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Record No. 5151

In the Supreme Court of Appeals of Virginia at Richmond

E. L. BAKER AND J. H. WHITE, TRADING ETC., ET AL.

v.

J. ARTHUR HODGES, SHERIFF, ETC.

FROM THE CIRCUIT COURT OF NORFOLK COUNTY

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.

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5151

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 2nd day of March, 1960.

E. L. BAKER AND J. H. WHITE, TRADING, &C., ET AL., Appellants,

against

J. ARTHUR HODGES, SHERIFF, &C., Appellee.

From the Circuit Court of Norfolk County

Upon the petition of E. L. Baker and J. H. White, Trading as Portsmouth Cab Company, and James S. Wilkins, Trading as Airline Cab Service, an appeal is awarded them from a final order entered by the Circuit Court of Norfolk County on the 10th day of September, 1959, in a certain proceeding then therein depending wherein the said petitioners were plaintiffs and J. Arthur Hodges, Sheriff of Norfolk County, 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

* * * * *

BILL.

To the Honorable Edward L. Oast, Judge of said Court.

Plaintiffs respectfully represent unto the Court the following:

1. That they are duly licensed taxicab owners and operators of the City of Portsmouth, having complied with all the provisions of the law, and particularly the rules, regulations and laws affecting taxicabs promulgated by the State Corporation Commission, and having paid all of the fees required by law for the operation of their taxicabs over the streets and highways of the State of Virginia.

2. The cabs of your plaintiffs are radio equipped, that is to say that their dispatching is done by radio and telephone, and your plaintiffs respond to calls emanating from Norfolk County to come to the County and pick up passengers and deliver them in accordance with the law.

3. That J. Arthur Hodges is Sheriff of Norfolk County and is arresting the drivers of your plaintiffs and charging them with violating the ordinances of Norfolk County, to-wit, operating without a permit, certificate or license.

page 2 } 4. Your plaintiffs allege that Section 56-291.4 and 56-291.5, et seq. of the Code of Virginia governs the rights, duties of the operators of taxicabs and imposes a limitation upon what cities and towns may do.

5. Your plaintiffs allege that there is a real controversy existing which should be determined by the Court to prevent a multiplicity of arrests, suits, and that this Court should decide just what are the right of the plaintiffs and the authority of the defendant for the execution of the laws as set forth by the Code.

Wherefore, your plaintiffs pray that the Court grant a hearing upon this matter and define the rights, duties and liabilities of the parties hereto, and that the said defendant or his deputies be restrained from interferring with or molesting the plaintiffs and those similarly affected thereby until said rights are ascertained and determined.

E. L. BAKER AND J. H. WHITE,
TRADING AS PORTSMOUTH
CAB COMPANY
By WILLIAM T. PARKER
Counsel.

JAMES S. WILKINS,
Trading as Airline Cab Service.
By WILLIAM T. PARKER
Counsel.

Filed in the Clerk's Office the 20 day of May, 1959.

Teste:

MAJOR M. HILLARD, Clerk
ESSIE E. EMERY, D. C.

* * * * *

page 4 }

* * * * *

ANSWER.

Now comes the defendant J. Arthur Hodges as and for his answer, and says:

1. That the defendant was acting pursuant to a valid ordinance for Norfolk County.
2. The defendant denies that any rights of the plaintiffs have been abridged.

Now having answered this cause the defendants prays the same be dismissed.

J. ARTHUR HODGES
By PETER M. AXSON, JR., p. d.

Filed 6-10-59.

. . . . . .

* * * * *

page 5 }

* * * * *

This cause came on this day to be heard upon the plaintiffs bill for Declaratory Judgment, the answer of the defendant, the evidence heard *ore tenus,* and the exhibits, and was argued

by Counsel; and the Court being of opinion that the plaintiffs are required to have a Certificate of Public Convenience and Necessity before operating taxicabs in Norfolk County, which said certificate is required by Section 3 of the Norfolk County Taxi and for Hire Vehicle Ordinance. To which action of the Court, the plaintiffs by Counsel except, and give notice of their intention to apply to the Supreme Court of Appeals of Virginia, for a writ of error and supersedeas.

Enter Sept. 10, 1959.

E. L. OAST.

* * * * *

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

NOTICE OF APPEAL.

Plaintiffs, E. L. Baker and J. H. White, trading as Portsmouth Cab Company, James S. Wilkins, trading as Airline Cab Service, and all other persons that may be affected thereby, hereby give notice of appeal that they will appeal to the Supreme Court of Appeals of Virginia from a final order entered in this cause on the 10th day of September, 1959, wherein the Court denied to the plaintiffs the relief prayed for in their Bill of Complaint.

ASSIGNMENTS OF ERROR.

Plaintiffs assign the following errors, to-wit:

1. That the Court erred in entering final judgment of September 10th, 1959.
2. That the Court erred in holding that taxicabs were not exempt from obtaining certificates of public convenience and necessity.
3. That the Court erred in ruling that plaintiffs were not exempt under the statutes of Virginia governing exemptions of *bona fide* taxicab service.
4. That the Court erred in ruling that the plaintiffs were

not entitled to declaratory judgment in their favor as set forth in their Bill of Complaint.

page 7 }

E. L. BAKER AND J. H. WHITE,
TRADING AS PORTSMOUTH
CAB COMPANY, ETC.
By WILLIAM T. PARKER
Counsel.

Filed in the clerk's office the 11 day of Sept., 1959.

Teste:

MAJOR M. HILLARD, Clerk
By ESSIE E. EMERY, D. C.

* * * * *

page 3 }

* * * * *

To: Peter Axson, Esq., Attorney for J. Arthur Hodges.

PLEASE TAKE NOTE that on the 22 day of September, 1959, the undersigned will bring to the Honorable Edward S. Oast, Judge of the Circuit Court of Norfolk County, Portsmouth, Virginia, at the court house of said city, the stenographic report of the testimony and other proceedings of the trial, and will, on the same date, make application to the clerk of said court for a transcript 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 in the trial court in said case.

E. L. BAKER AND J. H. WHITE,
ET ALS.,
WILLIAM T. PARKER
Counsel for Plaintiffs.

Legal service of the above notice is hereby accepted this 11th day of September, 1959.

PETER M. AXSON
Attorney for J. Arthur Hodges.

page 3 } Mr. Axson: Your Honor, may I state that it has been stipulated between counsel that there is an ordinance now in effect in Norfolk County, Chapter 27, Section 1 of the current ordinance book entitled "Taxi For Hire Vehicles." The contents of that ordinance will, at the proper time, be introduced, but there will be no requirement or formal proof of the argument.

Mr. Parker: That's right.

The Court: All right.

Mr. Parker: If Your Honor please, I would like to make a statement as to the matter in issue, the controversy before the Court this morning.

This is an action that has been brought in order to ascertain the rights, duties, liabilities, requirements of any of the Norfolk County taxi cab ordinances and the state law governing the operation of taxi cabs in the State of Virginia and particularly as it applies in the County of Norfolk.

We have alleged that the Plaintiffs in this case are fully licensed taxi cab operators in the City of Portsmouth. They have paid the license tax required by this city. They have paid the taxes required by the state, license taxes.

The first matter, may it please the Court, will be the question of "Certificate of Convenience and Necessity." If Your Honor would care to make notes of these code sections, as I outline them, after Your Honor has heard the case, we could then refer to those for argument.

page 4 } The State Code, Section 56-274 as amended, defines public carriers, necessity and convenience—

Mr. Axson: Mr. Parker, I believe you are misreading it. I believe if you are talking about definitions, 273, the definitions, and 278 is the certificate.

Mr. Parker: 274.

Mr. Axson: 273, isn't it?

Mr. Parker: 56-273, 56-274, and 56-276. The state law provides that for people who transport passengers for hire shall have a Certificate of Public Convenience and Necessity issued by the State Corporation Commission. There is specifically exempted from the operation of that Act, under 56-274, taxi cabs, automotive vehicles performing *bona fide* taxi cab service, having seating capacity of not more than six passengers while operating in a city, town, or county, which has or adopts an ordinance regulating and controlling taxi cabs and other vehicles performing a *bona fide* taxi cab service and not operating on a regular route between fixed termini; provided,

however, that each operator of a motor vehicle will perform *bona fide* taxi cab service shall file insurance as required by the Act, and, in addition, that they secure an exception warrant or exception certificate, specifically excepting them from the provisions of the Act requiring a Certificate of Convenience and Necessity.

Section 56-291, Point 1, may it please the Court specifically applies to permit required for taxi cab service and
page 5 } that provides in part, "It shall be unlawful for any taxi cab or other motor vehicle performing taxi cab service to operate on any public highway in this state outside the corporate limits of an incorporated city or town except as otherwise provided in Sub-Section 2 of 56-274," the provisions of which I just read Your Honor, "Without first obtaining from the Commission a permit, provided that the Commission shall issue such permit to any person who on June 29, 1948 had been operating a taxi cab service on the public highways of this state, outside the corporate limits of incorporated cities or towns for a period of at least six months, and provided further that the fee for any permit so issued shall not exceed $50.00 for each motor vehicle."

Section 56-291, Point 4 permits, in part, the governing bodies of cities and towns and counties to say they may require a license and impose and collect a license from every person, firm, association, and corporation who, or which, operates or intends to operate in such county or town any taxi cab or other motor vehicle for transportation of passengers for a consideration that the tax may be upon each such motor vehicle so operated.

The Board of Supervisors or other governing body of the county or governing body of the town may, by ordinance, provide for levying and collecting the tax and may impose penalties for violation of the ordinance and for operating any such motor vehicle without obtaining the required license.

The following section which is pertinent to the case before Your Honor today is 56-291, Point 5, which provides
page 6 } when the tax shall not be imposed or license imposed.

"No such county or town shall require a license or impose a license tax for the operation of any such motor vehicle for which a similar license is imposed or tax levied by the county, city, or town of which the owner or operator of the motor vehicle is a resident that such license may be required and such license tax imposed by any such county or town for the operation of any such motor vehicle if the owner, lessee, or operator thereof maintains a taxi cab stand therein for the solicitation of business."

The following section gives the qualifications of operators

and provides that the person operating or driving a cab must have a permit insofar as character and qualification is concerned.

We will show Your Honor that these Plaintiffs have been operating taxi cabs for more than the time prescribed by the statute, that they are duly exempted from any provisions of law for the requirement of a Certificate of Public Convenience or Necessity by virtue of the state law; that they are duly licensed in the City of Portsmouth; that they have paid the tax required by the state law and the ordinance of the City of Portsmouth, and that consequently, Norfolk County, in view of the prohibitions set forth in the statute cannot require them to have a license.

We will show you that these cabs are operated by method of radio and that they, in response to calls, will come to Norfolk County pick up a passenger, or *vice versa;* and that they have violated no law; that what they are doing is in
page 7 } strict accordance with the law as laid down by the state and the rules and regulations of the State Corporation Commission, and if we show you that, may it please the Court, we will ask that Your Honor enter judgment accordingly.

Mr. Axson: Your Honor, without belaboring this question, our position is simply this: that the Court has provided for the regulations and control of taxi cabs operating in Norfolk County. We do not try to prohibit any cabs that pick up in Portsmouth, South Norfolk, Norfolk City from depositing their passengers in Norfolk County.

What we prohibit are taxi cabs not complying with the provisions of our ordinance from picking up in Norfolk County. That is what they have been arrested for. Chapter 27, Section 1, to which I just referred, requires that taxi cabs operating in Norfolk County shall have a Certificate of Necessity and Convenience, which certificate can be obtained from the Board of Supervisors, and it also requires a permit from the sheriff to the operator of the taxi cab.

It also requires a license for those who are operating in Norfolk County.

Let me state further that our position is this. That is the only regulation of taxi cabs provided by the state which is in this Chapter 12 of the 1950 Code, as amended, Section 56-247; Sub-Section 2, of said Code reads as follows: The initial sentence in it says, "This chapter shall not be construed to include taxi cabs or other motor vehicles performing *bona fide* taxi cab service, having a seating capacity of not more than six passengers, while operating in a city, town, or county,

which has or adopts an ordinance regulating and
page 8 } controlling taxi cabs," and the rest of it is not
pertinent.

The Court: How about 56-291.5?

Mr. Axson: That is Article 42. If the Court wants to take up that licensing provision first, we can do that. We can go into that. There are three allegations made in the bill. They refer to the permit, certificate, or license. This article to which the Court just referred is 4.2, which is a part of the chapter.

The Court: What chapter are you talking about?

Mr. Axson: Chapter 12. Chapter 12 contains "Motor Vehicles, Carriers, Generally."

The Court: Give me the section.

Mr. Axson: You mean the one which I just read?

The Court: The section you referred to rather than my chapter.

Mr. Axson: 56-247, which excludes taxi cabs or vehicles performing *bona fide* taxi cab services in the counties where an ordinance has been adopted regulating and controlling taxi cabs. The first sentence said this chapter shall not be construed to include those vehicles.

The Court: What I am interested in is your answer to Section 56-291, Point 5, constraining the prohibition against the county in certain circumstances.

Mr. Axson: There are two answers to it. The immediate answer is this: That this article is contained in this chapter and that that previous reference refers to the exclusion of
those counties adopting the regulations. That ar-
page 9 } ticle, read in the strict sense, would be excluded
under the chapter from the operation. However, no one requires a license if there has been a license imposed in accordance with this requirement of this article. We do not require any license except those who operate in Norfolk County, and by operating I mean to pick up passengers.

It is not unusual at all in a tax law for a person operating a business in two separate places to require a license. We don't require a license except those who are operating in Norfolk County.

The Court: What section is 56-291.5 in the Chapter to which you refer?

Mr. Axson: Article 4.2 of *Chatper* 12. It is on Page 239, Your Honor, Article 4.2.

The Court: Yes. I am reading that.

Mr. Axson: That is a part of Chapter 12 of which I submit is controlled by Section 56-274 and this chapter includes all the articles in there.

The Court: What I was getting at was where in 56-291.5 prohibits the county from requiring a license without going into it unless it maintains a taxi cab stand within the county. That is the part I am interested in. Do you contend they have a taxi cab stand in the county?

Mr. Axson: No, sir, I do not contend that nor do I think they, in fact, maintain any taxi cab stands in the county.

The Court: You don't think that that prohibition applies?

Mr. Axson: Let's say this, Your Honor; that we have never tried to apply it; that we have never tried
page 10 } to acquire a license of those, to my knowledge, of those who are licensed in Portsmouth from depositing in Norfolk County or picking up, as a matter of fact.

The Court: That is what this says. You may impose a license if the owner, lessee, or operator maintains a taxi cab stand therein for the solicitation of business.

Mr. Axson: That is true, Your Honor. What I am saying is we do not require them to get a license in Norfolk County. We require them to obtain a Certificate of Necessity, Convenience; a permit to pick up in Norfolk County.

The Court: You are not involved in a license question?

Mr. Axson: If there have been warrants issued to anyone for failing to have a license in Norfolk County, I would dismiss those warrants at the proper time if they came to my attention. We don't require them to obtain a license but our position is this. If they pick up in Norfolk County, they are operating in Norfolk County, and should be required to obtain a Certificate of Necessity and Convenience and a permit to do so at the time they pick up.

Our further position is this, Your Honor. If I call a cab, however he may be dispatched to my office, I am making an offer for a service. If he comes to my house and I tell him to go on his way, there is no contract, no business done until I get in his cab and his offer to take me somewhere.

At that time he is doing business in Norfolk County regardless of why he came. I submit by that act he is doing business in Norfolk County and should be required to get a
page 11 } Certificate of Necessity and Convenience from the Board of Supervisors and a permit from the sheriff.

Mr. Parker: Probably this would clear it up. My first statement was neither the state nor the county can require a Certificate of Public Convenience and Necessity for a taxi cab because they operate specifically on exception warrant from the State Corporation Commission which is the law.

If my friend will just read the dates of this Act, this law,

the taxi cab ordinance that he refers to was adopted in 1944 and up until two or three months ago, that particular ordinance, so far as we know, was never enforced. The Act in question is for permits to taxi cabs.

The State, in 1948, specifically exempted from the law any person who had on June 9, 1948, had been operating a taxi cab service for a period of six months prior to that. The Act with reference to the license was adopted in 1947. Their taxi cab ordinance was adopted in 1944 and the only person that can require, the only agency of the State that can require a Certificate of Public Convenience and Necessity is the State Corporation Commission, and they have specifically exempted from the operation of that Act taxi cabs which must obtain an exemption certificate from the State Corporation Commission first before they can operate. When they have done that, then no city, county, or town can require a Certificate of Public Convenience and Necessity as set forth in the Code.

The ordinance that they have adopted, may it page 12 } please the Court, was adopted a long time ago and the State some three years after the adoption, exempted anyone from payment of a tax a license, for the operation of cabs unless there had been an assigned stand, unless other things had come up.

They can require a driver's permit, which is all that has been required of these people for many years and which the State gives them the right to do; but the county can only govern the taxi cab rates for cabs that are operating in their county or city; but Certificate of Public Convenience and Necessity, may it please the Court, can only be issued by the State Corporation Commission and these cabs are specifically exempted, and in the base at bar, they are exempted anyway, for these two particular Plaintiffs because they have been operating more than the required time, the required number of years, which would exempt them anyway.

Mr. Axson: May it please the Court, I fear that I am compelled to answer what Mr. Parker has said. To give the Court some background of how this came about, sir, I looked into the matter and found in 1942, Mr. A. O. Lynch wrote to the Attorney General, having been instructed to impose a license tax on Norfolk County taxi cabs.

The Attorney General then rendered an opinion; that, in his opinion, the county had no authority to license taxi cabs.

Again, in 1944, in answer to another Commonwealth's Attorney's inquiry, the Attorney General reaffirmed his position. Now, in 1945, in order to give the county authority to tax taxi

cabs, 56-291.4 was passed at the special session of
page 13 } the 1945 Legislature. Up until then, no Certificate
of Necessity and Convenience could not bind or any
requirement thereof for taxi cabs by the State Legislature or the State Corporation Commission. I submit to you they are not required to have one now.

The whole subject of taxi cabs is dealt with in Chapter 12 as well as other motor vehicle carriers, Articles 1, 2, 3, and 4, Sections 56-273 of Article L, Chapter 12 defines the taxi cab in sub-section G. "Taxi cabs or other motor vehicles performing taxi cab service means any motor vehicle having a seating capacity of not more than six passengers and not operating on a regular route or between fixed terminials used in the transportation of passengers for hire or compensation." Not a common carrier. Not a restricted common carrier or special or charter party operator as defined in this chapter. They have thereby defined a taxi cab.

The Certificate of Public Necessity and Convenience required under this chapter is 56-278 and it reads as follows: "No common carrier by motor vehicle or restricted contract carrier not herein exempted shall engage in the interstate operation on any highway in this state without first having obtained a certificate from the State for public convenience and necessity."

They require only what it says in there, a common carrier or restricted carrier, which are defined, excluding taxi cabs. Then the Legislature realized in 1948 that there were taxi cabs operating in counties where they were not regulated and
that something ought to be done to regulate those
page 14 } cabs so the legislature in 1948 then passed this
Section 56-291.1 requiring, sir, only a permit from the State Corporation Commission, not necessity and convenience; a permit and required them to comply with the *provions* for insurance in protection of the public. That is the only thing that is required by the State Corporation Commission: 1, a permit, and 2, the insurance. I call the Court's attention again to the fact that taxi cabs are not required to obtain Certificates of Necessity and Convenience from the State Corporation Commission and further, the Legislature, if we overlook the Police Court of the County, to regulate for hire vehicles which I think there is *adquate* authority for if we overlook that completely, the Legislature, in effect, tells the county they can regulate taxi cabs operating in their counties by "A county which has or which adopts an ordinance regulating and controlling vehicles performing taxi cab service."

J. H. White.

Our position is this. We require Certificates of Necessity and Convenience for those who pick up in the county. We are the only one that requires it for those picking up in the county.

MR. J. H. WHITE,
co-plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Parker:
Q. Will you state your name, please?
A. J. H. White.
Q. What is your occupation?
page 15 } A. Cab owner.
Q. Do you and E. L. Baker trade as the Portsmouth Cab Company?
A. Yes, we do.
Q. Where is your establishment?
A. 503 Dinwiddie Street, Portsmouth, Virginia.
Q. How many taxi cabs do you have?
A. Twelve.
Q. How long have you been operating?
A. Twenty years.
Q. Were you operating taxi cabs in 1944?
A. Yes.
Q. Do you have for your cabs an exemption certificate from the State Corporation Commission?
A. Yes, we do.
Q. Do you have it for each cab?
A. Yes, sir; each cab.
Q. Do you pay any license or tax to any city or municipality for the operation of your cabs?
A. City of Portsmouth.
Q. When is that license tax due and payable?
A. In May.
Q. Is that annually?
A. Annually.

The Court: Has it been paid for this year, 1959?

A. Yes, sir.

J. H. White.

page 16 } Mr. Parker:

Q. Mr. White, have you at any time during the entire years of operation of taxi cabs ever paid a license or tax to the County of Norfolk?

A. No, sir.

Q. Will you state to the Court what is required? What is required or has been required of you in the past for the operation of your cabs in Norfolk County?

A. The only thing we had to do in Norfolk County, the owners didn't have to do anything at all but the drivers had to get a permit which cost them $5.00 to pick up in Norfolk County. That is all we had to have during the past twenty years.

Q. Mr. White, how are your cabs dispatched?

A. Radio dispatched.

Q. Where is the *termini* for the dispatching service?

A. Norfolk City.

Q. How are they dispatched? May I give a hypothetical question, Mr. Axson? If Mr. Axson called you from Craddock, called the cab company, how would that be taken?

A. Our telephones are hooked up in the dispatching service in Norfolk. They dispatch the cab to you. It is hooked up with Export.

Q. In such an event of a call to Norfolk County, would that be dispatched from your Norfolk dispatching service?

A. Yes, sir.

Q. Will you state whether or not the nearest cab would respond or any particular cab?

page 17 } A. The cab in that district responds to the call.

Q. Do you have or mainatin in Norfolk County any pick-up station for taxi cabs?

A. Not any.

Q. Do you have any assigned place for the maintenance of your cab?

A. None at all in the county.

Q. Mr. White, I believe that ordinance which was stipulated was adopted by the county in 1944. In 1944 up until the present time, have you been required by the Norfolk County authorities or has it been suggested to you as an operator of *tax* cabs that you get a Certificate of Public Convenience and Necessity?

A. No, sir.

Q. Do you or Mr. Baker maintain any fixed establishment in Norfolk County for the operation of taxi cabs?

A. No, sir.

J. H. White.

Q. Have any of your drivers been arrested?
A. Yes, sir.
Q. Mr. White, the drivers of your cabs, I believe you stated here, are required to have a permit with their photograph on it?
A. Yes, sir. That is required by Norfolk County.
Q. Do all of your drivers have that?
A. Yes, sir.
Q. Has your warrant exemption permit issued to you by the State Corporation Commission, has that been
page 18 } revoked?
A. No, it never has.
Q. Is it required, Mr. White, that that exemption permit be issued annually?

Mr. Axson: I think the law speaks for itself. I object to what this man says.
The Court: You can leave the requirements out.
Mr. Parker: I was going according to the statute.
Mr. Axson: He can read the statute and so can the Court.

Mr. Parker:
Q. Has your permit for the operation of any of your cabs been revoked by the State Corporation Commission?
A. No, it hasn't?
Q. Have you filed with the State Corporation Commission proof of insurance?
A. Yes, sir.

Mr. Parker: You may inquire.

CROSS EXAMINATION.

Examined by Mr. Axson: (Commonwealth's Attorney).
Q. Do you have your Exemption Certificate with you?
A. No. They are in the cabs; each car.

The Court: Each cab has one.

A. Yes, sir.

Mr. Axson:
Q. What does it exempt you from?
A. It is something the state requires. It costs
page 19 } 1.50 a year. It is a small card. We have a number issued to us. My number is 154.

J. H. White.

Q. Do you have a Certificate of Necessity and Convenience from the State Corporation Commission?

A. I imagine that is what it is called.

Q. You imagine? The truth of the matter is that it isn't any Certificate of Necessity and Convenience required?

A. It is a warranty card.

Q. You go out in the county and you pick up passengers, do you not?

A. Yes, sir.

Q. Do you go to a passenger's house? Let me rephrase that. You do that regularly as a part of your business? You go to the county by whatever means you dispatch, and you pick up passengers?

A. Yes.

Q. You do it in South Norfolk?

A. No, sir.

Q. Norfolk City?

A. No.

Q. The reason you don't do that is because you don't have a Certificate of Necessity and Convenience in those places?

A. No, sir. It is too far away from us.

Q. That is your only reason?

A. Only reason I have now. Because of the tunnel and so forth, it is too far to go.

Q. Was it quicker to get across the ferries?

A. No. We never picked up in Norfolk.

page 20 } Q. You know you are arrested whenever you pick up in Norfolk County and South Norfolk?

A. Yes, sir.

Q. Do you have a Certificate of Necessity and Convenience for Norfolk County; from Norfolk County?

A. No.

Q. But you do pick up in Norfolk County, passengers to be taken to some other destination?

A. Yes, sir.

Q. And you also pick up in Norfolk County, passengers to be taken within Norfolk County?

A. Yes.

Q. If you are dispatched to a house and the people in the house tell you they do not want your cab, how much do you charge them?

A. Not anything.

Q. Then you understand that the only time you have a right to charge anybody or contract with anybody is when they get in your cab to go somewhere, is that right?

A. That's right.

Q. That's all. Thank you. One more question. You have never been given a warrant of arrest or required to conform to any Norfolk County ordinance as far as taxi cabs, have you?

A. No, sir.

Q. Nor has Mr. Baker, has he?

A. No.

page 21 } The Court: What's that?

Mr. Axson: They have never been required to conform to the Norfolk County ordinance; Mr. Baker or Mr. White.

RE-DIRECT EXAMINATION.

By Mr. Parker:

Q. I believed I asked you the question whether or not the drivers had been arrested?

A. Yes, sir, they have.

Mr. Axson: The declaratory judgment was brought by Baker and White, neither of which were affected.

The Court: Let's cut through the red tape.

MR. JAMES H. MOUSER,

a witness called in behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Parker:

Q. State your name.

A. James H. Mouser.

Q. Where do you live?

A. Eldon Lane.

Q. That is in Norfolk County?

A. Yes, sir.

Q. How long have you been living there?

A. Seven years.

page 22 } Q. What is your occupation?

A. Cab owner.

Q. How long have you been operating a cab?

A. Since 1941.

James H. Mouser.

Q. Mr. Mouser, do you have an Exemption Certificate from the State Corporation Commission for your cab?

A. Yes, sir.

Q. Mr. Mouser, do you receive from the State Corporation Commission Exemption Certificates for operation of cabs?

A. Yes, sir. This is for the individual car. You get a big certificate for how many you have got there and you get a little one to keep in the car.

Q. This is a record to be carried at all times in your cab?

A. Yes, sir.

Q. All right.

Mr. Parker: Your Honor, since these are required to be carried in the cabs at all times, may we substitute photostats?

The Court: Yes.

Mr. Parker: Offered in evidence.

The Court: "Plaintiff's Exhibit 1."

Mr. Axson: I think there is a number on it. You can take the number off.

Mr. Parker:

Q. Mr. Mouser, have you paid to the State of Virginia license for the operation of your taxi cabs?

page 23 } A. Yes, I have.

Q. You paid the State Corporation Commission for your permit?

A. Yes, sir.

Q. Have you paid the City of Portsmouth your license tax for the operation of your taxi cab?

A. Yes, sir.

Q. Have you been required since 1941 or from the adoption of the county ordinance in 1944, required to purchase a license or secure a Certificate of Convenience and Necessity?

A. No, sir.

Q. What have you been required to do?

A. They have been making the drivers buy a little card about that long (Witness measures with fingers) with a picture on it for $5.00.

Q. Mr. Mouser, in addition to the Exemption Certificate for each cab, do you secure a permit from the State Corporation Commission showing the number of cabs?

A. Yes, sir.

Mr. Parker: You may inquire.

James S. Wilkins.

CROSS EXAMINATION.

By Mr. Axson:

Q. You do not have a Certificate of Necessity and Convenience from Norfolk County?

A. I never heard of one.

Q. You do not have one was my question?

A. No, sir.

page 24 } Q. You pick up passengers in Norfolk County, do you not?

A. We did until they stopped the boys; before they started catching us.

Q. You picked up in Norfolk County?

A. Yes, sir.

Q. And you delivered them elsewhere?

A. Yes, sir.

Q. Some of them were delivered in Norfolk County?

A. Yes, sir.

Q. That has been going on for a number of years, hasn't it?

A. About forty years, I reckon.

Q. This permit that you have here, you paid the state how much for this permit?

A. That costs us a dollar a year.

Q. You do not have a Certificate of Necessity and Convenience from the state?

A. I have that piece there.

Q. I mean you do not have a Certificate of Necessity and Convenience?

A. That's all I have got there.

Mr. Axson: Mr. Parker, you will offer that later?

Mr. Parker: Yes.

Mr. Axson: No further questions.

page 25 } MR. JAMES S. WILKINS, co-Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Parker:

Q. Your name is James D. Wilkins?

A. Yes, sir.

Q. Where do you live?

James S. Wilkins.

A. 101 Rockbridge Road, Waterview.
Q. What is your occupation?
A. Taxi business.
Q. How long have you been operating taxi cabs?
A. Driving since 1937. I have been in business for myself since 1942.
Q. Have you received from the State Corporation Commission a permit for the operation of motor vehicle, taxi cabs, in the state?
A. Yes, sir, I do.
Q. What is this certificate? Rather, is this the certificate?
A. Yes, sir.

Mr. Parker: We offer this in evidence.
The Court: "P-2."

Mr. Parker:
Q. In addition to that permit, do you have for your cabs the Exemption Certificate?
A. Yes, sir; exactly like those.
Q. They are required to be carried in your cab at all times?
page 26 } A. Each individual cab, yes, sir.
Q. Have you paid your license to the state and to the State Corporation Commission for the operation of your cabs?
A. Yes, sir.
Q. Have you paid a license for the operation of your cabs to any municipality?
A. To the City of Portsmouth.
Q. Mr. Wilkins, from the inception of this ordinance up until recently, within the last few months, have you been required to obtain any license by the county?
A. No, sir; not for the cab. The driver of each cab had to get a permit.
Q. Have you been required to make application for what is known as a Certificate of Convenience and Necessity?
A. No, sir; never heard of it.
Q. And upon advice of counsel, you have stopped responding to calls until this matter is disposed of?
A. That is correct.
Q. Do you maintain or operate any stand in Norfolk County?
A. No, sir.

James S. Wilkins.

Q. How are you called? How are your cabs dispatched?
A. By radio.
Q. Is that the same type of hook-up Mr. White has?
A. Yes, sir; same thing.

Mr. Parker: You may inquire.

page 27 } CROSS EXAMINATION.

By Mr. Axson:
Q. The license which you pay to the state is this permit which you have referred to and the tax for your car, that is the license you are speaking of?
A. Yes, sir.
Q. Before you were advised by counsel to stop picking up in the county, you were picking up in the county, were you not?
A. Yes, sir.
Q. Not only were you delivering your passengers to other destinations but you were delivering them, picking up, in the county and delivering to a designated spot in the county, weren't you?
A. Yes, sir. Never been told not to.
Q. And you do not have a Certificate of Necessity and Convenience in Norfolk County to operate taxi cabs?
A. I have never been told to apply for one.
Q. I say, you have not?
A. No, sir.
Q. That's all.

Mr. Parker: Your Honor, in order to save time, I have many drivers and owners, operators. It would be merely cumulative, if Your Honor would require me to put them on. It would be the same testimony. We rest.

The Court: If the testimony is the same, I don't
page 28 } see any need to have a lot of cumulative evidence.

Mr. Axson: I think the testimony they have been picking up in the county and deliver to spots in the county and other areas, that's it.

Mr. Parker: We rest.

Mr. Axson: I have a motion I would like to make at this time. My motion is to dismiss the mandamus, Your Honor, for a number of reasons which I will enumerate as I go through. One is that there has been no showing on the part of the Defendant that anyone has been required to purchase a license from Norfolk County, and then there is some state-

ment that some of the drivers were arrested, but no statement as to what was the cause or why they were arrested or what they were doing.

The Court: See if you can't stipulate. Any questions about the permit—

Mr. Parker: Your Honor—

The Court: You charge that the sheriff is arresting them, charging them with violating the ordinances of Norfolk County, to-wit, operating without a permit, certificate or license. Deal with them in that order. Any question about the permit? Your people admit they have been getting permits.

Mr. Parker: We have the permit.

The Court: Certificate. That would be the Certificate of Public Necessity and Convenience.

Mr. Axson: Required by the county ordinance.

The Court: What about that?

page 29 } Mr. Parker: They don't have it, of course. From the law, they don't need it.

Mr. Axson: Our position is that they are required to have it if they pick up in the county.

The Court: The last one is the license. No contention is made by the county that they have a legal right to impose the license?

Mr. Axson: That's right. That is our position. As I see the case (I may be wrong) it boils down to whether we can require Certificate of Necessity and Convenience for a man who picks up passengers in the county and either transports them to Norfolk or South Norfolk, picks up in the county and transports them to another place.

The Court: That would seem to be the issue.

Mr. Parker: If that is the only issue before the Court, that could be disposed of very quickly because I call Your Honor's attention to the ordinance of taxi cabs which I believe it has been stipulated, without proving the ordinance, it can be introduced in evidence.

If Your Honor please, "Any person (Section 3 of the taxi cab ordinance of the county) desiring a Certificate of Public Necessity and Convenience to operate a taxi cab or for hire car within the County of Norfolk shall make application therefore in writing among forms to be provided by the Board of Supervisors of Norfolk County or its duly authorized agents, giving name, age, color, and residence of the applicant and such information is required as to make, description, and condition of the vehicle proposed to be operated and as to the

page 30 } financial ability, character, and responsibility of the applicant. No such certificate shall be granted to a person under eighteen years of age or to a person who, in the opinion of the Board of Supervisors, is not morally or mentally fit to receive the same or who has been a repeated and persistent violator of the traffic and safety laws and ordinances; no county license shall be issued to any person for a taxicab or for hire car until he first receive from the Board of Supervisors a certificate under this ordinance."

May it please the Court, the state took care of that matter. We go back to Section 56-274, or rather 56-273, where it defines certain certificates. Section 56-273, Sub-Section K: The term "certificate" means a Certificate of Public Convenience or Necessity issued by the State Corporation Commission to common car carriers, by motor vehicles, and restricted contract car carriers, by motor vehicles, under this chapter."

We read the permit means a permit issued by the Commission to common carriers, by motor vehicles, or to operators of taxi cabs or other vehicles performing taxi cab service under this chapter.

Now, the state, in enacting a taxi cab ordinance, made it specific. Under 56-291.1 of the Code, in which they make it unlawful for any taxi cab or other motor vehicle performing a taxi cab service to operate on any public highway in this state outside the corporate limits of incorporated cities or towns except as provided in Sub-Section 2 of 55-274 without

page 31 } first obtaining from the Commission a permit, provided that the Commission shall issue such permit to any person who on June 29, 1948 had been operating a taxi cab service on the public highways of this state outside the corporate limits of incorporated cities or towns for a period of *l*at least six months.

That was enacted in 1948 under "Taxi Cabs, the General Provisions," which stated that they had to have a permit from the State Corporation Commission to do that.

Section 56-274, which excludes certain vehicles from the operation under this chapter was taxi cabs in which they must receive an exemption certificate from the State Corporation Commission. Otherwise, they would be required to have a Certification of Public Convenience and Necessity. They go so far as to say that this chapter does not make taxi cab operators common carriers.

The Certificate of Public Convenience and Necessity is set forth in the general law under the State Corporation Commission. They are the only ones that could issue it. No county,

city, or town can issue a Certification of Public Convenience and Necessity for the operation of motor vehicles.

They went to this extent. In the application for permit, in "Plaintiff's Exhibit 1," this Act became effective in 1948, and the Act specifically says that any person that agrees to comply with the laws of the Commonwealth of Virginia and the rules and regulations of the State Corporation Commission, applicable thereto, shall be issued a permit, and a permit has been granted to these operators of the motor vehicles on the highways of the Commonwealth for taxi cab operapage 32 } tion.

This was granted, in this particular case, on the 25th of June 1948. The Exemption Certificate that specifically exempts taxi cabs from the provision of Certificate of Convenience and Necessity states very specifically, Your Honor, and they are required to have a metal tag, an exemption tag, a State Corporation Commission permit, this card, with corresponding validation plate or number, authorizes the owner of the vehicle prescribed to operate it for compensation for the following purposes: "Taxi cabs, not over six passengers."

Then we come down to the permits generally and the licenses.

So, in 1948 and 1946, 1945, 1947, it gave the right to the counties; they gave the rights to the cities and they gave the right to the counties and 56-291.4, Your Honor, the 11th section of that statute, says: "And the governing body of any town in any such county may require a license for and impose upon and collect a license tax from every person, firm, association, or corporation, who, or which, operates or intends to operate in such county or town any taxi cab or other motor vehicle for the transportation of passengers for a consideration. The tax may be upon each such motor vehicle so operated. The Board of Supervisors or other governing body of the county or the governing body of the town may, by ordinance, provide for levying for collecting the tax and may impose penalties for violations of the ordinance and for operating any such motor vehicle without obtaining the required license.

page 33 } When license may not be required: 56-291.5: "No such county or town shall require a license or impose a license tax for the operation of any such motor vehicle for which a similar license is imposed or tax levied by the county, city, or town, or town of which the owner or operator of the motor vehicle is a resident except that such license may be required and such license tax imposed by any such county or town for the operation of any such motor

vehicle in the owner, lessee, or operator thereof maintains a taxi cab stand therein for the solicitation of business nor exemptions herein authorized shall more than one county, city, or town impose such license, fee or tax on the same vehicle.

"This article shall not be construed to be applied to common carriers of persons or property operating as public carriers by authority of the State Corporation Commission on the franchise granted by any said county, city or town."

Now, we come to the next section which is the qualification of the operators, in which these Plaintiffs have testified that they have complied: "The Board of Supervisors or other governing body of any county or the governing body of any town covered by this article may regulate the rates and charges of any motor vehicle for the transportation of persons for the consideration on any highway, street, road, lane, alley, or highway in the county or town and may prescribe such reasonable regulations to the fixing of rates, charges, on the operation of such vehicles as it deems proper."

We come to the application for permits to
page 34 } operate taxi cabs which are granted, and granted
only by the action of the State Corporation Commission. "Any person desiring a permit under this section shall file with the Commission an application in the form prescribed by the Commission. Such application shall contain a promise of compliance by the application with the provisions of this chapter and with the lawful rules and regulations of the Commission governing the operation of contract carriers by motor vehicles upon the highways of this state.

"Such application may be filed with the permission of the application in person or transmitted by registered mail, upon satisfying the Commission that the provisions of this chapter and lawful rules and regulations adopted pursuant to the requisite to the granting of the permit have been complied with, the Commission shall issue such permits to such applicant without further proceedings."

That was the act of the General Assembly, may it please the Court in 1936, and which was amended in 1948, and which said permit has been introduced into evidence as "Plaintiff's Exhibit 2," which grants them the right, the privilege, to operate on the highways of the cities, towns, and the state.

The Certificate of Public Convenience and Necessity could not and by no stretch of the imagination be applicable in this particular case or any other case because the Board of Supervisors of Norfolk County or the cities, towns, municipalities cannot issue them. They are specifically prohibited by the

State Code which says that only the State Corporation Commission shall do so.

page 35 } The Court: Where do you see that?

Mr. Parker: 56-273, in which they define the terms.

The Court: Where does it say only the State Corporation Commission could require it?

Mr. Parker: "This chapter shall not be construed to include—"

Mr. Axson: He is reading 274.

Mr. Parker: I am coming to that. "This chapter shall not be construed to include, one, motor vehicles transporting school children, taxi cabs or other motor vehicles performing *bona fide* taxi cab service having a seating capacity of not more than six passengers."

Of course, the insurance provisions, regulations by the Commission are not issue of the Certificate of Convenience and Necessity in this. "No common carrier by motor vehicle or restricted common carrier by motor vehicle not here exempted shall engage in the transportation of passengers on highways without having first obtained from the Commission a permit of Public Convenience and Necessity authorizing such authority and the statement of the State Highway Commission that the law applicable to the proposed routes"; and I would take it they are the only ones could do that.

The Court: It doesn't say that.

Mr. Parker: If you permit me to go further, they specifically exempted from it the taxi cabs by virtue of 274. My friend says that we haven't established that these people are affected.

It is strange, may it please the Court, that over a

page 36 } period of from 1944 to the inception of this ordinance up until the present time, there has been no demand or request that any cab driver or operator do only that which he has been doing in the past, having a driver's or operator's permit.

We set forth the fact that there is a controversy existing here as to the rights, that the drivers are being arrested, and that the multiplicity of suits, and we have asked for this declaratory judgment to determine the rights of these people and whether or not, under this ordinance, that even if there was an ordinance of Norfolk County that has all been superseded by the state law which was passed after the adoption of the ordinance.

My friend says all they want them to do is to have a Certificate of Public Convenience and Necessity. The ordinance of

the county reads thus: Under Section 11 "Owners of taxi cabs and for hire cars shall pay license taxes annually to the Treasurer of Norfolk County as follows: For the operation of one cab or car, $100.00. For the operation of two to five cabs or cars, $250.00. For the operation of each cab or car in excess of five, $25.00."

Mr. Axson: That is the licensing provision. Necessity is back in the first part of it.

Mr. Parker: "A person desiring to drive a for hire car shall make application to the sheriff." That has been complied with. Your Honor, I would like to read to you this provision of the Certificate of Public Necessity and Convenience:

page 37 } "Any person desiring a Certificate of Public Necessity and Convenience to operate a taxi cab or for hire car within the County of Norfolk shall make application therefor in writing upon forms to be provided by the Board of Supervisors of Norfolk County or its duly authorized agent, giving name, age, color, and residence of applicant, and such information as is required to make, description, and condition of motor vehicle proposed to be operated and as to the financial ability, character and responsibility of the applicant. No such certificate shall be granted to a person under eighteen years of age or to a person who, in the opinion of the Board of Supervisors, is not morally or mentally fit to receive the same or who has been a repeated and persistent violator of the traffic safety laws and ordinances. No county license shall be issued to any person for a taxi cab or for hire car unless he shall first receive from the Board of Supervisors a certificate under this ordinance."

There is a direct conflict there, may it please the Court, because even if they issue a Certificate of Convenience and Necessity, he is then immediately required to get the license. I don't see how that could be separated, may it please the Court. It makes it unlawful to operate without the license.

The moment that they get a Certificate of Convenience and Necessity, they are then required to pay the license and that is what the state says cannot be done.

The Court: It doesn't say that. It says, "No county license shall be issued to any person for taxi cab unless he

page 38 } shall first receive from the Board a certificate," but it doesn't say he would have to get his license to get a certificate.

Mr. Parker: Reading the whole ordinance, to operate without the license, there would be an offense under that, sir.

The Court: Anything further?

Mr. Axson: I believe I have said everything I could say. Either one or two conditions are here. Either I couldn't understand the plain import of the English language or there is something in here I haven't seen. The definition explicity excludes the taxi drivers. The Certificate of Necessity and Convenience excludes them. It is a question of whether the county has a right to regulate.

The Court: If there is nothing further, I want to take a little time to consider this matter. There are numerous sections in the Code which seem to have some bearing on it as well as the county ordinance. You gentlemen have a slight advantage over the Court in having had an opportunity to prepare this thing and there are about ten or twelve of these sections that I would like to study and correlate with the ordinance. I will not hold you up unduly on this issue. I realize you want it as soon as possible and it will be given in a short while.

Mr. Axson: I hope I made our county position clear. It just deals with the Certificate of Necessity and Convenience which is now the only issue before the Court.

The Court: The only issue before the Court is whether or not the County has the right to require taxi cab drivers who are picking up in the *couty* and delivering in the
page 39 } county to obtain a Certificate of Public Convenience and Necessity from the Board of Supervisors before they have the right to operate as they have. That is the issue.

Mr. Parker: That is the only issue.

The Court: We are not here concerned with the license. The county is not trying to impose the license. We are not concerned with the permit because the taxi drivers have been getting that, and we are not contending they haven't.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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