

199 D. 747
4236

Record No. 4767

In the
Supreme Court of Appeals of Virginia
at Richmond

W. R. ASHBURN, ETC., ET AL.

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS.

§5. **NUMBER OF COPIES.** Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. **SIZE AND TYPE.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

H. G. TURNER, Clerk.

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

NOTICE TO COUNSEL

This case probably will be called at the session of court to
be held **JAN 1958**

You will be advised later more definitely as to the date.
Print names of counsel on front cover of briefs.

H. G. Turner, Clerk.

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 4767

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 12th day of June, 1957.

W. R. ASHBURN, ETC., ET AL., Appellants,
against

COMMONWEALTH OF VIRGINIA, Appellee.

From the Circuit Court of the City of Norfolk

Upon the petition of W. R. Ashburn, as Receiver for Levitt and Sons of Norfolk, Incorporated, and W. R. Ashburn, as Receiver for Levitt and Sons of Riverdale, Incorporated, an appeal and *supersedeas* is awarded them from an order entered by the Circuit Court of the City of Norfolk on the 28th day of February, 1957, in a certain proceeding then therein depending wherein the said petitioners were plaintiffs and Commonwealth of Virginia was defendant; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said Circuit Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

page 21 }

ORDER.

This cause came on to be heard by the Court upon the petition for the correction of allegedly erroneous tax assessments filed by complainants pursuant to the provisions of Section 58-1130 of the Code of Virginia, the answer of the Commonwealth of Virginia, the testimony of witnesses on behalf of the parties, the stipulation filed herein, and the argument of counsel; upon a consideration of all of which the Court being of the opinion that the said tax assessments are not erroneous, it is

ORDERED.

that the petition of the complainants be, and the same is, hereby dismissed, and that final judgment be, and the same is, hereby granted to the defendant; and it is further

ORDERED.

that the defendant recover of the complainants its costs in this behalf expended.

To which order of the Court the complainants, by counsel, duly excepted and prayed that their exception be noted of record, which is accordingly done; and the com-
 page 22 } plainants having expressed an intention to petition the Supreme Court of Appeals of Virginia for an appeal and a writ of error that this order may be reviewed, the operation of this order is suspended for a period of four months from the date of entry hereof, and thereafter until complainants' petition for appeal and a writ of error is acted upon by the Supreme of Appeals of Virginia, provided the complainants, or either of them, or someone for them, shall, within twenty days from the date of the entry of this order, execute a bond in the penalty of Two Hundred and Fifty Dol-

W. R. Ashburn, etc., et al., v. Commonwealth of Virginia 3

lars (\$250.00), with security or surety approved by the clerk and conditioned as required by law.

Enter Feb. 28, '57.

C. H. J.

* * * * *

page 23 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

W. R. Ashburn, as Receiver for Levitt and Sons of Norfolk, Incorporated, and as Receiver for Levitt and Sons of Riverdale, Incorporated, gives notice of appeal in this cause and hereby appeals, and makes the following assignments of error, to-wit:

The Circuit Court of the City of Norfolk, Virginia, erred:

1. In dismissing complainants' petition for the correction of erroneous tax assessments and entering judgment thereon in favor of defendant.
2. In decreeing that the assessments made by the defendant for State Income Taxes are not erroneous.
3. In denying the relief requested by complainants to vacate and annul the said assessments.
4. In decreeing that Section 128 of the Virginia Tax Code permits the assessment of corporate income taxes upon the funds in the hands of the Receiver for the corporations which dissolved on February 14, 1944, and upon such dissolution transferred all of their assets to their stockholders in cancellation and redemption of all of their issued and outstanding capital stock.

P. A. AGELASTO, JR.
Attorney for Complainants.

Filed 3-25-1957.

VIRGINIA MANNING, D. C.

* * * * *

page 4 }

W. R. ASHBURN,

the complainant, having been first duly sworn, testified as follows:

Examined by Mr. Agelasto:

Q. Mr. Ashburn, you are Mr. W. R. Ashburn, an attorney at law and an officer of Smith-Douglass Company, is that correct, sir?

A. Yes, sir.

Q. And you are the Receiver for Levitt and Sons of Norfolk?

A. Yes, sir.

Q. And Levitt and Sons of Riverdale?

A. Yes, sir.

Q. Mr. McIlwaine was interested in determining how notice originally issued and to whom, about the funds which were in the hands of FHA, and I hand you a letter which you may use to refresh your memory. Tell us, please, how it first came to the attention that FHA had these funds on hand.

A. Early in 1956 I was called by the telephone, by the Levitt organizations' lawyer in New York, and the reason why I was called was that when that organization was operating in this locality, I was attorney for it for its ventures and as shown by the stipulation, was statutory agent for these two corporations, all of their officers and directors being non-residents. The New York lawyer is Lloyd Berlin and in the telephone conversation he stated that Mr. Levitt had been

page 5 } notified that some fifteen years—some eleven years after the dissolution of these corporations by reason of the handling of the properties which had been surrendered, the Federal Housing Administration had satisfied its commitment for insurance and all claims and the mortgagee had funds in its hands to which, under the National Housing Act, the mortgagor was entitled. And he asked me if I would arrange to have a petition filed for the appointment of a Receiver in order to receive the transfer of the funds. I may also say that I handled the dissolution of these corporations in 1944 when they were dissolved and you have copies of the minutes requiring and directing the dissolution, certified by the secretary of the corporation as those minutes were adopted at that time.

Q. Mr. Ashburn, I hand you certified copies of the resolutions and minutes of Levitt and Sons of Norfolk, Incorporated, and Levitt and Sons of Riverdale, Incorporated, and I

W. R. Ashburn.

ask you if these are the minutes to which you just referred?

A. Your Honor, from my memory they are. Now, by way of explanation, the original minute books were left in my possession. They were placed on storage, where I stored my ended files, in the basement at the Seaboard Citizens Bank and sometime during the intervening period we had one of our tide rises here in Norfolk and almost everything I page 6 } had in storage down there suffered water damage.

The water came up in the basement, all of my papers ran together, and at the request of the bank we finally had those things taken out to the City dump and disposed of; and that is what became of the original minute book so far as I know.

By the Court:

Q. Does that represent your office copy?

A. This was not my office copy. My files were likewise so destroyed. But my clients had a copy of these minutes, which had been forwarded them at the time, and the secretary has certified them as having been forwarded and returned that carbon.

Mr. Agelasto: If Your Honor please, we introduce as Petitioner's Exhibit 2.

The Court: Levitt Exhibit.

Mr. Agelasto: Levitt Exhibit 2, the minutes of Levitt and Sons of Norfolk, Incorporated.

(The document referred to was marked Levitt Exhibit 2.)

The Court: And Levitt Exhibit No.—

Mr. Agelasto: Levitt No. 3, the resolutions of Levitt and Sons of Riverdale, Incorporated.

(The document referred to was marked Levitt Exhibit 3.)

page 7 } By Mr. Agelasto:

Q. Mr. Ashburn, do you have anything else that would be pertinent to the controversy, that you can testify to?

A. Mr. Agelasto, nothing occurs to me.

W. R. Ashburn.

Mr. McIlwaine: I object to the form; he may ask him specific questions.

The Court: Objection sustained. Ask him the direct question. By way of explanation of testimony he has already put in, he may explain that testimony heretofore given.

By Mr. Agelasto:

Q. Mr. Ashburn, are you familiar with the provisions of the National Housing Act which created the fund which you now hold as Receiver?

A. Mr. Agelasto, I am now. At the time of the existence of these corporations I was not acquainted with such a provision and neither were the beneficial owners of the corporation. And, incidentally, that provision I understand is no longer effective. It expired in 1950.

CROSS EXAMINATION.

By Mr. McIlwaine:

Q. Mr. Ashburn, I believe I understood you correctly when you said that Mr. Berlin, attorney for Levitt interests, contacted you and informed you that he had been in-
page 8 } formed or that the Levitt organization had been in-
formed that the Federal Housing Authority or Administration was holding funds which under the Federal statute belonged to the mortgagor in the transactions to which you have just referred?

A. Notified me that they were holding funds, Mr. McIlwaine.

Q. I am talking about Mr. Berlin's conversation with you, sir.

A. Yes, sir, which under the Federal law they were required to transmit to the mortgagor or the person entitled to act for the mortgagor.

Q. To the mortgagor or the person entitled to act for the mortgagor?

A. Yes.

Q. And the mortgagor in the case which we have under consideration was Levitt and Sons of Norfolk, Incorporated, and Levitt and Sons of Riverdale, Incorporated?

A. That is correct.

Q. And did he ask you to be appointed Receiver for these

C. H. Morrisette.

corporations for the purpose of being able to receive these funds from the Federal Government?

A. Yes, he did.

Q. For that purpose, pursuant to that request, you obtained an order of this court appointing you Receiver for these two corporations?

page 9 } A. That is correct.

* * * * *

C. H. MORRISETTE,

called as a witness on behalf of the Commonwealth, and having been first duly sworn, testified as follows:

Examined by Mr. McIlwaine:

* * * * *

page 12 }

* * * * *

Q. Mr. Morrisette, in applying the laws of the State to the situation of assets in the hands of a receiver as in the instant case at bar, did you make an assessment against Mr. Ashburn as a receiver? Did your department make an assessment against Mr. Ashburn's receiver for this corporation?

A. Yes, sir, an assessment was made against each of the corporations with Mr. Ashburn, Receiver.

Q. And doing your tenure as State Tax Commissioner for some thirty years, has it been the policy of your department to impose tax assessments upon receivers, trustees in dissolution and trustees in bankruptcy, representing corporations?

A. Always.

* * * * *

page 17 }

* * * * *

page 18 } A. The Virginia Department of Taxation in administering the corporation income tax law for the State, prepares return blanks and also in official in-

C. H. Morrisette.

struction for the preparation of such blanks. I hold in my hand a copy of the official instructions for the preparation of corporation income tax returns for 1956. In these instructions will be found stated the administrative practice through the years with respect to receivers of corporations. I am now reading from the third paragraph of the instructions for preparing State corporation income returns for the year 1956.

Mr. Agelasto: Just a moment, Mr. Morrisette. I have a 1953 paper here.

Mr. McIlwaine: The instructions are the same.

The Witness: It is exactly the same.

By Mr. Agelasto:

Q. Where are you reading from?

A. I think you will find it word for word the same. (Reading)

“Receivers, trustees in dissolution, trustees in bankruptcy and assignees operating the property or business of corporations, must make return of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property, whether he is engaged in carrying on the business for which the corporation
page 19 } was organized or only in marshaling, selling or disposing of its assets for purposes of liquidation.”

The same language appears in the instructions beginning with the income year 1950 and continuing through 1956.

By Mr. McIlwaine:

Q. And that statement which you have just read, is that representative or is that a statement of the policy of the Department which has obtained with respect to the taxation of receivers, trustees in dissolution and trustees in bankruptcy of corporations during your tenure as State Tax Commissioner?

A. It is a correct statement of the administrative practice as far back as I can remember.

Q. Judge Morrisette, has there been any change in the statute, Section 58-128, imposing a tax on corporations—

C. H. Morrisette.

Mr. Agelasto: Objection. The statute speaks for itself.

Mr. McIlwaine: I will withdraw the question, if Your Honor please.

By Mr. McIlwaine:

Q. Mr. Morrisette, would you state whether or not the policy of the Department with respect to the taxation of receivers, trustees in bankruptcy and trustees in dissolution, has ever been challenged by any member of the bar page 20 } during your tenure as State Tax Commissioner?

Mr. Agelasto: Objection, if Your Honor please.

The Court: Objection sustained. That is not material, the fact that no one has challenged it, if the law does not contemplate it.

Mr. McIlwaine: May I phrase the question this way, Your Honor—

By Mr. McIlwaine:

Q. It has been the policy of the Department, then, to impose a tax on receivers and trustees in dissolution in bankruptcy of corporations during your tenure as State Tax Commissioner?

A. That is correct.

Q. And it is true, is it not, that during that time, receivers and trustees in bankruptcy in dissolution have been filing with your department corporate income tax returns?

A. That is correct.

Q. That your Department of taxation has been assessing taxes on the basis of these returns which have been filed?

A. Whenever any were due.

Q. And that such taxes have been paid by these corporations?

A. That is correct.

Mr. Agelasto: Objection.

The Court: The fact that other people have page 21 } paid would not be—

Mr. McIlwaine: Your Honor, we think the position here is very similar to that which was evidenced in the Bott case and the recent realty corporation cases, in which it was material to determine how—

The Court: Can't you find it in the statute itself, the language which justifies the assessment?

C. H. Morrisette.

Mr. McIlwaine: Your Honor, the words receiver, trustee in dissolution and trustee in bankruptcy do not appear in the Virginia statute as such. The language of the particular section—

* * * * *

page 23 } CROSS EXAMINATION.

By Mr. Agelasto:

* * * * *

Q. In what instance have you ever assessed State income taxes against a dissolved corporation?

A. This is one instance in which it was done. We have assessed—I think that is a very broad question, because my memory is not sufficient to give you the instances of those things. But I can say that we have assessed income taxes against receivers of corporations.

Q. Now, have you ever at any time or has the State Department of Taxation since 1927 assessed income taxes against any corporation which had been dissolved and out of business for a period of more than twelve years?

A. I can recall none.

Q. Beg pardon?

A. I can recall none.

Q. You can recall none?

A. I think this is an unusual case.

Q. There has never been such an assessment against any corporation or its receiver where the corporation had been out of business and dissolved for a period of two years?

A. I couldn't answer that question. I don't know of my own knowledge at the moment. What I have said
page 24 } is that—

Q. Don't you realize, Mr. Morrisette—

A. We have been assessing all. Now, you must realize that corporations in dissolution as a rule do not have income.

Q. Mr. Morrisette, do you not realize that under the tax code you can assess no dissolved corporation after the year of dissolution?

A. I know that we can do it and I know that we have done it in this case.

C. H. Morrisette.

Q. But this is the only case that it has ever been done in?

A. The only case I can recall at the moment.

Q. Now, on your administrative instructions; they apply to existing corporations, do they not?

A. I didn't quite get that, sir.

Q. Your so-called instructions apply to existing corporations?

A. They apply to all corporations.

Q. Well now, let's analyze that. They don't apply to corporations that are not in existence, do they?

A. When is a corporation in existence, sir?

Q. All right, sir. I will ask you that question.

A. Well, I will say this, that a corporation—

Q. If you know.

A. —that has been dissolved is no more invisible
page 25 } than it was before it was dissolved.

Q. Dead, isn't it?

A. No; not absolutely dead.

Q. Well now, let's go on—

A. The General Assembly may resurrect such a corporation and it has done so by providing for the appointment of a receiver of those that have gone out of—been out of existence for some time.

Q. Let's analyze these instructions.

The Court: Nothing is dead that can be brought to life. That is the answer, I think.

The Witness: A dead human being, Your Honor, I am sure—

The Court: I say, nothing is dead that can be brought to life. On the dissolution of the corporation, the laws of Virginia provide for a receiver; that receiver steps in, it is a live corporation.

Mr. Agelasto: If Your Honor please, it is not a live corporation at that point.

The Court: Go ahead.

Mr. Agelasto: A receiver, by statute, is in charge.

The Court: It is a corporation by statute, too. Everything pertaining to it is statutory. Go ahead.

page 26 } By Mr. Agelasto:

Q. Reading these instructions, the first sentence I see states this: (Reading)

C. H. Morrisette.

"Receivers, trustees in dissolution, trustees in bankruptcy, and assignees operating the property or business of corporations must make returns of income for such corporations."

That is not true here, is it?

A. No. That wasn't operating.

Q. That is not true?

A. No.

Q. "If a receiver has full custody and control over the business or property of a corporation, he shall be deemed to be operating such business or property whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling or disposing of its assets for purposes of liquidation."

That applies to an existing corporation, does it not?

A. It applies to the case here.

Q. Does it not apply to a corporation in existence?

A. It applies to those in existence and also to such corporations as have been resurrected from the dead for temporary purposes.

Q. And you claim that these corporations have page 27 } been resurrected from the dead?

A. In a figure of speech I say that.

Q. You have no authority to support that?

A. The language of the statute, sir; Section 13-70 of the Code of Virginia.

(Mr. McIlwaine came forward with a volume in his hand.)

Mr. Agelasto: Let him find it. He is the witness.

By Mr. Agelasto:

Q. What section?

A. Section 13-70.

Q. Just a minute. Let me find that, too. All right, sir; read that.

A. I don't have the text of the section. Mr. McIlwaine, will you be so kind as to read it?

Mr. McIlwaine: May I read the section?

The Witness: 13—

Mr. Agelasto: Mr. McIlwaine, that only applies to the three years after dissolution.

C. H. Morrisette.

Mr. McIlwaine: Yes, Your Honor.

The Witness: 13-73. I gave the wrong number. "When any"—

The Court: That is the section where the officers continue as trustees for the purpose—

Mr. Agelasto: For a period of three years, page 28 } which has no application here.

* * * * *

page 29 }

* * * * *

The Court: The Court is of the opinion that the funds, two hundred some thousand dollars, were due to the corporations, both of which had been dissolved. The law of Virginia makes ample provision to bring to life a dead corporation such as by appointment of a receiver. For the first three years the officers act as trustees for the purpose. But this debt by virtue of the Federal statute was due this corporation against whom the Commissioner made his assessment. The mechanics of getting the fund in hand are provided for by the statute. The assessment was made against the corporation and this receiver dare not, without incurring personal responsibility, distribute this fund other than as required by law to those people who had interest in the corporation. So, in reality, the corporation received the money; the owners, eventual owners, of the money received it only by virtue of their interest in the corporation. The Court will uphold the assessment.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Appeal and <i>Supersedeas</i> Awarded	1
Record	2
Order—Entered February 28, 1957	2
Notice of Appeal and Assignments of Error	3
Witnesses:	
W. R. Ashburn	4
C. H. Morissette	7
Opinion	13