

2668
196-775

Record No. 3615

In the
Supreme Court of Appeals of Virginia
at Richmond

W. M. BOTT

v.

**HAMPTON ROADS SANITATION DISTRICT
COMMISSION, ETC.**

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

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 nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk.

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

190 VA 775

RULE 14—BRIEFS

1. **Form and contents of appellant's brief.** The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

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

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

(c) A clear and concise statement of the facts, with references to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

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

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

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

2. **Form and contents of appellee's brief.** The brief for the appellee shall contain:

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

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

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

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

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

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

4. **Time of filing.** (a) *Civil cases.* The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than thirty days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than fifteen days, and the reply brief of the appellant not later than one day, before the first day of the session at which the case is to be heard.

(b) *Criminal Cases.* In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

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

5. **Number of copies 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 nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

7. **Non-compliance, effect of.** The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief the cause will not be heard. If one of the parties fails to file a proper brief he cannot be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.

INDEX TO PETITION

Record No. 3615

	Page
Introductory	1*
The Facts	2*
Assignments of Error	5*
Argument	
Assignment of Error No. 1—The Court erred under the conceded facts of this case in holding that the Plaintiff, W. M. Bott, as the owner of said apartment buildings, was using or occupying the same as contemplated by Section 1560iii7 (1948 Supplement	6*
Statutory Construction	8*
Assignment of Error No. 2—The action of the Sanitation Commission, in charging its sewage bills to the Plaintiff as owner of these properties, was contrary to the provisions of Section 1560iii7 (b), and is therefore void	17*
Assignment of Error No. 3—The Court erred in holding the Plaintiff liable for, and the Defendant authorized and empowered to charge and collect from the Plaintiff, fees, rents and other charges for the use and services of the disposal system connected with the apartment buildings hereinabove mentioned, and in holding that the imposition upon and collecting from said Plaintiff said fees, rents and other charges was not violative of the Fourteenth Amendment of the Constitution of the United States and of Section 11 of the Constitution of Virginia, in that it deprives such owner of his property without due process of law	23*
Assignment of Error No. 4—The Court erred in entering judgment in favor of the Defendant against the plaintiff for said fees, rents and other charges	33*
Conclusion	33*

CITATIONS AND TEXTS

Cases

	Page
<i>Billings v. United States</i> , 232 U. S. 261.....	12*
<i>Burke v. City of Water Valley</i> , 87 Miss. 732, 40 South. 820, 112 Am. St. Rep. 468.....	24*
<i>Etheridge v. City of Norfolk</i> , 148 Va. 795.....	24*
<i>Martin v. South Salem Land Co.</i> , 97 Va. 353.....	31*
<i>McCoy v. City of Sistersville</i> (W. Va. 1938) 199 S. E. 260	14*
<i>Southern Ry. Co. v. City of Richmond</i> , 175 Va. 308.....	13*
<i>Waldron v. International Water Company</i> , (Vt.) 112 A. 219, 13 A. L. R. 340.....	24*
28 Am. and Eng. Enc. of Law (2d Ed.) 640.....	30*

Statutes

Sanitation Act of 1946 (Chapter 206, par. 19).....	11*
Virginia Acts of Assembly, 1938, Chapter 335, Section 19, page 525	10*
Virginia Acts of Assembly, 1940, Chapter 350, Section 19, page 624	10*
Virginia Code, Section 1560iii5.....	32*
Virginia Code, Section 1560iii7 (1948 Supp.).. 4*, 8*, 9*,	17*
Virginia Code, Section 1560iii7 (b) (1948 Supp.).....	32*
Virginia Code, Section 1560iii7 (d).....	32*
Virginia Code, Section 1560iii9 (1948 Supp.).....	11*
Virginia Code, Section 1560iii20 (1948 Supp.).....	11*
Virginia Code, Section 1560iii28.....	33*

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 3615

W. M. BOTT, Plaintiff in Error,

versus

HAMPTON ROADS SANITATION DISTRICT COMMISSION, A CORPORATION DULY CHARTERED,
ORGANIZED AND EXISTING UNDER THE LAWS
OF THE STATE OF VIRGINIA, Defendant in Error.

PETITION FOR WRIT OF ERROR
AND *SUPERSEDEAS*

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

INTRODUCTORY

The petition of W. M. Bott, herein designated as plaintiff, respectfully represents unto the Court that he is aggrieved by a judgment of the Circuit Court of the City of Norfolk against him rendered on the 8th day of April, in the year 1949. By that judgment it was held that Hampton Roads Sanitation District Commission, herein known as defendant, is entitled to collect its charges for sewage disposal emanating from Princess Anne Apartments, 826 West Princess Anne Road, Armistead Bridge Court Apartments, 800 West Princess Anne Road, Westover Terrace Apartments, 825 Westover

Avenue, and Earle Court *Apartments, 3421 Granby Street, all in the City of Norfolk, Virginia, from the plaintiff, W. M. Bott, as the owner of all of said apartments, so long as such plaintiff uses or occupies the real estate consisting of said apartment buildings and the same are connected with the defendant's sewage disposal system, and so long as sewage or industrial waste continues to enter the sewage disposal system of the defendant. It was further adjudged that the plaintiff, W. M. Bott, is not entitled to any relief in this cause, but that the defendant is entitled to consequential relief under its cross claim for the amount of such charges imposed against the plaintiff by the defendant which have accrued and become past due and payable; and for which the said defendant was awarded a judgment against the plaintiff in the principal sum of Six Hundred Eighty-two and 73/100 Dollars (\$682.73), with interest thereon from the entry of said judgment until paid at six per cent (6%) per annum, and the costs in the above entitled proceeding, to which action of the Court, the plaintiff then and there excepted. The transcript of the record is herewith presented.

THE FACTS

This was a proceeding instituted by notice of motion for a declaratory judgment under Virginia Code, Sections 6140A, *et seq.*, to construe Chapter 65A of the Virginia Code of 1942 and particularly Section 1560nn thereof and also the provisions contained in Acts of the Virginia Assembly of 1946, Chapter 206, page 7 and Chapter 65A of the Virginia Code of 1942, particularly Section 1560iii7 1948 Supplement).

*Upon the return of this notice of motion for declaratory judgment, the defendant filed its answer and cross claim in which it denied the allegation contained in the notice of motion for declaratory judgment that the plaintiff had not contracted for the use and services of the defendant's sewage disposal system and claimed that, on the contrary, the plaintiff, by availing himself of the use and services of the defendant's sewage disposal system, had contracted for such use and undertaken to pay its charges. It further by way of cross claim asked that the Court, as consequential relief, award the defendant judgment against the plaintiff for such charges and additional charges which might have accrued and become past due and payable, and also denied that its action and undertakings had in any way deprived plaintiff of his property without due process of law, alleging that no constitutional question, State or Federal, was presented in the cause.

The facts leading to the controversy in question are as follows: The plaintiff is the owner in his own right of the four

certain apartment buildings all in the City of Norfolk, Virginia; the Princess Anne Apartment contains forty (40) individual apartment units; the Armistead Bridge Court Apartment contains twenty-four (24) individual apartment units; the Westover Terrace Apartment contains twenty-four (24) individual apartment units; and the Earle Court Apartment contains forty (40) individual apartment units, each of said apartment units being rented to separate tenants and none of said apartment units being used or occupied by the plaintiff. The said tenants or occupants have the sole, exclusive occupancy, possession *and use of all of the said individual 4* apartment units, and the plaintiff, even though the legal owner, has no right or authority to enter in or upon or to use, occupy or possess the same, which are subject entirely to the sole, exclusive use, occupancy and possession of the respective tenants therein, nor has said plaintiff contracted for or undertaken to pay said fees, rents or other charges in connection with the said apartments for the use and services of the defendant's sewage disposal system.

In view of the aforesaid state of facts, the plaintiff filed its notice of motion for a declaratory judgment in which it moved the Court to construe the provisions of the Virginia statutes as set out above.

Section 1560iii7 (1948 Supplement) referred to above reads in part as follows:

"Such fees, rents and charges may be charged to and collected from any person contracting for the same or from the owner, lessee or tenant, or some or all of them, who uses or occupies any real estate which directly or indirectly is or has been connected with the sewage disposal system."

The defendant, relying upon the statutory provisions referred to, and especially Section 1560iii7 *supra*, undertook and attempted to charge and collect from the plaintiff the fees, rents and charges imposed by it in the nature of use or service charges which it claimed were authorized by the above quoted statutory provision, bills for such charges covering the period from August 27, 1948 to December 29, 1948, being as follows:

Princess Anne Apartment	\$152.20
Armistead Bridge Court Apartment	86.57
Westover Terrace Apartment	93.67
Earle Court Apartment	120.14
<hr/>	
Total	\$452.58

5* *Bills representing these charges are filed herewith as plaintiff's Exhibit 1, from which it will be seen that these bills are made out in the name of the apartment building and not in the name of the plaintiff or any other person, a total charge being made for each apartment building as a whole.

This situation confronting him, the plaintiff filed his notice of motion for a declaratory judgment, in which proceedings the judgment complained of was entered on April 8, 1949, and to which a writ of error and *supersedeas* are requested.

ASSIGNMENTS OF ERROR.

1. The Court erred under the conceded facts of this case in holding that the plaintiff, W. M. Bott, as the owner of said apartment buildings, was using or occupying the same as contemplated by Section 1560iii7 (1948 Supplement).

2. The action of the Sanitation Commission, in charging its sewage bills to the plaintiff as owner of these properties was contrary to the provisions of Section 1560iii7(b), and is therefore void.

3. The Court erred in holding the plaintiff liable for, and the defendant authorized and empowered to charge and collect from the plaintiff, fees, rents and other charges for the use and services of the disposal system connected with the apartment buildings hereinabove mentioned, and in holding that the imposition upon and collecting from said plaintiff said fees, rents and other charges was not violative of the Fourteenth Amendment of the Constitution of the United States and of Section 11 of the Constitution of Virginia,
6* in that it deprives *such owner of his property without due process of law.

4. The Court erred in entering judgment in favor of the defendant against the plaintiff for said fees, rents and other charges.

ARGUMENT.

Assignment of Error No. 1.

The Court Erred Under the Conceded Facts of This Case in Holding That the Plaintiff, W. M. Bott, as the Owner of Said Apartment Buildings, Was Using or Occupying the Same as Contemplated by Section 1560iii7 (1948 Supplement).

It is respectfully suggested that counsel for the defendant, as well as the trial court, has fallen into error in their inter-

pretation of the word "use" as found in the statute in question. The defendant in its answer and in the oral argument before the Court urged that the plaintiff was using each and every one of said apartment buildings to obtain revenues or profits therefrom; and the trial court, in its judgment rendered on April 8, 1949, indulges in the same erroneous interpretation by holding the plaintiff liable for the defendant's charges for sewage disposal emanating from the four apartment buildings in question so long as such plaintiff "uses or occupies the real estate consisting of said apartment buildings".

It will be seen from the foregoing that, according to the defendant's and the court's interpretation, "ownership" and "use" connote one and the same thing. This is an illogical conclusion which is readily demonstrated by a reference to the pertinent language of Section 1560iii7. The fees, rents and charges which the defendant is authorized to collect are to be collected from any person contracting for the same, which is not applicable in the instant case, or "from the 7* *owner or lessee or tenant, or some or all of them, who uses or occupies any real estate which directly or indirectly has been connected with the sewage disposal system". It will thus be seen that the person liable for such charges is one who "uses or occupies" said real estate. This use or occupancy may be either by the owner or by his lessee or tenant. It would be a strange distortion of language to say that an owner leasing premises, to which premises during the term of the lease he has no right of possession, is "using" such premises in the same sense that the actual physical occupant thereof is using them, and yet if we follow the contention of the defendant affirmed by the trial court, we have the term "use" applied to two separate, distinct and mutually conflicting relationships. There can be no question but that the physical occupant of the premises is using the same, and still the defendant's contention is that at the same time the same premises are being used by the owner who has no access thereto, who has parted with the use, and for a consideration has transferred the same to another who thereafter is in sole physical possession thereof. This statute doubtless had a capable author and to convict him of such an illogical result, it would be necessary to totally disregard the correct application of a word whose meaning is well recognized and defined.

It has been generally recognized that the charges which the defendant is authorized to impose are upon those persons actually using and receiving the benefits of the facilities in question. Bearing this in mind, what is the true interpretation of the statute? It proceeds upon the natural assumption that

the premises involved could be occupied and used by the owner, in which event the fees, rents and charges for the use and services of the sewage disposal system should be paid by him, the owner. In the event of occupancy by a lessee or tenant, these fees, rents and charges should be collected from said lessee or tenant. Otherwise, if the defendant's contention is correct, the defendant in its arbitrary and capricious discretion, without regard to the true situation, could make the collection from either the owner or the lessee or tenant, regardless of his relation in fact to the control of and use of the facilities. Such an inequitable result, we confidently assert, was never contemplated by the draftsmen of the statute or by the legislative body which adopted the same. It is further suggested that even had that been intended, it could hardly withstand the result of judicial scrutiny.

STATUTORY CONSTRUCTION.

As set forth above, the sole clause in the Sanitation Act which is before the Court for interpretation is found in Section 1560iii7 (1948 Supplement) :

"Such fees, rents and charges may be charged to and collected from any person contracting for the same or from the owner, lessee or tenant, or some or all of them, who uses or occupies any real estate which directly or indirectly is or has been connected with the sewage disposal system."

In the case at bar the Sanitation Commission has attempted to assess its charges solely against the *owner* of these four apartment properties. Since he has not "contracted" to pay such charges, the Commission must obviously rest its case on the theory that he is the one who "uses or occupies" the real estate in question. And since he is certainly not "occupying" the premises, the portion of the above-quoted Code

Section upon which the Commission is relying may be narrowed to read as follows:

"Such * * * charges may be charged to and collected from * * * the owner, lessee or tenant * * * who uses * * * any real estate * * * connected with the sewage disposal system."

This brings into bold relief the fact that this case presents one issue and one issue only, namely, what is the true meaning of the word "uses" as it is employed in this section of the Sanitation Act? Is it synonymous with "occupies", which connotes a physical possession and enjoyment of the

premises, or is it synonymous with the much broader term "owns"? The Commission takes the latter view—and therein, it is submitted, lies the error of the trial court's ruling on the matter.

Counsel for the petitioner earnestly submit that the Legislature, in employing the phrase "Such charges * * * may be charged against the owner * * * who *uses* any real estate", was deliberately avoiding the imposition of charges against an owner of real estate merely because he "owns" that real estate, but was placing such liability on him only when he is "using" the premises. The following arguments are advanced in support of this construction of the Act:

1. If the Legislature had intended to hold the *owner* liable for these sewage charges, it most certainly would have drawn the Act to read: "Such charges * * * may be charged against the person * * * who *owns* or occupies any real estate." Or the wording would have been: "Such charges may be charged against the *owner* of, or against a tenant who uses or occupies, any real estate." In either case, the responsibility of the owner would have been established beyond all shadow of a doubt. Yet, instead of making *ownership* the 10* *basis of liability, the Legislature chose to make *use* (noun) the criterion.

2. The following sub-paragraph of this same Code Section bears out the above interpretation of the Act by re-emphasizing that "Such * * * charges *being in the nature of use or service charges*, shall * * * etc." This statement can only mean that the charges are to be imposed upon the owner, lessee or tenant who is physically *using* the real estate. In some instances this might be the owner and the tenant jointly, as for example where the owner himself occupies one unit of a multiple dwelling building and the tenant or tenants occupy the remainder.

3. The Legislature, when it first passed this Sanitation Act, expressly made the sewage charges a liability against the owner of property as such, rather than against the *user* of property, by making the same a lien on the premises. See 1938 Acts of Assembly, Chapter 335, page 510, which reads in part as follows (page 525):

"Section 19. Lien for charges. (a) There shall be a lien upon real estate for the amount of any fees, rents or other charges charged by a commission to the owner or lessee or tenant of such real estate for the use and services of the sewage disposal system by or in connection with such real

estate. * * * Such lien shall be superior to the interest of any owner, lessee or tenant of such real estate."

Because of the widespread opposition which this provision of the Act encountered, the next session of the General Assembly omitted this objectionable feature of the Act and restricted the Sanitation Commission to the collection of its charges from the "owner, lessee or tenant or contracting party as set forth in Section 1560nn * * *", namely, from the owner who "uses or occupies the real estate". See 1940 Acts of Assembly, Chapter 350, page 619, which reads (page 624):

11* "Section 19. Collection of service charges. The commission shall have the right to recover the amount of any fees, rents or other charges charged by the commission to the owner or lessee or tenant or contracting party, as set forth in Section seven of this act, for the use and services of the sewage disposal system by or in connection with such real estate and of the interest which may accrue thereon, by any action, suit or proceeding permitted by law or in equity."

This section of the 1940 Act is incorporated verbatim into the Sanitation Act of 1946 (Chapter 206, par. 19), and is found in Sec. 1560iii19 (1948 Supplement to the Virginia Code). It is submitted that this review of the legislative background of the Sanitation Act clearly shows that the General Assembly, in view of the above change, did not intend for the owner to be liable for sewage charges unless he was *also* one of the persons who actually *used* the premises—as sole or joint occupant. If this interpretation of the Act is not followed, the owner is *still* being saddled with those charges just as effectively and just as inescapably as though the same were made a lien on his property.

4. The argument set forth in the preceding paragraph is buttressed by the language used in Section 1560iii20 of the Act (1948 Supplement). The Legislature once again repeats its admonition that real estate as such (which is but another way of saying the *owners* of real estate) shall not be burdened with these charges. That section reads in part as follows:

"* * * no tax shall be levied on real estate for such obligation"—i. e., sewage charges.

If the owner can, as now claimed by the Commission, be charged with sewage bills merely because he is the owner of real estate, there can be no denying the fact that he is being

“taxed” for such ownership, whether the liability be called a “tax” or a “sewage charge”.

12* *5. One of the fundamental principles of statutory construction is that words of a statute are to be given their ordinary or popular meaning, unless it plainly appears that they were used in some other sense. (See cases collected in Michie’s Digest, Vol. 9, page 51.) Using this principle as a guide, there should be no difficulty in understanding what the Legislature meant when it referred to an “owner * * * who uses * * * any real estate”. Is he “using” his real estate when he himself is not physically possessing or enjoying the premises? A simple question will show that he is not—at least so far as the popular understanding and employment of the word “use” is concerned. For example, if A. owns a cottage at the beach and is asked: “Are you using your cottage this summer?”, his answer, if he had rented out the cottage, would unhesitatingly be: “No, I’m not using it this year, I have rented it out.” In other words, he would be distinguishing between personal use by himself and indirect dominion over his property as represented by the act of renting the *actual* use of the same to others.

6. The decided cases in Virginia and from other jurisdictions support this distinction between the *right to use*, as implied by ownership, and the *actual use*, as implied from physical possession or occupancy.

See *Billings v. United States*, 232 U. S. 261. There, the Court was required to construe a Federal statute which imposed a tax “upon the use of every foreign built yacht * * * owned * * * by any citizen * * * of the United States.” In holding that this was a tax on “actual use” as distinguished from “ownership”, the Court said (page 280):

13* *“It is to be observed that the provision deals with ownership and distinguishes between ownership and use, since it bases the tax not upon the former but upon the latter. From this it follows that it is not ownership but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership, the right to use which is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that in the statutory sense could exist without use having taken place. The words of the statute under this construction were used in an every-day sense and not in a technical one: in other words but convey the distinction without reference to nice analysis of the nature of things which is commonly conceived to exist between ownership and use. Let

it be conceded that the ownership of property includes the right to use, plainly we think, as use and ownership are distinguished one from the other in the provision, the word 'use' as there employed means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster; 'The act of employing anything or of applying it to one's service; the state of being so employed or applied.' If the use which arises from the fact of ownership without more was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words the potentiality of using involved in ownership, inherently there is the fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective), that is, it is the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership."

' See also *Southern Ry. Co. v. City of Richmond*, 175 Va. 308. In that case the Court was called upon to construe a Constitutional provision which gave to municipalities the right to impose a tax "for either the construction, or for the use of sewers." Under this authority, the City of Richmond purported to levy a tax "for the privilege of using * (a) 14* sewer." The Court, in declaring this City ordinance to be unconstitutional, said (pages 315, 316) :

"Judge Holt, speaking for the court in *Quesinberry v. Hull*, 159 Va. 270, 165 S. E. 382, and quoting from Black on Interpretation of Laws, page 25, said: 'It is a general rule that the words of a Constitution are to be understood in the sense in which they are *popularly employed*, unless the context or the very nature of the subject indicates otherwise.'"

"Webster's International Dictionary gives ten definitions of the word 'use' as a noun. The first, primary and popular definition is 'act of employing anything or state of being employed; application; employment; as, the use of a pen; his

machines are in use'. The primary definition given in the Standard Dictionary is 'the act of using, employment, as of means or material for a purpose, application to an end, particularly a good or useful end, as use for steam and navigation' 'Privilege of use' is a right to use. 'Use' is the exercise of the privilege."

"* * * The rule of constitutional and statutory construction, the popular meaning of the term 'for the use of sewers,' and the context of this language in the Constitution, compel the conclusion that the language means 'use in fact' or 'actual use' as contradistinguished from 'privilege of using' or 'available for use'."

The case which, on its facts, is submitted to be practically on all fours with the one at bar is *McCoy v. City of Sistersville* (W. Va., 1938), 199 S. E. 260. In that case the City of Sistersville passed an ordinance imposing charges for certain "special service" rendered to its citizens in the way of 1) fire protection, 2) street lighting, 3) sanitary sewerage, 4) garbage collection, and 5) street cleaning. The ordinance was predicated upon a state statute which gave the City the authority to impose such charges "upon the users of such special service(s)". The Court found that the ordinance assessed these charges against the owners of property, and that "no attempt (was) made to impose any burden on the users of such services as a class, except, of course, as to that class of users who are both owners of property and *users of the services." The Court then points out (page 262):

"The City is therefore driven to rest its claim on the basis that the charges imposed are special assessments under the act, and that act provides that assessments may be imposed upon the users of the services intended to be provided for, and impliedly negatives the idea that they be imposed on property alone or upon a class of people owning property. Proceeding under the act, the city is bound by its terms."

After holding that charges for fire protection *may* be properly charged to the owners of buildings, on the theory that such owners are actually "users" of the services of the fire department, the Court concludes that the owner because of his ownership alone, *cannot* be held liable for charges for street lighting, *sanitary sewerage*, garbage collection, or street cleaning. The reasons given for this distinction are as follows (page 263):

“There are other considerations which strengthen our view that the ordinance as to street lighting cannot be upheld. It may be true that a system of street lighting confers a special benefit on a particular individual who happens to own real estate on an important highway, particularly in the business section of the city; yet the furnishing of street lights is a governmental responsibility and the owner of such a building has, presumably, on account of its location and value, paid his fair share of the expense of the entire street lighting system of the city, including the section in which his property is located. Under these circumstances, it is difficult to accept a theory that the owner of such building must be assessed with the entire cost of lighting the street, to the exclusion of a tenant who may have a stock of merchandise in the building equal to or in excess of the value of the building, and to the exclusion of those who use the street, either as pedestrians or by the various means of transportation used in carrying on traffic over the streets so lighted. What seems to us the inherent injustice of imposing such a burden on a particular class of individuals does not encourage us to give a strained construction to the statute in question. With all the admitted difficulty in working out a formula under which the provisions of the statute may be carried out, we are unable to accept as sound the arguments advanced that the word users be given a meaning under which a special class of property owners are laid under a burden which, in all fairness, should be borne by all alike, in proportion to property valuation *under general taxation; but if this cannot be provided for under our levy limitation, a more equitable plan than that proposed should be adopted. This court cannot set itself up as an arbiter of what is fair. That is a legislative function. But the Legislature having imposed the burden of these services on the users thereof, we are not disposed to give its enactment a meaning not fairly to be drawn from the language used, nor compatible with what we believe to be a just distribution of the burden of the services provided for in the act in question.”

Applying this same reasoning to the charge made by the City against property owners for sanitary sewerage services, the Court says (page 264):

“What we have said with respect to street lighting *more strongly applies to the other services* provided for, other than fire protection, and it is not considered necessary to discuss them in detail. If the assessment for street lighting cannot

be sustained, the assessments for such other services cannot be."

"We have given it (the Act) a liberal interpretation. * * * However, we are unable to extend that liberality to the point where we can uphold a plain assessment against property, and the owners of property, to the practical exclusion of every other class of people living in a municipality, where the act itself imposes the cost of the special services provided for upon the users thereof."

7. The Sanitation Act was not adopted by the citizens of the Hampton Roads District until it was first submitted to a vote of the qualified voters of the District. In giving approval to the Act, the voters must have intended to impose upon themselves as *individual users and beneficiaries* of the sanitation sewerage services the responsibility to pay for such services. They were casting their ballots as *individual citizens* and not as *owners or tenants*. The West Virginia court in the *McCoy* case called attention to that very significant consideration (page 262):

"Bearing upon what we may reasonably conclude the Legislature had in mind in enacting this law, and the persons *sought to be affected thereby, attention is called to the fact that an ordinance of this character is required to be published once a week for two successive weeks in two local newspapers, and if 10 per cent of the registered voters, by written petition, protest against the same, it shall not become effective until it has been ratified by a majority of the votes cast by the duly qualified voters of such municipality at an election duly and regularly held as provided by the laws and ordinances thereof. This provision, it seems to us, necessarily implies that the charges imposed must, in theory at least, apply to all users of the services provided for, living within the municipality."

Assignment of Error No. 2.

The Action of the Sanitation Commission, in Charging its Sewage Bills to the Plaintiff as Owner of These Properties, Was Contrary to the Provisions of Section 1560iii7(b), and Is Therefore Void.

As has been pointed out in the foregoing argument under the first Assignment of Error, Section 1560iii7(a) provides that the charges of the Sanitation Commission

• “* * * may be charged to and collected from * * * the owner, lessee or tenant * * * who uses * * * any real estate * * * connected with the sewage disposal system.”

The following paragraph of the same section, however, expressly stipulates that such charges *shall be uniform for the same type, class and amount of use or service of the sewage disposal system*. The pertinent portion of that paragraph reads as follows:

“*Such fees, rents and charges being in the nature of use or service charges, shall as nearly as the Commission shall deem practicable and equitable, be uniform throughout the district for the same type, class and amount of use or service of the sewage disposal system, and may be based or computed either on the consumption of water, etc.*” (Italics inserted.)

It is thus seen that the Commission is, by the very terms of the statute, required to make its charges “uniform * * * for the same type (and) class * * * of use or service”. If 18* this means anything it *certainly means that the Commission must impose its charges uniformly upon all persons “(of) the same type (and) class” who use the sewage disposal system. Has the Commission followed that legislative mandate by billing the plaintiff, W. M. Bott, in this case?

The answer to that question necessitates a brief review of the method followed by the Commission in assessing its charges.

1. The individual sewage bills involved in this case are made out in the name of the particular apartment property involved, for example, “Westover Terrace Apartments, 825 Westover Avenue”, and are *not* made out to W. M. Bott or to any other person, firm or corporation. (See plaintiff’s Exhibit No. 1.)

2. The plaintiff testified that these bills, when tendered to him, were in this form. See record, page 19:

“Q. I notice that these bills are made out not in individual names but in the name of the Westover Terrace Apartments, Earle Court Apartments, Princess Anne Apartments and Armistead Bridge Court Apartments?

“A. That is right.

“Q. That is the condition in which those bills were originally rendered you?

“A. Yes, sir.”

3. When the Sanitation Commission first set up its books, and began to send out bills for the use of the sewage system, it made no attempt whatever to determine the persons who were "using or occupying" any of the premises connected with the system but instead followed without change the addressing system used by the Norfolk City Water Department for sending out *water* bills. See the testimony of J. W. Morris, Jr., acting manager of the Commission, on this point (Record, pages 36, 37):

19* * "Your books are set up, then, I take it, from an examination of this ledger sheet, to show the premises in question, where water is consumed; is that correct?"

"A. Well, our records have to parallel those of the Water Department because—in other words, our original records were set up from the Water Department's records and that is the way that heading appears on that plate. Now, in addition to that, we found out the responsibility for the water bill was in the name of W. M. Bott and Company and we also had that record certified by the City that those bills were sent to that—

"Q. Does that appear on there anywhere, that you have a certification that W. M. Bott, individually, is liable for any water on the premises?"

"A. We have W. M. Bott as a notation.

"Q. But W. M. Bott and Company is not W. M. Bott individually?"

"A. Well, no, sir, it is not.

"Mr. Ashburn: It was testified that he purchased the water.

"A. (Continuing) This is the mailing address, Mr. Ferebee.

"By Mr. Ferebee:

"Q. Mr. Morris, has your commission ever investigated to find out who is the legal owner of the Westover Terrace Apartments?"

"A. No, sir.

* * * * *

"Q. Mr. Morris, I was asking you questions along this line: In setting up your records of the Commission, did the Commission make any attempt to ascertain the legal owner of any premises on which water was consumed?"

"A. No, sir.

"Q. It likewise made no such investigation as to these four apartments that we are concerned about here today?

20* "A. That is correct.

"Q. Did you make any investigation as to the persons actually occupying the premises?

"A. We did not.

"Q. I believe you said that your records were taken over, or, rather, copies were made from the records of the Division of Water Supply of the City of Norfolk?

"A. That is correct."

From this it will be seen that the Commission has never *at any time* attempted or even professed to make its charges conform to the *type* or *class* of use made of its facilities by the plaintiff or by any other person in the district. Instead, it has elected to disregard any and all distinction between types and classes of use, and has imposed its charges *against the property itself!* Its bills are made out *not* to the owner of premises—on the theory that he may or may not be using the same—or to the tenant, where the actual use or occupancy of the premises has been transferred from the owner to him—but are addressed to an apartment house (if the property has a name) or to a street number!

This method of billing, aside from being a completely blind operation, is contrary to the very requirement of the Sanitation Act, which says that such charges "may be charged to * * * any *person* contracting for the same or from the *owner* or *lessee* or *tenant* * * * who uses or occupies any real estate. * * *" In other words, the Commission has the duty to ascertain the user of its services, and to impose its charges upon such user. It cannot discharge that duty by sending its bills to a street number, which is neither a "user" nor a legal entity.

21* "In addition to being violative of the Act as above mentioned, this method of billing flies in the very teeth of the restriction that charges of the Commission "shall * * * be uniform * * * for the same type (and) class of use or service." Granting for the purpose of argument that the sending of a bill to the "Westover Terrace Apartments" is the same thing as sending it to W. M. Bott, such a bill cannot be rendered to him *merely because he happens to be listed on the records of the Norfolk City Water Department as the person to whom its water bills are delivered!* He may receive those bills and then immediately turn them over to a tenant for payment, in accordance with the terms of his lease. Or if, as often happens, he has sold the property in question

without requiring the purchaser to sign a new contract with the Water Department, he would turn the bill over to the new owner for payment. In either case, the listed addressee on the records of the Water Department would not be either the *user* of the water or the one legally responsible for the cost of the same. Yet the Sanitation Commission sends its bills to the same addressee as listed by the Water Department—showing unmistakably that it is imposing its charges *not* upon the same type or class of use, but upon the wholly fortuitous circumstance *as to the mailing addresses used by the Norfolk City Water Department!*

A few examples will serve to illustrate the lack of uniformity which results from such a practice:

1. A. owns a private home which he lives in himself. The water bill for the premises comes to him, as the result of a contract with the Water Department. The Sanitation Commission bill, for sewage disposal, likewise comes to him 22* —and properly so, for he is *both “using” and “occupying” the premises.

2. A. owns a similar private dwelling next door, which he rents out to B. Under the terms of the lease, water is furnished at the expense of the owner. The water bill and sewage bills *both* are mailed to him. He pays the water bill, but refuses to pay the sewage bill because he is neither “using” nor “occupying” the premises.

3. A. owns a similar private dwelling which he rents out to C. Under the terms of the lease, water is to be paid for by the tenant, but the meter is left in the name of the owner. The water bill and sewage bill are mailed to A., who passes them on to the tenant for payment. The tenant pays the water bill pursuant to the terms of his lease, and pays the sewage bill because he is “using” and “occupying” the premises.

4. Same facts as in (3) above, except that the water meter for the house is transferred to the name of the tenant. Water and sewage bills both go to the tenant. The tenant pays both bills.

From these illustrations it will be seen that the Sanitation Commission makes no attempt whatever to assess its charges against the person who “uses or occupies” the premises. In Example No. 2, the owner is being billed for the sewage charges *not* because he is “using” the premises, but because the *water* bill happens to be rendered to him. In example No. 4, although the owner stands in exactly the same relationship to the property (i. e., has rented out the exclusive use

and occupancy but retains the income from such rental), the Commission would bill the *tenant* solely because the water bill happened to be addressed to him.

23* Surely the Legislature, in adopting the Sanitation Act, did *not intend for sewage charges to be borne only by those whose names unfortunately happened to appear on the mailing list of the Water Department! And, it is submitted, the "uniformity" required in the imposition of sewage charges cannot be allowed to rest upon any such irrelevant a happenstance. The Commission should no more be allowed to follow this method of assessment than it should be permitted to charge the *owner* of premises on one side of a street, and the *tenants* of premises on the other side—when in both instances the question of who is "using" or "occupying" the property (as between the owners and tenants) would be the same in each case.

It is respectfully submitted that the principles suggested above compel a finding that the plaintiff in the case at bar has been improperly assessed with these sewage charges.

Assignment of Error No. 3.

The Court Erred in Holding the Plaintiff Liable for, and the Defendant Authorized and Empowered to Charge and Collect from the Plaintiff, Fees, Rents and Other Charges for the Use and Services of the Disposal System Connected With the Apartment Buildings Hereinabove Mentioned, and in Holding That the Imposition Upon and Collecting from Said Plaintiff Said Fees, Rents and Other Charges Was Not Violative of the Fourteenth Amendment of the Constitution of the United States and of Section 11 of the Constitution of Virginia, in That it Deprives Such Owner of His Property Without Due Process of Law.

In the notice of motion for a declaratory judgment the distinct allegation is made that Section 1560iii7 of the Code of Virginia as construed by the trial court would be repugnant to the Fourteenth Amendment of the Constitution of the United

24* States and to Section 11 of the Constitution of Virginia in that it would deprive the owner of *his property without due process of law. This assertion is herewith renewed and relied upon as requiring a reversal of the judgment rendered by the trial court. As a preliminary to a discussion of what we believe to be the applicable Virginia law,

reference will be made in passing to a few cases from other states evincing the judicial consensus generally upon this question.

In *Waldron v. International Water Company* (Vt.), 112 A. 219, 13 A. L. R. 340, it was held that a regulation of a water company requiring a property owner to pay for water furnished his tenant is unenforceable.

In *Burke v. City of Water Valley*, 87 Miss. 732, 40 South. 820, 112 Am. St. Rep. 468, it was held that a regulation of a water company that charges for water should be to the owner of the property and not to the tenant, and that if the water charge is not paid, the water should be cut off and not connected again until the delinquent charge is paid, and which prevents a new tenant on tendering water charges, from getting necessary water unless he pays a delinquent charge against the property, is void as being unreasonable. In the course of its opinion there is cited the following language with approval, "It may be desirable that a water company or a gas company should have an easy way of collecting its debts; but we see no reason why it should be enabled by the Court to collect a debt from one who is not a party to the contract, when it sells its commodity on credit."

Numerous additions to the above might be made which would only prove repetitious. The most careful attention of the Court is now invited to the principles enunciated in 25* *Etheredge v. City of Norfolk*, *148 Va. 795, which we believe applicable in confirming our contention that the statute in question as construed by the trial court is wholly unconstitutional and consequently void.

The City of Norfolk was authorized by its Charter to provide an "adequate water supply for said City" and "to establish, impose and enforce water rates". Section 156 of the Norfolk City Code, 1920, reads as follows:

"Section 156. Both owner and occupant responsible for supply of water to premises connected with city sewer.

"The owner of any premises which are required by the city ordinances to be connected with the city sewer shall see that water from the waterworks of the city is connected with said sewerage on said premises, and not cut off therefrom at any time, except for necessary repairs, while said premises are occupied, and such owner shall cause the water rent for the use of water on said premises to be paid the division of water supply when due."

By an ordinance subsequently adopted, it was further provided as follows:

“Whenever any bill for service or water shall remain unpaid thirty days after the first of the month in which the same is due the bureau of water shall cut off the water from said premises and shall not turn the same on again until all delinquent charges therefor have been paid in full.”

Claiming its right so to do by virtue of the provisions of the above ordinances, the water bureau of the City pursued the method of charging and billing all water rents to the premises supplied with water instead of to the owner or occupant of the premises. If the bill so rendered, was not paid, no attempt was made to collect it from the occupant or consumer, as such, but the owner of the premises alone was held responsible and, upon his refusal to pay, the water would be shut off until the delinquent bill was paid.

Etheredge, the plaintiff in error, bought the property 26* in *question in January, 1914, and continued to own the same thereafter. He never occupied the premises; never consumed any water therein; never made any contract with the City for water to be consumed therein and never paid for any water so consumed. The tenant entered the premises under a written lease from Etheredge in which she covenanted to pay “all water rents levied, or to be levied, thereon during the term.” At the expiration of the term the tenant moved out leaving unpaid a bill for water consumed by her during her term. Etheredge knew nothing about the unpaid water bill until the delinquent tenant moved out and when a new tenant was secured, who, upon going to the water department to arrange for water, was there advised of the unpaid bill and told that unless it was paid water would be cut off. This threat was not carried into execution, but instead an action was instituted by the City against Etheredge for the sum represented by the delinquent water bill in question.

After a detailed recital in the opinion of the pertinent facts, the Court proceeds:

“The city’s right to recover in this case being based solely upon the provisions of section 156 of the Norfolk City Code, the specific question presented for decision is whether that ordinance, insofar as it seeks to make the owner of premises personally liable, irrespective of contract, for water consumed

upon such owner's premises by a lessee thereof, is repugnant to the fourteenth amendment of the Constitution of the United States and to section 11 of the Constitution of Virginia, in that it deprives such owner of his property without due process of law.

* * * * *

"The authorities are also practically unanimous that the regulation of a water company or ordinance of a municipality which requires the property owner to pay a delinquent bill for water furnished the tenant of the premises, which the owner has not contracted to pay, is unreasonable and void, unless a lien is given on the premises by statute, *or there*
27* *is at least some statutory authority therefor by virtue of the charter, or otherwise.*

* * * * *

"The right of a municipal corporation or water company to compel a property owner to pay for water furnished to a former occupant seems to depend on the existence of a lien against the property. 27 R. C. L., page 1455.

"Neither the charter of the city of Norfolk nor any other statute provides a lien on property for water rents; nor is there any statutory authority, so far as we are advised, for the ordinance in question. This being so, said ordinance, insofar as it attempts to hold a property owner personally responsible for the payment of arrearages for water consumed by the tenant on the premises, is unreasonable and void; unless, as contended by counsel for the city, that provision of the ordinance is necessary for the protection of the public health, and, for that reason, a valid exercise of the police power of the city.

* * * * *

"In *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1121, the court quotes from 1 Lewis on Eminent Domain, section 249, as follows:

" 'The Supreme Court of the United States, which is the final arbiter upon these questions, says: 'The validity of a police regulation, whether established directly by the State

or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. * * * If the means employed have no real substantial relation to the public objects which government may legally accomplish, if they are arbitrary and unreasonably beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action." "

* * * * *

"It is not claimed, and no attempt was made to show, that the building belonging to Etheredge is not connected with the city sewer, or that the connections are not constructed according to the building regulations. Nor is it claimed that it would be injurious to the public health to shut off water from an unoccupied building. The whole contention, then, resolves itself into this: That it would be unhealthful to live in 28* a house from which the water had been cut off, and for that reason the property owner should be required to pay the water rent in order to conserve the health of his tenants. We think it would be just as unreasonable as a police regulation to require him to do this as it would be to require him, in the absence of contract, to furnish his tenant with any other necessity which would conduce to the preservation of the tenant's health. The regulation is also unreasonable in its effects, because it requires the property owner—as in this case—to pay the delinquent water bill of a former tenant, which he is under no obligation to pay, in order to secure another tenant and keep his premises occupied; and denies the incoming tenant the use of the water to which he is entitled when he occupies the premises and offers to comply with the regulations required of consumers. The language of the court in *Waldron v. International Water Company*, 95 Vt. 135, 112 Atl. 219, 13 A. L. R. 340, is pertinent here:

" 'A regulation of a water company unauthorized by statute, requiring a landlord to pay for water is unenforceable. * * * *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905; *Stein v. McArdle*, 24 Ala. 344. Neither can he be held liable for a bill of a tenant. *McCarthy v. Humphrey*, 105 Iowa, 535, 75 N. W. 314. Nor can his premises be subjected to a lien for such charges. *Turner v. Revere Water Company*, 171 Mass. 329,

50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432. * * * A rule that the water company will deal only with the owners of property occupied by tenants, if valid, would enlarge the obligation of the landlord to the tenant to the extent of requiring the former to furnish water and pay the water assessment in order that the premises may be occupied, and, in case the landlord was in arrears, would deny the tenant the right of water service to which he was entitled unless he paid the landlord's debt.'

"Nor do we see any necessity for such a provision. It is important, of course, to the financial interests of the city that it should collect its water charges and derive sufficient revenue therefrom to maintain its waterworks; and it is true that the plan it has adopted, of charging such bills to the premises and holding the landowner responsible under any and all circumstances, under the penalty of making his house uninhabitable by cutting off the water, furnishes a simple and easy way of collecting its water rents. But, as said by the court in *Turner v. Revere Water Company*, *supra*: It may be desirable that a water company or a gas company shall have an easy way of collecting its debts, but we see no reason why it should be enabled by the court to collect a debt from one who is not a party to the contract, when it sells its commodity on credit.'

* * * * *

29* * "Reading the two ordinances hereinbefore referred to together, it is obvious that the provision of section 156 of the Norfolk City Code which is now under consideration was designed to enforce the collection of water rents and not as a health regulation. It has at the most only a remote connection with the public health—a connection by far too remote to justify us in sustaining it as a police regulation on that ground. We therefore conclude that said ordinance, insofar as it requires a property owner, in the absence of contract, to pay rent due the city of Norfolk for water consumed on the premises by the tenant, is not only unreasonable and unnecessary but foreign to the purpose alleged, and same is therefore unconstitutional and void. In this case it constitutes an arbitrary infringement upon the rights of Mr. Etheredge.

" 'When a health law is challenged by the courts as unconstitutional on the ground that it arbitrarily interferes with

personal liberty and private property without due process of law, the courts must be able to show that it has at least in fact some relation to the public health, and that the public health is the end actually aimed at, and that it is appropriate and adapted to that end.' *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

" 'A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, the public safety, comfort or welfare, when it is manifest that such is not the real purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensatory damages. *Cooley's Const. Lim.* 248.' *Spann v. City of Dallas*, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387.

" 'The well settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution.' *Hennington v. State of Georgia*, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166."

In the light of the foregoing it may be concluded that, in the absence of a statutory provision imposing a lien upon property for services furnished thereon to the tenant in the absence of a contract with the owner, the latter cannot personally be chargeable for the services so furnished.

30* *It is interesting to note that, as has previously been pointed out, there is no provision for such a lien in the pertinent legislation and, when the history of the movement looking to the enactment of the statutory provisions in question is borne in mind, it will at once be concluded that the omission of such a provision was not due to inadvertence. Intense public discussion followed the suggestion of the proposed legislation and the main contention centered around the question of whether or not the enactment should carry a provision for a lien on the premises in default of payment for services supplied thereon. This was followed by a referendum in which the question was clearly defined, the result of which was an overwhelming majority in favor of the elimination of a lien provision. It would thus follow that, in the absence of such a lien, which according to the authorities is a prerequisite to the collection from the owner of delinquent charges incurred by the tenant, an effort to so impose such charges, as was attempted unsuccessfully in the *Etheredge*

case, should here meet with a like result. It is submitted that the authorities above relied upon definitely preclude the collection of the charges in question from the non-occupant owner of the premises.

In the remote contingency that any doubt on the question should remain as to whether or not the statute in terms attempts to impose this liability, in the first of which events, the statute would be unconstitutional and in the latter, constitutional and enforceable, and that the statute was susceptible of these two constructions, the duty of the court, in the face of such doubt, is clearly defined.

28 Am. and Eng. Enc. of Law (2d Ed.) 640—"There is a presumption in favor of the constitutionality of a statute, and in accordance therewith, when a statute is susceptible of two constructions, one of which supports the act and gives it effect and the other renders it unconstitutional and void, the former will be adopted, even though the latter may be the more natural interpretation of the language used."

Martin v. South Salem Land Co., 97 Va. 353—"Nothing is better settled than if two constructions may be given a statute, one of which is clearly within, and the other without, the legislative power, the courts will hold that it intended to do that which it had the right to do, and not that which was beyond its power."

We therefore submit, for the reasons above given, that the attempt to impose and enforce the collection of charges for sewage disposal upon the plaintiff in error, in the absence of contract, when he has not personally occupied the premises in question, is a flagrant violation of his rights under the cited sections of the Constitution of the United States and of the State of Virginia.

It will perhaps be strongly urged that such a method is a convenient one from the standpoint of the defendant. We are unaware that constitutional rights should be subordinated to personal convenience. It may be true, as previously stated by this Court in the *Etheredge* case approving the decision in *Turner v. Revere Water Company*, that it might be desirable that a water company or a gas company, in which category we would also include the defendant in error, should have an easy way of collecting its debts, but that is no reason why it should be enabled by the Court to collect a debt from one who is not a party to the contract, when it sells its commodity on credit.

Applying this principle to the case at bar, the defendant would not be precluded from effective methods in collecting the charges which should rightfully be imposed on the tenant. In this connection the following observations may be pertinent:

32* While it appears from the evidence that the water used in *connection with sewage disposal in each of the constituent units of the apartment building is furnished through a common meter, there is no unsurmountable obstacle whereby the charges imposed by the Commission upon the individual tenants cannot be enforced. It will be observed by reference to Section 1560iii7(b) that there are various ways of basing or computing these charges which may be "either on the consumption of water on or in connection with the real estate, making due allowance for commercial use of water, or on the number and kind of water outlets on or in connection with the real estate or on the number and kind of plumbing or sewage fixtures or facilities on or in connection with the real estate, or on the number or average number of persons residing or working on or otherwise connected or identified with the real estate or on any other factors determining the type, class and amount of use or service of the sewage disposal system, or on any combination of such factors."

It will thus be seen that taking the total water consumption on the premises, the apportionment of this charge among the respective occupants thereof can easily be arrived at by the application of one or the other, or a combination of the factors above set out. It might be observed that these various methods were doubtless provided with a view to meeting the situation here presented.

Under Section 1560iii5 the Commission is authorized to sue and be sued.

Under Section 1560iii7(d), it is provided that the delinquent against whom the charge is made shall, as a result of his default, cease to dispose of sewage or industrial waste originating from or on such real estate by discharge thereof directly or indirectly into the *sewage disposal system, and to make this provision effective, the Commission may enter upon the premises. Section 1560iii28 provides that any person violating any provisions of the Chapter shall be guilty of a misdemeanor and upon conviction shall be punished accordingly.

Assignment of Error No. 4.

The Court Erred in Entering Judgment in Favor of the Defendant Against the Plaintiff for Said Fees, Rents And Other Charges.

For the reasons hereinabove given, it is respectfully urged that error was committed by the trial Court in entering judgment for the defendant against the plaintiff for the fees, rents and charges in question. If the foregoing arguments are accepted by the Court, it follows that the pecuniary judgment against the plaintiff is improper and should be set aside.

CONCLUSION.

For the foregoing reasons and upon the authorities cited, it is respectfully submitted that a writ of error and *supersedeas* to the judgment aforesaid should be granted herein, and that the Court should review and reverse said judgment and render final judgment in favor of this petitioner.

The original of this petition, together with a transcript of the record and exhibits in the cause, is forwarded to M. B. Watts, Esq., Clerk of the Supreme Court of Appeals of Virginia, Richmond, Virginia, on the 12th day of July, 1949, and on the same date a copy has been delivered to opposing counsel.

If a writ of error is awarded, petitioner will adopt 34* this *petition as its opening brief.

Opportunity for oral presentation of this application is requested.

Respectfully submitted,

W. M. BOTT,
By EDWARD S. FEREBEE,
TAZEWELL TAYLOR,
His Counsel.

EDWARD S. FEREBEE,
713 National Bank of Commerce Bldg.,
Norfolk, Virginia.

TAZEWELL TAYLOR,
509 Citizens Bank Building,
Norfolk, Virginia,
Attorneys for the petitioner.

35* *We, Edward S. Ferebee and Tazewell Taylor, attorneys at law, practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion it is proper that the judgment and decision complained of in the foregoing petition should be reviewed by said court.

EDWARD S. FEREBEE,
713 National Bank of Commerce Bldg.,
Norfolk, Virginia.

TAZEWELL TAYLOR,
509 Citizens Bank Building,
Norfolk, Virginia.

Norfolk, Virginia, July 12, 1949.

Received July 13, 1949.

M. B. WATTS, Clerk.

Writ of error and *supersedeas* awarded. Bond \$1,000.

Aug. 3, 1949.

JOHN W. EGGLESTON.

Received August 4, 1949.

M. B. W.

RECORD

VIRGINIA:

Pleas before the Circuit Court of the City of Norfolk, at the Courthouse thereof, on the 8th day of April, in the year, 1949.

Be It Remembered, That heretofore, to-wit: In the Circuit Court aforesaid, on the 14th day of February, in the year, 1949, came the Plaintiff, W. M. Bott, and docketed his Notice of Motion for Judgment against the Defendant, Hampton Roads Sanitation District Commission, etc., in the following words and figures, to-wit:

Virginia:

In the Circuit Court of the City of Norfolk.

W. M. Bott, Plaintiff,

v.

Hampton Roads Sanitation District Commission, a corporation duly chartered, organized and existing under the laws of the State of Virginia, Defendant.

TO: Hampton Roads Sanitation District Commission,
The above named defendant.

You are hereby notified that on the 14th day of February, 1949, at 10:00 A. M. o'clock of that day or as soon thereafter as counsel may be heard, the undersigned plaintiff will move the Circuit Court of the City of Norfolk at its Courthouse in said City, for a declaratory judgment under Virginia Code, Section 6140a, *et seq.*, construing Chapter 65A, of page 2 } the Virginia Code of 1942, and particularly Section 1560nn thereof, and also the provisions contained in Acts of the Virginia Assembly of 1946, Chapter 206, page 7, and Chapter 65A of the Virginia Code of 1942, particularly Section 1560iii7 (1948 Supplement). Section 1560nn, referred to above, reads in part as follows:

(a) Every commission is hereby authorized and empowered to charge and collect fees, rents, or other charges for the use and services of the sewage disposal system. Such fees, rents and charges may be charged to and collected from any person contracting for the same or from the owner or lessee or tenant, or some or all of them, who uses or occupies any real estate which directly or indirectly is or has been connected with the sewage disposal system, or from or on which originates or has originated sewage or industrial wastes, or either, which directly or indirectly have entered or will enter the sewage disposal system, and the owner or lessee or tenant of any such real estate shall pay such fees, rents and charges to the commission at the time when and place where such fees, rents and charges are due and payable.

(b) Such fees, rents and charges being in the nature of use or service charges, shall as nearly as the commission shall deem practicable and equitable, be uniform throughout the district for the same type, class and amount of page 3 } use or service of the sewage disposal system, and may be based or computed either on the consump-

tion of water on or in connection with the real estate, making due allowance for commercial use of water, or on the number and kind of water outlets on or in connection with the real estate or on the number and kind of plumbing or sewage fixtures or facilities on or in connection with the real estate, or on the number or average number of persons residing or working on or otherwise connected or identified with the real estate or on any other factors determining the type, class and amount of use or service of the sewage disposal system, or on any combination of such factors.

An actual antagonistic assertion and denial of the plaintiff's rights by said defendant under the above quoted statutory provisions obtain, and it is desired to have a clarification and adjudication of such rights and the authority of said defendant under the statutory provisions above quoted.*

The facts leading to the controversy in question are as follows:

The plaintiff is the owner in his own right of certain apartment buildings known as the Princess Anne Apartments, 826 West Princess Anne Road, Armistead Bridge Court Apartments, 800 West Princess Anne Road, Westover Terrace Apartments, 825 Westover Avenue, and Earle Court Apartments, 3421 Granby Street, all in the City of Norpage 4 { folk, State of Virginia. The said Princess Anne Apartment contains forty (40) individual apartment units, the Armistead Bridge Apartment contains twenty-four (24) individual apartment units, the Westover Terrace Apartment contains twenty-four (24) individual apartment units, and the Earle Court Apartment contains forty (40) individual apartments units, each of said units being rented to separate tenants and no portion of said buildings or any of the apartments therein being used or occupied by the plaintiff. The said tenants or occupants have the sole, exclusive occupancy, possession and use of all of the said individual apartment units, and the plaintiff, even though the legal owner, has no right or authority to enter in or upon or to use, occupy or possess the same, which are subject entirely to the sole exclusive use, occupancy and possession of the respective tenants therein, nor has said plaintiff contracted for or undertaken to pay said fees, rents or other charges for the use and service of the defendant's sewage disposal system.

The said defendant, relying upon the statutory provisions above quoted, has undertaken and attempted to charge and

collect from the plaintiff the fees, rents and charges imposed by said defendant in the nature of use or service charges authorized by the above-quoted statutory provisions. Bills for such charges, covering the period from August 27, 1948, to December 29, 1948, are as follows:

Princess Anne Apartment	\$152.20
Armistead Bridge Court Apt.	86.57
Westover Terrace Apartment	93.67
Earle Court Apartment	120.14
	<hr/>
	\$452.58

page 5 } No portion of the said amount of \$452.58 has been paid by the plaintiff, although the defendant asserts and claims that the same is due and payable at the present time. The defendant has indicated that future bills will be presented to the plaintiff for charges similar to the above, and that payment will be demanded for the same. Such charges and claims on the part of the defendant against the plaintiff are denied by the plaintiff, and give rise to an actual existing controversy which can only be resolved by an adjudication of the rights and obligations between the said parties.

As a direct result of the right asserted by the defendant to collect from the plaintiff the charges referred to above, the value of the plaintiff's interest and title in and to the afore-said apartment properties has been reduced by an amount equal at least to the capitalization of such charges on an annual basis, namely:

	<i>Annual Charge</i> <i>(estimated)</i>	<i>Capitalized</i> <i>at 6%</i>
Princess Anne Apartment	\$ 456.60	\$ 7,610.00
Armistead Bridge Court Apt.	259.71	4,328.50
Westover Terrace Apartment	281.01	4,683.50
Earle Court Apartment	360.42	6,007.00
		<hr/>
Total reduction of value		\$ 22,629.00

The plaintiff further avers that the above quoted statute, insofar as the Commission seeks thereby to make the owner or premises personally liable for the fees, rents and other charges (which are in the nature of use or service charges) for the use and services of the sewage disposal system, irrespective of contract, or the use of said sewage disposal system by said

owner, is and would be repugnant to the Fourteenth
 page 6 } Amendment of the Constitution of the United States
 and to Section 11 of the Constitution of Virginia in
 that it does and would deprive such owner of his property
 without due process of law.

The plaintiff therefore asks, in view of the premises, that this Court take jurisdiction of the matter in controversy and interpret the scope and extent of the statutes above set out, and determine whether or not, under the facts and relationship of the parties, there is any liability on said plaintiff for said fees, rents and other charges, which said defendant claims the right to impose upon and collect from this plaintiff, it being the contention of said plaintiff that the fair and correct interpretation of said statutory provisions imposes no liability upon him for the payment of said fees, rents and other charges; and that the Court further make binding adjudications of the rights of the respective parties hereto, and grant all such further relief as the plaintiff may be entitled to. And he will ever pray.

(s) W. M. BOTT.

W. M. Bott, the plaintiff named in the foregoing bill, being first duly sworn, says that the facts and allegations contained in the said bill which he makes of his own knowledge are true, and that all other matters therein stated he believes to be true.

Given under my hand this 4th day of February, 1949.

(s) MARY W. CROCKER,
 Notary Public.

My commission expires July 17, 1951.

TAZEWELL TAYLOR and
 EDWARD S. FEREBEE, p. q.

page 7 } And on the same day, to-wit: In the Circuit Court
 aforesaid, on the 14th day of February, in the year,
 1949:

Upon the motion of the plaintiff, by counsel, it is ordered that this notice of motion be docketed. And thereupon came the parties, by counsel, and said defendant pleaded the general issue to which said plaintiff replied generally and issue is joined; and the further hearing is continued.

And on another day, to-wit: In the Circuit Court aforesaid, on the day and year first hereinabove written, viz., on the 8th day of April, in the year, 1949:

This day came the parties by their attorneys, and this proceeding was heard in open court on the written motion of the plaintiff and the answer and cross-claim of the defendant, this day filed by leave of Court, and the cause was argued by counsel for the respective parties.

On consideration whereof, it is the judgment of the Court that the defendant Hampton Roads Sanitation District Commission is entitled to collect its charges for sewage disposal emanating from Princess Anne Apartments, 826 West Princess Anne Road, Armistead Bridge Court Apartments, 800 West Princess Anne Road, Westover Terrace Apartments, 825 Westover Avenue, and Earle Court Apartments, 3421

Granby Street, all in the City of Norfolk, Virginia, page 8 } from the plaintiff W. M. Bott as the owner of all of said apartments, so long as such plaintiff uses or occupies the real estate consisting of said apartment buildings and the same are connected with the defendant's sewage disposal system, and so long as sewage or industrial waste continues to enter the sewage disposal system of the defendant, and the Court doth so declare;

And it appearing to the Court from the conclusion which it has reached, and which is set forth and declared in this order, that the plaintiff is not entitled to any relief in this cause, but that the defendant is entitled to consequential relief under its cross-claim for the amount of such charges imposed against the plaintiff by the defendant which have accrued and become past due and payable, accordingly, the said defendant is awarded a judgment against the plaintiff in the principal sum of Six Hundred eighty-two and 73/100 Dollars, with interest thereon from the entry of this judgment until paid at Six (6%) per cent per annum and the costs of this proceeding.

And the said plaintiff having evidenced an intention to apply to the Supreme Court of Appeals of Virginia for a writ of error to the terms of this judgment, the operation hereof is suspended for a period of sixty (60) days upon the said plaintiff, or someone for him, entering into bond before the Clerk of this Court in the penalty of Three Hundred Dollars, with good and sufficient security conditioned according to law.

page 9 } The following is the Answer and Cross Claim filed by leave of the foregoing order:

For answer to the complaint exhibited against it in the above captioned matter, or so much thereof as this defendant is advised should be answered, defendant says:

1. Defendant admits that plaintiff is the owner in his own right of Princess Anne Apartments, Armistead Bridge Court Apartments, Westover Terrace Apartments and Earle Court Apartments as set forth in his complaint. Defendant denies that no portion of said buildings or any of the apartments therein are used or occupied by the plaintiff, but avers that on the contrary, on information and belief, the plaintiff is using all, each and every one of said apartment buildings to obtain revenues or profits therefrom; that he is using the water lines in said buildings to distribute water which he purchases to the several parts of each of said buildings, and that he uses the sewerage lines in each of said buildings to discharge the same water plus other waste materials into the disposal system of the defendant Commission. Defendant denies the allegation that plaintiff has not contracted for the use and services of the defendant's sewerage disposal system, and says that on the contrary the plaintiff, by availing himself of the use and services of the defendant's sewerage disposal system, has contracted for such use and undertaken to pay its charges.

2. Defendant admits that it has imposed the charges set forth in the complaint and attempted to collect page 10 } same, and says that it is legally entitled to collect same from the plaintiff. Defendant prays that this answer will be treated as a cross claim and that the Court will adjudicate in this cause that it is entitled to collect such charges and additional charges which have accrued and become due and payable since the institution of this suit, and that the Court will by way of consequential relief award the defendant judgment against the plaintiff in this cause for so much as may have accrued and become past due and payable.

3. Defendant denies that its actions and undertakings have in any way deprived plaintiff of his property without due process of law, and says that no constitutional question, State or Federal, is presented in this cause. That the charges made by defendant against this plaintiff are not a tax, nor an assessment, nor an imposition by public authority to which plaintiff is required to submit; but on the contrary plaintiff's liability for such charges depends entirely upon his voluntary determination to use or not to use the facilities of this de-

defendant. That plaintiff has elected to use such facilities by using them.

4. Defendant admits the existence of an actual controversy and the jurisdiction of this Court, and asserts that while the plaintiff is entitled to no relief in this cause the defendant is entitled to consequential relief in the form of a judgment against the plaintiff for the charges against him which are delinquent and unpaid accruing from his use of the facilities of this defendant.

page 11 } HAMPTON ROADS SANITATION DISTRICT
COMMISSION,

By: (s) JAMES M. MORRIS, Jr.,
Acting Manager.

RICHARD B. KELLAM and
W. R. ASHBURN,
Counsel for Defendant.

State of Virginia,
City of Norfolk, To-wit:

I, Richard B. Kellam, a Notary Public of and for the City aforesaid in the State of Virginia, whose notarial commission expires on the 7th day of November, 1949, do certify that James M. Morris, Jr., whose name as Acting Manager of Hampton Roads Sanitation District Commission is signed to the foregoing answer, personally appeared before me and being first duly sworn made oath that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

Given under my hand this 14th day of March, 1949.

(s) RICHARD B. KELLAM,
Notary Public.

The following is the Certificate of Exceptions in the above styled case:

page 12 } In the Circuit Court of the City of Norfolk;
Virginia.

W. M. Bott, Plaintiff,
v.

Hampton Roads Sanitation District Commission, a corporation duly chartered, organized and existing under the laws of the State of Virginia, Defendant.

NOTICE OF APPEAL.

To: Messrs. Ashburn, Agelasto & Sellers (Mr. Willard R. Ashburn) and Messrs. Kellam & Kellam (Mr. Richard B. Kellam), attorneys for the defendant:

PLEASE TAKE NOTICE, That on the 12th day of May, 1949, the undersigned will present to the Honorable Clyde H. Jacob, Judge of the Circuit Court of the City of Norfolk, Virginia, at the courthouse of said city, the stenographic report of the testimony and other proceedings of the trial of the above-entitled case for certification by said Judge, and will, on the same date, make application to the Clerk of said court for a transcript of the record in said case, for the purpose of presenting the same to the Supreme Court of Appeals of Virginia with a petition for a writ of error and *supersedeas* to the final judgment of the trial court in said case.

W. M. BOTT,
By: TAZEWELL TAYLOR and
EDWARD S. FEREBEE,
his attorneys.
By EDWARD S. FEREBEE,
Of Counsel.

Legal service of the above notice is hereby accepted, this 9th day of May, 1949.

RICHARD B. KELLAM.

page 13 } In the Circuit Court of the City of Norfolk,
Virginia.

W. M. Bott, Plaintiff,
v.

Hampton Roads Sanitation District Commission, a corporation duly chartered, organized and existing under the laws of the State of Virginia, Defendant.

TRANSCRIPT OF TESTIMONY.

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled case, in said court, on the 17th day of March, 1949, before the Honorable Clyde H. Jacob, Judge of said court.

Walter M. Bott.

Appearances: Messrs. Tazewell Taylor and Edward S. Ferebee, counsel for the plaintiff.

Messrs. Ashburn, Agelasto & Sellers (By Mr. Willard R. Ashburn) and Messrs. Kellam & Kellam (by Mr. Richard B. Kellam) counsel for the defendant.

page 14 } (The witnesses were sworn, opening statements
were made by counsel, and the following evidence
was introduced:)

WALTER M. BOTT,
the complainant, having been first duly sworn, testified as
follows:

Examined by Mr. Taylor:

Q. Mr. Bott, will you state your name and residence?

A. Walter M. Bott; 940 Jamestown Crescent, Norfolk, Virginia.

Q. And what is your business?

A. Real estate, insurance, hotel, and some other.

Q. You are the plaintiff in this proceeding, are you not?

A. I am.

Q. And in there, you have alleged that you are the owner of four separate and distinct apartment buildings of the city?

A. I am.

Mr. Taylor: For the purpose of the record, I will read them, Your Honor.

The Court: Very well, sir.

Mr. Taylor: Princess Anne Apartments, 826 West Princess Anne Road; Armistead Bridge Court Apartments, 800 West Princess Anne Road; Westover Terrace Apartments, 825 Westover Avenue; and Earle Court Apartments, 3241 Granby Street; all in the City of Norfolk, Virginia.

By Mr. Taylor:

Q. That is true, is it not?

A. It is.

Q. Can you state the number of individual apartment units in the Princess Anne Apartments?

A. I can. It is 40.

Q. And in the Armistead Bridge Apartments?

Walter M. Bott.

A. 24.

Q. And in the Westover Terrace Apartments?

A. 24.

Q. And in the Earle Court Apartments?

A. 40.

Q. Now, will you explain generally to the Court just the layout of those apartments, whether they are separate and distinct units or just what their character is?

A. They are separate and distinct units that are rented to tenants who have exclusive use of the apartments so long as the lease is in effect.

Q. And they open on a common hall, do they?

A. They do.

Q. Under the terms of your lease, as applied to each and every one of these apartments, what rights have you so far as possession or the right to enter upon any one of the units?

Mr. Ashburn: Objection, if Your Honor please, page 16 { on the ground that the lease instrument between the landlord and the tenant is the best evidence.

The Court: The objection is sustained.

By Mr. Taylor:

Q. Can you produce a sample lease of each one of those apartments?

A. Yes. I think they are—

Q. Will you do that during the progress of this case?

A. I will.

Mr. Taylor: Without delaying the hearing, Your Honor, we would like to have the opportunity.

The Court: All right, sir; you may.

By Mr. Taylor:

Q. And the lease defines the relation between you and each one of your tenants?

A. It does.

Q. What use have you of these apartments which are under rent?

Mr. Ashburn: Objected to as calling for a legal conclusion, Your Honor.

The Court: That calls for a construction of the lease, what rights he has in the premises.

Walter M. Bott.

Mr. Taylor: Well, sir, we will await that.

page 17 } By Mr. Taylor:

Q. On the question involved in this case of the matter of fees, rents and other charges made by the defendant Hampton Roads Sanitation District Commission, state whether or not you have contracted for any such charges?

A. I have not.

Q. State whether or not you have agreed to pay any such charges?

A. I have not.

Q. State whether or not you have used directly or indirectly this sewerage system that is operated by the Hampton Roads Sanitation District Commission?

A. The only use I have had of it is some facilities in the basements of the various apartments that the caretaker will use, such as a sink and commode. And I would certainly say that the water used by the caretaker will not exceed the water used by any tenant in that building, or in that particular building.

Q. State whether or not you stand ready, able and willing to pay your proportionate part, based upon just what you have said as to use of the facility?

A. I do.

Mr. Ashburn: Objected to, Your Honor please, because any question as to the reasonableness or propriety of the amount of the charge against Mr. Bott can be de-
page 18 } termined only in the manner prescribed by the
statute, by application to the State Corporation
Commission.

The Court: The Court will decide the principle that the individual payment will be proper. Whether he is willing to pay or unwilling to pay, he has to pay if the Court holds that each user would have to pay. He admitted that he is one of the users.

Mr. Taylor: As to that particular instrumentality.

The Court: Whether he says he is willing to pay or not, if the Court should so hold that the users individually should pay, he comes in that category on his testimony already in.

Mr. Ashburn: But our point is that Your Honor can not decide in this cause whether the tenant or the landlord should

Walter M. Bott.

pay. You can only determine whether there is a right on the part of the Commission to make a charge to the fee simple owner of these properties.

Now, illustrating, if the charge made is \$100 and the fee simple owner says it ought to be \$1.00, then his exclusive means of relief is prescribed by statute and it is by application to the State Corporation Commission.

By Mr. Taylor:

Q. I hand you certain bills rendered by the Hampton Roads Sanitation District Commission and ask you whether you received those bills?

A. Yes, sir, I did.

page 19 } Q. And are those the bills that are referred to in your notice of motion for judgment in this case?

A. They are.

Q. I notice that these bills are made out not in individual names but in the name of the Westover Terrace Apartments, Earle Court Apartments, Princess Anne Apartments and Armistead Bridge Court Apartments?

A. That is right.

Q. That is the condition in which those bills were originally rendered you?

A. Yes, sir.

Mr. Taylor: I would like to file those as an exhibit.

(The bills referred to were marked Plaintiff's Exhibit 1.)

By Mr. Taylor:

Q. And you have declined to pay those bills, for the reasons you have indicated?

A. That is right.

Q. As a matter of fact, do you, or not, go on the premises representing the individual units leased by you to various tenants?

Mr. Ashburn: You mean whether he personally walked into the apartments?

page 20 } Mr. Taylor: No, I am asking him first as to himself. I will then come to his agent.

A. I do not unless by special permission of the tenant.

Walter M. Bott.

By Mr. Taylor:

Q. I will now ask you the same question with reference to your agents or duly authorized representatives. Do they go upon those premises?

A. They do not. They have express, explicit instructions from me not to enter an apartment that is under lease.

Q. And will you get a typical lease for each one of these apartments during the course of the hearing?

A. I will.

CROSS-EXAMINATION

By Mr. Ashburn:

Q. Mr. Bott, let's devote our attention first to the Princess Anne Apartments. You have already said that that is a building containing 40 dwelling units?

A. Yes, sir.

Q. I suppose that as of the present time each one of those 40 dwelling units are rented to tenants?

A. They are.

Q. Now, approximately how many stories do the buildings comprise?

A. Four stories.

Q. And these apartments or dwelling units are
page 21 } on each of the four stories to the building?

A. Yes.

Q. Some on each story?

A. They are.

Q. I would assume that the lease to each tenant entitles that tenant to dwell in the apartment designated by number or some other description?

A. It does.

Q. Well, now, what public space is there in the entire apartment building; that is, space not let to the possession of any individual tenant?

A. Public hall and the basement.

Q. Well, then, is the public hall on each of the four floors?

A. Yes, sir.

Q. And there is a basement below the four floors?

A. Yes, sir.

Q. Do you have a manager or a custodian or an employee representative living on the premises?

A. So far as I know, the Princess Anne, the Armistead Bridge Court, the Westover Terrace has no such occupancy.

Walter M. Bott.

The Earle Court does have a janitor that stays on the premises part time.

Q. Well, now—

A. The basement, in one basement room.

page 22 { Q. Dealing still with the Princess Anne Apartments, how are the spaces in the entire building not given under lease to the possession of tenants, cleaned or otherwise cared for?

A. The tenants clean their own apartments, the ones they occupy.

Q. What happens to the halls?

A. The janitor cleans that.

Q. What happens to the basement?

A. The janitor cleans it.

Q. Are there any lavatories, sinks or basements in any part of the building exclusive of the dwelling units leased to tenants?

A. Yes. A sink in the basement and a commode in the basement of the apartment buildings.

Q. One or more than one?

A. It's probably two in the Armistead Bridge Court and one in the Princess Anne; two in the Earle Court; one in the Westover Terrace.

Q. Well, now, Mr. Bott, still devoting our attention to the Princess Anne, state whether or not you have a central heating system for the building?

A. I do.

Q. So that heat is furnished by you as owner to all of your dwelling tenants on the premises?

page 23 { A. It is

Q. And what sort of heating system is that?

A. Steam heat.

Q. And does that involve the use of water in the heating system?

A. It does, but the system is so constructed that it probably would not use over 100 gallons per year, because the same water heats over and over again.

Q. Is such water as is used in the heating system discharged into the sewerage disposal lines?

A. No. When they drain the water system, it is drained out by a spigot on the side of the boiler; and that is done probably once a year unless we have trouble with the boiler, which is not often. Now, they might take a bucketful of water, pour it in the sink and let it drain that way.

Q. That is the only place they can pour it?

Walter M. Bott.

A. As far as I know.

Q. What?

A. They could. They could probably pour it in the commode. I have seen them do that sometime.

Q. Well, at any rate, it goes through the sewerage disposal system?

A. I imagine so. I don't know where it goes after it leaves there.

page 24 } Q. All right, sir. Now, concerning the use of water on the premises by anyone in possession of any part of the premises, is that from the water distribution system of the City of Norfolk?

A. Would you ask me that question again, please.

Q. Any water used on the premises, does it come from the water distribution system of the City of Norfolk?

A. Yes, supposed to. We are—piped into the building.

Q. Do you purchase the water from the City of Norfolk?

A. I do.

Q. And pay the City of Norfolk its charges for the water consumed on said premises?

A. I do.

Q. And is it not the fact that every commode in the entire building—when I say “commode,” I mean “toilet”—is operated by means of water coming from the water system of the City of Norfolk?

A. It is a fact.

Q. And the same answer would apply to every bathtub, shower and basin?

A. That is right.

Q. Is it not also the fact that every bit of that water when it has been used, goes off as waste matter through the sewerage disposal system?

page 25 } A. I would not know, Mr. Ashburn.

Q. Certainly, all passing through the showers, tubs, toilets and basins goes off through the sewerage disposal system?

A. I would not know whether it is even connected up or not.

Q. Where else would it discharge, Mr. Bott? How else could it discharge?

A. I would not know, I say. I am not familiar with that system.

Q. Do you know whether or not it goes into the city sewerage?

A. No, sir.

Q. You don't know where it goes?

Walter M. Bott.

A. No, sir. It is supposed to go in the sewers but I don't know that it does.

Q. Mr. Bott, you are individually the owner of these four buildings?

A. I am, yes, sir.

Q. Well, now, concerning the subjects that we have just been inquiring on, the same answers as you have given about the Princess Anne Apartments apply as well to the other three, with the single exception that in the Earle Court Apartments, your paid representative lives on the premises?

A. Yes. That is my understanding. He has a page 26 } room there and I imagine he spends most of his time at night in that room.

Q. The purchase and distribution of water, the distribution of waste matter and all other arrangements are the same so far as you know for the four buildings?

A. Yes.

Q. You buy the water in every instance from the city and it is used in the water lines and sewerage lines in your buildings?

A. So far as I know. I buy the water from the city.

Q. Well, now, Mr. Bott, as the individual owner of these four buildings, you are using them for profit, are you not?

A. I am trying to get some profit out of them; yes, sir.

Q. And—

Mr. Taylor: We will agree with that.

By Mr. Ashburn:

Q. If as a result of the rental of space in those buildings a profit results, then you are using the buildings for profit?

Mr. Taylor: I object to that.

The Court: That calls for a conclusion. He can state the fact that he did make a profit.

Mr. Ashburn: It does not make any difference, Your Honor, so long as he is trying to make a profit. That is page 27 } the criterion.

Mr. Ferebee: It makes a difference to him.

The Court: Apartments are not run for charitable purposes, ordinarily.

By Mr. Ashburn:

Q. Mr. Bott, the ownership and rental of apartment dwelling units is a business with you?

Walter M. Bott.

A. Yes, I would say so.

Q. Now, each, all and every one of these buildings is connected with the sewerage disposal system, whose ultimate disposition is through the facilities of the Hampton Roads Sanitation District Commission; is it not?

Mr. Taylor: He said he did not know.

A. I don't know, Mr. Ashburn. I received a bill from the Sanitation Commission on my home. I paid that and I understand now that has not even been hooked up to the sewerage. So the same thing might apply to these other apartments.

By Mr. Ashburn:

Q. You actually don't know?

A. No, sir.

Q. Did you not have some conferences with representatives of the Commission in order to find out, or in which that subject was discussed?

A. I have talked to Reid Digges on a few occasions but the information I received was not authentic, I page 28 } don't think. He could not tell me himself at that time.

Q. You refer to Digges; he was the former manager for the District Commission?

A. Yes. I don't think I discussed it with Digges within the past seven or eight months.

Q. Mr. Bott, you did pay some of the bills submitted by the Commission for charges on these apartment buildings?

A. I did, yes, sir.

Mr. Taylor: Paid under protest.

By Mr. Ashburn:

Q. And they were prior in date to those that are in controversy?

A. Yes, sir. They were paid under protest.

Q. Mr. Bott, as to each of these apartment buildings, is it the fact that there is only one main line for the transmission of water coming into the premises to each building?

A. I really could not tell you. I imagine that is a fact. I have not investigated. As long as I received water—I purchased them set up, and so long as I receive the proper water, I am not interested further.

Walter M. Bott.

Q. So far as you know, there is only one water meter at each premises, each building?

A. So far as I know.

Q. And so far as you know, is there only one page 29 { discharge line from each building out of which goes the waste water and sewage?

A. So far as I know.

RE-DIRECT EXAMINATION.

By Mr. Taylor:

Q. As I understand, Mr. Bott, you paid a former bill under protest?

A. I did; yes, sir.

Q. Will you state whether or not each individual apartment can be disconnected from the general sewerage system?

A. I am sure it can, but if it cannot at this time, it can be so fixed that it can be.

Q. And that is not a major operation, is it?

A. No, sir.

Q. Did you, or not, have sewerage disposal for these four apartments of yours prior to the inauguration of the service of the defendant Hampton Roads Sanitation District Commission?

A. Sewerage disposal?

Q. Yes, sir.

A. Yes, sir; I did.

Q. State whether or not in your opinion the value of your property has been enhanced?

Mr. Ashburn: Objected to, if Your Honor please. There is no question of value here, none whatever.
page 30 { Mr. Taylor: There is a question of special benefit. That is one phase of this matter.

Mr. Ashburn: There is no question of special benefit.

The Court: The entire situation developed by the establishment of this quasi corporation, public service corporation, the Sanitation Commission—whether or not people as a whole have been benefited—is immaterial. Whether or not he has benefited or whether or not someone else would be benefited is a general question, does not seem to be properly applicable to this case.

Mr. Ashburn: That is purely a matter of legislative concern, as we contend.

Littleton W. Tazewell.

The Court: If you can show that he is in a class by himself, that he has been harmed and everyone else has been benefited, still he would have to suffer in a public matter of this kind.

Mr. Taylor: We withdraw that question, Your Honor. I don't think it is material.

That is all.

Mr. Ashburn: If he will say they are similar, we will not require him to produce all of his leases, just a representative one.

The Court: All are alike, I suppose; just one page 31 } lease.

Mr. Ferebee: One lease for each building.

Mr. Taylor: That is all, Your Honor.

LITTLETON W. TAZEWEILL,
called as a witness on behalf of the respondent, and having
been first duly sworn, testified as follows:

Examined by Mr. Kellam:

Q. Will you tell the court your name, please, sir?

A. Littleton W. Tazewell.

Q. What is our occupation?

A. Design engineer for the Hampton Roads Sanitation District Commission.

Q. How long have you been engaged in the engineering business?

A. I hate to admit it. I graduated 38 years ago.

Q. Are you familiar with the sewer lines of the City of Norfolk and of the Hampton Roads Sanitation District Commission?

A. I am.

Q. Will you tell the Court whether or not the apartment house known as the Princess Anne Apartments is connected with the sewer lines of the Hampton Roads Sanitation District Commission?

A. It is connected.

page 32 } Q. Are the sewer lines of the apartment known
as the Armistead Bridge Apartments connected?

A. Yes.

Q. And the Westover Apartments?

A. Yes.

Q. And the Earle Court Apartments?

A. Yes.

James W. Morris, Jr.

Q. Is the waste material from those apartments discharged through the facilities of the Hampton Roads Sanitation District Commission?

A. It is.

Q. And is that waste material treated in the treatment plants of the Commission?

A. It is.

Q. You don't know anything about the bills or the amount of the charges?

A. No, I do not.

Q. Mr. Tazewell, has that condition existed for a period of more than six months; have those connections been made for a period of more than six months?

A. Have the connections to the treatment plant been?

Q. That is right.

A. More than six months? Yes.

page 33 } JAMES W. MORRIS, JR.,
called as a witness on behalf of the respondent, and
having been first duly sworn, testified as follows:

Examined by Mr. Kellam:

Q. You are Mr. James W. Morris, Jr.?

A. That is right.

Q. And you are the acting manager for the Hampton Roads Sanitation District Commission?

A. That is correct.

Q. Mr. Morris, you are also in charge of the billing and accounts of the Commission?

A. That is correct.

Q. Now, will you tell the Court, please, what sum is now due and owing by the Princess Anne Apartments or by Mr. W. M. Bott as the owner of that apartment.

Mr. Taylor: That is a legal question. He can testify to any fact.

The Court: He can say what his books show.

By Mr. Kellam:

Q. Show what your books reflect as to the account charged to the Princess Anne Apartments or Mr. W. M. Bott as the owner of that apartment, as of this date?

A. Well, unfortunately, I have not got these months added up, Mr. Kellam.

James W. Morris, Jr.

Q. Give it to us for the various months.
page 34 } A. Yes, sir. The bill for the month ending September 27 was \$39.10. For October 25—

Q. That is 1948, September, 1948?

A. That is correct, sir. October 25, 1948, \$34.97. November 29, 1948, \$36.23. December 27, 1948, \$41.90. January 26, 1949, \$37.42. February 24, \$34.76.

Q. Now give us those figures with reference to the Armistead Bridge Court Apartments?

A. For the month ending September 27, 1948, \$23.00. November 25, 1948, \$24.87. That is October 25; I beg your pardon. November 29, \$19.08. December 27, \$19.62. January 26, 1949, \$28.25. February 24, 1949, \$17.64.

Q. Now, give us the figures with reference to the Westover Terrace Apartments?

A. Westover?

Q. Yes, sir.

A. September 27, 1948, \$25.04. October 25, 1948, \$21.04. November 29, \$18.15. December 27, \$29.44. January 26, \$21.89. February 24, \$21.63.

Q. Earle Court is the next one.

The Court: Have you totaled those amounts?

The Witness: I have not, unfortunately.

A. September 28, \$31.33. October 26, \$28.53. November 26, \$30.14. December 29, \$30.14. January 27, \$28.18. February 25, \$29.09.

page 35 } Mr. Kellam: That is all.

CROSS EXAMINATION.

By Mr. Ferebee:

Q. Mr. Morris, do you have the ledger sheets in your hand? Is that what you are reading from?

A. That is right.

Q. May I see them, please.

A. This is the actual ledger on which the credits are made, which is the other end of the bill. This is the consumption record sheet on which the original bill is also computed.

Q. You are referring in your latter statement to the yellow sheet entitled "Westover Terrace Apartments"?

A. That is correct; with W. M. Bott and Company. This is the notation that they, according to the City Water De-

James W. Morris, Jr.

partment, are responsible for the water bill and to whom our bill is to be sent.

Q. Now, I notice, Mr. Morris, that this yellow sheet which I hold in my hand, which presumably is taken from your ledger, bearing at the top the notation "Hampton Roads Sanitation District Commission Monthly Consumption Record", has under the description of the property in the upper right-hand corner the name "Westover Terrace Apartments, 825 Westover Avenue, Norfolk 7, Virginia; 24 apartments"?

A. Yes, sir.

page 36 { Q. Your books are set up, then, I take it, from an examination of this ledger sheet, to show the premises in question, where water is consumed; is that correct?

A. Well, our records have to parallel those of the Water Department because—in other words, our original records were set up from the Water Department's records and that is the way that heading appears on that plate.

Now, in addition to that, we found out the responsibility for the water bill was in the name of W. M. Bott and Company and we also had that record certified by the City that those bills were sent to that—

Q. Does that appear on there anywhere, that you have a certification that W. M. Bott, individually, is liable for any water on the premises?

A. We have W. M. Bott as a notation.

Q. But W. M. Bott and Company is not W. M. Bott individually?

A. Well, no, sir, it is not.

Mr. Ashburn: It was testified that he purchased the water.

A. (Continuing) This is the mailing address, Mr. Ferebee.

By Mr. Ferebee:

Q. Mr. Morris, has your Commission ever investigated to find out who is the legal owner of the Westover
page 37 { Terrace Apartments?

A. No, sir.

Q. Does it ever make such an investigation before setting up one of these ledger sheets as to the consumption of water on any premises?

Mr. Ashburn: Objected to as immaterial.

James W. Morris, Jr.

The Court: The Notice of Motion sets up the ownership, I take it. Did you set up in the Notice of Motion ownership of the property? What are you going to accomplish by it?

Mr. Ferebee: To show that the ledger sheets and the billing by the Commission are made to the property and not to an individual. The statute does not permit a charge to the property but only to the individual.

Mr. Ashburn: It makes no legal difference. That is not charged to the property. We are charging Mr. Bott by the answer in this suit.

The Court: Continue the examination.

By Mr. Ferebee:

Q. Mr. Morris, I was asking you questions along this line: In setting up your records of the Commission, did the Commission make any attempt to ascertain the legal owner of any premises on which water was consumed?

A. No, sir.

Q. It likewise made no such investigation as to page 38 } these four apartments that we are concerned about here today?

A. That is correct.

Q. Did you make any investigation as to the persons actually occupying the premises?

A. We did not.

Q. I believe you said that your records were taken over, or, rather, copies were made from the records of the Division of Water Supply of the City of Norfolk?

A. That is correct.

Q. So that your billing in no sense represents an investigation on the part of the Commission as to the person or persons actually using the water that goes into those premises?

A. I would say yes, but I would like to add something. Is that possible?

The Court: Answer it in your own way.

A. (Continuing) The records were taken from the City Water Department's records and, naturally, we assumed that in view of the fact that they had been billing these particular individuals involved, such as, for instance, those accounts are set up under the name of W. M. Bott and Company as a point to which those bills would be mailed. There was no

James W. Morris, Jr.

question, for instance, about the first two bills that were sent to each of these apartments. They were paid by W. M. Bott and Company. We did not feel that any further
page 39 } investigation in that connection would be necessary. Now, if there had been some question about ownership or question about who would be responsible for the bill, why, we then do investigate. We do have some cases of that kind and we have a special man who does make such an investigation.

By Mr. Ferebee:

Q. Mr. Morris, you admit, do you not, that the first bill or the first two bills paid by Mr. Bott on any of these four billings were paid under protest?

A. Oh, that is correct.

Q. You know that?

A. Yes, sir.

Q. So you were put on notice that there was some question about the liability as to these four buildings, were you not?

A. Well, now, as I recall the letter that we got, it was not a question of protesting or from that particular standpoint, but it was protesting as to his individual responsibility. And that was clearly brought out, of course, in several conferences we have had on the subject before us.

Q. Mr. Morris, on this ledger sheet which I hold in my hand of the Westover Terrace Apartments, I find pencil notations down in the lower left-hand corner, from which I think you read as to the amount of water consumed on the premises?

A. Well, I read the amount in dollars and cents.
page 40 } I did not read the consumption figures, but they are—

Q. I also see that those pencil figures apparently show the amount of water consumed on the premises during each of the months in question?

A. That is correct, sir.

Q. How is the charge made by the Commission computed?

A. Well, that is computed on a rate chart, which is established from our official rates. In other words, if you notice—I have not got that sheet, of course, in front of me—Step Rate 3. We have our rates translated into a formula which enables us simply to multiply the amount of consumption by the necessary formula figure and arrive at this particular result. You will find that that is based on our rate schedules, a minimum of \$1.50 for the first 1,300 cubic feet on a quar-

James W. Morris, Jr.

terly basis, and so on. That goes straight through our rate steps. There is no question in your mind about the computation, is it?

Q. That figures out to approximately what percentage of the water bill? That is, the charges of the Commission figure out to—

A. Well, it is not based in any way on the water rates. It is not a particularly—that percentage varies as the various rate classifications vary. In other words, for example, our rate schedule is a step rate plan. The City has page 41 } a somewhat similar plan. Now, they may drop off very much more sharply than we do in certain rate brackets, and therefore, the percentage in those rate brackets might be higher. We have seen percentages that have run anywhere from about 35 per cent up to, in some rate brackets, as high as 50 per cent.

Q. As to all of these four apartments that we are concerned about here where the consumption is approximately the same since the apartment units are approximately the same size, your scale, your bracket, would be approximately the same as the City of Norfolk, would it not?

A. Well, I don't understand exactly what you mean by that, Mr. Ferebee. Our—as far as our rates are concerned, they are entirely separate. They are based on entirely different amounts of consumption of water and it is—and, as a matter of fact, they have no particular relation in so far as rates are concerned at all.

Q. You say, based on an entirely different consumption of water?

A. No. What I mean is, for instance, the City of Norfolk has a minimum service charge of \$2.50. This is an example. It will go throughout the rate steps; has a minimum charge of \$2.50 per quarter. That allows the user 500 cubic feet of water. Over that, they begin to then pay on the basis of so much per 100 cubic feet.

Now, on the other hand, we have a minimum rate page 42 } of \$1.50 a quarter, but we allow for that \$1.50 up to 1,300 cubic feet, and we don't begin charging the next rate bracket at 10 cents until it does go over 1,300 cubic feet. Then you are charged on a basis of 10 cents per 100 cubic feet. In other words, what I am trying to point out is that we have an entirely different base. We have an entirely different schedule of rates. I don't see that it has any bearing on the matter.

Q. But it runs, roughly, between 35 and 50 per cent of the actual water charge?

A. It has done that; yes, sir. It does not necessarily mean that that is so. It depends entirely on the rate bracket in which they fall.

Q. Mr. Morris, how long have you been with the Commission?

A. Two—approximately two years.

Q. You were under Mr. Reid Digges when he was general manager of the Commission?

A. That is correct, sir.

Q. And you succeeded him as acting manager upon his resignation?

A. That is correct.

Q. I believe you were present at a conference held in Mr. Tazewell's office, between Mr. Taylor, Mr. Digges, yourself and myself, were you not, in connection with this matter?

A. And also Mr. Kellam. Yes, sir.

Q. At that time, a decision was had, was it not, page 43 } as to the manner in which bills were being charged to the owners of multiple-family buildings such as these four involved in this suit?

Mr. Ashburn: If Your Honor please, we object to that or any discussion on the subject. The evidence makes plain how they are charged in this instance. We contend that is proper and legal and that is the only question.

The Court: There is no objection to the question he just asked. I imagine you object to the one he might follow with. He was just asking was there a conference.

Mr. Ashburn: Well, but I took it that he wanted the witness to state what was said in the conference.

The Court: He has not asked that yet.

A. There was such a conference, yes.

By Mr. Ferebee:

Q. That conference has to do with the apportionment of charges for use of water in multiple-family dwellings, did it not?

A. It was a conference that was in connection with the possibility of being able to do that.

Q. Mr. Digges, as manager of the Commission at that time and in your presence, did he not, made a statement to the effect that—

Walter M. Bott.

page 44 } Mr. Ashburn: Objected to.
Mr. Ferebee: Just a minute.

By Mr. Ferebee:

Q. (Continuing)—made a statement to the effect that the proper apportionment of these charges would require the billing of the water used by each of the tenants, and that the only reason that that method was not followed was because there was no individual water meter for each of the apartments?

Mr. Ashburn: Objected to, if Your Honor please. Don't answer it (addressing witness) until the Court rules.

Mr. Ferebee: The reason for asking that question is this: The statute says that the method used by the Commission in assessing its charges must be uniform, as far as practicable in the community, to the ones who use the water. I think that any statement made by the Commission is binding on the Commission if it has any bearing in the determination as to whether or not the method used is, as far as practicable, the best method of apportioning those charges.

Mr. Ashburn: Your Honor—

The Court: That would be an individual expression or construction of the meaning of the law.

Mr. Ferebee: No, sir, not that.

The Court: That would be the result of it. For
page 45 } that reason, it would not be admissible. The objection is sustained.

Mr. Ferebee: I note an exception, if Your Honor please.
No further questions.

RE-DIRECT EXAMINATION.

By Mr. Ashburn:

Q. As a matter of practice, Mr. Morris, the Commission bases its charges on the amount of water consumed?

A. That is correct, sir.

Q. And makes its charges to the person who has contracted for that water?

A. That is correct, sir.

Mr. Ashburn: We rest, Your Honor.

WALTER M. BOTT.

recalled, testified further as follows:

Examined by Mr. Taylor:

Q. Mr. Bott, when you were on the stand before, you were

Walter M. Bott.

requested to get a typical lease applying to each one of the four apartments.

A. I was.

page 46 } Q. And to bring them back and introduce them
in evidence?

A. Yes, sir.

Q. Have you done so?

A. Yes, sir.

Q. Have you the other three here?

A. I have the three.

Q. I hand you four leases and ask you if those are the leases referred to in your examination.

The Court: You may answer it. You have just had them.

A. Yes, sir. They are.

By Mr. Taylor:

Q. And those leases are all uniform, are they not, in their essentials?

A. Yes, sir.

Q. With the exception—

A. With the exception of the typewritten portion.

Q. The typewritten portion, with the name of the lessee, description of the premises, date and amount of rental?

A. Yes, sir.

Q. In all other particulars, they are uniform?

A. Yes, sir.

page 47 } Q. And those leases outline the entire relation-
ship so far as your contract may apply as between
you and your respective tenants?

A. It does.

Q. Mr. Taylor: We would like to offer these in evidence, appropriately marked.

(The leases referred to were marked Plaintiff's Exhibits 2, 3, 4 and 5; and the ledger sheets of the Hampton Roads Sanitation District Commission, Monthly Consumption Record, were marked Plaintiff's Exhibits 6, 7 and 8.)

Mr. Taylor: We would like to reserve the privilege of withdrawing these leases upon substitution of compared copies.

(The case was then argued by counsel, after which the following occurred:)

The Court: Gentlemen, I do not believe that this case would be here at all but for the fact that we have a rent control act. The thirty-day lease which Mr. Bott has with the various tenants would expire and he would increase the rent to a sum to include the average sewerage charge; and this case would not be here at all. It is here, however.

The service performed by the Commission is purely a health measure and it inures to the benefit of every page 48 } living soul in this community. The rich man can't occupy more space in the Lafayette River than the poor little colored boy who wants to avail himself of a swim in the river which this plan seeks to purify.

The burden of the operation should be borne by everyone equally according to the use he makes of it as an individual, and not placed on any special class of land owners or apartment house owners or rich people. And that was the Court's view before the act was read just having read the newspaper account of this case, not having read the pleadings.

But the Legislature seems to have, by its act, used sufficient words to place liability on Mr. Bott or other apartment house owners under like circumstances; and the Court will enter judgment for the amount set out in the answer.

Mr. Taylor: We wish to save the point and ask the usual suspension of execution.

page 49 } JUDGE'S CERTIFICATE.

I, Clyde H. Jacob, Judge of the Circuit Court of the City of Norfolk, Virginia, do hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings of the case of W. M. Bott, plaintiff, v. Hampton Roads Sanitation District Commission, defendant, tried in said court on the 17th day of March, 1949, and includes all the testimony offered, the motions and objections of the parties, the rulings of the Court and the exceptions of the parties, and all other proceedings of said trial.

I further certify that the exhibits offered in evidence, as described by the foregoing record, and designated as Plaintiff's Exhibits 1 to 8, inclusive, are all of the exhibits offered upon said trial, and the originals thereof have been initialed by me for the purpose of identification.

I further certify that the said transcript was presented to me for certification and signed within sixty days after the final order in said cause, and that the attorneys for the defendant had reasonable notice in writing of the time and place at which the same would be tendered for certification.

Supreme Court of Appeals of Virginia

Given under my hand this 12th day of May, 1949.

CLYDE H. JACOB,
Judge.

A copy, teste :

CLYDE H. JACOB,
Judge.

page 50 } CLERK'S CERTIFICATE.

I, W. Robertson Hanckel, Clerk of the Circuit Court of the City of Norfolk, Virginia, do hereby certify that the foregoing transcript of testimony and other proceedings of the trial of the case of W. M. Bott, plaintiff, *v.* Hampton Roads Sanitation District Commission, defendant, duly certified by the Judge of said court, together with the original exhibits introduced upon the trial of said case, identified by the initials of said judge, were filed in my office on the 12th day of May, 1949.

W. ROBERTSON HANCKEL,
Clerk.

By T. A. W. GRAY, Deputy Clerk.

page 51 } Virginia :

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the 24th day of May, in the year, 1949.

I, W. R. Hanckel, Clerk of the Circuit Court of the City of Norfolk, do hereby certify that the foregoing is a true transcript of the record in the case of W. M. Bott *v.* Hampton Roads Sanitation District Commission, etc., lately pending in said Court.

I further certify that the same was not made up and completed and delivered until the defendant had received due notice in writing thereof, and of the intention of the plaintiff to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment therein.

Teste :

W. R. HANCKEL,
Clerk of the Circuit Court of the
City of Norfolk,

By T. A. W. GRAY, Deputy Clerk.

Fee for this transcript \$19.75.

A Copy—Teste :

M. B. WATTS, C. C.

INDEX TO RECORD

	Page
Petition for Writ of Error and <i>Supersedeas</i>	1
Record	28
Notice of Motion for Judgment	29
Plea of General Issue	32
Judgment, April 8, 1949,—Complained of	33
Answer and Cross-Claim	34
Notice of Appeal	36
Transcript of Testimony, &c.	36
Walter M. Bott	37, 55
Littleton W. Tazewell	47
James W. Morris, Jr.	48
Judge's Certificate	57
Clerk's Certificate	58