IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

COMMONWEALTH OF VIRGINIA

vs.

JOHN E. ROSE, JR., COMMISSIONER OF THE REVENUE OF THE CITY OF RICHMOND, AND AMERICAN SURETY COMPANY OF NEW YORK, SURETY.

Answer to the Petition for a Writ of Error.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF VIRGINIA:

In reply to the petition of the plaintiff, the Commonwealth of Virginia, the defendant, John E. Rose, Jr., Commissioner of the Revenue of the City of Richmond, respectfully says:

That the judgment of the Circuit Court of the City of Richmond of December 14th, 1931, in the above matter

should be affirmed, because the judgment is in accordance with the local law (charter of Richmond) and the general law, and a large number of recent decisions of the Supreme Court of this State. It should be borne in mind that this question arose out of the question of segregation, as contemplated from the 1926 session of the Legislature and which was consumated with the adoption of the constitutional amendments in June, 1928. The City of Richmond sought to avoid what happened to it upon a former occasion of partial segregation in 1915. By the General law the City of Richmond was required to pay the City Treasurer for loss of compensation by this partial segregation, *Richmond* v. *Pace,* 127 Va., page 274. The City secured the following amendment to its charter in 1926 to prevent such an occurrence. See charter of City of Richmond, Acts of General Assembly, 1926, page 572, latter part of section 58, which reads as follows:

> "The Council of the City of Richmond on the recommendation of the Comptroller may fix the compensation of the Commissioner of the Revenue for services rendered the City."

The Council of the City of Richmond passed an ordinance fixing this compensation at one-half of one per cent of the tax lawfully and properly levied, etc. The General law fixing the compensation of Commissioners of Revenue in 1928 recognized this charter right of the City. See Acts 1928, page 1346, latter clause of section 3, as follows:

> "Nor shall this act apply to any city, whose council, by virtue of power and authority conferred by the

charter of such city, prescribes the salary or other compensation of the Commissioner of Revenue for services rendered to such City in relation to its revenue."

All of this was after the law put $2,500.00 as the limit of local salary. The defendant never drew any of this compensation from the City of Richmond until he secured the opinion of Honorable James E. Cannon, the City Attorney, that he had the right to do so. This opinion given the defendant is dated March 13th, 1930, and is as follows:

"Responding to your request for an opinion regarding the fixing of your compensation for services rendered the City of Richmond, I beg to advise you that Section 117 of the constitution of Virginia, subsection (d) provides that any law or charter enacted pursuant to the same, shall be subject to the provisions of the constitution relating expressly to judges, clerks of courts, attorneys for the commonwealth, Commissioners of Revenue, city treasurers and city Sergeants. Also that section 119 of the constitution provides that in every city there shall be elected one commissioner of the revenue for a term of four years, whose duties and compensation shall be prescribed by law. These provisions in the constitution of 1920 are substantially as they are in the present constitution. Under the provisions of section 58 of the charter of the City of Richmond, it is provided that the Council on the recommendation of the Comptroller, may fix the compensation of the commissioner of revenue, for services rendered the city. In view of the provisions above quoted of constitutional and statute law, there is no doubt in my mind but that it is competent for the council of this

city to fix your compensation for services rendered to the city."

(Signed) JAMES E. CANNON,
City Attorney.

Section 117 of the State constitution has been twice amended so special acts for city governments can be passed. Most of the compensation paid the Commissioner of Revenue by the City of Richmond comes from property segregated to the City and which the State is forbidden to tax. All the City is doing is exactly what it learned from the State, to pay liberally for assessing property to pay the expenses of government.

This question before us concerns the assessment and collection of taxation and the compensation of the officer. Let us see what the Supreme Court has to say on this subject. See *City of Portsmouth* v. *Weiss,* 145 Virginia Reports, page 94—see page 105 and 106 for the following:

"Municipal corporations are given large powers of self-government. They have extensive powers of taxation and are subjected to pains and penalties unknown to other political sub-divisions of the State. This is especially noticeable with reference to negligence in the exercise of their corporate powers. It was to be expected therefore in framing the Constitution some provision would be made to enable them to care for their special interests and to protect themselves against improper legislation. Usually this could be done by general laws applicable to all municipal corporations, but the Convention realized that there might be cases where it would be desirable to confer special powers, or special privileges, on one not needed or required by all, and hence we find it

provided by section 117 of the Constitution that general laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in article four of the constitution, and this only by a recorded vote of two-thirds of the members elected to each house. This section has been twice construed by this court. *Miller* v. *Pulaski,* 109 Va., p. 137. *Town of Narrows* v. *Giles County,* 128 Va., p. 572. In both of these cases the validity of the special charters was upheld. We must therefore construe section 117 of the constitution in connection with section 63 so much relied on."

Let us now look to pages 107 and 108 of this case of the *City of Portsmouth* v. *Weiss* for their construction of not an act, but of two competing sections of the constitution for their construction:

"Section 63 must be held to apply to cases not otherwise provided for. It cannot be supposed that the convention intended to impose upon the legislature any other restraints in the enactment or amendment of municipal corporations than those imposed by section 117. It was dealing with that specific subject, and threw around it all the safeguards it deemed necessary. If these were complied with, the power of the legislature in reference thereto was unrestrained. The language of section 63 is general, that of 117 is specific. The general must give way to the specific and section 63 applied to cases not otherwise specifically provided. In this way the two sections are made to harmonize and the apparent repugnancy is avoided."

So it is clear that the City Attorney's opinion to the Commissioner of Revenue of Richmond is sustained by the Supreme Court of Virginia. It sustains his opinion again in the case of *Fonticello Mineral Springs Co.* v. *City of Richmond,* 147 Va. Reports, page 355. Just as the court settled and made harmonious the apparent difference between the sections of the constitution by declaring that the specific in 117 prevails over the general in 63. So for the general and special statutes they apply the same doctrine. The specific conquers the general. Upon a vital subject, too, that of eminent domain. Note pages 359 and 360 for the following:

> "The language quoted from the city charter is slightly in conflict with the language of the Code, section 4363, and to the extent of such conflict supercedes the provisions of the general statute as to the City of Richmond."

And yet, in spite of the fact that the above two cases deal with subjects that were generally thought should always be uniform, the procedure of courts, and the great question of eminent domain, have yielded to city charters all over the State and wisely so. Still our friends of the other side say upon a question of assessing property segregated wholly to the City, which they have not one cents worth of interest in, they demand of the City that they whack up with the State, all over $2,500.00 they paid the Commissioner of Revenue. Yet, the State itself pays the Commissioner of Revenue $7,500.00 for assessing millions less for the State than he does for the City; why? Because the State has in its law the right to pay the Commissioner just the same way as the City pays the Com-

missioners of Revenue, to-wit, that method the State has followed since its foundation. Why should the State hold on to the fee system for the best results in getting revenues, and then try to say it is wrong for the City to hold out the same doctrine for their revenue? Well, I believe it is certain that the Supreme Court doctrine will guard and protect the charter in its right to follow the best route, to secure the best results in producing revenue from that which the constitution gives to it as its very own, and which are the taxable values they can assess. Should the City have the right to hold out an incentive of a reward of a few thousand to its Commissioner of Revenue, which they can lower at any time or abolish altogether where millions of dollars are concerned? They must know that if $2,500.00 is all the Commissioner of Revenue is to receive, he would have to make no effort whatsoever to receive it, there being a sufficient volume to produce it without a sign of effort on his part. It is just as good business for the City to hold out as large or larger reward to its Commissioner of Revenue in the collection of over $7,000,000 as it is for the State to give him a greater reward for the collection of $2,000,000. At any rate the ink was scarcely dry on the general law that put a limit of $2,500.00 on "what a local government could pay its Commissioner of Revenue for services" when it was repealed by this doctrine of the Supreme Court in a regular constitutional manner by the General Assembly of Virginia.

This general law was approved on March 18, 1926, and, of course, was being fixed for the 1930 term of the officers mentioned. The act that passed the City charter was March 24, 1926, six days later. And just as in the case of the *Fonticello Springs Co.* v. *Richmond City* the

specific eminent domain rights granted under section 117 of the constitution gives that right; so here the charter granted by the Legislature repeals the general law as far as the City was concerned when it set forth the duties and rights the City were to have in relation to this important officer, the Commissioner of Revenue. I say, the charter rights given supercede the general law; more, they repeal it as far as the City of Richmond is concerned. The rights are stated in the Acts of 1926, pages 570, 571 and 572. The sections are 54 to 58 inclusive. I say that the doctrine of the Supreme Court set forth in these two recent cases mentioned justifies me in saying they repeal the general law so that the specific for the City may obtain, that it may assess and collect the revenue due the City through its Commissioner of Revenue. But if this does not satisfy, though I think it should, then there can be no doubt it is successfully repealed by a repealing clause at the end of the charter act, pages 587 and 588. It is as follows:

> "That all acts and parts of acts in conflict with this charter or any provision thereof, be and the same are hereby repealed, and all former charters for the said city and amendments thereto, be and the same are hereby repealed; provided that nothing contained in this act shall alter in any respect any general law segregating subjects of taxation to the State, or authorize the levy of any tax, or imposition of any license fee in any case where the general law prohibits cities and towns from so doing. An emergency existing this act shall be in force from its passage."

Surely this repeals the general law as far as the City of Richmond is concerned, but if any doubt still exists, surely when the general law on compensation to Commissioners of Revenue, in the Acts of 1928, admits it, it must be recognized by all. See page 1346, Acts of 1928, latter clause of section 3:

> "Nor shall this act apply to any city, whose council, by virtue of power and authority conferred by the charter of such city, prescribes the salary or other compensation of the Commissioner of Revenue for services rendered to such city in relation to its revenues."

Now, it does not sound well to say this plain language means anything else than that which it so plainly expresses. Our friends of the other side say this means nothing like it sounds, but means the fee commission can divide it up as fees in excess over $2,500.00. In other words, they construe it as an "Indian gift," give it to him, and then when it's due tell him to divide with the State and City by giving the City two-thirds and the State one-third. No, it means just what the language indicates, the Legislature knew that if segregation of real estate and personal property went to the local government it could make such agreements as they thought best. We are $5,000.00 cheaper this way than if we went under the general law, taking the division of fees between the State and City upon a one-third for the State and two-thirds for the City. Why, before the new arrangement of 1930 went into effect the City saved $28,000.00 per annum. I will say the City attorney and Council were wise in holding on to the fee system like the State holds to it in the assessment of our tax-

able values. The system has its defects, but through the centuries governments cling to it for its one virtue, no other system proves quite so effective as dangling in front of the assessing officer the charm of a reward in fees for each and every tax dodger he catches. I'll say it works, and to abandon it spells ruin for the City and bankruptcy indeed if upon the bulk of what is segregated to the City, to-wit, real estate and tangible personal property, they cannot perform in the manner as set forth in section 58 of the charter. Why does not the State try out this thing on itself first? Let them pay $2,500.00 only to the Commissioner and see how it works, rather than defying the law and seeking out a local government on which to try an experiment which they would in no sense undertake. Am I stating this too strong? I am certainly not stating it anything like as strong as the Governor when he appealed for an increase of salary almost double for his Tax Commissioner who presses and supervises the tax system altogether ~~construed~~ Constructed on the fee system. He is the big chief who directs the Commissioners of Revenue of the State to never let up while one tax dodger lives who is holding out on the State, but now other State officers come and whisper softly, the local governments must not give pay like we do, to get nice returns like we do. Hear how the Governor pleads for the State Tax Commissioner. See pages 765 and 766, Journal of the House, Session of 1930, for the Governor's communication of which we point to the fourth paragraph as follows:

> "The question at once arises why the incumbent of this office should receive a salary larger than the average given the other heads of departments. My an-

> swer to this question is that the task assigned to this official transcends in importance that assigned to most of the other heads of departments. It involves the supervision of the collection of the public revenues. Money collected from taxation is the life blood of the State. Unless our tax system is efficiently administered, all other departments of government will suffer. I make a distinction between tax-producing and tax-consuming departments."

Yet, in spite of the sound reasoning of the Governor, our friends opposing want a different doctrine applied for the plainly written charter on which the City relies to secure through its revenue officer the same fine results which the Governor points out they have accomplished through their revenue officer. Do our friends opposing think that the Supreme Court decisions which changed the general law for the charter special law on eminent domain, and the limitation of actions for damages will be overturned, that the State may secure one-third of $11,000 and do the greatest injury to the City by denying to the City the right to give compensation in like manner as the Governor points out to "collect millions of omitted taxes heretofore lost to the State." The City needs it more than the State, and yet we are told we must take the compensation away from our officer who has done fine service in time of falling values than any occupant of that office has had in over seventy years, and in the face of a repeal of the general law as clear as any ever made by the Legislature that it should not apply to the City of Richmond in six days after the general law was made, and specifically mentioned in the general law of 1928. Now, about the salary of the Commissioner of the Revenue. It has been

paid and without complaint, after deducting expenses it leaves some they claim. The City does not have to pay this by the charter a moment longer than the next meeting of the Council. They can reduce it to what they please, or they may say to the Commissioner, how about spending about $10,000 more with an enlarged force to see if these returns on household goods are valued as fairly in the Commissioner of Revenue's office by the taxpayers as when they insure them in the insurance office? Suppose it is something in a thing like this, are we to be told that the State which cannot tax it herself is going to prevent us from doing so? I can only hope that this Honorable Court can find some fine way to tell the State to attend to its own business, and leave the charter rights of the City alone, for if we are to be disturbed in the only revenue we really have, real estate and tangible personal property, the City will become as near bankrupt as some of the other local governments are.

In closing, I say the City Attorney's opinion is consistent with the Supreme Court's decision as to the powers of special acts under section 117 of the constitution. When an act passes correctly as a special act, under section 117, the Supreme Court says they are unrestrained in their jurisdiction. Why our distinguished Attorney-General, Honorable John R. Saunders, is far in advance of the City Attorney in saying the same thing or before the Supreme Court or even the second and last amendment to 117 had been adopted. Yes, before it was broadened out as "unrestrained" in its own jurisdiction to which it applies. See Journal of the House of Delegates, 1918, pages 657, 658 and 659. Even then he held it was proper for the General Assembly to pass such special laws for cities and for such

rights as we now have. And now when the city can no longer share in many tax values in which it used to share with the State, we simply ask for a right we always have had and which is more important than ever before, that the government of the City be allowed to proceed with a strict survelance over that which the constitution has segregated to the local government for taxation, and which the State cannot tax; that we be permitted to simply assess in the only way the State does, and in the only way the State has ever taught its sub-divisions to assess, and which today the City needs more than ever before, to pay or not to pay its Commissioner of Revenue more as they deem best for the same reasons the present Governor assigned for urging the last General Assembly to increase the compensation of the State Tax Commissioner.

It is hard indeed to understand how anyone could ever come to the thought that the Supreme Court doctrine laid down on such important matters in favor of special laws for cities would be cast aside along with the plainly written law in both 1926 and 1928 and all for the sum of one-third of the compensation of a city officer's salary, some four or five thousand dollars more or less. But the graver thing of paying the revenue officer as they deem best for the reasons that the Governor assigned upon property the constitution gives to the City to tax and not to the State is a wrong contemplation which will work untold injury upon the City, which does the State no good and hurts the local government very seriously in securing funds to do its work for the body politic.

Let us look at the mechanics of the tax assessor. He is what I would call in the vernacular of the times the "main

guy." Verily he is indeed tax collector Number 1. This is true in all civilized governments and is true as we all know for our National, State and local governments. If he assesses poorly, the government is poor indeed and no assessor has ever yet assessed enough to satisfy the demands on the government. Hear the President, the Secretary of the Treasury, the Governors, the Mayors, the Councils, the Supervisors; all must have more money and all blame the assessor. Surely you will say the patriotism of the people will assert itself and they will visit the assessor and assess themselves for the public good. The U. S. Government has thrown hundreds in prisons for perjury, fined thousands and is forever pressing the assessor to do better. The State Officials, since Mr. Morrisette has been Tax Commissioner, has made collections in thousands of dollars in Constables' offices. Yes, and right here in Richmond too. The State now wants as a direct act of mercy to extend great consideration to the taxpayers of the local government. They say to the taxpayers of the local government, we are going to pull the Commissioner of the Revenue off of you as far as local taxes are concerned, he shall have no incentive to press you as we do for State taxes. That is what their attitude appears to be. When you think how the Commissioner of Taxes for this State gathers them together each year to teach them how to get results for the State, it would be economy indeed to not let the City pay the Commissioner as they deem best for some of this "tact" that the Governor says Mr. Morrisette has. We were told by those who opposed segregation that the State would fix it so that all the economy would be at the expense of the local government. I voted for segregation, but I never dreamed that the local gov-

ernment would not have the right to pay for assessing property that was segregated to them or partially so just as they have been doing for many years. A tax assessor is no more popular now when he comes in contact with a taxpayer than he was in Christ's time. If the taxpayer is allowed to assess himself, he will deal generously with himself. I heard our new State Auditor the other day say to a group of county officers gathered from all over the State, that he thought a bad system established by one in authority, which tempted employees of the State to steal, was just as much a crime as the one who, when tempted, stole. There is a good deal in this, and our City Council and City Attorney, having had the foresight to see this thing and put it in the charter, we may well ask why tempt our Commissioner of Revenue to be popular by not doing his duty to the City, by taking his compensation from him which the City has given him without complaint on their part. Why try something on us when they have no interest in the tax values? They would not think of doing anything like this where the State's revenue was involved.

The Assistant Attorney-General admits on the 17th page of the record "that the Legislature of Virginia has the power and the authority to make of the Commissioner of Revenue of the City of Richmond an exception, and to confer upon the City Council of Richmond special powers." He cites cases to prove this. We agree with the distinguished officer the Legislature has the right under section 117 of the constitution to grant this charter right, and having done so, we most respectfully insist that the judgment of the trial court be affirmed for reasons this Honorable Court has stated so often in City Charter cases. These cases are absolutely uniform, holding that when

granted in the proper manner they shall stand for the jurisdiction of the cities, and holding too that when cities try to avail themselves of special rights they do not possess in their charters, this Court promptly forbids them as expressed in the *City of Hopewell* v. *N. & W. Rwy. Co.,* 154 Va., page 19, in which that City was informed on page 22 that they had no such special provisions in their charter. Note the fine rule of construction of Judge Keith adopted in this case for City Charter cases.

It is hard to conceive that the City of Richmond should not be permitted in these days of depression when so many seek to evade just assessment be allowed to assess upon that which is its very own in the manner the State itself assesses. It certainly would embarrass financially the present officer. To say the State can allow the City to pay him as they deem best and say so in the charter and the general law, and then take it from him, while the Legislature grants the same right to counties in 1932. This can be seen from an act to substitute the salaries of fat years for the lean fees of the present time in the counties. Note act on page 892, 893 and 894. Also note counties with special forms of government may pay treasurers and Commissioners of the Revenue the same salaries. The proper assessment of property by the Commissioner of Revenue for the local government is its most important function. How can it expect to maintain orderly government if revenue is not forthcoming? The case of the *Albemarle Oil Co.* v. *Morris,* 138 Va., page 1, shows the attitude of this Honorable Court in a similar situation. The City of Charlottesville adopted a form of government at the polls and then went to the Legislature and had it amended again. The court held the Legislature had the right to give them the

change desired. This opinion shows plainly the fallacy of permitting some slight interest to upset the charter. See page 17 of the above case for the following:

> "The interest of the relator are slight and any other form of government would probably levy the same taxation and impose the same restrictions upon it as those of which it complains."

If the State secures its one-third of the amount paid by the City of Richmond, without complaint, it enriches itself a little while the officer is seriously effected financially, he having relied on the general law, the charter law, the City ordinance passed thereunder, the constitution and the City Attorney's opinion that he was entitled to what the City paid him of its own volition. It would seem that if this Honorable Court would feel that the Legislature had not fairly followed the Constitution in giving this now disputed charter right to the City I hope in fairness to the officer effected they will restrain its effect for the present term of his office, the last year of which term is about to start.

Respectfully submitted,

JOHN E. ROSE, JR.,

Commissioner of the Revenue of the City of Richmond.

E. C. FOLKES, p. d.