, 713. *Ould v. Richmond*, 23 Grat. 464, 14 Am. Rep. 139.

Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are alike protected so all alike should bear the burden in proportion to the interests secured.

See Cooley, Const. Law, 707.

Wherefore, counsel for petitioner respectfully submits that the foregoing argument is sufficient to show that the County Ordinance complained of is unconstitutional and invalid and, therefore, that the warrant issued thereunder is also invalid and insufficient and that the Circuit Court of Elizabeth City

County erred in sustaining the same for the reasons hereinbefore stated.

Note: It is suggested by counsel for the petitioner that the several arguments made upon Assignment One and the clauses thereof hereinbefore set out are sufficient to cover clauses 6, 8, 12 and 14 of said Assignment One, therefore, no further argument upon those grounds is herewith submitted.

54\*

#### \*ASSIGNMENT TWO.

This assignment is based on the action of the Court in refusing to sustain the petitioner's motion to strike out the evidence for the County and dismiss the warrant in this case after all of said evidence introduced by the County had been heard by the trial Court, in view of the facts and law then and there presented to the Court. Petitioner respectfully submits that the evidence so presented, failed to establish that any *unlawful offense* was committed by the petitioner in conducting his business in the County of Elizabeth City on and or prior to the 21st day of May, 1940, without paying for the county licenses assessed against him therefor, during the year beginning January 1st, 1940, by the Commissioner of the Revenue of Elizabeth City County under the provisions of the said County Ordinance adopted by the Board of Supervisors of Elizabeth City County December 6th-22nd, 1939, and approved and made applicable by the Judge of the Circuit Court of said County February 27th, 1940, but which was never published at length in a newspaper with general circulation in the said County of Elizabeth City as required by Section 2743 of the Code of Virginia, 1936.

For which reasons and all of the other numerous reasons set forth in the facts and arguments in this case, it is respectfully submitted that the said trial Court erred in not sustaining petitioner's motion to strike the evidence introduced by said County of Elizabeth City at the trial of this case.

55\*

#### \*ASSIGNMENT THREE.

Petitioner respectfully submits that in view of all the facts, circumstances surrounding this case as shown by the record; in view of the many laws and authorities submitted to the trial Court as in this record set forth showing that (1) the law—(Section 2743 b of the 1938 Supplement to the Code,

1936), is unconstitutional, vague, misleading and uncertain; that it was not applicable to Elizabeth City County and otherwise void and of no effect; (2) that the Ordinance was unlawfully adopted and is unlawful in itself; and (3) for all the many other facts, evidence, laws and authorities presented to the trial Court and set out in this record, the said trial Court erred in overruling petitioner's motion to set aside the findings of said Court, and grant him a new trial.

### CONCLUSION.

For the foregoing reasons, your petitioner respectfully prays that he may be awarded the writ of error and *supersedeas* to the judgment aforesaid, and that said judgment may be reviewed and reversed and that your petitioner may be awarded a new trial or that he be finally dismissed of this prosecution.

56\*

### \*AVERMENTS OF COUNSEL.

In the event that a writ of error and *supersedeas* is granted your petitioner adopts this petition as his opening brief.

Your petitioner requests that his counsel may be permitted to supplement this written petition by oral argument of the reasons for reviewing the judgment complained of.

Your petitioner, by counsel, avers that on the 3rd day of July, 1941, this petition was filed with Justice C. Vernon Spratley, a member of the Supreme Court of Appeals of Virginia, at his office in the City of Hampton, and your petitioner, by counsel, further avers that on the 30th day of June, 1941, written notice was given to J. W. Hope, Jr., Attorney for the Commonwealth of Elizabeth City County, who accepted service thereon, and another copy of said notice was mailed to Frank A. Kearney, associate counsel for the County of Elizabeth City, informing him that this petition would be presented to the aforesaid member of the Supreme Court of Appeals of Virginia as hereinabove stated, on the 3rd day of July, 1941, and your petitioner, by counsel, further avers that on the 3rd day of July, 1941, a copy of this petition was delivered to J. W. Hope, Jr., Esquire, Attorney for the Commonwealth in and for the County of Elizabeth City, who, together with Frank A. Kearney, associate counsel for the said County of Elizabeth City, appeared and represented the Commonwealth of Virginia as its counsel in the prosecution

against your petitioner in the Circuit Court of the County of Elizabeth City, which was the trial court.

Respectfully submitted,

W. J. GANDY,  
By Counsel.

H. H. HOLT,  
Hampton, Virginia.  
57\* \*MONTAGUE & HOLT,  
By H. H. HOLT, JR.,  
Counsel for Petitioner.

I, H. H. Holt, an Attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion there is error in the judgment complained of in the foregoing petition and that said judgment should be reviewed.

H. H. HOLT.

Received July 3rd, 1941.

C. V. S.,  
Justice of the Supreme Court of  
Appeals of Virginia.

Writ of error and *supersedeas* granted, *supersedeas* not to release plaintiff in error from custody, if in custody, or from bail, if out on bond.

C. V. S.

Aug. 4, 1941.

Received August 5, 1941.

M. B. W.

## RECORD

page 58 } VIRGINIA:

Pleas before the Circuit Court of Elizabeth City County, Virginia, June 23rd, A. D. 1941.

Be it remembered, that heretofore to-wit: A Warrant of Arrest was issued by a Justice of the Peace and tried by the Trial Justice of Elizabeth City County in the case of the County of Elizabeth City v. W. J. Gandy, charged with violating the County License Ordinance in which the defendant

was convicted and appealed the case to the Circuit Court of Elizabeth City County.

Which warrant is in words and figures, as follows, to-wit:

No. 3820

A-5754-County

### COUNTY ORDINANCE.

State of Virginia,  
Elizabeth City County, To-Wit:

To any and all of the Constables of said County:

WHEREAS C. C. Frost of the said county has this day made complaint and, information on oath before me: C. M. Seward a Justice of the said county, that W. J. Gandy (Oak Park Tea Room) of said county on the 21st day of May 1940, in said county, did unlawfully violate the following sections of an Ordinance of Elizabeth City County, Virginia, imposing a license Tax on Business and Professions:

1. Section 61 (b) of said ordinance (Merchants' Tax).
2. Section 80 (Restaurant Tax).
3. Section 7 (j) (Alcoholic Beverage Tax).
4. Section 57 (b) (Music Machine).

THESE ARE THEREFORE, in the name of the Commonwealth, to command you forthwith to apprehend and bring before The Trial Justice of the said County, the body of W.

J. Gandy to answer the said complaint and be furpage 59 } ther dealt with according to the law.

Given under my hand and seal this 21st day of May in the year 1940.

C. M. SEWARD, Justice, (L. S.)  
C. M. SEWARD.

On the back which appears the following words and figures:

Appealed. County,	6/13
	7/26
v.	10/3
	2 P. M.
W. J. Gandy	

## WARRANT OF ARREST.

Demurrer overruled at former hearing.

Executed this 21st. day of May 1940, by E. W. Covington,  
Co. Officer.

Upon hearing the evidence in this case, I do find the accused guilty as charged in the within warrant and adjudge fine \$10.00 & costs. Appealed to Circuit Court 10/3/40—Not paid.

Fine	\$10.00
Justice	3.00
Const.	1.00
Clerk	.25
<hr/>	
Total	14.25

JOHN H. BOWEN, Trial Justice.

An appeal.

Jury waived.

Evidence heard.

Fined 5.00 and costs each on 1, 2, 3.

Not guilty as to No. 4.

page 60 }

J. W., Judge.

3/5/41.

Virginia, Elizabeth City County, To-wit:

BE IT REMEMBERED, That on the 3rd. day of October, 1940, W. J. Gandy and A. A. Aiken of said county, came before me, the undersigned, a Justice of the Peace of the said County, and jointly and severally, respectively, acknowledged themselves to be indebted to the Commonwealth of Virginia in the sum of \$50.00 *dollars*, good and lawful money of the United States, to be levied of their respective goods and chattels, lands and tenements, for the use of the said Commonwealth; but to be void, if the said W. J. Gandy shall per-

sonally appear before the Circuit Court of the said county on the 7th day of October, 1940 at 10 o'clock A. M., to answer the within charge and at any time or times to which the proceedings may be continued or further heard, and before any Court, Judge, or Justice having or holding any proceedings in connection with the said charge, to answer for the offense with which he is charged, the said recognizance to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent Court, and shall in the meantime keep the peace and be of good behavior toward all citizens of this Commonwealth, and shall not depart thence without the leave of the said Court, else to remain in full force and virtue.

Taken and acknowledged by the obligors herein before me in my said county, the day and year the first above written.

JOHN H. BOWEN,  
Trial Justice.

And at another day to-wit:

page 61 } Circuit Court of the County of Elizabeth City  
on Friday the twenty-second day of November, in  
the year of our Lord one thousand nine hundred and forty.

County of Elizabeth City, Virginia

v.

W. J. Gandy

### MISDEMEANOR APPEAL—VIOLATION COUNTY ORDINANCE.

This day came the Attorney for the Commonwealth and the defendant appeared in Court in discharge of his recognizance and the said defendant, by counsel, with leave of the Court filed his demurrer to the plaintiff's warrant and the Court having heard the arguments of Counsel upon the said demurrer, doth defer his ruling on the same until some later day in this term.

And the further hearing of this case is continued until some later day in this term.

The Demurrer is in words and figures, as follows, to-wit:

In the Circuit Court of Elizabeth City County, Virginia:

Commonwealth of Virginia

*v.*  
W. J. Gandy

### DEMURRER.

The said defendant, W. J. Gandy, says that the warrant in this action is not sufficient in law and for grounds of demurrer assigns the following:

1. That said warrant is based on an ordinance passed pursuant to the Act of the Legislature of Virginia, which Act of the Legislature as set forth in the Code of Virginia, page 62 } Section 2743B, is invalid and unconstitutional for the following reasons:

(1). That the title of such Act embraces more than one subject contrary to law.

(2). That the title of the Act does not express its object in terms broad enough to cover this proceeding.

(3). Said Act of the Legislature has been revised and amended with reference to its title contrary to the provisions of Section 52 of the Constitution of Virginia.

(4). Said Act of the Legislature is a special, private and local law and under the provisions of Sections 39 and 65 of the Constitution, the Legislature of Virginia had no authority to confer powers of local and special laws upon Boards of Supervisors, except by general law.

(5). Said Act of the Legislature is invalid in that the Legislature did not have the power to amend a general law so as to have the effect of a special, private or local law.

(6). Said Act of the Legislature is unconstitutional and invalid as the Legislature did not have the power to delegate its legislative powers to administrative arms of the State.

(7). Said Act of the Legislature is so ambiguous in its terms as to be impossible of determination as to its applicability and does not apply to Elizabeth City County.

(8). Said Act violates the provisions of Section 39 of the Constitution in that it delegates legislative power to executive boards by special, private and local legislation. Said Act is in violation of Section 50 of the Constitution in that it imposes the tax without specifically stating such tax and also requires a reference to another law of another tax. It is in violation of Section 63

of the Constitution in that it delegates by special, private and local law, the power of assessing license taxes towards the supervisors; and also authorizes the exemption by special, private and local law of property within the same tax authority from taxation.

(9). Said Act is in violation of Section 64 of the Constitution in that it is an amended act and operates directly or indirectly to enact and has the effect of the enactment of special, private and local law. It is contrary to the provision of Section 110 of the Constitution in that it gives to some counties a complete change in their form of county organization and government by special, private and local law and makes the same effective without submitting it for approval to qualified voters of such county .

2. (a) That said warrant is further invalid because it is based on an ordinance passed pursuant to an Act of Legislation and which said legislation did not intend to authorize Boards of Supervisors in counties to pass such ordinances.

(b) The warrant is invalid because it is based upon an ordinance which was passed pursuant to statute which does not plainly create the power to impose a license tax for revenue purposes.

3. The warrant is insufficient because it is based on an ordinance which is invalid and unconstitutional for the following reasons:

(1). The said ordinance has the effect of an *ex post facto* law.

(2). Said ordinance has never been published as provided by law and hence has never become effective.

(3). Said ordinance is invalid in that it creates page 64 } a tax for revenue and it is not uniform to all of the same class in its operation.

(4). Said ordinance is invalid in that its provisions are repugnant to the provision of Section 136 of the Tax Code.

(5). Said ordinance is invalid in that it refers to another law to create a tax.

(6). The ordinance is unlawful and invalid because it creates a tax that is not necessary and contrary to the provisions of Section 188 of the Constitution.

4. The warrant is unlawful and invalid in that it is based on an ordinance which levies a license tax on property in a county without lawful authority.

5. The warrant is invalid in that under the terms of the ordinance, itself, no license tax was legally assessable or payable until February 1st, 1941.

W. J. GANDY,  
By H. H. HOLT,  
His Counsel.

Upon the back which appear the following:

Filed 11/22/40.

J. W., Judge.

Demurrer overruled.

J. W., Judge.

1/13/41.

page 65 } And at another day, to-wit:

Circuit Court of the County of Elizabeth City on Monday the twentieth day of January, in the year of our Lord one thousand nine hundred and forty-one.

County of Elizabeth City

*v.*  
W. J. Gandy

MISDEMEANOR APPEAL—VIOLATION ORDINANCE  
IMPOSING A LICENSE TAX.

This day came the Attorney for the Commonwealth and the defendant appeared in Court in discharge of his recognition and the Court having maturely considered the arguments of counsel and the law pertaining to the demurrers of the defendant, doth overrule same to which ruling of the Court the defendant, by counsel, excepted and asked leave to subsequently file his bills of exceptions, which leave is granted.

And the further hearing of this case is continued until some later day in this term.

And now at this day, to-wit:

Circuit Court of the County of Elizabeth City on Wednesday the fifth day of March, in the year of our Lord one thousand nine hundred and forty-one.

County of Elizabeth City, Virginia:

v.

W. J. Gandy

MISDEMEANOR APPEAL—VIOLATION COUNTY  
LICENSE ORDINANCE.

This day came the Attorney for the Commonwealth and the defendant appeared in Court in discharge of his recognizance and pleaded "not guilty" to the warrant and with the consent of the Attorney for the Commonwealth, waived his right of trial by jury and submitted all questions of law and fact to the Court for trial and the Court having heard the evidence and arguments of counsel, doth find the accused guilty as charged in count No. 1 under Section 61 b and fix his punishment at a fine of Five (\$5.00) dollars and doth find him guilty as charged in count No. 2 under Section 80 and fix his fine at Five (\$5.00) dollars and doth find him guilty as charged in count No. 3 under Section 7J and fix his fine at Five (\$5.00) dollars, in the warrant set forth, aggregating Fifteen (\$15.00) dollars, which findings of the court, the defendant, by counsel excepted and asked leave to subsequently file his bills of exceptions, which leave is granted.

It is therefore considered by the Court that the plaintiff, The County of Elizabeth City, Virginia, recover of the defendant, W. J. Gandy, the sum of Fifteen (\$15.00) dollars fine and her costs by her about her prosecution in this behalf expended.

Whereas, the defendant expressed his desire to appeal to the Supreme Court of Appeals of this State for a Writ of Error and *Supersedeas*, the execution of this judgment is suspended for the period of ninety (90) days, in order to perfect the said appeal.

page 67 } In the Circuit Court of Elizabeth City County,  
Virginia.

County of Elizabeth City

v.

W. J. Gandy

BILL OF EXCEPTIONS NO. 1.

BE IT REMEMBERED that at the preliminary trial of this case on the 20th day of January, 1941, in the Circuit

Court of Elizabeth City County, Virginia, came the defendant, W. J. Gandy, and filed his demurrer to the plaintiff's warrant in this case, which demurrer is in words and figures as follows, to-wit:

In the Circuit Court of Elizabeth City County, Virginia:

County of Elizabeth City

*v.*

W. J. Gandy

### DEMURRER.

The said defendant, W. J. Gandy, says that the warrant in this action is not sufficient in law and for the grounds of demurrer assigns the following:

1. That said warrant is based on an ordinance passes pursuant to the Act of the Legislature of Virginia, which Act of the Legislature as set forth in the Code of Virginia, Section 4793B, is invalid and unconstitutional for the following reasons:

(1). That the title of such Act embraces more than one object contrary to law.

(2). That the title of the Act does not express its object in terms broad enough to cover this proceeding.

(3). Said Act of the Legislature has been revived and amended with reference to its title contrary to the provisions of Section 52 of the Constitution of Virginia.

(4). Said Act of the Legislature is a special, private and local law and under the provisions of Section 65 of the Constitution, the Legislature of Virginia had no authority to confer powers of enacting local and special laws upon Boards of Supervisors, except by general law.

(5). Said Act of the Legislature is invalid in that the Legislature did not have the power to amend a general law so as to have the effect of a special, private or local law.

(6). Said Act of the Legislature is unconstitutional and invalid as the Legislature did not have the power to sub-delegate its legislative powers to administrative arms of the State.

(7). Said Act of the Legislature is so ambiguous in its terms as to be impossible of determination as to its applicability.

2. That said warrant is further invalid because it is based on an ordinance passed pursuant to an Act of the *Legislation* and which said legislation did not intend to authorize Boards of Supervisors to Counties to pass such ordinances. The warrant is invalid because it is based upon an ordinance which was passed pursuant to which does not plainly create the power to impose a license tax for revenue purposes. Said warrant is invalid because it is based on an ordinance passed pursuant to an Act of the Legislature which does not authorize the Boards of Supervisors of Elizabeth City County to pass such an ordinance, and further, the warrant is insufficient because it is based on an ordinance which is invalid and unconstitutional for the following reasons:

(1). The said ordinance has the effect of an *ex post facto* ordinance.

(2). Said ordinance has never been published as provided by law and hence has never become effective.

(3). Said ordinance is unlawful in that by its terms it is effective on January 1st, 1940.

(4). Said ordinance is invalid in that it creates a tax for revenue and it is not uniform in its operation.

(5). Said ordinance is invalid in that its provisions are repugnant to the provision of Section 136 of the Tax Code.

(6). Said ordinance is invalid in that it refers to another law and its force to create a tax.

3. The warrant is unlawful and invalid in that it is based on an ordinance which levies a license tax on property in a County without lawful authority.

4. The warrant is invalid in that under the terms of the ordinance, itself, no license tax was legally assessable or payable until February 1st, 1941.

W. J. GANDY,  
By .....,  
His Counsel.

Whereupon, the Court having then heard the arguments of counsel for both plaintiff and defendant upon the page 69 } questions of law arising under said demurrer, did overrule the same, to which ruling of the Court the defendant, by counsel, then and there excepted, and this defendant now prays that this his Bill of Exceptions thereto, be signed, sealed and made a part of the record in this case,

which is accordingly done, and is now marked "Defendant's Bill of Exceptions No. 1".

Given under my hand and seal this the 12th day of May, 1941.

JOHN WEYMOUTH (Seal)  
Judge of the Circuit Court of Elizabeth  
City County, Virginia.

Filed with me May 3rd, 1941.

JOHN WEYMOUTH, Judge.

page 70 } In the Circuit Court of Elizabeth City County,  
Virginia.

County of Elizabeth City

<sup>v.</sup>  
W. J. Gandy

BILL OF EXCEPTIONS NO. 2.

BE IT REMEMBERED that upon the trial of this cause on the 5th. day of March, 1941, the defendant, by counsel, with the consent of the Attorney for the Commonwealth, waived his right of trial by jury and submitted all questions of law and fact to the Court for trial. And thereupon the plaintiff to maintain the issue, introduced certain evidence, and the defendant to maintain the defense thereof, also introduced certain evidence, all of which evidence for both plaintiff and defendant is herein certified, and the evidence so introduced by the plaintiff and defendant is the evidence and all of the evidence introduced in the trial of this cause, the same being in words and figures as follows, to-wit:

page 71 } Index.

page 72 } Virginia:

In the Circuit Court for Elizabeth City County.

County of Elizabeth City

<sup>v.</sup>  
W. J. Gandy.

*S. M. Gibson.*

TESTIMONY.

Before: The Hon. John Weymouth, Judge.

Hampton, Virginia, March 5th, 1941.

Present: Messrs. Kearney & Kearney (Mr. Frank Kearney) and Mr. J. W. Hope, Jr., for the County. Messrs. H. H. Holt and H. H. Holt, Jr., for the defendant.

J. M. Knight,  
Shorthand Reporter,  
Norfolk-Newport News, Va.

page 73 } Mr. Holt, Sr.: The defendant pleads not guilty,  
your Honor.

S. M. GIBSON,  
sworn on behalf of the complainant, testified as follows:

Examined by Mr. Kearney:

Q. State your name and residence, please.

A. S. M. Gibson, 329 Hampton Roads Avenue, Hampton, Virginia.

Q. What is your occupation?

A. Deputy Clerk.

Q. What position, if any, do you hold by reason of your position as Deputy Clerk with the Board of Supervisors, Mr. Gibson?

A. I am the Deputy Clerk that has charge of the Board of Supervisors' minutes and affairs. I attend meetings.

Q. Does your office have the custody of the ordinances passed by the Board of Supervisors of Elizabeth City County?

A. Yes, sir.

Q. Do you have an ordinance passed known as the County License Ordinance?

A. Yes, sir, it is in the papers there, in the minutes of the Board.

page 74 } Q. Will you get this and advise the court, please,  
Mr. Gibson, as to the date of the passage of that ordinance?

A. The ordinance was adopted by the Board of Supervisors December 6th, 1939. It was amended December 22nd, 1939, and approved by the Board of Supervisors December 22nd, 1939, and approved by the Circuit Court of Elizabeth City

S. M. Gibson.

County on February 27th, 1940. That is from the minutes. The same certificate appears on the ordinance itself.

Q. Mr. Gibson, will you advise us what Section 61-b, Section 80-b, and Section 70-j, and Section 57-b records?

A. (Witness reads Section 61-b.)

Q. Mr. Gibson, is Section 61-b known as the Merchants' License Tax?

A. 61 is, yes, general (Wholesale and retail), etc.

Q. Read us from Section 80 of that ordinance.

A. (Witness reads Section 80.)

Q. Section 70-j—

A. Interrupting—(Witness reads Section 70-j.)

Q. Section 57-b.

A. (Witness reads Section 57-b.)

Q. Have those ordinances been signed by the Chairman of the Board of Supervisors?

A. Yes, sir.

Q. When was that ordinance passed?

page 75 } A. The ordinance was adopted by the Board of Supervisors December 6th, 1939. It came up for second reading on December 22nd, 1939, and was amended, and was then approved December 22nd, 1939, by the Board of Supervisors, on second reading. It was approved by the Circuit Court on February 27th, 1940, on a *nunc pro tunc* order as of that date. It was actually approved on Thursday, the 14th day of March, 1940.

Mr. Holt: Read that date again.

The Witness: It was approved by the Court on Thursday, the 14th of March, 1940, a *nunc pro tunc* order.

Mr. Kearney: We want to offer in evidence a copy of Section 61-b of the ordinance, Section 80-b, Section 70-j, and Section 57-b, as well as a copy of the order of the court of February—

The Witness: It was entered March 14th, as of Feby. 27, and appears on page 269.

Mr. Holt: In that connection, if the court please, it occurred to me that we will probably need the entire ordinance in the record, or otherwise it could be used as an original exhibit. Frankly, I have not examined the law as to how far we can go in certifying the original exhibit, but I do be-

*S. M. Gibson.*

lieve in considering this matter it is necessary to have the entire ordinance, and insofar as the notation is concerned, I believe counsel for the County and I can get to page 76 } gether on that.

The Court: I think the ordinance should be put in evidence.

Mr. Kearney: We will ask to put it in as Exhibit No. 1 for the County.

Note: The ordinance above referred to was offered and received in evidence and marked for identification "County's Exhibit No. 1".

Mr. Kearney: Then we ask leave, if your Honor please, to put in a copy of the order that was entered on March 14th as of February 27th, as "County's Exhibit No. 2".

Note: Order above referred to was offered and received in evidence and marked for identification as "County's Exhibit No. 2".

By Mr. Kearney:

Q. Now, Mr. Gibson, do you know Mr. W. J. Gandy, the defendant herein?

A. Yes, sir.

Q. Are you familiar with the place of business conducted by Mr. Gandy?

A. Yes, sir.

Q. Where is that place of business located?

A. It is located on Kecoughtan Road, just west of East Avenue, the intersection of East Avenue and the Kecoughtan Road.

page 77 } Q. In which Magisterial District, of what County?

A. Wythe Magisterial District, Elizabeth City County.

Q. What sort of business did Mr. Gandy conduct, Mr. Gibson, do you know?

A. He ran a luncheonette, I would call it. He served meals and sold drinks and confections.

Q. Do you know whether he has been operating at that place of business on or about the 21st of May, 1940?

A. Yes, sir.

Q. You say you do know?

A. Yes, sir.

Q. Was he operating it?

*S. M. Gibson.*

A. Yes, sir.

Q. Mr. Gibson, there has been filed in the papers in this cause by the attorney for the defendant here a report of audit of public accounts of the Commonwealth of Virginia, a report showing the comparative cost of local government. Will you look at that and advise me whether that report shows the areas of Elizabeth City County and the population of Elizabeth City County?

A. Yes, sir, in which summary or detail of comparative cost of the various departments of the County Government it shows Elizabeth City among the other hundred counties of the State as having a population of 53 square miles in each instance.

page 78 } Mr. Holt: Area?

The Witness: I mean area of 53 square miles.

By Mr. Kearney:

Q. What is the population?

A. The total shown here is 19,835 in the County.

Q. Do you know whether that is exclusive or inclusive of the City of Hampton?

A. My census report will show it is exclusive of the City of Hampton. It does not include the City.

Q. That is the population for 1930?

A. Yes, sir.

Q. Do you have the census report showing the population of Elizabeth City County for 1940?

A. Yes, sir.

Q. What records do you have of that?

A. I have the official population report from the Department of Commerce, Bureau of Census, released on January 9th, 1941.

Mr. Kearney: Of course, we want to introduce this report of the Auditor of Public Accounts for the year ending June 30th, 1933. I think it was originally introduced on a plea in this matter by the attorney for the defendant to show the area and the population of Elizabeth City County, and I offer it as Exhibit No. 3. We will have it understood that we will introduce this report of the Auditor of Public Ac-  
page 79 } counts, and if it is necessary to make up a record  
in this case we will use simply the part of the record that shows the area of Elizabeth City County and the population as set forth, with any pertinent part of the record.

*S. M. Gibson.*

The Court: All right.

✓ Mr. Kearney: We offer this in evidence as Exhibit No. 3.

Note: The paper above referred to was offered and received in evidence and marked for identification as "County's Exhibit No. 3".

Mr. Holt: That may be applied to other official documents, I take it?

The Court: Yes.

By Mr. Kearney:

Q. You say you have an official public report showing the population of Elizabeth City County for 1940?

A. Yes, sir.

Q. Does that show the population of Elizabeth City County—what does that show the population of Elizabeth City County to be?

A. It shows the population for 1940 to be 32,283, an increase over 1930 to 1940 of 12,448, or a percentage of 62.8.

Mr. Kearney: We offer this in evidence as Exhibit No. 4.

page 80 } Note: The paper above referred to is offered  
and received in evidence and marked for identification as "County's Exhibit No. 4".

By Mr. Kearney:

Q. There is one more thing I want to ask you, Mr. Gibson. Before this matter was presented to the court, this data for approval, was there a publication in the newspaper?

A. Yes, sir.

Q. Is this the certificate?

A. Yes, sir.

Q. This ordinance here that is in the papers, is that the original ordinance?

A. I don't think it is, Mr. Kearney. I think it is substantially this ordinance that was approved by the court, as far as the record is concerned.

#### CROSS EXAMINATION.

By Mr. Holt:

Q. Mr. Gibson, I understand you to state that you are familiar with Mr. Gandy's place?

*S. M. Gibson.*

A. Yes, sir.

Q. You don't know of your own knowledge whether or not he was actually doing business on the 21st of May, 1940, do you?

page 81 } A. I don't know as I went in there that day, Mr. Holt. I went in there quite frequently, ate there not quite frequently, but occasionally. He was in business about that time. I don't know as I went in there that day.

Q. Do you know when he stopped doing business?

A. No, sir, I don't exactly. I passed there twice a day. I haven't noticed his sign since probably a little over two months, around the first of the year, I would say offhand.

Q. You couldn't put it at a certain date?

A. No, sir, I couldn't.

Q. Now, I believe you stated that you had charge of the records insofar as the Clerk's Office is concerned of the Board of Supervisors?

A. Yes, sir, that is my job.

Q. Do you have any official capacity with the Board of Supervisors?

A. No, sir, I have just been delegated by the Clerk to attend to that particular part of the duties.

Q. You are Deputy Clerk?

A. That is correct.

Q. As such you do have charge of the records of the Board of Supervisors?

A. That is correct.

Q. And you are familiar with the meetings of the Board of Supervisors?

page 82 } A. Yes, sir.

Q. Do you carry out the instructions of the Board of Supervisors to the Clerk? In other words, if the Clerk is directed to do a certain thing by the Board of Supervisors, are you the person in the Clerk's office that would do that?

A. Generally, yes, sir.

Q. You would know if it was done by the office or someone in the office?

A. I would, sir.

Q. Has this ordinance referred to ever been published since its passage and approval by the court?

A. In its entirety?

Q. Yes.

A. In a newspaper, do you mean?

*S. M. Gibson.*

Q. Yes.

A. No, sir.

Q. Has it ever been published as approved by the court?

A. It has been published in pamphlet form.

Q. I am speaking now in the newspapers?

A. No, sir.

Q. When you said just now not in its entirety, will you explain what you mean by that?

A. Well, what I mean is that there is a section of the Code that the late Commonwealth's Attorney followed. It was that section that required notice to be given before the ordinance came before the court. In that case we page 83 } give the title and purpose of the ordinance, and not the ordinance in its entirety. There is another section of the code that requires the ordinance in its entirety be advertised, but that has not been used since I have been Deputy Clerk.

Q. Are you familiar with Section 2743 of the Code?

A. I think so, yes, sir.

Q. Has this ordinance been published according to that section?

A. I would like to look at it first. One of them is "B". I think B is the one we worked on. No, sir, the ordinance was adopted, according to my understanding, under 2743-b of the Code.

Q. And it has not been published according to that?

A. No, sir, not to my knowledge.

Q. May I ask you this, I don't want to put Mr. Wilson on if it isn't necessary.

A. I am sure it isn't.

Q. You would know if it were done by the Clerk of the Board?

A. Yes, sir.

Q. Were you present at the time that the original ordinance was discussed and approved by the Board of Supervisors?

A. Yes, sir.

Q. Will you state what was the purpose of this license ordinance?

page 84 } A. My understanding of the purpose of the license ordinance was to provide in the two Magisterial Districts in the County, the Wythe and Chesapeake Districts, garbage disposal, or additional garbage disposal, police protection, licenses, and services peculiar to the districts.

*S. M. Gibson.*

Q. Well, now, so that, in other words, increased the revenues for those purposes?

A. That was my understanding of the—for its purpose was to provide those additional facilities for business and commercial places, which had grown up very rapidly in the County areas, and they felt it was not fair to take the tax from real property and pay these extra expenses entailed by business entirely.

Q. What I am trying to get at is this. The license ordinance, was that an ordinance, with the fees to be used solely for the issuance of licenses? In other words, does it cost the County as much as they obtain in licenses to issue the license certificates?

A. No, sir.

Q. Does the amount received from the license ordinance or the licenses issued thereunder amount to more than the amount necessary for the issuance, is that correct?

A. That is correct.

Q. And this was for increasing the revenue for the two districts, for the purposes for which you stated?  
page 85 } A. That is my understanding that was the purpose of it.

Q. Now, I believe you referred to the 1940 census. Will you state the date of this publication?

A. It was released for use in the afternoon papers on January 9th, 1941, and was mailed to me under date of January 25th, 1941, from George H. Thomas, in charge of the Population Division.

Q. That is January 9th, 1941, it was released?

A. That is correct.

Q. Do you know as a matter of fact when the census for 1941 was accomplished?

A. Completed?

Q. Yes.

A. No, sir, I do not.

Q. That is the first bulletin that you know of that was issued, and that was in 1941?

A. No, sir, it is not the first bulletin.

Q. Do you know of any bulletin which covered the census of the State of Virginia prior to that time?

A. No, I do not, that covered the State. An issue in the newspaper prior to this I think was unofficial, from the Newport News office.

Q. What I mean, was there any officially?

*S. M. Gibson.*

A. No, sir.

page 86 } Q. Would you look at that census bulletin and  
tell us what the population of the City of Hampton is?

A. This bulletin shows Hampton, Elizabeth City County, 1940, 5,898.

Q. And in the town of Phoebus?

A. Phoebus, Elizabeth City County, 3,503.

Q. Now, would you refer to the census in the bulletin of 1930?

Mr. Holt: I would like to introduce it at this time under the same conditions, so we may use only such excerpts under it as are necessary, with the understanding that we may use such relevant parts.

By Mr. Holt:

Q. I hand you what purports to be a 1930 census bulletin for Virginia, and ask you to turn to page 1125. Will you state what is located thereon as relevant to the census of Elizabeth City County?

A. Elizabeth City County, 1930, top of the column, says 19,835.

Q. The area?

A. No, sir.

Q. No area given?

A. No area given.

Q. Now, will you turn to page 1120 and read what it says there relevant to the area and census of Elizabeth  
page 87 } City County, please, sir?

A. Elizabeth City County, under column 1930, shows 19,835.

Q. The area?

A. It does show the area. It shows the population per square mile—I beg your pardon—it does on the other side, 53 square miles, and the population per square mile 374.2.

Q. 374.2?

A. Yes.

Q. Now, will you refer to the same bulletin and give me the population and area of Norfolk County?

A. Norfolk County shows a land area in square miles of 373 for 1930. The population for 1930 is 30,082, a population per square mile of 80.6.

Note: The paper above referred to is offered and received

*S. M. Gibson.*

in evidence and marked for identification as "County's Exhibit No. 5".

By Mr. Holt:

Q. Now, will you refer to your 1940 bulletin once more and give me the population of Norfolk County?

A. Norfolk County is shown in the 1940 census as 35,828.

Q. 35,828?

A. Yes, sir.

page 88 } Q. And does it give the area?

A. It doesn't give that here.

Q. Does it give the—

A. It just gives the 1930 census, the increase and percentage of increase for the two continued periods.

Q. For the purpose of the record will you refer back to the area of Norfolk County in the 1930 bulletin?

A. Yes, sir. Do you want me to state what it is?

Q. Please.

A. 373 square miles in 1930, it shows.

Q. Now, does that 1940 census bulletin include Hampton or not? What does it state?

A. 1940?

Q. Yes.

A. It doesn't state, Mr. Holt, but the census figure that it gives for 1930, that appears in the 1930 census without the City of Hampton, is identical, so therefore, I take it it doesn't include the City of Hampton.

Q. Will you refer to the City of Hampton in the 1940 census?

A. 1940?

Q. Yes.

A. Yes, sir.

Q. What is that census?

A. Hampton, 1940, 5,898.

Q. And the town of Phoebus?

page 89 } A. Phoebus, 1940, 3,503.

# RE-DIRECT EXAMINATION.

By Mr. Kearney:

Q. Mr. Gibson, before the Board of Supervisors passed this ordinance did they hold a public hearing on it?

A. Yes, sir, they held several.

Q. Do you know whether Mr. Gandy was present at any of those?

*S. M. Gibson.*

A. Yes, sir.

Q. Do you know whether he made any objections or made any statement with reference to the ordinance?

A. I know he made some statement, but I wouldn't recollect what it was about.

Q. Where did he make that statement?

A. In the Trial Justice's Court Room.

Q. Is that where the Board of Supervisors met?

A. Yes, sir.

Q. When they considered this ordinance?

A. Yes, sir.

Q. Now, when the matter was heard before the Circuit Court after this notice had been published in the newspapers, do you know whether Mr. Gandy was present at that time or represented by counsel?

page 90 } A. My recollection is that he was present, but I know he was represented by counsel.

Q. Who was the counsel representing him at that time?

A. Mr. Holt, Sr.

Q. Now, you say it is a fact that the ordinance in its entirety has not been published in the newspapers?

A. It has not.

Q. Since its approval by the court?

A. No ordinance that has been passed by the Board since I have been here has been published in the newspapers.

Q. What publication has there been of this ordinance?

A. There was notice given with the title of the ordinance and the brief purposes of the ordinance, and notifying all persons interested that the Judge of the Circuit Court would hold a hearing on a certain date, and announced that those in favor of it or opposed to it might be heard at that time.

Q. After its passage was there any publicity given to the ordinance?

A. Oh, yes, sir. Commissioner Frost can tell you better about that. A series of advertisements were run notifying the public, in addition to a number of news items.

Q. Were there any printed copies of the ordinance prepared for distribution?

A. Yes, sir.

Q. How many copies were prepared, do you  
page 91 } know?

A. I wouldn't like to say. I don't remember.

Q. Who did that?

A. Mr. Frost has it printed and he would know, but I don't

*S. M. Gibson.*

recollect. There were a good many, I know, but I don't know how many.

Q. Mr. Gibson, Mr. Holt has questioned you about the population of 1930 and 1940. I want to ask you whether there has been any large increase in business establishments in the County between 1930 and 1940?

A. Unquestionably there have. I couldn't give you the figures, but I think the Commissioner could give it to you probably exactly from his records. I know there has been a considerable increase, but I don't know how much.

Q. What kind of business houses?

A. There is most every class of business that they have in the cities. There have been chain grocery stores, automobile dealers concerns, bowling alleys, luncheonettes, shops by merchants, and very near everything.

Q. Where do those merchants come from, do you know, any particular place?

A. No, sir, I don't know where. I know where some of them come from, but as a whole I don't know.

#### RE-CROSS EXAMINATION.

page 92 } By Mr. Holt:

Q. Mr. Gibson, I want to offer what purports to be a certified copy of certain court records, particularly an order of the Circuit Court for the County of Elizabeth City, of Monday, March 30th, 1908, by Judge William N. Portlock, and ask you if that is a true copy of your record, sir?

A. I would say so, yes, sir.

Mr. Holt: We wish to introduce that in evidence as "Defendant's Exhibit No. 2".

Note: The paper above offered in evidence was marked for identification "Defendant's Exhibit No. 2".

By Mr. Holt:

Q. Now, there is just one thing that is not particularly clear to me. We keep referring to the publication of this ordinance or any notice entered. Have there been any newspaper publications of this ordinance at all?

A. There has been of a heading of it, yes, sir.

Q. That was for the hearing on the necessity of it, isn't that true? Since its passage has there been any newspaper publication of it?

*Cecil C. Frost.*

A. No, sir.

Q. Mr. Gibson, under Section 3191 of the Code of Virginia a copy of all maps of the bays, rivers, and creeks of this Commonwealth made by the Engineer of the Commissioner of Fisheries and showing the location of oyster planting grounds in these waters will be filed in the Clerk's Office of the County having jurisdiction over the respective underwater areas. Would you get that map for me, please, sir?

A. Get it now?

Mr. Holt: I am through with you now.

✓  
CECIL C. FROST,

sworn on behalf of the complainant, testified as follows:

Examined by Mr. Kearney:

Q. State your name and residence.

A. Cecil C. Frost, fifty-two, Allegheny Road, Elizabeth City County.

Q. What is your official position in Elizabeth City County?

A. Commissioner of Revenue.

Q. How long have you held that office?

A. Since January 1st, 1940.

Q. Do you know Mr. W. J. Gandy, Mr. Frost?

A. Yes.

Q. Do you know whether he conducts a place of business at Elizabeth City County, or not?

A. He did, yes, sir.

page 94 } Q. Where was his place of business located?

A. It was on the Kecoughtan Road. I think the number is 3512 Kecoughtan Road.

Q. His place of business was located in what Magisterial District, in what County?

A. Wythe Magisterial District, Elizabeth City County.

Q. Do you know whether he conducted that place of business there during 1940?

A. Yes, sir.

Q. Do you know whether he conducted it in May, 1940?

A. Yes, sir, I am sure he did.

Q. Well, did you ever visit his place there, Mr. Frost?

A. I was there in January at regular license time, State license.

Q. Did you talk to Mr. Gandy?

A. No, he wasn't there. I talked to his wife.

*Cecil C. Frost.*

Q. What kind of business were they conducting there?

A. They were conducting a business that required a retail merchant's license and a restaurant license. They were handling off and on the premises wine and beer, a music machine, and business of that nature. I was in there with the state license man at the time.

page 95 } Q. You went in in company with the state license man?

A. Yes.

Q. Now, Mr. Frost, did Mr. Gandy purchase a state license for 1940?

A. Yes, sir.

Q. What state license did he purchase?

A. He purchased a retail merchant, restaurant, and a slot machine.

Q. A music and slot machine?

A. Yes, sir.

Q. Did he purchase this from you?

A. Yes, sir.

Q. Did you discuss with him the question of the purchase of these county licenses?

A. At the time that we were—that this went into effect, around April, I then took the matter up with him.

Q. What was his answer to you as regard to your solicitation for him to purchase these licenses?

A. Well, he failed to take out a license at the proper time, and I got in touch with him again. His argument was that it was unconstitutional and that he just wasn't going to take it out.

Q. Did he make any statement to you as to whether he was or was not conducting business there at this place that you assessed the license for?

A. No, sir, he didn't deny it.

page 96 } Q. Did you come back in the place any more after January, 1940?

A. I don't recall definitely, but I am sure I did. I was up—I belong to a little association out there—we used to eat there in the evenings, the Wythe Progressive Club, I believe it was styled, we used to meet there about once a month.

Q. Do you know whether you met there during the months of February, March, April or May, 1940?

A. I am sure I did, but I couldn't say definitely to save my life.

Q. Mr. Frost, as Commissioner of Revenue, did you have any publication made of this license ordinance?

*Cecil C. Frost.*

A. Yes, I had the ordinance printed in this form (indicating).

Q. How many copies did you have printed?

A. I was just trying to think—there were some of the folks talking about it awhile ago—if I am not mistaken I think it was 1,200 copies, but I would have to look it up to make sure. We decided not to have too many copies made, because there might be some changes that the Board of Supervisors might want to make.

Q. After this ordinance had been approved by the Circuit Court of Elizabeth City County, did you give any page 97 } notice of that fact to the merchants of the County?

A. Yes, sir, I had a mimeographic letter that I mailed to every known merchant that advertised in the papers.

Q. Did you mail Mr. Gandy one?

A. Yes, sir. I mailed all of them one.

Q. And advertised it in the papers?

A. I had that advertised in the paper also.

Q. Did Mr. Gandy ever obtain a 1940 County license for merchant, or general merchant, or a restaurant license, or an alcoholic beverage license, or a license for a music machine?

A. No, sir.

### CROSS EXAMINATION.

By Mr. Holt:

Q. Mr. Frost, the 500 copies of the printed license ordinance, how were they distributed?

A. Well, I simply had them in the office for the use and benefit of any person who might want one. Anybody that made a request for one, of course, got one. We did have quite a number of requests by mail, which I mailed to them.

Q. You referred a moment ago to some request that you had mailed to the merchants to pay their licenses. Do you have a copy of that?

A. I think I have it down in the office, yes, sir.

page 98 } Mr. Holt: I would like to get a copy of it. If it is agreeable to the court I would like to file it with the papers. It is a letter addressed to the merchants in the State.

The Court: All right.

*Cecil C. Frost.*

By Mr. Holt:

Q. You also referred to a newspaper advertisement?

A. Yes, sir.

Q. Did that advertisement include a copy of the ordinance?

A. No, sir.

Q. Was that merely a directory notice to come in and pay the license in pursuance of the ordinance?

A. Yes, sir.

Q. That didn't specify any particular business or branch of a business?

A. No.

Q. Or businesses, or business that might be covered by the ordinance?

A. No.

Q. You never have caused to be published in a newspaper circulated in Elizabeth City County a copy of this ordinance, have you?

A. No, sir.

Q. You were Commissioner of Revenue at the page 99 } time this ordinance was approved by the court, were you not?

A. Yes, sir.

Q. When you assessed these license taxes, you assessed them as of what date?

A. As of January 1st.

Q. As of January 1st? That license ordinance was not approved until February 27th, isn't that correct?

A. I don't know the date exactly.

Q. In other words, you assessed back to the date of January 1st, is that correct?

A. That is correct, retroactive.

Q. January 1st of the year 1940?

A. 1940.

Q. Under what theory did you do that—under the terms of the ordinance itself?

A. Yes, sir.

Q. The ordinance itself stated that it should be effective as of January 1st, 1940?

A. Yes, sir.

Q. Notwithstanding the fact that it was not approved by the court until February 27th?

A. That is right.

page 100 } E. W. COVINGTON,  
sworn on behalf of the complainant, testified as  
follows:

Examined by Mr. Kearney:

Q. State your name, residence and occupation, please, sir?

A. E. W. Covington, 1808 Electric Avenue, Hampton.

Q. What is your occupation, Mr. Covington?

A. County Police Officer.

Q. How long have you been employed as a County Police Officer?

A. I have been regularly about six years.

Q. I hand you this warrant against W. J. Gandy and ask you did you execute that warrant on the 21st of May, 1940?

A. Yes, sir.

Q. Did you summon Mr. Gandy to court on that date or arrest him?

A. On that date.

Q. I say did you summon him or arrest him?

A. I summoned him.

Q. Was he conducting a business in the County at that time?

A. Yes, sir.

Q. What kind of a business was he conducting, Mr. Covington?

A. A restaurant and beer, soft drinks, sand-  
page 101 } wiches.

Q. Did you ever visit the place?

A. Yes, sir.

Q. Do you know whether he had a music machine there?

A. Yes, sir.

Q. Where was Mr. Gandy when you summoned him?

A. Mr. Gandy was at his place of business, the Cosby Motor Company up here on Queen and Armistead Avenue, when I summoned him. We called up his business that morning and he wasn't there.

Q. Was the place open for business that day?

A. Yes, sir. His wife was there.

Q. Where was his place of business located on the 21st of May, 1940?

A. 3512 Kecoughtan Road.

Q. What Magisterial District of the County is that located in?

A. Wythe Magisterial District, Elizabeth City County.

Q. Did you have any conversation with Mr. Gandy on the

*E. W. Covington.*

day you summoned him with regard to whether he had his County license, or not?

A. No, sir.

Q. You did not?

A. No.

Q. You just summoned him?

A. Yes, I just summoned him on that warrant.

page 102 } CROSS EXAMINATION.

By Mr. Holt:

Q. Mr. Covington, you stated that Mr. Gandy was doing business in Elizabeth City County on May 21st. Of your own knowledge do you know that?

A. Yes, sir.

Q. Were you in his place of business on that date?

A. Yes, sir.

Q. Didn't you state in the lower court you were not, but you went to the door and no one was there?

A. No, sir, I went inside and his wife was there.

Q. Was there anyone else there?

A. I didn't see anyone else.

Q. Did you see anything sold or bought there?

A. No. That is all I know. The place was open, the doors were open, his wife was behind the counter, and I asked her was Mr. Gandy in, and she said he was not.

Q. Did you buy anything?

A. No, sir.

Q. Didn't you state in the lower court that you hadn't seen any business performed there that day?

A. I stated the place was open for business. I didn't say there wasn't any business.

Q. You said it was open. You don't know  
page 103 } whether they were open for business, or not, is  
that right?

A. I don't know. She was behind the counter when I asked her the question.

Q. Where was Mr. Gandy at that time?

A. He was in the Cosby Motor place.

Q. He was working there, wasn't he?

A. Yes.

Q. Now, you referred to a slot machine or music machine, or something of that kind?

A. Yes, sir.

Q. Did you look at that?

*E. W. Covington.*

A. No, sir. The reason I know the machine was there, I had complaints about the machine running after hours.

Q. You don't know that it is Mr. Gandy's machine, do you?

A. He said it was his. I don't know.

Q. He said it was his?

A. On the night we went to see him about somebody made a complaint about the music being used late, and I went there and he said then it was his machine. I don't know what time that was or when it was. It was sometime during last year.

Q. Was it before May?

A. I wouldn't know.

Q. Well, now, I would like for you to be very particular, because—did you look at the machine—wasn't  
page 104 } Mr. Calvin Smith's card on it and hadn't he paid a license for it?

A. I didn't see the machine.

Q. You didn't see it?

A. No, sir, on this date, no, sir.

Q. So you don't know?

A. I don't know at this particular time, Mr. Holt. It was around twelve, something after twelve o'clock on this date I went there about the machine.

Q. Mr. Covington, you realize that this is a criminal matter, Mr. Gandy is charged with operating a music machine or slot machine without a license?

A. Yes, sir.

Q. Now, we want to know whether or not he had that machine in there and it was his on the date of May 21st.

A. I wouldn't know whether the machine was there on May 21st or not.

Q. Will you testify whether or not Mr. Gandy had a music machine of his own in there that date?

A. No, sir.

Q. Will you testify as to whether or not you saw a music machine in there that day?

A. No, sir, I didn't notice any machine on that date.

Q. Can you testify that you saw any music machine in there prior to that date?

A. No, sir, I wouldn't say.

page 105 } RE-DIRECT EXAMINATION.

By Mr. Kearney:

Q. Mr. Covington, during the year 1940 did you see a music machine in there?

*E. W. Covington.*

A. Yes, sir.

Q. In that place?

A. Yes, sir.

Q. How many times?

A. Well, it was several times. I don't know how many times, Mr. Kearney. I was in his place several times and the machine was going. I noticed that he had—somebody had a license on the machine, but I don't remember whose name it was in.

Q. And the license was a state license?

A. State license?

Q. State license?

A. Yes.

Q. Did you see any County licenses on it?

A. I don't think so, no.

Q. Now, how often did you visit Mr. Gandy's place during 1940?

A. Well, maybe I went in his place a half dozen times, but I was by his place every day and every night of 1940.

Q. Was he open for business during that year?  
page 106 } A. Every day, yes, sir.

Q. Every day?

A. Yes. His place of business was open up until—I won't say every day—until sometime before Christmas he closed up.

# RE-CROSS EXAMINATION.

By Mr. Holt:

Q. Mr. Covington, I want you to be very careful. On the day you went there and you say you saw a State license on that machine, did you look to see whether the State license was on the machine and you didn't see any Calvin Smith card there?

A. I am not positive, but I think—I wouldn't say whether both of them were there, or not, Mr. Holt. I know the State license. I wouldn't be positive about the other one.

Q. Well, now, another thing. Don't Mr. and Mrs. Gandy live in that place, in that building?

A. Yes, sir.

Q. They lived there at that time?

A. Yes, sir.

page 107 } V. T. JACOBS,  
sworn on behalf of the complainant, testified as  
follows:

Examined by Mr. Kearney:

Q. What is your name and address?

A. V. T. Jacobs, 139 Locust Avenue.

Q. What is your occupation?

A. Elizabeth City County Police.

Q. How long have you been a police officer for Elizabeth  
City County?

A. About three years.

Q. Where do your duties require you to patrol?

A. Wythe Magisterial District.

Q. Do you know Mr. W. J. Gandy?

A. Yes, sir.

Q. Do you know whether he conducts a place of business  
in Wythe Magisterial District, Elizabeth City County?

A. Yes, sir.

Q. Where is his place of business located?

A. The forty-five hundred block on Kecoughtan Road.

Q. What kind of business did he conduct there during 1940,  
if any?

A. He had a restaurant, beer, cigars and—

Q. Do you know whether his place of business was open  
in May, 1940?

A. Yes, sir.

page 108 } Q. And you say he conducts a restaurant and  
what else?

A. Beer, cigars, cigarettes.

Q. Do you know whether he has a music machine in there  
—had a music machine in there?

A. Yes, he had one.

Q. Did you ever visit the place yourself?

A. Yes, sir.

Q. I believe at that time you were on traffic duty down  
there at the school located down there?

A. Armstrong school, yes, sir.

Q. How many times a day were you down there, Mr. Ja-  
cobs?

A. I was there every day. Do you mean at the school?

Q. Yes.

A. I was there every school day.

Q. How many times a day? Were you there in the morn-  
ing?

A. In the morning and afternoon.

*Cecil C. Frost. Fred E. Ruediger.*

Q. And recess time?

A. I wasn't there at recess time. I was there in the morning from eight o'clock to nine o'clock, and in the afternoon from one-thirty until about three-forty-five o'clock.

CROSS EXAMINATION.

By Mr. Holt:

Q. You stated that there was a music machine page 109 } there?

A. Yes, sir.

Q. Was that Mr. Gandy's or Mr. Smith's?

A. That I wouldn't know. I wouldn't know who owned it.

Q. You don't know whether there was a license paid on it or not?

A. I wouldn't know that.

Q. Do you know whether it was in there on May 21st?

A. I wouldn't know about that particular day. I just know he had one in there.

CECIL C. FROST,  
recalled, testified as follows:

Examined by Mr. Kearney:

Q. I just wanted to ask one question I neglected to ask you. When was there any penalty added to the license tax for 1940?

A. On the 1st of May. We had the license ordinance, the machinery all set up, started to collecting April 1st, and gave them thirty days in which to pay without penalty.

Q. That was for the year 1940?

A. Yes, sir.

page 110 } Mr. Kearney: That is the County's case, your Honor. The plaintiff rests.

FRED E. RUEDIGER,  
sworn on behalf of the defendant, testified as follows:

Examined by Mr. Holt:

Q. State your name, please, sir.

A. Fred E. Ruediger.

Q. Mr. Ruediger, what is your occupation?

*Fred E. Ruediger.*

A. Civil engineer and surveyor.

Q. And you are employed by whom?

A. The Commission of Fisheries of Virginia.

Q. And your headquarters are at what place?

A. Newport News.

Q. Mr. Ruediger, do you have a map, an official map of the Fish Commission of the State of Virginia showing the waters of Hampton Roads and Chesapeake Bay, sir?

A. I have not a map, an official map of the Commission of Fisheries. I have a map we use.

Q. Is that one that you did use in your surveys?

A. We have used it in surveys along here on page 111 } the Norfolk County side.

Q. Do you have any map showing the line between Norfolk County and Elizabeth City County?

A. No, I have not, sir.

Q. Will you state what county licenses and permits to oyster and fish are issued from your office for that property lying between the channel or centerline of Hampton Roads and the south shores known as the City of Norfolk?

A. Well, the Commission of Fisheries has always considered the center of the channel all the way out as the line between the two counties.

Q. Between what two counties?

A. Between Norfolk and Elizabeth City Counties.

Mr. Kearney: We object to that as being immaterial, what the Commission of Fisheries might consider the line, the center of Hampton Roads as the line in designating that the Inspector from Norfolk might collect south of Hampton Roads, and that the Oyster Inspector for Elizabeth City County or Warwick County might collect the license north of the center, and that would not, of course, be in any wise helpful in this case, and we object to the introduction of that evidence, and ask that this witness' statement be stricken out.

The Court: He may state that that is the policy of the Commission for that purpose, that as far as the page 112 } issuances of licenses is concerned that that is the line they consider for it.

Mr. Kearney: My objection is that it is immaterial to the issues in this case.

Mr. Hold: It is our feeling that it is relevant and helpful to show the actual boundary lines of Elizabeth City County

*Fred E. Ruediger.*

and Warwick County, and we feel that is a very pertinent issue in this case.

The Court: I think for the purpose of showing what the policy of the Commission is, that it is perfectly proper.

By Mr. Holt:

Q. Under Section 392 of the Code, "Assignments of Planting Ground to Riparian Owners. Any owner of land having a waterfront thereon suitable for planting oysters, who has not had as much as one-half acre of ground already assigned him on said front, or whose lease has terminated and is not to be renewed, may make application for planting ground to the Inspector for the district in which the land lies, who shall assign to him such ground \* \* \* ." Now, I ask you under that section what Inspector would you apply to for land lying between the thread of Hampton Roads and the south shores?

A. Apply to the Norfolk County Inspector.

Q. What Inspector would you apply for land lying between the Thread of Hampton Roads and the north  
page 113 } shore?

A. The Inspector for Elizabeth City County.

Q. What land would you apply between the thread of Chesapeake Bay and the west shore?

A. Elizabeth City County.

Q. And the thread of Chesapeake Bay and the east shore opposite Elizabeth City County?

A. The eastern shore?

Mr. Kearney: Of course, your Honor understands we object to this whole line as being immaterial. I don't want to have to keep objecting to it.

The Court: I understand it is the usual practice and custom of the Commission of Fisheries.

By Mr. Holt:

Q. Now, do you have any plat showing the lines for the various districts?

A. We have at the office, but I haven't got it here, sir. The lines are as I have stated.

Q. The lines are as you have stated?

A. Yes.

Q. Now, under your evidence Virginia oyster applications for the land from the thread of Hampton Roads to the thread of Chesapeake Bay, to the north and west, would be in what county?

*Fred E. Ruediger.*

A. Elizabeth City County.

Q. Now, do you have a different district for page 114 } the City of Norfolk from that of Norfolk County?

A. No, sir.

✓ Q. Do you have one for the City of Norfolk?

A. The district takes in the City of Norfolk, Norfolk County and Princess Anne County.

Q. And that includes the area to the south of the thread of Hampton Roads?

A. Yes, sir.

### CROSS EXAMINATION.

By Mr. Kearney:

Q. Mr. Ruediger, Mr. Gary for a number of years was oystering over there and he lived in the City of Norfolk, didn't he?

A. Yes.

Q. I understand he is the Inspector that you would make application to for oyster planting ground off of Ocean View?

A. Yes, sir.

Q. And you say that that inspector is inspector for the City of Norfolk, Norfolk County, and Princess Anne County?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

By the Court:

Q. You have no separate inspector for the City page 115 } of Hampton either, have you?

A. No, sir.

Q. That is embraced within the County?

A. Elizabeth City County, yes, sir.

### RE-DIRECT EXAMINATION.

By Mr. Holt:

Q. Does that plat show where the County of Elizabeth City stops and where the County of Norfolk starts?

A. Yes, it does, because this is a survey of Mr. Darling's ground, and part of that is in Warwick County, and part of it is in Elizabeth City County.

Q. How about Norfolk County and Elizabeth City County?

A. Norfolk County and Elizabeth City doesn't show any-

*J. B. Sinclair.*

thing except the Thread of the channel. I have another map here, the Coast Survey Map, the latest issue.

Mr. Holt: If your Honor please, I have here a certificate from Department of Commerce, Bureau of the Census, at Washington, as certified under Act of Congress, for the year 1930, as to the population of Fort Monroe, Hampton Institute, National Home for Disabled Soldiers, and Langley Field, and I wish to introduce it in evidence as "Defendant's Exhibit No. 4".

J. B. SINCLAIR,

sworn on behalf of the defendant, testified as follows:

Examined by Mr. Holt:

Q. State your name, please, sir.

A. J. B. Sinclair.

Q. You are a civil engineer, sir?

A. Yes, sir.

Q. How long have you been a civil engineer, sir?

A. Legally, I imagine since 1903.

Q. Did you, Mr. Sinclair, at the request of counsel for the defendant use a planimeter and make certain checks on the areas as outlined on the Coast Geodetic Survey?

A. I did.

Q. You have those plats here, sir? For the purpose of the record, will you describe that as being Coast and Geodetic Survey Map?

A. They go by quadrangles, the Hampton page 117 } Quadrangle and Newport News Quadrangle, both in the State of Virginia.

Q. Now, will you state what you found from that survey, checked by the planimeter, as the area of the County, the land area of the County of Elizabeth City?

Mr. Kearney: We object, and the reason for the objection is this. The Legislature in passing certain Acts have in mind and have taken into consideration the population area of Elizabeth City County and the other Counties in the State, and it has been recognized and was recognized by the Legislature as being 53 square miles as the area of Elizabeth City County, and the law in this State is, if I understand it, that the recognized population area is the area that is to be considered, not only by the legislature but by the courts in mat-

*J. B. Sinclair.*

ters pertaining to legislation, pertaining to Counties in certain areas, and we think this is immaterial and should not be admitted as evidence.

Note: Argument was had on the objection.

The Court: I think it is immaterial, but in this case you are entitled to put it in record. You may put it in the record over the objection, for the purpose of the record.

Mr. Holt: Do I understand your Honor is ruling against us?

The Court: I am ruling that it is immaterial.

page 118 } Mr. Holt: I except to the ruling.

The Court: Of course, you are entitled to put it in the record.

Mr. Holt: I except to the court's ruling.

By Mr. Holt:

Q. Mr. Sinclair, will you state the land area of Elizabeth City County as shown by survey?

A. Of the County itself?

Q. Yes.

A. 53.8 acres.

Q. 53.8 square miles?

A. 53.8 square miles I meant, yes.

Q. Now, based on that area and a population of 19,835, will you state what the population per square mile is?

A. 368.68.

Q. 368.68?

A. 368.68.

Q. Now, Mr. Sinclair, let me ask you this, in that area that you have given, does that include Hampton Creek or Hampton River, Mill Creek, or the Southwest prong of Back River, or any of Back River, in the area I have just given.

A. 53.8?

Q. Yes, what does that merely include, the land area?

A. That doesn't include any of the creeks or rivers as shown on this plat, with the exception of 200 lots in what page 119 } is known as Langley Field, that have been filled in since this plat was made, and some filling approximately at Fort Monroe.

Q. Now, did you, at our request, also determine by a planimeter the area of Elizabeth City County, including the land, including the waters of Hampton River or Creek, in-

*J. B. Sinclair.*

cluding Mill Creek, and including a half of Back River and Harris Creek?

A. I did.

Q. Will you state the area shown by the planimeter on that?

A. I will state it in this way, that I used a planimeter from the center of the northwest prong of Back River and the center line of Back River itself along the—

Q. Does the boundary line show on that map as being there, sir?

A. Yes. It is shown on this map as being the line between Norfolk County and Elizabeth City County. This is along the waterline of Chesapeake Bay to Fort Monroe.

Q. This is along the waterline?

A. Yes, sir.

Q. Do you mean along the shore line?

A. The shore line, yes, sir.

Q. All right, sir.

A. Thence along the shore line of Hampton Roads.

Q. That is the north shore line?

page 120 } A. The north shore line of Hampton Roads, which would throw Mill Creek and Hampton Creek in the area I am giving you.

Q. Do you extend that on up to Warwick County line?

A. Up to the Warwick County line, around the Warwick County line to York County, and the York County line back to the northwest prong. That gives you an area of 60.8.

Q. Now, that is shown as how many?

A. 60.8.

Q. 60.8 Square miles?

A. Yes.

Q. Based on the same population, now, did that include the City of Hampton?

A. I am getting ready to bring that out. That doesn't include—that is after deducting one square mile for the City of Hampton.

Q. Now, based on the same population excluding the City of Hampton and using the same population of 19,835, what population per square mile is then produced?

A. 326.23.

Q. 326.23?

A. Yes.

Q. Now, including the City of Hampton the population would be what?

A. 26,217.

*J. B. Sinclair.*

✓ Q. And what would be the population per page 121 } square mile?

A. 424.21.

Q. 424.21?

A. Yes. That is including the population of Hampton along with the County, and the area of Hampton along with the—in other words, I am using 26,217 as the population and 60.8 square miles.

By the Court:

Q. You are using the increased area?

A. Area and population.

By Mr. Holt:

Q. Now, Mr. Sinclair, did you also figure on the Coast and Geodetic survey map, did you figure from that?

A. Yes.

Mr. Holt: For the purpose of identification this is Coast and Geodetic Survey Chart No. 1222.

By Mr. Holt:

✓ Q. Did you use the planimeter and obtain the area included in Elizabeth City County and the area of Hampton along with the Thread or to the Thread of Hampton Roads on the south and to the Thread of Chesapeake Bay on the east?

A. I did. In other words, I ascertained the area between the shore line of Elizabeth City County and approximately half the distance across Chesapeake Bay, and between the shore line of Elizabeth City County and approximately half the distance across Hampton Roads.

page 122 } Q. Will you state what area you found that to be?

A. The approximate area of one-half of Hampton Roads would be 8.5 square miles.

Q. That would be added to the 60.8, is that correct?

A. Yes.

Q. Eight how much?

A. Five-tenths.

Q. 8.5 square miles?

A. Yes. Now, I used approximately a center line on this chart by scaling rather than using the line shown on the first map as being the line between Norfolk County and Elizabeth City County.

Q. You took the Thread of the stream?

*J. B. Sinclair.*

A. I took mid-distance across.

Q. Did you also do the same with Chesapeake Bay?

A. Yes, sir.

Q. What is the area between the thread of Chesapeake Bay and the westerly shore thereof opposite Elizabeth City County?

A. Approximately 77 square miles.

Q. 77 square miles?

A. Yes.

Q. So that you have a total area, including a portion of Chesapeake Bay and a portion of Hampton Roads, together with the highland of Elizabeth City County, and page 123 } together with Hampton River, a portion of Back River, and Mill Creek, a short tributary extending inland, of how much?

A. 146.3.

Q. What is the population?

A. 26,217.

Q. Now, will you divide that and give me the population per square *miles* of 26,217, I think, which includes Hampton, what is that population?

A. Do you want to include Hampton?

Q. Yes.

A. You want to include Hampton?

Q. Yes, 26,217.

A. Approximately 179.

Q. 179 per square mile?

A. 179 per square mile.

Q. Now, will you figure the population per square mile excluding Hampton, which would be how many square miles, did you say?

A. I excluded the Hampton area on this last one.

Q. You did?

A. Yes.

Q. Well, I would like to include Hampton in that.

A. About 177.

Q. 177?

page 124 } A. That was including the Hampton area.

Q. Now, will you exclude Hampton and use the population of 32,283?

A. Thirty-two—

Q. And 283.

A. Approximately 221.

Q. That is based on a population of 32,283, and for the purpose of the record that is the population as shown by the

*J. B. Sinclair.*

census bulletin for 1940, which has been marked as an exhibit in this case. Now, will you figure the population per square mile based on an area of 60.8 and a population of 32,283?  
A. 531.

Mr. Holt: For the purpose of the record we are introducing this mimeographic copy of a letter from Cecil C. Frost, Commissioner of Revenue, Elizabeth City County to all wholesale and retail merchants and businesses and professions in Elizabeth City County, and Mr. Kearney wants to introduce these tax notices.

Note: The papers above referred to were offered and received in evidence and marked "Defendant's Exhibit No. 5", and "County's Exhibit No. 6", respectively.

#### CROSS EXAMINATION.

page 125 } By Mr. Kearney:

Q. Mr. Sinclair, figuring the easterly boundary of Chesapeake Bay, what line did you take?

A. I simply took approximately two points. In other words, I took a point of approximately half-way across from the middle of the Back River to the point of the Eastern Shore. Just what point I don't know.

Q. Why did you stop on the eastern shore? Why didn't you take in a little bit of the ocean?

A. Between the land of one County and the land of another.

Q. Isn't that shown, part of the easterly boundary of Chesapeake Bay?

A. Part of the way, yes.

Q. But you took a point on the eastern shore in each County?

A. Half-way between the land at these points.

Q. You took half-way between the land at Cape Charles?

A. Yes, half-way between the land at the middle of the Back River, and then from the other point I extended the line from the shore at Cape Charles to the shore of Cape Henry, and took approximately a line a half-way point between that and approximately Fort Wood.

Q. As a matter of fact, according to this map the easterly boundary of Elizabeth City County would be the Atlantic

*J. B. Sinclair.*

Ocean, wouldn't it? Isn't that Elizabeth City  
page 126 } County in there?

A. Yes.

Q. Running right straight across wouldn't you come out on the ocean?

A. I would say not.

Q. Where would you say it would come?

A. I would say the County—I don't know the name of it.

Q. Northampton?

A. Northampton would come here, along here, across Cape Henry, and this County would come half-way across to there (indicating).

By Mr. Holt:

Q. The County on the side would come half-way across to Cape Charles?

A. Yes.

By Mr. Kearney:

Q. You mean on the land or in the water?

A. In the water.

Q. There is no land in either one of those counties that forms the eastern boundary?

A. No, land, no, no land above water.

Q. So I say Chesapeake Bay runs right out into the Atlantic Ocean, doesn't it?

page 127 } A. Right.

Q. And if you took the center of Chesapeake Bay and extended it across—I mean took the center of Elizabeth City County due east, it would go right into the Atlantic Ocean without hitting any land?

A. Without hitting any land except under water. I am doing this, Mr. Kearney, in that way. As I understood it, the information I was to get up was to have boundaries of the various counties, that is, approximately one-half the distance to another county. That is the theory I worked on in Hampton Roads, and I came down approximately the center line between Norfolk and Elizabeth City. When you go out into the Chesapeake Bay you not only have the counties—not only have the Elizabeth City County on the west and Northampton County on the east right there, but you have these counties over there, Princess Anne, I think, which has certain rights in there, too. Princess Anne, in my opinion, has water rights half-way across to Cape Charles, and Northampton has half-way across to Cape Henry. In other words, your

*J. B. Sinclair.*

line between Princess Anne and Northampton would come along a line—midway between that—

By Mr. Holt:

Q. Mid-way?

A. Mid-way between the two Capes, along the line—

Q. From Cape Charles and Cape Henry?

A. From Cape Charles and Cape Henry. Now, page 128 } Princess Anne or Norfolk County—in other words, the counties on the south would have jurisdiction of water rights there along a line from their right into Fort Wood. Elizabeth City County would have water rights north of this line and half-way across the Bay. Northampton County would have water rights from this east and west line north of that out as far as half-way across the Bay, northward as far as the counties go.

By Mr. Kearney:

Q. Where is Norfolk City on this map, how far down does it extend?

A. It practically extends—

Q. I mean in a northerly direction?

A. Norfolk City extends to the waters of Hampton Roads.

By Mr. Holt:

Q. To the waters of Hampton Roads?

A. Yes.

By Mr. Kearney:

Q. Where do you start that line there, and let the others go out to the middle of the stream?

A. Norfolk City?

Q. Yes.

A. Simply I don't know where the Norfolk City line is, and the only reason I should have said for Norfolk County and York County and Elizabeth City County, is because they are so designated on this coast and Geodetic Survey page 129 } vey map.

Mr. Holt: Known as Hampton Quadrangle and Newport News Quadrangle.

By Mr. Kearney:

Q. You don't know whether that plot was originally pre-

*J. B. Sinclair.*

pared before Norfolk took in the area down at Hampton Roads or not, do you?

A. It is simply marked "Addition of 1921", and reprinted in 1932.

Q. Do you know that in 1921 that Norfolk City did not include the Willoughby Spit and Ocean View area?

A. I do not.

Q. And that is just a reprint of a plot that was made in 1921?

A. Yes, the addition of 1921.

# RE-DIRECT EXAMINATION.

By Mr. Holt:

Q. This was reprinted in 1932, I believe you say?

A. 1921.

Q. Reprinted, I say.

A. Reprinted in 1932.

Q. Now, what was the date of this Coast and Geodetic survey map No. 1222?

A. May, 1937, published at Washington, D. C.

page 130 } RE-CROSS EXAMINATION.

By Mr. Kearney:

Q. Does this plot that was published in 1937 give you any line of marking as to where the boundary line is between Northampton County and Princess Anne County?

A. No, it doesn't give any lines in the water.

Q. It gives no boundary lines between any of the counties?

A. No.

Q. This population that you gave Elizabeth City County for 1930 of nineteen thousand and some did not include the City of Hampton proper, did it?

A. No.

Q. And did the area of 53.8 square miles include the area of the City of Hampton?

A. It did not.

Mr. Holt: Now, if your Honor please, we have a certified copy of the order of the Circuit Court of Norfolk County on Monday, July 24th, 1922, *the City of Norfolk v. the County of Norfolk*, the annexation ordinance, and we  
page 131 } would like to introduce this in evidence for the defendant.

Note: The paper above referred to was offered and received in evidence marked "Defendant's Exhibit No. 6".

Mr. Holt: The defendant rests.

The Court: I find him guilty under Section 1, Section 2, and Section 3, and not guilty on the music machine count.

Mr. Holt: That is 61-b, Section 80, and Section 70?

The Court: Yes.

Mr. Holt: Your Honor rules, then, that Section 61-b is not the same as "a" or does not include it, is that correct?

The Court: Yes. Now, I will fine him the minimum fine. If the minimum fine is \$5.00 I will fine him a minimum.

Mr. Holt: I understand that is your finding, but page 132 } we want to except. I assume your Honor has remained conscious of the fact that we have excepted right straight through, but before there is any—

The Court: You may except to any ruling you want to.

Mr. Holt: We want it understood that we except to the ruling of the court.

page 133 } The defendant, therefore, tenders this his Bill of Exceptions No. 2 and asks the Court to certify that it contains the evidence and all of the evidence introduced at the trial of said cause and prays that the same may be signed, sealed and made a part of the record, which is accordingly done.

Given under my hand and seal this 12th day of May, 1941.

JOHN WEYMOUTH, (Seal)  
Judge of the Circuit Court of Elizabeth  
City County, Virginia.

Filed with me this 34d day of May, 1941.

JOHN WEYMOUTH, Judge.

page 134 } In the Circuit Court of Elizabeth City County,  
Virginia.

County of Elizabeth City

v.

W. J. Gandy.

### BILL OF EXCEPTIONS NO. 3.

BE IT REMEMBERED that upon the trial of this case in the Circuit Court of Elizabeth City County and after the

County had introduced all of its evidence and rested its case, the defendant, by counsel, moved the Court to strike out all of the evidence for the County and dismiss the warrant in this proceeding, which motion the Court overruled, to which action of the Court the defendant at the time excepted and defendant prays that this his Bill of Exceptions thereon be signed, sealed and saved to him and made a part of the record in said case and that the evidence so introduced on behalf of the County be made a part of the record in this case, which is accordingly done, and said evidence so moved to be stricken out is all of the County's evidence as shown in Bill of Exceptions No. 2 herein, and which said Bill of Exceptions No. 2 by reference thereto is specifically made a part of this Bill of Exceptions.

Given under my hand and seal this 12th day of May, 1941.

JOHN WEYMOUTH, (Seal)  
Judge of the Circuit Court of Elizabeth  
City County, Virginia.

Filed with me this 3rd day of May, 1941.

JOHN WEYMOUTH, Judge.

page 135 } In the Circuit Court of Elizabeth City County,  
Virginia.

MISDEMEANOR—VIOLATION OF COUNTY ORDINANCE IMPOSING LICENSE TAX.

County of Elizabeth City

v.

W. J. Gandy.

BILL OF EXCEPTIONS NO. 4.

BE IT REMEMBERED that upon the trial of this case, after the Court had rendered its opinion, whereby the defendant was found guilty as charged in the warrant, the defendant moved the Court to set aside its findings because the same is contrary to the law and the evidence, which motion the Court overruled and entered judgment according to the verdict, to which action of the Court in overruling such motion and entering such judgment, the defendant, by counsel, excepted and assigned for his reasons the same reasons assigned in support of the motion.

And the defendant prays that this his *Bills* of Exceptions No. 4 be signed, sealed and enrolled as a part of the record, which is accordingly done.

Given under my hand and seal this 12th day of May, 1941.

JOHN WEYMOUTH, (Seal)  
Judge of the Circuit Court of Elizabeth  
City County, Virginia.

Filed with me May 3, 1941.

JOHN WEYMOUTH, Judge.

page 136 } In the Circuit Court of Elizabeth City County,  
Virginia.

MISDEMEANOR APPEAL—VIOLATION OF COUNTY  
ORDINANCE.

County of Elizabeth City, Virginia,

*v.*

W. J. Gandy.

NOTICE OF PRESENTING BILLS OF EXCEPTION.

To J. W. Hope, Attorney for the Commonwealth for the  
County of Elizabeth City, Virginia.

Please take notice that on the 3rd day of May, 1941, at 10:00 o'clock A. M., or as soon thereafter as my counsel may be heard, I shall present to the Judge of the Circuit Court of the County of Elizabeth City, Virginia, at the Court-house of said County, in the City of Hampton, Virginia, my bills of exception to be signed by the said Judge and made a part of the record in this case.

Given under my hand this 28th day of April, 1941.

W. J. GANDY,  
By H. H. HOLT,  
of Counsel.

H. H. HOLT,  
MONTAGUE & HOLT,  
Attorneys for defendant.

Legal notice of the above is hereby accepted this 28th day of April, 1941.

J. WILTON HOPE,  
Attorney for the Commonwealth for the County  
of Elizabeth City, Virginia.

page 137 } County of Elizabeth City  
v.  
W. J. Gandy.

MISDEMEANOR APPEAL—VIOLATION OF A COUNTY  
ORDINANCE IMPOSING LICENSE TAXES ON  
BUSINESS AND PROFESSIONS IN  
SAID COUNTY.

It is agreed between counsel for both plaintiff and defendant, and with the assent of the Court, the Clerk of the Circuit Court of Elizabeth City County is directed in making up the record to be filed with defendant's petition to the Supreme Court of Appeals for a writ of error in this case, will certify the originals of each of the several exhibits made a part of the evidence in this case instead of making copies thereof as a part of said record.

H. H. HOLT,  
Counsel for appellant.  
J. WILTON HOPE, JR.,  
Commonwealth's Attorney of Elizabeth City  
County.  
J. WILTON HOPE, JR.,  
Counsel for appellee.

Approved.

JOHN WEYMOUTH, Judge.

5/14/41.

page 138 } In the Clerk's Office of the Circuit Court of  
Elizabeth City County, June 23rd, A. D. 1941.

I, R. E. Wilson, Clerk of the Circuit Court of Elizabeth City County, Virginia, do hereby certify that the foregoing is a true and perfect transcript of the record in the Misdemeanor case heretofore pending in this Court in which the County of Elizabeth City, Virginia, is plaintiff and W. J.

Gandy, defendant, upon the charge of violating the County License Ordinances, as the same now appears on file in this office.

I further certify that the notice required by the Statute to be given by the appellant to the appellee has been duly given to the Attorney for the Commonwealth of this County by the defendant, and is now on file among the original papers in this office.

Given under my hand this the 23rd day of June, A. D. 1941.

R. E. WILSON,  
Clerk of the Circuit Court of Elizabeth  
City County, Va.

By S. M. GIBSON,  
Dep. Clk.

A Copy—Teste:

M. B. WATTS, C. C.

## INDEX TO RECORD

	Page
Petition for Writ of Error and <i>Supersedeas</i> .....	1
Record . . . . .	39
Warrant . . . . .	39
Judgment of Trial Justice . . . . .	41
Appeal Bond . . . . .	41
Hearing in Circuit Court . . . . .	42
Demurrer to Warrant . . . . .	43
Order Overruling Demurrer, January 20, 1941.....	45
Judgment, March 5, 1941,—Complained of.....	45
Bill of Exceptions No. 1—Demurrer to Warrant.....	46
Bill of Exceptions No. 2—Evidence.....	49
S. M. Gibson . . . . .	50
Cecil C. Frost . . . . .	62, 71
E. W. Covington . . . . .	66
V. T. Jacobs . . . . .	70
Fred E. Ruediger . . . . .	71
J. B. Sinclair . . . . .	75
Bill of Exceptions No. 3—Motion to Strike Evidence....	84
Bill of Exceptions No. 4—Motion to Set Aside Verdict....	85
Notice of Presenting Bills of Exceptions.....	86
Agreement as to Record . . . . .	87
Clerk's Certificate . . . . .	87