CLERK
SUPREME COURT OF VIRGINIA
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JAN 17 1978
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 77-1060

CITY OF PORTSMOUTH,
Appellants,

v.

CITIZENS TRUST COMPANY, TRUSTEE,
ETC., ET AL.,
Appellees.

JOINT APPENDIX

Gordon B. Tayloe, Jr.
City Attorney
Stuart E. Katz
Assistant City Attorney
P.O. Box 820
Portsmouth, Virginia 23705
Counsel for Appellants

J. Stanley Livesay, Jr.
P.O. Box 1137
Portsmouth, Virginia 23705
Counsel for Appellees

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY, Trustee
under the Will of Francis E. Whitlock,
Deceased,

Petitioner

-vs-

CITY OF PORTSMOUTH,
a municipal corporation,

Defendant

Serve: W. A. O'BRIEN
City Attorney
#1 High Street
Portsmouth, Virginia

MARGARET JONES
Treasurer of the City of Portsmouth
#1 High Street
Portsmouth, Virginia

ROBERT G. ESLEECK
Commissioner of the Revenue
of the City of Portsmouth
#1 High Street
Portsmouth, Virginia

PETITION TO CORRECT ERRONEOUS LICENSE TAX ASSESSMENT

Now comes your petitioner and sets forth the following:

1. Your petitioner, Citizens Trust Company, Trustee under the Will of Francis E. Whitlock, Deceased, as such rents twelve (12) units located in the City of Portsmouth and paid rental tax in the amount of $146.00 for the year 1972 and in the amount of $146.00 for the year 1973.

2. That on June 22, 1971, the Council of the City of Portsmouth, Virginia, enacted Ordinance Number 1971-52 which ordinance amended the license tax ordinance of the said City by adding Section 87.1, a copy of which is attached hereto as Exhibit "A".

3. That said ordinance is the same type of ordinance as has been subsequently held to be invalid under the rule of Krauss v. City of Norfolk, 214 Va. 93 (1973), rehearing denied 214 Va. , 199 S.E.2d 529 (1973).

. LEVY
AY. LTD.
AT LAW
VIRGINIA

Teste:

4. That said ordinance is invalid in that the City had by its ordinance extended the definition of "engaged in business" so as to controvene the general law of this state and Section 1-104 of the Code of Virginia.

5. That your petitioner has requested refunds of the aforesaid payments from respondents and said requests have been denied.

6. That this petition is brought pursuant to Virginia Code Section 58-1145 et seq.

7. That this improper assessment is in no way due to petitioner's failure to provide all information to respondent required by law.

WHEREFORE, your petitioner requests the Court to correct this erroneous assessment; order the respondent to refund all sums paid pursuant to this assessment along with interest at the rate of six per cent (6%) per annum from the date of said payments; and provide such other relief as the law may require.

CITIZENS TRUST COMPANY, Trustee
under the Will of Francis E.
Whitlock, Deceased

By _____
Dean W. Sword, Jr., Co-counsel

DEAN W. SWORD, JR., Esq.
SCHLITZ, LEVY AND LIVESAY, LTD.
301 Central Building
Portsmouth, Virginia 23705

NORRIS HALPERN, Esq.
Maritime Tower
Norfolk, Virginia 23510

Filed in the _____ 19__
Writ Tax $ _____
Fee _____
Deposit _____
Total Paid $ _____
_____ Clerk
_____ D. C.

AN ORDINANCE TO AMEND THE LICENSE TAX ORDINANCE OF THE CITY OF PORTSMOUTH, 1969, BY ADDING THERETO A NEW SECTION NUMBERED 87.1, IMPOSING A LICENSE TAX ON ENGAGING IN THE BUSINESS OF RENTING RESIDENTIAL PROPERTY, INCLUDING HOUSES, APARTMENTS AND DWELLING UNITS, FOR THE LICENSE TAX YEAR BEGINNING MAY 1, 1972, AND FOR EACH AND EVERY YEAR THEREAFTER BEGINNING WITH MAY 1 OF EACH SUCH YEAR AND ENDING WITH APRIL 30 FOLLOWING.

Be it ordained by the Council of the City of Portsmouth, Virginia:

1. That the License Tax Ordinance of the City of Portsmouth, 1969, be amended by adding thereto a new section numbered 87.1, such new section to read as follows:

Section 87.1. Rental of Residential Property.

Every person engaged in the business of renting residential property, including houses, apartments and dwelling units shall pay an annual license tax of $50.00 for the first four units and $12.00 for each additional unit in excess of four.

For the purposes of this section a person shall not be deemed to be engaged in the business of renting residential property in the City unless such person shall rent four or more such residential units. The business of renting houses, apartments or dwelling units as used in this section shall be construed to mean the renting of buildings or portions thereof, each designed for residential occupancy as a single dwelling unit by one family but not hotels, motels, mobile home parks, lodging houses or boarding houses for which a license is otherwise required by this ordinance.

2. The taxes imposed by this ordinance shall apply to the license tax year beginning May 1, 1972, and each and every year thereafter beginning with May 1 of each such year and ending with April 30 following.

Adopted by the Council of the City of Portsmouth, Virginia, at a meeting held June 22, 1971.

Teste:

City Clerk

EXHIBIT "A" 3

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH
ON THE 21ST DAY OF APRIL, 1977.

CITIZENS TRUST COMPANY,
TRUSTEE, ETC., ET AL,

Petitioner,

v. AT LAW NO. L-73-298

CITY OF PORTSMOUTH, a
municipal corporation,

Defendant.

ORDER

THIS CAUSE came on remand from the Supreme Court of Virginia to be heard upon the evidence of the parties presented in open Court which was done on December 13, 1976, at which time, the Petitioner, through one of its Trust Department Officers and its Rental Agent, and the Defendant through the Commissioner of Revenue of the City of Portsmouth were present and examined as witnesses; and the City Attorney of the City of Portsmouth defended this application; briefs were thereafter submitted; and the matter was argued by Counsel.

WHEREUPON, the Court after hearing oral argument of the parties on March 21, 1977 announced its ruling which was reported and transcribed by Leslie F. Jolly, Registered Professional Reporter, and in lieu of an opinion letter a copy of same is attached hereto to be and the same is hereby incorporated herein by reference and is to be and the same is hereby made a part of these proceedings.

WHEREFORE, it appearing to the Court from the facts in this case that the Petitioner was not doing business within the scope of the City's ordinance taxing persons engaged in the business of renting residential real property, it is ORDERED that the City refund unto the Petitioner $146.00 paid to the City by the Petitioner on account of said ordinance in 1972 and $146.00 paid to the City by the Petitioner in 1973 on account of said ordinance together with six percent (6%) interest on each payment, and the Petitioner's

taxable Court costs; to which ruling of the Court the Defendant, City of Portsmouth, objects and takes exception.

I ask for this:

_____,p.q.

Seen and object to:

_____,p.d.
Assistant City Attorney

A COPY, TESTE: WALTER M. EDMONDS, CLERK OF THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, VIRGINIA

BY _____ D. C.

CITIZENS TRUST COMPANY v. CITY OF PORTSMOUTH, VIRGINIA

DECISION OF THE HONORABLE R. WINSTON BAIN, JUDGE OF THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, ON MARCH 21, 1977:

THE COURT: Well, the situation remains today as it did on December 13th of last year, after hearing all of the arguments and so forth, and very nice memorandums, very thorough; but my conclusion remains exactly the same as when I stated to Mr. Tayloe, on page 100, the last page of the transcript, that: "The whole issue is whether or not the language of the Ordinance puts you or the bank in the position of being an isolated instance of conducting business, considering the other facets ---". I'm going to rule on this case right now; and I'm going to rule on the question of the terminology "Engaged in business". There is no need to get involved in the second point raised by Mr. Livesay, concerning this numerical test, at this time; but I just can't, in my own mind, by any stretch of the imagination, see how we can say the Citizens Trust Company is in the business of renting property. Again, I'm considering the fact that if Citizens Trust solicited business of this nature and had a number of estates that had property, it would be a horse of another color; but here we have got this one isolated instance, and all they are doing at the apartments, they are receiving the money

for the estate; and from that point on, they administer it as an estate, just as if they had securities and stock dividends were coming in, and they would take the dividends and administer them the same way. That's my feeling. It's just going a little too far to say that this large banking-trust institution is in the business of renting property because of this one estate that they have got, with several apartments involved, which is operated entirely by the real estate agent.

* * * * * * * * * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY,
Trustee, Etc., Et Al,

Petitioner,

v.

AT LAW NO. L-73-298

CITY OF PORTSMOUTH, a
municipal corporation,

Defendant.

NOTICE OF APPEAL AND ASSIGNMENTS
OF ERROR

NOW COMES, the City of Portsmouth, Virginia, a municipal corporation, and the Defendant in this matter and states that it is aggrieved by the decision of the Circuit Court of the City of Portsmouth, in this matter and that it hereby gives Notice of Appeal to the Supreme Court of Virginia. The City of Portsmouth sets forth the following matters as its Assignments of Error in this cause:

1. That the Trial Court erred in holding that the Petitioner because it is a large banking-trust institution can not be in the business of renting residential property an activity which § 20-104 of the Code of the City of Portsmouth, 1973 as amended, designates as taxable.

2. That the Trial Court erred in holding that the Petitioner in operating two buildings containing a total of 12 apartment units, with and/or by an agent was not engaged in the business of renting residential property as defined at common law.

3. That the Trial Court erred in holding that in view of the facts presented in evidence that the petitioner was not engaged in the business of renting residential property as defined at common law.

Furthermore, the City of Portsmouth states that, in accord with Rule 5:6 of the Supreme Court of Virginia, that the transcript of testimony and evidence presented at the trial of this matter has hereinbefore been filed with the Circuit Court of the City of Portsmouth on January 31, 1977 and that a statement of facts, testimony and/or other incidents of this case shall be filed hereafter.

CITY OF PORTSMOUTH

By _____
Of Counsel

Gordon B. Tayloe, Jr.
City Attorney
Stuart E. Katz
Assistant City Attorney
P. O. Box 820
Portsmouth, Virginia 23705

I hereby certify that I have this 5TH day of May, 1977, and prior to filing of the foregoing Notice of Appeal and Assignments of Error, mailed a true copy thereof, postage prepaid, to J. Stanley Livesay, Jr., Esquire, at the offices of Schlitz, Levy and Livesay, Ltd., P. O. Box 1137, Portsmouth, Virginia, 23705, Counsel of record for the Petitioners.

_____

ASSIGNMENT OF CROSS-ERROR

The Trustee, as appellee, pursuant to Rule of Court 5:27, makes the following assignment of cross-error, to be dealt with only if the appeal is granted:

1. That the Trial Court erred in refusing to declare the subject tax ordinance invalid upon the ground that the City was attempting to apply and enforce said ordinance employing a numerical test administratively, when a numerical test has been determined to be illegal.

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JUL 29 1977
RICHMOND, VIRGINIA

CITIZENS TRUST COMPANY, Petitioner, vs. CITY OF PORTSMOUTH, VIRGINIA, Defendant	AT LAW NO. L-73-~~387~~ 498

TRANSCRIPT OF TESTIMONY

Following is stenographic transcript of the testimony of Gordon Tayloe, Witness, taken in the above-entitled cause for the purpose of discovery, before Leslie F. Jolly, RPR and Notary Public, at the law offices of the City Attorney, One High Street, Portsmouth, Virginia, on the 22nd day of September 1976, at 2:00 p.m.

APPEARANCES: J. STANLEY LIVESAY, ESQ.,
SCHLITZ, LEVY & LIVESAY,
Counsel for Petitioner

STUART E. KATZ, ESQ.,
Assistant Attorney for the
City of Portsmouth

* * * * * * * * *

jj

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* * * * * * * * *

GORDON TAYLOE, Witness called by Attorney for the Petitioner, having been first duly sworn, was examined and testified as follows:

EXAMINED BY MR. LIVESAY:

Q State your name, please.

A Gordon Tayloe.

Q What is your occupation?

A I am an attorney.

Q Where are you employed?

A As City Attorney of the City of Portsmouth.

Q Have you been so for what, a year?

A Believe it or not, it's almost a year and three-quarters.

Q Upon the Supreme Court of Virginia having decided the case of the City of Portsmouth vs. Citizens Trust Bank in the Court of Appeals, favorable to the City -- I forget when, but was it some time in the spring of 1976?

A I'm familiar with the decision.

MR. KATZ: I'm going to object to the question, and I should give you the courtesy to get the whole question out, but it sounds to me like you are asking for an expert opinion.

Are you willing to stipulate this gentleman is an expert?

MR. LIVESAY: I am not stipulating anything.

Q From that period, which was probably some time in the spring of '76, which if any of the judges of the Circuit Court of the City of Portsmouth have you discussed the question of the rental tax of the City of Portsmouth?

A I spoke on one occasion, I believe, with Judge McMurran.

Q This was after the Supreme Court opinion?

A That's correct.

Q Any other judges of the court?

A Not that I remember.

Q What was the subject matter of your discussion with Judge McMurran?

A I appeared before Judge McMurran with Mr. Esleeck and discussed with him essentially what the meaning of the definition -- of what the common law definition of being in the business of rental property was.

Q Does this cause me to believe that Mr. Esleeck didn't understand the common law definition of doing business?

A I believe that whatever conversation that

I have had with Mr. Esleeck is a confidential relationship, and what he understands or does not understand has been given to me and it is privileged.

Q I would suggest to you that if you are claiming the attorney-client privilege, I thought you were the attorney for the City of Portsmouth; I didn't know you represented Mr. Esleeck; and if it is the attorney-client privilege, Mr. Esleeck is the one to assert it and not you.

A Until he has voluntarily waived it, I would suggest to you I would be breaking a confidence.

Q In other words, you refuse to answer the question?

A That's right.

MR. KATZ: I would object to this question because it calls for an opinion and not a statement of fact.

MR. LIVESAY:

Q Is it true that before going to talk with Judge McMurran, Mr. Esleeck had come to talk to you?

A On numerous occasions.

Q As to the application of the Supreme Court opinion to the persons and property subject to the rental tax?

A I again raise my attorney-client privilege, which if Mr. Esleeck wants to waive, he can.

Q Would it be true that your going to Judge McMurran was because you as an attorney had some question in your mind as to the common law definition of doing business?

A I have never had any problem with what the common law definition of being in business means.

Q Would you tell us what in your opinion doing business means under the common law?

A I would think that you were asking me as an expert in law.

Q I am asking you for an opinion of facts, not an opinion of opinion.

A Until you qualify me as an expert, I refuse to give my opinion.

Q Did you as a result of talking with Judge McMurran secure his factual determination of doing business?

A No, I did not.

Q Subsequent to you and Mr. Esleeck conferring with Judge McMurran, did you and Mr. Esleeck further confer amongst yourselves?

A We have had continuous conversations involving all matters which deal with the business of the

City and its potential revenue.

Q And I am speaking specifically now, of course, as necessarily so, as to the rental tax ordinance.

A I have raised before and continue to do so on a continuing basis, any communication I have had with Mr. Esleeck --

Q Are you representing to me that you represent Mr. Esleeck?

A I represent the Commissioner of the Revenue when he seeks legal advice concerning City Ordinances.

Q Do you give it to him?

A Yes. I am his attorney.

Q Subsequent to the ruling of the Supreme Court in the cases we mentioned, have you discussed the question of the definition -- of the common law definition of doing business with the City Council of the City of Portsmouth?

A I have an attorney-client relationship with the Council of the City of Portsmouth, and so assert it.

Q Have you discussed that same question with the City Manager of the City of Portsmouth?

A I raise the same assertion.

Q Did you cause Mr. Esleeck to prepare or

did you help him prepare a questionnaire to send out to certain persons or corporations who might be doing business under the rental tax ordinance?

A I raise the same assertion.

Q Was such a paper sent out?

A I never sent any out.

Q I asked you was one sent out?

A I have no knowledge of it being sent out, other than hearsay.

Q Did Mr. Esleeck at one time bring to you a large number of such papers and ask your opinion on it?

A I assert I have an attorney-client relationship.

Q Did you in fact, as Acting City Manager of the City of Portsmouth, tell Mr. Esleeck not to tax a certain party under the rental tax ordinance, and then countermand that order within a day or two?

A I have no memory.

Q You are not asserting the privilege?

A I don't remember.

Q You don't recall acting as City Manager during recent years?

A I do that every time the City Manager is absent.

Q I ask you whether or not when you were acting

as City Manager, you issued a directive to Mr. Esleeck not to tax a particular person, and then countermanded it within several days?

A I don't recall it.

Q You don't deny it?

A I don't recall it.

Q You don't deny it?

A I don't recall it.

Q I assume that you read the local newspapers?

A On occasion.

Q Did you have occasion to read the paper of Sunday, June 6, 1976?

A I don't recall.

Q Have you ever discussed the subject matter that we have discussed just now with one Jack Dorsey of the newspaper?

A I have not.

Q You have not?

A I have not.

Q Have you discussed it with any reporter from the local newspaper?

A I have not.

Q So if Mr. Dorsey in the local newspaper quotes you as having said something about this rental tax ordinance, he is not telling the truth?

A If they quote me, they got it from a public City Council hearing, but not from an interview conversation.

Q I call your attention to Section I of the Ledger Star-Virginian Pilot, Sunday, June 6, 1976, where it is asserted that: "City Attorney Gordon B. Tayloe, who has been asked to render an opinion this week on just how the law should be applied, and Commissioner of the Revenue R. G. Esleeck, who will be trying to collect the revenue, have huddled over the issue for several weeks". Is Mr. Dorsey in the newspaper in error in reporting that fact?

A I have an attorney-client privilege with Mr. Esleeck, and I so assert my conversation and discussions with him.

Q Further in the article, the newspaper reporter says with reference to a Mr. Sullivan, "Sullivan's sentiments are actually shared by both Esleeck and Tayloe who agree the small property owner was never intended to be hurt by the tax." Do you have any idea how the newspaper reporter reached such a conclusion to put it in the paper?

A I do not.

Q Have you such a feeling, that a small property owner was never intended to be hurt by the tax?

A You are asking for my opinion?

Q Yes.

A As an expert?

Q No -- as a factual matter.

A I refuse to give it until I am qualified as an expert.

Q "Esleeck had asked Tayloe for an opinion, to which Tayloe answered that request last week, noting that the Supreme Court had defined that, 'being in the business at common law' is a 'course of dealing that requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit and implies a continuous and regular course of dealing."

"Tayloe's opinion went on to state that 'it has been contended by some taxpayers that the renting of one or two single family units or a duplex or triplex is an isolated transaction and cannot be considered a business.'

"I have considered this argument and conclude that a taxpayer who rents as many as ten dwelling units will be required to spend time, attention and labor on such endeavor. In addition, common sense dictates that any person who owns or rents as many as ten dwelling units will do it only if he is making a profit therefrom. Accordingly, I suggest that Section 20-104 of the Code of

the City of Portsmouth 1973, be administered as presuming any person who owns ten or more dwelling units as being in the business of renting residential property", Tayloe said.

Has the newspaper quoted you accurately?

A I never spoke to the newspaper.

Q I asked you have they quoted you accurately, to whomever you spoke?

A I have a legal-client privilege with Mr. Esleeck.

Q Are you refusing to identify whether or not you were quoted correctly at a public meeting which the public newspaper refers to?

A I never gave that opinion at a public meeting.

Q Where did you give it?

A I had conversations with Mr. Esleeck.

Q Was the newspaper man present?

A No, he was not.

Q Are you saying he has quoted you improperly and falsely?

A If it was a conversation, he has, because I never spoke to him on the subject.

MR. CATZ: For the purpose of the record, I am going to object

to this line of questioning.

I don't think you have got the best evidence in the public newspaper. If you want to present Mr. Dorsey of the newspaper to give his account, then you may be able to pursue interrogation under this method.

MR. LIVESAY: Thank you for your opinion.

Q Mr. Tayloe, did you ever see the article that I have here in front of you?

A I have seen a similar-type article, whether it is the same article, I'm not sure.

Q Did you call on the newspaper to retract misquotations from you?

A They did not quote from me personally.

Q Did you call on them to retract anything from the article I have been reading from?

A Since they did not quote me personally, no, I didn't.

Q So your answer would be no, you didn't?

A The answer is what I gave.

MR. CATZ: Mr. Livesay, if it is your intention to continue with

the very vein, I think my objection should be taken up with the Court.

MR. LIVESAY: I think it would be more orderly if all objections were taken up at one time.

Q I call your attention, if you will, to an article from the Virginian Pilot, Wednesday, June 9, 1975, and ask you if you are reading that article?

A I have seen it.

Q Now, this June 9, 1976 article, of course, this article didn't carry a byline of any particular reporter, but in it, it purports to say that, "Councilmen heard a plea", et cetera, and mentioned this Mr. Sullivan, and goes on to mention, "City Attorney Gordon B. Tayloe said that sentence outlined the landlord's right to challenge the assessment. 'Some people are not in business who own and rent real property', he said."

The newspaper has quoted you, and if I read the article correctly, they are quoting you in an open public meeting of the Portsmouth City Council.

MR. CATZ: For the purposes of the record, my objections will continue.

A I will answer that: Mr. Sullivan did appear at a City Council Meeting and did present a petition

seeking repeal of the ordinance. As far as any conversations that I made or quotes that I made, I don't recall them specifically and have no way of recollecting my thoughts because of no transcript being prepared of the meeting.

MR. LIVESAY:

Q May I say that you neither admit nor deny that you said in the public meeting of City Council, "Some people are not in business who own or rent real property"?

A I said I don't recollect.

Q Continuing in the article, it says, "Applying the provision to those only renting ten units or more are purely administrative", which can be abutted administratively. Did you say that?

A I don't recall.

Q Do you know what became of all these letters that were sent to various people to fill out forms and send them back to Mr. Esleeck as to how many units you had and what services you provided to the units, et cetera?

A You will have to ask Mr. Esleeck.

Q You have seen such forms, though, haven't you?

A I don't recall whether I have seen the

1 form or not.

2 Q Do you recall whether or not any person

3 who paid or was assessed a rental tax at any time by

4 the City of Portsmouth has been refunded or the tax

5 abated because it was determined that "He was not doing

6 business"?

7 A I don't know.

8 Q You don't know. Who would have the

9 authority to decide whether or not I or any of my

10 clients were "doing business" with respect to the rental

11 tax ordinance?

12 A I can only tell you, Mr. Livesay, that

13 the person who administers and collects taxes is the

14 Commissioner of Revenue.

15 Q Are you saying it would be his job,

16 prerogative and whatever to make that determination?

17 A It is my understanding of the law that

18 is what his job is.

19 Q And if the person was thought to be in

20 business by the Commissioner, he has a prerogative of

21 challenging that under the Code Section 58-whatever it

22 is, does he not?

23 A That's the procedure.

24 Q And likewise, if the Commissioner of

25 Revenue decided the matter adversely to the City of

Portsmouth, in your opinion, it would be your duty to do the same thing, to challenge him in court?

A I have never researched it as to whether I have that authority or not.

MR. LIVESAY: I have no further questions. Do you have any, Mr. Katz?

MR. KATZ: I have no questions.

MR. LIVESAY: Do you waive your signature to the deposition?

A I do.

* * * * * * * * *

* * * * * * * * *

STATE OF VIRGINIA AT LARGE,

CITY OF PORTSMOUTH, to-wit:

I, Leslie F. Jolly, RPR and Notary Public, do hereby certify that the foregoing deposition of Gordon B. Tayloe, Witness, was duly taken and sworn to before me at the time and place and for the purpose in the caption mentioned; that signature thereto and filing thereof were waived.

Given under my hand this 30th day of September 1976.

My commission expires December 3, 1977.

Leslie F. Jolly, RPR and Notary Public

* * * * * * * * *

77060

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JUL 29 1977
RICHMOND, VIRGINIA

CITIZENS TRUST COMPANY, Petitioner, vs. CITY OF PORTSMOUTH, VIRGINIA, Defendant	AT LAW NO. L-73-~~309~~ 278

TRANSCRIPT OF TESTIMONY

Following is stenographic transcript of the testimony of Moses Reuben, Robert G. Eslcock, C. Roy Kelley and Joyce H. DeBerry, Witnesses, taken in the above-entitled cause, in said court, on the 13th day of December 1976, before The Honorable R. Winston Bain, Judge of said court.

APPEARANCES: J. STANLEY LIVESAY, ESQ.,
SCHLITZ, LEVY & LIVESAY,
Counsel for Petitioner

GORDON B. TAYLOE, ESQ.,
Attorney for the City of Portsmouth,
and
STUART E. KATZ, ESQ.,
Assistant Attorney for the City of Portsmouth

* * * * * * * * *

JJ
LESLIE L. JOLLY
COURT REPORTER

* * * * * * * * *

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
DeBERRY, Joyce H.	81-90	90-95	96-98	98-99
ESLEECK, Robert G.	13-51	51-64	64-68	---
KELLEY, C. Roy	68-74	74-79	79-81	---
REUBEN, Moses	3-11	11-13	---	---

* * * * * * * * *

E X H I B I T S

PETITIONER'S		PAGE
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1A	(REFUSED) - Newspaper article	43
2	Letter from Mayor Davis to Mr. Reuben	11
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DEFENDANT'S		
1	Lease	80
2	Will	95

* * * * * * * * *

* * * * * * * * *

MOSES REUBEN, Witness called by Attorney for the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. LIVESAY:

Q State your name, please.

A Moses Reuben.

Q Where do you live?

A 458 Washington Street

Q How old are you?

A Sixty-four.

Q Do you have a mother named Bertha Reuben?

A That's right.

Q How old is she?

A She's eighty-nine.

Q Do you take care of her business affairs or whatever?

A Yes, sir, I do.

Q In connection with your own situation, do you own any houses for rent in the City of Portsmouth?

A Yes. I own one.

Q And in the past have you owned more than one?

A I did own two.

Q As to your mother, Bertha Reuben, how many does she own?

A She owns five.

Q And has she owned more than that in recent years?

A Not recently. There were some which were acquired some years back. They were acquired by the Housing Authority.

Q So now, have you, through the newspapers and other information, become aware of a tax imposed by the City on people in the business of renting residential units to other people?

A Yes, I did.

Q Did that cause you to do anything?

A Yes.

Q I want to hand you a letter that is undated but appears to have been received on or about August 17, 1976, and ask you if you wrote that letter?

A Yes, I did.

MR. LIVESAY: With the permission of the Court, I would like to ask him to read the letter.

MR. TAYLOE: Your Honor, I must object for several reasons, the first

of which is the relevancy and materiality of what Mr. Reuben has testified to already; and secondly, that there are statements in this letter which are nothing but hearsay and that have nothing to do with the Citizens Trust case -- if anything, it may have something to do with the case of his own before the City.

MR. LIVESAY: He doesn't have a case.

MR. TAYLOE: If he may in turn bring one, and we would respectfully submit that the matters, without the Court at least looking at it and making a determination whether it has any relevance and materiality, and based upon hearsay statements, would certainly be very improper.

THE COURT: Well, I'm hearing the case without a jury, and I want to get all the information I possibly can obtain about this matter, and hopefully resolve it in a correct manner, and I think I can separate the wheat from the chaff.

when the time comes, if necessary, so I overrule the objection.

MR. TAYLOE: Note my exception.

MR. LIVESAY:

Q The first paragraph is -- it's addressed to Mayor Davis and the Council.

"I am writing you on behalf of my mother, Bertha Reuben, and myself, Moses Reuben, concerning a matter in which I feel we have received unfair treatment from the City of Portsmouth."

That's merely an expression of your opinion; is that right?

A Yes.

Q "On May 24th I called the Commissioner of Revenue's office and inquired concerning the business license on residential property. I was told that it was due and payable by May 31st for 1976 and two prior years."

Do you know who you talked to over the telephone?

A No, I don't.

Q But you know it was the Commissioner's office?

A It was the Commissioner's office and one of the clerks.

Q "The following day I paid two hundred eighty-

eight dollars for my mother and one hundred thirty-two dollars for myself for three years' license."

You did that personally, did you not?

A Yes, I did.

Q "I have since learned that people who called later in the week were advised to withhold payment until after a public hearing on the matter before the City Council the following week."

Leaving the letter, how did you learn that there had been any such statement; who told you that?

A Well, someone that I know said that.

MR. TAYLOE: Objection, Your Honor.

THE COURT: I sustain the objection here.

MR. LIVESAY:

Q Who was it that told you other people had called?

A You want the name of the person?

Q Yes, sir.

A Her name is Sarah Becker.

MR. TAYLOE: I renew my objection.

THE COURT: I sustain the objection.

MR. TAYLOE: Did you attend the

public hearing that was referenced in your letter?

A No.

MR. TAYLOE: Did you get any information concerning that public hearing?

A The following day, in the newspaper.

MR. TAYLOE: I object, Your Honor.

MR. LIVESAY:

Q As a result of the information you got, you contined writing the letter?

A Yes, sir.

Q "The report of that meeting stated --"

THE COURT: I sustained the objection. You can't read in all the hearsay.

MR. LIVESAY:

Q Did you go on and say, "Since my mother owns eight units and I own three, I applied to Mr. Esleeck for a refund of our license payments"?

A That's true.

Q Then you say that "Mr. Esleeck said that if we would answer a questionnaire to establish our non-business status --"

MR. TAYLOE: I object, Your Honor. I would like to know what form that was in.

MR. LIVESAY:

Q Did Mr. Esleeck tell you if you would answer a questionnaire, he would ask that you be approved for a refund?

A Yes, he did.

Q Did you mail him the questionnaire?

A I did.

Q In your letter you say, "After mailing the questionnaires and waiting several weeks, I again called Mr. Esleeck and was told that we had qualified for exemption, but the City Attorney would not authorize the refund until there was an outcome of current litigation of similar cases."

Is this the same Mr. Esleeck you talked to?

A That's correct.

Q Of course, you went on into other paragraphs, pleading the matter to the Mayor and Council, did you not?

A Yes, sir.

MR. LIVESAY: We ask that this be received as an exhibit.

MR. TAYLOE: We object to it on the previous grounds.

THE COURT: I'm going to -- I want to get everything in I can -- I will accept it.

MR. TAYLOE: Note my exception.

THE COURT: The letter from Mr. Moses Reuben to Mayor Davis and Councilmen is received and admitted in evidence and identified as Petitioner's Exhibit 1.

MR. LIVESAY:

Q As a result of writing that letter, did you receive a response from the Mayor of the City of Portsmouth?

A Yes, I did.

Q What date was it, September 1, '76?

A September 1st; that's correct.

Q Is that a copy of the letter in front of you?

A Yes, it is.

MR. LIVESAY: We would ask that it be received as a companion exhibit.

MR. TAYLOE: I renew my objection on the grounds of irrelevance and immateriality.

THE COURT: I receive the letter

in evidence as Petitioner's Exhibit No. 2. This is the letter dated September 1, '76, from Mayor Richard J. Davis to Mr. Moses Reuben.

MR. LIVESAY:

Q Have you or your mother, either one of you, received any refund from the City with respect to these taxes that were paid?

A No, we haven't.

MR. LIVESAY: Answer Mr. Tayloe.

CROSS-EXAMINATION

EXAMINED BY MR. TAYLOE:

Q Mr. Reuben, in reference to Exhibit No. 1, the middle paragraph thereof, this is your letter to the Mayor -- Mr. Esleeck, you stated, said that he would ask the City Attorney to approve the refund, and after the mailing of the questionnaires and waiting the several weeks, you again called Mr. Esleeck and were told "We had qualified for the exemption but the City Attorney would not authorize the refunds until there was an outcome of current litigation of similar cases" -- is that identical to what he said to you?

A Yes, it is.

Q He did not say that, "I, the Commissioner, will not authorize the refunds, on the grounds of legal

advice given by the City Attorney"?

A Well, the impression that I got, he said he had to get it approved by the City Attorney and that you wouldn't approve it until there was an outcome of current litigation.

Q Is that what he told you, exactly -- it's very important that you understand that. You have testified to these statements. Did he tell you directly and exactly as you testified to?

A As far as I can remember, that's the language which he expressed concerning why he wasn't able to make the refunds, because the City Attorney said he would not approve it until the outcome of current litigation.

Q Mr. Reuben, I intend to prove by Mr. Esleeck that that was not the statement, and I make you aware that I intend to so prove otherwise.

MR. LIVESAY: That last statement doesn't change anything that you wrote in your letter that you testified to this morning?

A No.

MR. TAYLOE:

Q Have you ever talked to the City Attorney? Have you ever talked to myself about this subject?

A No, I have not.

MR. LIVESAY: Have you ever talked

to me about it before you called me last Friday?

A No, I haven't.

MR. LIVESAY: That's all.

MR. TAYLOE: That's all.

* * * * * * * * *

ROBERT G. ESLEECK, Witness called by Attorney for the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. LIVESAY:

Q State your name, please.

A Robert Esleeck.

Q Mr. Esleeck, how old are you?

A I'm fifty-nine.

Q What is your employment?

A I am Commissioner of the Revenue, City of Portsmouth.

Q Have you been in that position for some number of years?

A Several years.

Q Can you remember when you took over the full-time duties?

A February 1973.

Q And prior to that time, what was your employment?

A I was Chief Deputy Commissioner.

Q And would it be true that perhaps for some period of time you were really running the office because of the health and so forth of the prior Commissioner?

A Possibly.

Q During the time you were Deputy, did you have any particular area for which you were responsible anyway?

A No particular area -- more overall supervisor.

Q Were you, prior to actually becoming the Commissioner, responsible for any license tax operation?

A Yes. For years, I was in charge of the license tax department.

Q So for many years you have been in charge of that department, and actually Commissioner for several years?

THE COURT: How do you refer to that?

MR. LIVESAY: He was in charge of the license tax department for many years, and actually Commissioner for several years.

Q For the record, Mr. Esleeck, how are you chosen to be Commissioner of the Revenue?

A I was appointed on the death of the Commissioner.

Q And how is the Commissioner of Revenue in Portsmouth selected, other than by appointment or upon resignation?

A I was appointed in February and elected in November of the same year.

Q So you are elected by the people?

A Yes, sir; that's right.

Q It's not an appointed office in Portsmouth?

A No, sir.

Q Are you familiar with Section 604 of the Charter of the City of Portsmouth, which defines the duty of the Commissioner of Revenue?

A Fairly well.

Q Of course, you have other duties under State Statute?

A That's correct.

Q For the purpose of the record, Your Honor, I may, and I'm sure my friend may also refer from time to time to certain things we would like permission to give you copies of. I don't believe we have to prove the Section 604 of the Charter, but when we get into the license tax ordinances, when they would have to be proffered, and we would proffer them and give you Xerox

copies.

THE COURT: That's all right. You can offer the whole City Code if you want to. What page are you at?

MR. LIVESAY: Page 26 of the Charter, Your Honor, right now.

THE COURT: All right. I have got it.

MR. LIVESAY:

Q You understand that 605 makes you the person in the City to assess and collect license taxes imposed by the City of Portsmouth?

A That's correct, sir.

Q Now, while it's on my mind and fresh in your mind, you have heard Mr. Moses Reuben testify?

A Yes, sir.

Q I would assume that you know nothing about his having called the office on May 24th?

A I knew he called. I don't remember whether he talked to me directly or not, but in May he was directed to buy a license for his rental units.

Q You don't deny, do you, that he did pay the two hundred eighty-eight dollars for his mother and one hundred thirty-two dollars for himself?

A I don't know the amounts, but I know he bought

license.

Q After May 24th or May 31st, did you or anyone in your office advise any persons who may or may not have been subjected to imposition of this tax to withhold payment until after some public hearing?

A I didn't. I don't think anybody in my office did. I have no reason to believe they did. I would say no. It was public knowledge that a public hearing was coming up.

Q Do you have any knowledge of whether or not any people did withhold after May 31, '76?

THE COURT: '76 -- that's this year.

MR. LIVESAY: Yes, sir.

A I wouldn't be surprised if quite a few didn't withhold it.

Q You know that's true?

A I can't think of any right offhand, but I'm sure they did.

Q The importance of May 31, '76 is the fact that is the deadline of buying license in the City of Portsmouth?

A That's correct.

Q May 31st, and you have thirty days?

A That's correct.

THE COURT: When was the public hearing you are talking about?

MR. LIVESAY: I think I will get to that, Your Honor.

THE COURT: You were talking something about withholding payments until after May 31st?

MR. LIVESAY: Yes, sir.

THE COURT: That's the deadline for paying the tax?

MR. LIVESAY: That's what we are trying to establish.

THE COURT: Who was told not to pay them by the time they were supposed to pay them?

MR. LIVESAY: His testimony at this point is he didn't tell anybody not to pay them.

Q That's the substance of your testimony?

A Didn't tell anybody not to pay them.

Q After May 31, 1976 had passed, did you or your people assess anybody that had not filed and paid?

A After May 31st?

Q Yes, '76.

A Yes, sir, quite a few people.

Q Involuntarily?

A Involuntarily.

Q People who didn't come in and sign up and you looked for and found?

A Well, we didn't make a door to door survey.

Q In other words, there has been no enforcement on your part for anybody to pay who didn't pay by May 31st?

A Unless it came to my attention.

Q Not the usual type of enforcement you had done in prior years?

A No, sir.

Q Now, did you attend any meeting of City Council that was held in June of '76?

A Yes, a few minutes of it. I got there late.

Q Prior to that time had you asked for any assistance from the City Attorney with respect to your duties?

A I asked for assistance from the City Attorney from the day the Supreme Court ruling came down.

Q Has he given you any in writing?

A He gave me a letter; is that what you are speaking of?

Q May I see a copy of it, please, sir.

A I don't have it with me.

MR. TAYLOE: Your Honor, in view of the ruling you want to hear everything, we voluntarily give this, based upon that desire.

THE COURT: Thank you, sir.

MR. LIVESAY:

Q At this point would you take my word that it is dated June 3, 1976?

A Yes, sir; that's about right.

Q Can you recall at what point in time you told Mr. Reuben to complete this questionnaire that you had; was that before or after you got Mr. Tayloe's letter of June 3rd?

A I believe it was after I received the letter.

Q Now, as a result of this letter or any other conferences with the City Attorney, did you prepare this questionnaire?

A Yes, sir.

Q And did the questionnaire contain your thoughts or questions or a combination of both your thoughts and questions?

A A combination of both.

Q That's the questionnaire Mr. Reuben prepared?

A That's right; the same questionnaire that

went out to a number of other people.

Q Was it the same questionnaire that went out to a large number of other people?

A Quite a few people.

Q You heard Mr. Reuben testify that after he returned the questionnaire, that he and his mother were exempt from not paying the taxes. In your opinion, did you tell him he was not liable?

A In my opinion, he is not subject to the license, and it is still my opinion.

Q Have he or his mother received the refund of the three years they were required to pay?

A No, sir.

Q Why?

A He hasn't received a refund because there are a number of cases in litigation -- and I'm not speaking of the refund to Mr. Reuben alone -- there are many people in the City of Portsmouth who have paid this license tax and are possibly, and in my opinion, I think they are due a refund. Because of the litigation, we are not speaking of one refund; we are speaking of any number; and depending on the results of these cases in court, Mr. Reuben and these other people might be entitled to a refund. They might not. Regardless of what I say, I'm going to have to do what the Court tells me to do.

Now, if there is a possibility that there might be mass refunds, it makes sense to wait and see what happens in court, and if the Court says to make a refund, we will give them back with interest.

Q You can't speak for Mr. Reuben; his letter to City Council says otherwise.

A This was after his letter.

Q In this case, you have not made a refund?

A I have not; except one, and you are familiar with that.

Q Subsequent to receipt of Mr. Tayloe's letter of June 3rd and the propounding of these questionnaires, which you and I agree are the interrogatories you have the right to propound, have you determined that Mr. Reuben and Mrs. Reuben are not subject to the tax?

A Yes.

Q Have you made any refunds to anybody at all?

A No refunds.

Q Did you put in process at least one refund?

A Only the one -- there was a technicality.

Q Who was that?

A I have forgotten who it was. You are representing the people, I believe.

Q Are you saying Chelsea is the only one that has received a refund?

A That's correct.

Q Whether or not you ever determined they were entitled to a refund --

MR. TAYLOE: We will stipulate it was Chelsea, and because the one dollar fifty-cent payment was received late, it was not allowed. I continue to renew my objection on Mr. Reuben as to the materiality and relevancy, whether he deserves a refund. It has nothing to do with the Citizens Trust case, and we renew our objection on that ground.

THE COURT: What is the objection of my hearing all of the testimony? I am an absolute stranger to this situation. Judge McMurran has handled it all up to today. So I can have the complete picture, I feel I am quite capable of separating what is irrelevant and immaterial at the present time.

MR. TAYLOE: I understand, Your Honor. If I can make one continuing objection.

MR. LIVESAY:

Q The paper that Mr. Tayloe gave me, is that a

true copy of the memo or letter that he wrote you on June 3, 1976?

A Yes, sir.

MR. LIVESAY: I ask that be received as an exhibit.

THE COURT: All right. This is the letter from Mr. Tayloe to Mr. Esleeck, dated June 3, 1976, and will be received and admitted in evidence and identified as Plaintiff's Exhibit No. 3.

MR. LIVESAY:

Q Has that letter been supplemented by any other written or verbal information from your legal advisor?

A Verbal, yes, sir.

Q When you got that verbally, was it from Mr. Tayloe in his capacity as Acting City Manager or City Attorney?

A City Attorney.

Q Was he not at the same time functioning as Acting City Manager?

A Not -- I don't think so, not at that time.

Q Did you and Mr. Tayloe or anyone else from the City have a conference as to making the refunds?

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A Yes, sir.

Q Who was present?

A Mr. Tayloe and Mr. Katz, I believe.

THE COURT: When did you have that conference?

A This was shortly after Mr. Reuben called me, Your Honor, requesting a refund.

THE COURT: Do you know what month it was?

A Well, what was the date of that letter?

THE COURT: June 3rd.

A It was probably in June, Your Honor.

MR. TAYLOE: June or July, Your Honor.

MR. LIVESAY:

Q Can you remember whether it was before or after that public hearing or meeting?

A It was probably afterwards.

Q Who was present other than Mr. Tayloe, Mr. Katz and yourself?

A That's all.

Q Did you have any meeting with anyone from the City Manager's office?

A No.

Q Have you ever had any meeting with anyone from the Director of Finance office?

A No.

THE COURT: Let's back up a second. You had a meeting in June, July, with Mr. Tayloe and Mr. Katz, at which time you discussed what?

A A refund or refund for those people, Your Honor, who had paid the license tax in May, and then I determined after they paid it that they weren't subject to the license tax, and I felt they were due a refund.

MR. LIVESAY:

Q This was based on what you had gotten from your questionnaire?

A That's correct.

Q But as I am understanding you right now, you have never met with anyone from the City Manager's office or the Director of Finance office with respect to this?

A No. I haven't met with anyone, not pertaining to this. I haven't talked to anybody but the City Attorney.

Q Do you know if the City Attorney has talked to any of those people?

A I don't know.

MR. TAYLOE: Objection.

THE COURT: Sustained.

MR. LIVESAY:

Q I refer you to the Code of the City of Portsmouth, that chapter dealing with license, Section 20-5, which we would ask the Court to receive in evidence.

MR. TAYLOE: I have the entire license code. I will give Mr. Livesay a copy of it and I have one for the Court, too.

THE COURT: What section are you referring to?

MR. LIVESAY: 20-5.

Q Do you have one in front of you, Mr. Esleeck?

A No, sir.

(Mr. Livesay hands witness copy of Section.)

Q Have you found 20-5?

A Yes, sir.

Q Isn't it true that under 20-5, that you have to employ license inspectors and so forth? Isn't it true that under 20-8, that you are in charge of determining and you are the person to whom people go to obtain license?

A That's correct.

Q On the next page, you are the one that assesses the applicant with respect to any license tax?

A Yes, sir.

Q And of course, it doesn't say that that power resides in the City Attorney or the City Manager or the Director of Finance, does it?

A It resides in me, no one else.

Q Of course, where we talk in terms of your questionnaire, that would apply to what is referenced in 20-13 of this Code, as well as the State Code, correct?

A I think so.

Q In other words, it says you can prepare interrogatories to persons?

A True.

Q And you can make inspections to determine the enforcement?

A Yes.

Q Now, under 20-32, would you look at that, please, sir.

A 32?

Q 20-32. Of course, that's merely boiler plate to say what is understood, you cannot impose or the City does not attempt to impose any unauthorized tax?

A That's correct.

Q I ask you whether or not the City imposes any tax on a bank and trust company?

A Yes, sir.

MR. TAYLOE: Your Honor, there

are taxes --

MR. LIVESAY: He has answered it.

Q What tax is that?

A Retail Merchants license on banks, for selling favors or advertising. They sell dishes; some of them sell silverware.

Q In other words, you are saying if they conduct any business outside bank and trust work, you make them buy a license?

A If they are subject, we make them buy a license.

Q As to their banking and trust business, do you impose a license?

A Not as to banking.

Q That is, of course, because the State law limits you to taxation of the stockholder, and you get that every year, don't you?

A That's correct.

Q And in lieu of any other tax, in other words, you don't tax bank and trust departments direct, you get a tax based on the state law?

THE COURT: Aren't we getting away from the issue in this case? We are talking about renting property,

not taxing the banks and various things of the stockholders and so forth.

MR. LIVESAY: Although Your Honor may not agree with me, I would ask you to look at Section 20-87.

Q Isn't it true that because of what we just said, where you are taxing loan companies, you expressly excluded banks?

A That's correct. It expressly says they are exempt by State law.

THE COURT: I don't see where this has got anything to do with the case.

MR. LIVESAY: I will try to connect it up, Your Honor.

THE COURT: The issue, as I understand it, is that Citizens Trust Company in this situation, under the trust of Mr. Francis E. Whitlock, deceased, set forth in his will, was renting several properties that he had owned and set up under a trust.

MR. LIVESAY: One position we take with respect to this case is that a trustee doing what Citizens Trust did

is not engaged in business under the common law definition, and in addition, they are exempt from the taxation of anything they do as a bank or trust company, by locality, because the locality gets the tax on capital stock.

THE COURT: The issue is that they are renting out property of the Whitlock estate. Let's stick to the issues.

MR. LIVESAY:

Q Would you look at Section 20-103, then Section 30 thereunder.

A Yes, sir.

Q And I will ask you whether or not the City taxes, as a professional occupation, land agents, rental agents?

A Yes, sir.

Q I will ask you if you know whether or not in this case the trust department of Citizens Trust Bank had a rental agent managing the properties and paying the tax under this 20-103?

A It is my understanding that it is with C. Roy Kelley, and he was licensed.

Q And was throughout the time which we are

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litigating these taxes?

A Yes, sir.

Q And the Whitlock or the Citizens Trust apartments, you know to have been within his license, what he was managing and operating and paying gross receipts tax on, correct?

A No. Well, it's a different type license, Mr. Livesay. One of them --

MR. TAYLOE: Objection, Your Honor. He asked him a question.

A Citizens Trust is being assessed for twelve dollars per unit. It's a flat license per unit, and Mr. Kelley as a realtor pays a license tax on his commissions.

MR. LIVESAY:

Q Are you through with your answer?

A Yes, sir.

Q Insofar as the taxable incident, or the thing that is being done is the rental of the unit, isn't it?

A Twelve dollars per unit is what I am looking for.

Q But --

MR. TAYLOE: Your Honor, they are discussing this question of law,

which I think we can brief.

MR. LIVESAY:

Q Would you look at 20-104?

A All right, sir.

Q Of course, under Section A, it says every person -- and we would of course understand that because of elsewhere in the Code, that means corporation trusts or anything else -- and then it says engaged in business, and then it says renting residential property. Now, when we come to Section B, you have a definition, do you not?

A That's right.

Q Of what engaged in business means?

A Correct.

Q I will ask you, if you have that set out in 20-104, why did you find it necessary to ask for legal guidance?

MR. TAYLOE: I don't understand the relevance and materiality. If it said cat and dog, it wouldn't make any difference if he asked for legal advice.

THE COURT: I don't see where it has any probative value at all. He can go to the City Attorney any time he wants to.

MR. LIVESAY: We will note our exception.

Q In the definition, "Requiring time, attention and labor"?

A Right.

Q It doesn't say anything about money or investment.

A It says "livelihood".

Q It says, "Time, attention and labor"; it doesn't say anything about money or investment?

A No.

Q It goes on to say, "For the purpose of earning a livelihood or profit"?

A Correct.

Q I think you and I will agree it implies the continuous and regular course of dealing, rather than an irregular or isolated transaction?

A Correct.

Q And it goes on, of course, and excludes certain types of entities or rental-type activities; correct?

A Yes, sir.

Q Now, were you familiar or are you familiar with the fact that the property in question is an investment within the trust under the Whitlock will?

A Yes, sir, I am familiar with it.

Q Are you familiar with the amount of time,

attention and labor that anybody devotes to those properties?

A Exactly how much time, no, sir, but I do know that it is a part of the estate trust that the Citizens Trust Bank is handling, and they in turn have hired an agent, Mr. Kelley, to handle it for them. I know he provides maintenance. I know he has been to court for Citizens Trust. I know that the bank pays mortgage interest. There are a lot of things that enter into these things before I make a judgment whether a person is in business or not, and these are things I have to consider and I have considered these things. I have taken all these things into consideration.

Q What I am asking you right now is what you know, and you told me everything you know about how the property is owned and handled.

A I know it's part of the estate. I know the bank handles it for the estate, the trust. I know the bank has hired an agent, Mr. C. Roy Kelley. I know the bank makes the mortgage payments on this property. They pay interest. They pay utilities. They pay water bills, and their agent, Mr. Kelley, provides maintenance, and I believe garbage, I'm not sure about the garbage, but taking all these things into consideration, this is what I have to do with each individual case. This is no

different from any other case that I handle every day of my life. They are all judgment cases, and in my judgment, Citizens Trust Bank is in the business of renting property.

Q Are you familiar with any other property that they rent?

A Not right offhand.

Q So would this still not be an isolated transaction?

A They might rent property that I don't know about, Mr. Livesay. It's very possible. They bought license in '72 and '73 for this property.

Q Did they buy it for any other property in the City of Portsmouth?

A I'm not familiar with that right now. I'm not sure.

THE COURT: What does the Whitlock estate consist of, as far as rental units?

A There's twelve apartments that I know of, eight on Webster and four on Linden, or vice-versa. There's twelve units there. My position is that somebody owes a license. If the people are dead and the estate has somebody else to handle it for them, whether it's the bank or Mr. Kelley or who, somebody is renting this property and needs a license.

MR. LIVESAY:

Q Of course, that's got to be taken into consideration with the entire definition, whether it is set up in the Code or the common law, concerning time, attention and labor?

A That's right.

Q Is there anything in your definition, or that you know from the City Attorney and the common law, that says you have to own the property in which you are engaged in business?

MR. TAYLOE: That's a legal question we can answer when we submit briefs.

THE COURT: Unless Mr. Esleeck knows.

MR. LIVESAY:

Q You said you did attend a public meeting some time in the first week of June of '76, in City Council chambers?

A Yes, sir. I got there late. I only heard a few minutes of it.

Q While you were there, did you hear any of the City Attorneys make any public statements?

A I don't remember.

Q Did you hear any representative of the City

make any public statement?

A The time I was there, Mr. Sullivan was presenting a case on behalf of the Port Norfolk Civic League, and that's about all I heard, to tell you the truth.

Q To be specific, can you recall whether any City official made any statement as to how to apply this ordinance administratively?

A I don't remember, Mr. Livesay.

Q Do you remember seeing an article in the paper the following Sunday?

A Yes, sir.

Q Was that article true as to what you heard?

MR. TAYLOE: Objection, Your Honor. If he wants the newspaper writer here, he could have subpoenaed him.

THE COURT: I sustain the objection. I'm completely lost as to the newspaper article. If I read it, I don't remember.

MR. LIVESAY: Without wanting to trespass too much on the Court's time, I would like to proffer, and I understand there will be an objection --

MR. TAYLOE: So objected to.

MR. LIVESAY: I give you what purports to be a copy, and I will be glad to show you the original.

THE COURT: What is this you offer?

MR. LIVESAY: Two newspaper articles of the meeting he participated in.

THE COURT: How can you use a newspaper reporter's article on that?

MR. LIVESAY: I understand you are going to overrule me, Your Honor, but for purposes of the record, I want to ask him if what the article said is true, what he heard at the meeting.

Q You saw that article in the Sunday paper?

A Yes, sir.

Q Is there anything in there that is wrong, from your memory?

A I don't know. You want me to read the whole thing?

MR. TAYLOE: For the record, I understand your position in accepting

this. First of all, Mr. Livesay characterized Mr. Esleeck as having participated, and I believe Mr. Esleeck said he came in late.

THE COURT: I heard that.

Did you participate in any way?

A I sat on the last row in the chambers, with Chief Ashe. I didn't open my mouth.

MR. LIVESAY:

Q You attended it?

A Yes, sir. It was a public meeting.

Q With respect to any statements made by anybody, was there anything wrong in there -- I'm not talking about the reporter's analysis or anything?

MR. TAYLOE: Your Honor, there is a difference.

THE COURT: I'm getting a little tired of you all talking about things not in front of me. I am at a complete loss as to what you are talking about.

I don't think it's proper, Mr. Livesay, to ask Mr. Esleeck to read this newspaper article and then propound the question to him, "Is everything stated therein true or

correct". You have got statements by this man in Port Norfolk, Sullivan, in here.

MR. LIVESAY: I was trying to limit, if I could, to any statements made by public officials.

MR. TAYLOE: Your Honor, I would suggest that you look at Exhibit No. 3, which is my letter to Mr. Esleeck, and compare the language of my letter and what appears in this newspaper article, and you will see that they are almost identical.

MR. LIVESAY: I would be willing to stipulate that. The only thing I don't know is whether it was read publicly or not, and that's what I'm trying to get.

THE COURT: Whether Mr. Tayloe's letter was read publicly?

A I don't remember it being read publicly. It may have been, but I don't remember.

THE COURT: Who had it to read publicly? It was addressed to you.

A The City Attorney could have read it. He

wrote it to me.

MR. TAYLOE: I think the best evidence is the newspaper reporter.

MR. LIVESAY: I think the best evidence is Mr. Tayloe. I thought he was a necessary witness, and that's why I summonsed him.

THE COURT: We have already ruled on that. I think these two sort of mesh together as Mr. Tayloe suggested.

MR. LIVESAY: Your Honor, may I have you mark the original?

THE COURT: Since, Mr. Tayloe, you mentioned the fact that your letter and the article here are almost practically the same, then I take it there is no objection to the newspaper article being offered by the plaintiff?

MR. TAYLOE: With the stipulation that nobody knows, and the Court certainly doesn't know, based upon testimony, what went on, either at the public hearing or where he got that information or what-have-you.

THE COURT: That's right, so normally, I would say this wasn't admissible.

MR. TAYLOE: I think there are other statements in there. It says right after "Tayloe said", about the middle of the far right column, "I just don't think these kind of people should be taxed or licensed", he said. It certainly looks like Tayloe is saying that.

THE COURT: Then they have got Esleeck saying he was, "All for it", and Mr. Esleeck just said he didn't open his mouth.

MR. TAYLOE: The probative value is so messed up in this, Your Honor, I object to any use of that.

THE COURT: I'm going to refuse it.

MR. LIVESAY: We will note our exception.

THE COURT: This will be Plaintiff's -- we will call it Plaintiff's Exhibit 1-A, refused.

MR. LIVESAY:

Q Now, you just heard the Court read from that refused exhibit, a statement attributed to you. You saw

it on that Sunday morning, didn't you?

A Yes, I saw it.

Q Did you ever ask the newspaper to publish a retraction?

A No, sir.

Q While you were at the meeting, did you hear the City Manager, Mr. Williams, make any statements to the public?

A Mr. Livesay, the only thing I remember about that meeting was Mr. Sullivan. I missed part of his presentation, and when he finished, the best I remember, Mayor Davis spoke about how hard-up the City was and needed every dime they could get and they couldn't abolish any taxes, or words to that effect, but I don't remember the City Manager or the City Attorney either making a statement. They could have.

Q You don't remember Mr. Williams saying, "The idea of assessing the landlord was arrived at last week in order to spare hardship on elderly people."

MR. TAYLOE: The evidence is that he does not remember.

MR. LIVESAY:

Q Does that refresh your memory, Mr. Esleeck?

A No, sir.

Q Now, going back to those questionnaires you

sent out in the spring of '76, how many did you send out?

A I don't remember, Mr. Livesay. It was quite a few of them. Some of them I mailed out, some of them I had my deputies-- I have men working on them right now.

Q Do you remember being deposed in the City Attorney's council chamber in October?

A Yes, sir.

Q I asked you how many you sent out and you said, "I doubt if it was a hundred"; is that correct?

A That's correct.

Q How many did you get back?

A I don't remember.

Q Didn't you answer that same question by saying, "We got back a few, maybe half of them"?

A Right.

Q What did you do with the ones you didn't get back?

A I'm working on them right now.

Q At the time didn't you say, "We haven't followed through with them"?

A Yes, sir. You want to know why?

THE COURT: Yes, sir.

A The reason we haven't followed through on those questionnaires up to now is the license are due the

last day of May. I have a backlog of mail the last day of May that takes me almost two weeks of June to clear up. Once we clear those up, we are well into August before we can get our files right. The men can't go out working license until we get our files in order. We don't know who has bought a license or who hasn't bought a license until we get our files in order.

It's well into August before my men can begin a city survey. August, September and October, it takes them three months or better than three months to make a door to door survey of the whole city. They break the city down into zones and they go in there and don't come out until they finish. We can't check rental taxes this way, because they don't have a window display advertising they are in business; so I feel the real money in license is in this door to door survey, and once we clear this up and my men -- as they are doing now, are working on these interrogatories -- that's the reason they haven't done it until now, Mr. Livesay. They have been on it about two weeks.

MR. LIVESAY:

Q That's a normal thing every year, then?

A Well, we haven't followed this procedure with rental taxes before, because this is something new. This is the first time we have sent out interrogatories;

but this door to door survey is every year, yes, sir. I'm sure we have been to your office.

Q Now, in connection with your duties as Commissioner of the Revenue, I believe you testified that you, at least insofar as the two Reubens, determined they were not subject to the tax?

THE COURT: This is all repetitious.

A Yes, sir.

MR. LIVESAY:

Q Have you made a determination in your own mind as to any other persons in the city?

A Yes, sir.

Q Can you give us an idea of the number of such persons?

A Well, no. It would only be people who called me and requested refunds, who paid the license in May; primarily, they would be the ones.

Q Did you communicate this information -- of people you thought were not in the business and should be refunded -- to the City Attorney?

A I discussed it with the City Attorney after I determined that Mr. Reuben wasn't in business.

Q Did he agree or disagree with you?

MR. TAYLOE: Objection. I would

like to say he has the right to privilege if he wants to assert it.

THE COURT: This is all repetitious.

A There again, I discussed it with the City Attorney.

THE COURT: We are getting back to the whole thing, that nothing was going to be done because you had these pending suits.

MR. LIVESAY:

Q Did the City Attorney tell you at any time he wanted to take it up with the Director of Finance?

A He asked me how much money would be involved, and I told him at the time I didn't know, and as far as I was concerned, it didn't make any difference -- if they were entitled to a refund, they were entitled to a refund.

Q Did the City Attorney say he wanted to take it up with Mr. Cherry, the Director of Finance?

A He did say he would discuss it with Mr. Cherry, as to the amount and so forth.

Q Has anyone at the City directed you not to make the refunds on people that you feel were entitled?

A No. No one has ever directed me to do anything in that office.

Q Have you ever said, "I wouldn't make a refund of general nature, that's going to involve a lot of men, until I discuss it with the City Manager or City Attorney"?

A When we are speaking of mass refund, I think common courtesy demands that I discuss it with the City Manager or City Attorney.

Q So you did make such a statement?

A I probably did.

Q Now, in connection with those interrogatories or questionnaires, was there a question on there: "Whether you engaged someone else to manage the property for you, and if so, what services that person rendered to the property"?

A I believe it's on there, yes, sir.

Q Why would that be pertinent to you?

A I don't know right offhand.

Q Isn't it true that you told me on these depositions that it was because you had discussed it with the City Attorney, whether or not hiring an agent would be subject to a tax?

A I discussed it with the City Attorney, yes, sir.

Q So you considered it relevant and put it in your questionnaire?

A That's correct.

Q I want to put a hypothetical question to you.

MR. TAYLOE: Objection, Your Honor. I don't know of any testimony hear that he is an expert. If he is an expert on licenses, then I will stipulate to that.

THE COURT: What's the nature of the question?

MR. LIVESAY: The hypothetical question is: "Should I die, owning one piece of real estate, and my executor qualified and rented out that piece of real estate, pending distribution or dissolution or whatever of my estate, would you consider that my executor was doing business under your City Code?"

MR. TAYLOE: Again, Your Honor, I don't see that that's the facts in this case, which is my understanding is the criteria for qualifying experts. I think we are getting so far removed. The Court has got the facts before it right now.

THE COURT: What's wrong with him answering the question?

MR. TAYLOE: Fine.

A Your Honor, I would have to have more information than what the City Attorney has given me. In all probability, if I knew of the instant, I would send the bank or whoever is handling it an interrogatory.

MR. LIVESAY:

Q Which, when I asked you substantially the same question on discovery, didn't you say, "I would say someone was doing business"?

A I remember you asking me a similar question and I asked you wasn't it the same question, because this instant you have one dwelling; the other one was more than one dwelling.

THE COURT: That's enough for the hypothetical. Let's get along.

MR. LIVESAY: No further questions of the witness.

CROSS-EXAMINATION

EXAMINED BY MR. TAYLOE:

Q Mr. Esleeck, you have before you Chapter 20 of the license code?

A Yes.

Q I draw your attention to page 1335.

A Yes, sir.

Q 1335 particularly, "Boats used for towing", Section 20-65.

A "Every person engaged in the business of towing."

Q Is not that the same definition of "engaged in business" which the Supreme Court has asked you to decide?

A Right.

Q Are there not numerous other sections of the City Code that start off with the same thing, "Every person engaged in business" and so on?

A Every page in this Code?

Q Using the same definition, are you required to make the same determinations day in and day out?

A Five days a week.

Q So there is really nothing new in what you are doing in this case?

A Not really.

Q As a result of applying this definition, have you weighed certain factors in regards to the Citizens Trust that have come to your attention?

A Yes, sir.

Q Would you tell the Court how these matters come to your attention to make this determination?

A Well, I have any number of methods of gaining information as to who is operating a business and who isn't: Advertising, newspapers, yellow pages of the phone book, information my staff brings in, field deputies who make door to door surveys; I might use the real estate assessor's records, water department records; I have any number of sources for gaining information as to who is in business and who isn't in business.

Q As a result of utilizing these courses, did certain information come to you in regards to the Citizens Trust trust department in regards to the Whitlock estate?

A Yes, sir.

Q Would you itemize as clearly and succinctly as possible what these facts were?

A Well, the fact that -- I have said most of it already -- that Citizens Trust is handling the estate for Francis Whitlock. I don't know the legal terms exactly, but they pay the utilities, water; they pay the mortgage on this property; they pay the interest.

Q Tax?

A They pay taxes.

Q How many units were in this?

A Twelve.

Q Did they pay fire and liability?

A Yes, sir.

Q Electricity?

A Yes, sir.

Q Water bills?

A Yes, sir.

Q Was there an agent hired by Citizens Trust?

A Yes, sir.

Q Within your knowledge?

A Yes, sir.

Q And do you recall, based upon your information, who the bills were sent to and under what name?

A The agent was C. Roy Kelly, and the bank paid the bills.

Q Out of the proceeds from --

A From the estate; that's correct.

Q But the routine maintenance, that was paid by --

A By the agent, Mr. Kelley.

Q But those bills were in the name of Citizens Trust?

A That's correct.

Q And when a court action was made, under whose name was the court action brought, by Mr. Kelley?

A Mr. Kelley has been to court to represent Citizens Trust.

Q And for this estate -- Mr. Kelley?

A Not for the estate, but for Citizens Trust.

Q And you understand he received a fee for his services?

A I'm sure he does.

Q Does this innuendo, that the City Attorney, the City Manager and the Mayor have made certain decisions and directed you to do certain acts; is that true?

A I'm glad you brought that out, because it has been inferred that the City Attorney in particular has been giving me my instruction, and I want to make it very clear that I make my own decisions. The City Attorney doesn't make any decisions for me. I seek his advice. The City Manager doesn't make any decisions for me, nor the Mayor or the City Council. I make my own decisions.

Q Regarding the testimony of Mr. Reuben, do you recall the conversation you had with Mr. Reuben concerning the payment, authorization of refunds?

A Yes, sir.

Q What do you remember of that conversation?

A Well, Mr. Reuben paid the tax in May, because it was demanded of him by my office. I don't know whether it was me or one of my deputies, but he was told to pay the tax and he paid it.

Some time thereafter, Mr. Reuben called me.

He had read in the paper a copy of your letter and he received the impression from that letter that anyone with less than ten units would not be subject to the license, and he requested a refund for he and his mother, and I told Mr. Reuben at the time that I couldn't request a refund until it was determined whther or not he was in business, and I told him I was going to send him a questionnaire for he and his mother and to fill them out and return them to me and then we could tell more about the refund.

He returned the questionnaire and I determined that he nor his mother were in business, neither of them, and I don't know whether I called him or he called me at a later time, but I told him that I had had a discussion with the City Attorney and he advised me that a number of cases were coming up in court similar to his, and rather than go through all these refunds and then possibly have to come back and collect them again, the best thing to do was sit on it until after the court decisions were made, and then if they were entitled to a refund, they would receive their refund with interest.

I passed this on to Mr. Reuben; only I didn't say anything about interest.

Q Did you ever tell him that the City Attorney would not authorize the refund until there was an outcome of current litigation of similar cases?

A I think there must be a misunderstanding. The City Attorney doesn't authorize refunds, period.

Q Not to pursue that matter, and moving forward, Your Honor, may I show the witness Exhibit No. 3, please, sir?

Mr. Esleeck, Exhibit No. 3 is my letter addressed to you.

A Yes, sir.

Q In regards to that letter, has there been any further discussion concerning the use of the numerical number between yourself and my office?

A Yes, sir.

Q Would you tell the Court how you used, then, the numerical number?

A Well, if you recall, Mr. Tayloe, in the last paragraph of the first page, "Accordingly, I respectfully suggest that Section 20-104 of the Code of the City of Portsmouth, 1973, be administered as presuming any person who owns ten or more dwelling units as being in the business of renting residential property." In other words, you are suggesting to me that I use the number ten as a guideline.

All right. Shortly thereafter -- it may have been the next day -- you and I had a discussion -- I think you were passing through the office and stopped by -- and we discussed the letter and it was decided that

the figure ten is not to be a fast figure that I have to go by, that I should go by. You suggested it as a guideline, but even though a person might have nine units or eight units or seven units, it's up to me through my interrogatories or by whatever information I can gather, it's up to me personally to determine who is in business and who is not in business, and even if a person might have eleven units or twelve units, I can't pick anybody with that many units who wouldn't be in the business; so I would say it's possible; so the figure ten is used and I am using it as a guideline, but not something concrete I have to go by, and I don't go by it.

Q By saying you "Don't go by it", you are saying you look at other factors besides the number ten?

A Yes, sir.

Q And that is not the sole criteria?

A No, sir.

Q And you have gone beyond the number ten in regards to Citizens Trust?

A If I was going to use the figure ten strictly, I wouldn't need my interrogatories.

Q Based upon the information that you have said came into your hands regarding the Citizens Trust case, have you made a conclusion concerning whether the Citizens Trust Bank trust department, working for the

estate of Francis Whitlock, is in the business of renting residential property in the City of Portsmouth?

MR. LIVESAY: Before he answers, that is the thing to be determined by the Court, so with that reservation --

A Until the Court rules otherwise, I have determined that the Citizens Trust Bank is in the business of renting dwellings.

MR. TAYLOE: So the Court would have to reverse your decision?

A That's correct.

THE COURT: What is the section itself?

MR. TAYLOE: 20-104, Your Honor.

THE COURT: You are talking about this figure of ten, which is, as I understand, appears to be sort of an arbitrary figure, ten units?

MR. TAYLOE: Yes, sir. It appears -- to answer your inquiry, it appears in the Virginia Landlord and Tenant Act, as to who is eligible and who must do the things under that act, but it is a number which was derived -- it could have been five, it could have been ten -- but

the important thing that Mr. Esleeck is telling you is that it is not a fixed criterion whereby he uses it as the sole judge.

THE COURT: I understand that, but the Commissioner of Revenue then could arbitrarily set any number of units he wanted to.

MR. TAYLOE: If that was not the sole criterion he was using, he could use two, I think along with the other things, if he wanted to do so, but that is not his sole judgment and the Court shouldn't be swayed by that because he is saying that helps him to put them in two separate piles.

THE COURT: I understand that, but I am trying to get the picture, because all the other things you consider are taken into consideration, like having an agent and that sort of thing, and then you say -- what was that act you referred to?

MR. LIVESAY: Landlord and Tenant Act.

THE COURT: Landlord and Tenant Act refers to the ten units for what purpose?

MR. TAYLOE: As to who meets the qualifications under that act. That's an arbitrary figure of the legislators, and I think the important aspect -- and Mr. Livesay will argue the opposite when we get to it -- that's only a tiny little part of it, but it may, but that's not the sole criterion.

THE COURT: It's certainly an extremely important one, because the Commissioner can cut the melon any way he wants to. The people who fall on one side are not going to pay it, and the people who fall on the other side are going to pay it.

MR. TAYLOE:

Q Have you assessed people who have more than ten apartments?

A Yes, sir.

Q The basis is what, then, that you have made that assessment?

A Yes, sir -- whether or not they have employees, whether or not they provide services, any number of things.

THE COURT: You mean like janitorial services?

A Yes, sir. All of that enters into it, in my opinion.

MR. TAYLOE:

Q Would you tell the Judge how you use that number ten?

A The number ten is just a suggestion from the City Attorney for me to go by, not to abide by strictly, but as a guide. Now, I made the statement, and I know that the Supreme Court has ruled that you can't use a particular number to determine who is in business and who isn't in business, but there isn't any question in my mind that a man with a high rise apartment is in the business of renting apartment dwellings..

On the other hand, I don't feel like the old lady who rents out the upstairs apartment to put food on the table is in business, and somewhere along the line, I have to determine the borderline, who is and who isn't. That's the reason I use all of these questions, Judge, not the number; the number isn't the big factor unless you get into a large number.

Like I said a while ago, I can't pick anybody right offhand who has more than ten units who doesn't devote quite a bit of time and labor to the renting of these properties and who doesn't derive a profit or try to derive a profit or livelihood, and it can't be an isolated instance. It's got to be continuous if he has that number of units, and this is what I have to determine; and like I said before, I make these judgments every day of my life. Some of them are not as strenuous as this, I will have to admit.

THE COURT: In other words, as I understand it, it is conceivable that I could own an apartment house with eight units, eight apartments?

A Yes, sir.

THE COURT: But if I just rented it and then I said, "You are on your own; you do everything", I take it you wouldn't consider that as being in business; but if I maintained the apartments and had janitorial services and all those other features, then I would certainly qualify to pay the tax?

A If you pay the utilities, taxes, provided

garbage service, fixed the roof -- all these things are taken into consideration, yes, sir.

MR. TAYLOE: I have no further questions of the witness.

REDIRECT EXAMINATION

EXAMINED BY MR. LIVESAY:

Q You have been quoted as saying it's an impossible thing.

THE COURT: What's an impossible thing?

MR. LIVESAY: Determining whether or not a person is in the business of renting residential property.

THE COURT: I think you ought to lay a little more background.

A I will lay a little more background, Judge. Shortly after this public hearing that Mr. Livesay is speaking of -- I don't know why he hasn't brought it out -- I didn't make these statements at a public hearing. I was interviewed and I assume Mr. Tayloe was, too, afterwards, and at the time, I will be very frank with you, I was real upset about the rental tax because someone in Mr. Tayloe's office had prepared for me -- well, when the Supreme Court decision came down, I didn't know what the common law definition of being in business was, Judge, and I asked

the City Attorney's Office to give me this information -- so when I got them, it wasn't drawn by Mr. Tayloe; it was drawn by one of his assistants who is no longer there, and when I read them, I nearly had a fit.

My interpretation was that everybody who wrote a check to repair the roof was in business. If you made a profit, you were in business. If you had put money aside to pay off the mortgage, you were in business; and I took these guidelines to Mr. Tayloe and I told him, I said, "Don't tell me who is in business. Give me what an example of somebody in the City of Portsmouth who is not in business", because the guidelines I received placed everybody in the City of Portsmouth who rented as much as one apartment in business, and I was upset about it; and shortly after this public hearing, I was interviewed by a reporter and I said, "Yes, sir, it was impossible", but since then, in talks with the City Attorney -- and I have sought his advice on this time and time again because I was confused, and when the Council passes an ordinance, regardless of whether I like it or not, it's my duty to administer it the best I can -- and this is what I was trying to do, and I went to Mr. Tayloe on more than one occasion and this is the reason I have come up with interrogatories, and he has helped me with some of the questions, that's correct, but it's still my

decision and my decision alone as to who is in the business of renting property.

MR. LIVESAY:

Q At the time you said, "It's an impossible thing", that was after you had received Mr. Tayloe's letter of June 3rd?

A I received the letter the day before the public hearing.

Q It was after you had gotten that letter. Now, coming to Citizens Trust and the Whitlock estate property, have you ascertained how much time anybody up at Citizens Trust spent paying that water bill you talked about?

A No. I haven't ascertained how much time. No way in the world I can determine that for Citizens Trust Bank or anybody else.

Q Just one check a month or every two months, isn't it?

A I assume it's one a month.

Q Now, you say they were paying mortgage payments. Who were they paying it to?

A I don't know.

Q Were they paying it to themselves?

A It could be.

Q And the taxes were paid every quarter?

A Paying taxes, yes, sir.

Q You know from your own knowledge that substantially all of the maintenance and servicing and repair bills were paid by Mr. Kelley in a net check given to the bank once a month?

A That's right, I don't know.

Q You don't know how much time, attention and labor anybody in the Citizens Trust Bank put into what you are talking about?

A No. I have no way of knowing.

Q Speaking in terms of the employees who may have worked around the apartments, any of those employees of Citizens Trust?

A I don't know.

Q Isn't it true that you have been shown statements that they were independent contractors hired by Mr. Kelley's operation?

A No. I haven't seen any statements like that.

Q Would that make a difference?

A The maintenance is being provided by somebody, Mr. Kelley or the bank, it doesn't make any difference to me who it was. The bank is paying for it.

Q The same thing about the rendering of any other services, janitorial, garbage, et cetera?

A The bank is paying for it.

Q But I mean it doesn't make any difference to you whether those things are being done directly by the bank or someone at the rental agency?

A Not unless the rental agent is going to take out a license on its own, twelve dollars a unit.

Q When you got the letter of June 3rd and it suggested a guideline of ten, did Mr. Tayloe tell you that that tied into this Virginia Landlord and Tenant Act?

A No.

Q Is this morning the first time you heard of that?

A First time I heard of it.

Q You are not familiar with that act?

A No, not familiar at all, never heard of it.

MR. LIVESAY: That's all.

* * * * * * * * *

C. ROY KELLEY, Witness called by Attorney for the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. LIVESAY:

Q State your name, please.

A Roy Kelley.

Q And Mr. Kelley, how old are you?

A Thirty-nine.

Q What is your principal business at this time?

A Realtor.

Q Have you in the past acted as rental agent for Citizens Trust Company, now known as Citizens Trust Bank, with respect to property?

A Yes, for their trust department.

Q Can you recall in what year it was that you undertook this employment for the bank?

A I do not recall the year we undertook the management of the units in question. We had them for several years.

Q It's been some years ago, right?

A Yes.

Q Of course, the units we reference are over in the north side of Portsmouth?

A Right; Webster Avenue and Linden Avenue area.

Q In connection with your employment, did you meet with anyone at the bank to be employed?

A Yes, I did, but I don't recall the individual who happened to be at the initial meeting.

Q Was there any written contract?

A I'm not certain, but I don't believe there was a written contract.

Q At that time were you engaged in managing property for other people in and about Portsmouth?

A Yes.

Q Did you have a City business license to conduct that business?

A Yes.

Q And so far as the arrangements with Citizens Trust, was it any different then with any other owners that you were dealing with at that time, as far as your commissions?

A No. That was typical of most of the management accounts that the firm handled.

Q Do you know whether or not the trust that the bank was involved with still owns that property?

A The property has been sold -- at least, that is my understanding -- it was sold at the end of this past year or the first part of this year.

Q You know that because your services were terminated?

A Yes; and we were told it had been sold.

Q During the period of time that your company had this management, very briefly tell the Court what services were performed by you or your company or the employees of your company, with respect to the property.

A Virtually full services, as far as operation

and management of the property, were performed by our company. Some disbursements were made by the trust department.

Q Which ones; would it have been bills that got mailed directly to them?

A I believe they paid the tax bills, but I am really not sure. We were in a position we would pay any bills that would come to us, and the only thing that would be paid by the bank would be those items that happened to go directly to them. It would be much the same situation you would have if you had a single-family home -- the owner may be paying his real estate taxes or the mortgage and the owner usually receives the bills.

Q During this period of time, did your company place the tenant?

A Yes.

Q And replace the tenants?

A Yes.

Q And sue the tenant for the rent due?

A Yes.

Q Did your company determine and undertake any necessary repairs, maintenance?

A Yes.

Q What about janitorial services for the hallways?

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COURT REPORTER
PORTSMOUTH, VIRGINIA 23705

A Yes; we provided those services.

Q Or outside services, like mowing grass?

A Yes.

Q What arrangements if any were there for disposition of garbage?

A We had an employee who would check to make sure the garbage cans had been put on the street, emptied and put back, and the area was clean.

Q Say, if a tenant left and the apartment needed to be cleaned and painted, who did that?

A We did that.

Q Whose services did you use for that?

A Most instances it was employees of C. Roy Kelley; for specialized work we would use outside people. For instance, if service was needed on the heating system, we would call the appropriate people.

Q In specific, you had no plumbers?

A That's right. In general, those trades that require licensing are the ones we call in from the outside.

Q As you went through a month and had any services rendered by your people, and you had services of a painter or plumber, what happened as far as your charges for the maintenance and the plumbers' bills and what-have-you?

LESLIE J. JOLLY
COURT REPORTER
FORTSMOUTH, VIRGINIA 23705

A They were paid from our office.

Q What happened to the rents?

A The rents were received by our office.

Q And having the gross rents and having paid out the various charges and costs, did you take a commission in agreement with the bank?

A Yes; a commission was deducted.

Q Then what would you do?

A The net proceeds were forwarded to the bank, along with a statement outlining the disbursements.

Q Outlining the charges by yourself and the maintenance and so forth?

A Yes; along with the statement that had been paid.

Q Did you have any other property, other than this belonging to the Francis Whitlock estate, in hand for Citizens Trust Bank?

A We did not.

Q Now, you have mentioned that you know the Citizens Trust paid the taxes. Did the water bills go to them?

A I do not recall. Mrs. Gilliam, who is with us today, probably would be more familiar with that than I am.

Q They had insurance to pay every year?

A I'm not sure whether they paid it or we paid it, as far as the writing of the check is concerned.

Q At one time during this period that your company had the management of those apartments, the City put into effect, and it's still in effect, some procedures under the ordinances where the apartments, before they can be rented to a new tenant, have to be inspected?

A Right; Health Department inspection.

Q Who took care of that?

A That is the function of our company.

Q You did that?

A Yes.

Q And also disbursed the checks for those charges, and I assume, deducted it out of the rent collected?

A That's correct.

MR. LIVESAY: Answer counsel's questions.

CROSS-EXAMINATION

EXAMINED BY MR. TAYLOE:

Q Mr. Kelley, in whose name did you do all these activities, such as when a court case came up, was it Citizens Trust v. John Jones or C. Roy Kelley v. John Jones?

A Actually, I believe it's C. Roy Kelley versus

John Jones.

Q Do your records reflect that?

A I'm making that statement, and Mrs. Gilliam can answer the question better than I can. She just told me a little while ago that the cases were handled in that manner.

Q How about your leases, were they C. Roy Kelley or were they Citizens Trust Company?

A C. Roy Kelley was shown on it as the agent on the leases, not the owner.

Q And the owner was Citizens Trust?

A That's right.

Q And I show you this document which appears to be 5, and ask you if you recognize that as a lease between the Citiznes Trust Company and a given individual of one of the apartments that is in issue today?

A Yes. This is the month to month apartment lease dated May 7, 1974, for Apartment D, at 16 Linden Avenue.

Q And that again refers to you as the agent, and Citizens Trust as the owner of the property?

A That's correct.

Q And in regards to the services which you provided, did you pay a tax on the business of renting residential property in the amount of twelve dollars on

behalf of Citizens Trust Company?

A I do not recall from my own records when or what taxes were paid.

Q Would you, in the ordinary course of your business, pay the tax of renting residential property license if you are the agent?

A Yes.

Q You would pay it in the normal course of your business?

A No. We would disburse the funds on the account of the owner. It would be a charge to the owner.

Q So Citizens Trust Company, in your normal procedure, would have been charged the tax of twelve dollars for the tax of renting residential property?

A Yes; as would any other tax be charged to the owner.

Q This is very important: I ask you whether you have a number of people which you are the rental agent for, a number of firms which you handle the same services, the same services which you handled for the Citizens Trust Company?

A Would you like to define a "number"?

Q Edgefield Apartments?

A Yes.

Q Can I go on: Are there not more than Edgefield Apartments?

A Yes, there are others.

Q And you are in the business of managing apartments for people as a real estate broker?

A That's correct.

Q Are you in the business of renting residential property?

A We manage residential property for others.

Q Are you in the business of renting residential property -- you say you handle the operating and management -- are you in the business of renting residential property?

MR. LIVESAY: I would make this objection. He is asking him perhaps for a legal conclusion.

A That's what bothers me in my answer -- I'm not sure my definition of being in the business is the same definition you are seeking. I can tell you what we do and you can establish perhaps --

MR. TAYLOE: That's been established, and I'm not going to go into it.

Q It can be said that you pay a license tax on managing and operating apartments and being a real estate

broker?

A Yes. We have a City and State license for performing those services.

Q Do you have a license -- and you have already answered that you did not have a license on behalf of Citizens Trust for the renting of residential property -- you didn't pay the twelve dollars a month fee?

A I don't remember.

Q You said you didn't know?

A In fact, I believe it was paid for some period of time, but I'm sorry, I don't have the facts in front of me.

Q You said in the normal course of business, that would be charged back to Citizens Trust?

A Yes; the same as any other charges.

THE COURT: You just deducted it from your rentals?

A That's right; from the payment to the owner at the end of the month.

MR. TAYLOE:

Q Did you not, over the period of time, pay a check over to Citizens Trust Bank over the amount of deductions that you made; wasn't there a profit realized?

A Funds were disbursed to the bank, but I question whether there was a profit realized after other

expenses relating to the property.

Q But that's not within your personal knowledge?

A No.

MR. TAYLOE: No further questions.

REDIRECT EXAMINATION

EXAMINED BY MR. LIVESAY:

Q Mr. Kelley, you were asked about court cases. Did anybody from Citizens Trust ever go to court that you know of?

A Not that I know of.

Q Did anybody from Citizens Trust ever sign one of these leases that you know of?

MR. LIVESAY: You didn't have this marked as an exhibit. Did you intend to?

MR. TAYLOE: Yes, I did.

A The lease was signed by the resident and it's signed by a representative of C. Roy Kelley Realty Company.

MR. LIVESAY:

Q Not by the bank?

A That's right.

Q Nothing different or unusual about that situation of going to court or signing the leases or anything?

LESLIE F. JOLLY
COURT REPORTER
FORT SMITH, VIRGINIA 24280

THE COURT: The lease of Mr. Kelley is offered by the defense?

MR. TAYLOE: Yes, sir.

THE COURT: Very well. Is this lease relative to this particular property in question?

MR. LIVESAY: It is one of the units.

THE COURT: Very well. Then the lease will be received and admitted into evidence and identified as Defendant's Exhibit 1.

MR. LIVESAY:

Q My question was: Was this way of collecting rentals not paid or this way of signing leases, was that any different from other property you managed?

A No. This routine would be normal. It would be an exception if we had the owner on the lease. I might relate in the commercial area, almost always you have an owner's signature as opposed to the way we handle it in the residential.

Q In other words, in the residential thing, the agent does the whole thing; otherwise, it would serve no purpose, would it?

A That's right, because of the repetitive

nature of the business, with the large number of leases, and it can become a burden to get the owner's signature.

Q There was some question whether you on behalf of the bank paid this twelve dollars per unit over the several years for being in the business or renting residential units. Do you know if that was paid under protest on advice of counsel?

A I do not recall.

MR. LIVESAY: No further questions.

MR. TAYLOE: No questions.

* * * * * * * * *

JOYCE H. DeBERRY, Witness called by Attorney for the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. LIVESAY:

Q State your name, please.

A Joyce H. DeBerry.

Q And for the record, how old are you?

A Forty-nine.

Q That's always a painful question. What is your employment?

A Trust Officer, Citizens Trust Bank.

Q That's the same entity that was known as Citizens Trust Company?

A Right.

Q How long have you been associated with the trust department of that bank?

A Since about 1962.

Q Is the trust department a part of the bank itself?

A Yes, it is.

Q Does the trust department or the bank itself have to pay any City license taxes that you know of?

A Not that I know of.

Q Do you take care of paying the tax on the stockholders to the City?

A The bank auditor would do that.

Q In connection with the specific property involved, and if I may move it along just a little bit, is it true that one Francis, F-r-a-n-c-i-s, a male, E. Whitlock died back in 1962 and under his will probated in the Circuit Court of the City of Portsmouth, the old Circuit Court of the City of Portsmouth, made the trust department of your bank the trustee under a Trust A and a Trust B?

A That's correct.

Q Now, at the time that that occurred back in

'62, do you know what the nature of ownership, if any, the bank received as trustee of these apartments?

A We had no ownership of the apartments. We had stock in Dunn & Whitlock, Incorporated.

Q In other words, at the time he died, the stock passed into the trust?

A In the trust.

Q What if anything happened to that corporation?

A In 1969 the corporation was dissolved.

Q And upon dissolution, what if anything happened to these particular units of apartments?

A An agreement between interested parties -- the bank took over the apartments in place of the stock as an investment.

Q Are you saying, in other words, that the distribution and dissolution to the trust was the apartments?

A That's right.

Q And someone else who owned stock perhaps got something else from the corporation?

A That's correct. We have an agreement that stipulates --

Q Who got what?

A Yes.

Q So at that time the trust department, instead of owning stock in a corporation, then became owner of these apartments?

A That's right.

Q You heard Mr. Kelley say his company was engaged to take over the management. Are you familiar with that?

A I knew he was in charge of it, yes.

Q All right. Now, before I forget it, you have also heard him testify that the subject apartments were sold?

A That's correct.

Q Are you familiar with that?

A Yes.

Q And once again, to perhaps speed it along a little bit, there appears of record in Deed Book 685, a deed from your bank to one Bernice C. Pilzer, of certain property. Is that the person whom you sold it to?

A Yes.

Q And that deed is dated May 21, '76?

A Yes.

Q Is that about the same time Mr. Kelley's corporation was relieved of any duties?

A That's correct.

Q From approximately 1971 through the time that the bank disposed of this asset, what was its status insofar as the trust department of the bank was concerned?

A It was an investment..

Q Did the trust have other investments?

A Yes.

Q Of what nature?

A Stocks, savings accounts.

Q Did the bank have any procedure or any committee or any routine for review of investments held in trust?

A Yes. We have a trust committee that meets once a month.

Q With connection with the trust under Mr. Whitlock's, did it review all the investment, stocks, et cetera?

A Yes.

Q And make any changes it thought proper?

A That's right.

Q I would assume, and I will ask you if there came a point when the bank's committee and the trust department determined that the ownership of the apartments was not to the best interest of the trust?

A That's correct.

Q And that caused the sale?

A Right.

Q Up to that point, when the property was sold, tell us just what time, labor and attention, if any, the employees of the trust department put into renting these residential units?

A We put no time in the renting at all.

Q There has been some testimony that tax bills were mailed to you quarterly?

A Yes. We paid anything that was mailed to us direct.

Q And I think the testimony was also that water bills came to you direct?

A That's correct.

Q And I think there were some questions about paying the deed of trust. Was that money borrowed from someone?

A We borrowed money from the bank when we took the apartments over, to get it in rentable condition.

Q And paid that back out of the moneys Mr. Kelley gave you?

A Yes.

Q What about insurance, how often did you pay on insurance?

A Once a year.

Q You have been paying real estate taxes every

quarter and water bills every month?

A I think the water bill came every two months.

Q And the insurance every year?

A Yes.

Q Can you think of any other checks?

A We paid one electric bill once a month. It was, I assume, for the halls and so forth -- I'm not sure -- anyway, we had an electric bill.

Q It came to you so you paid it direct?

A Right.

Q Who paid all other charges or expenditures on the property?

A C. Roy Kelley.

Q Who placed the tenants?

A C. Roy Kelley.

Q Who chose the tenants?

A C. Roy Kelley.

Q Who signed the leases?

A They did.

Q Who threw them out if they didn't pay, or took them to court to make them pay?

A They did, we hope.

Q Did anybody from the bank do any kind of maintenance?

A No.

Q You heard Mr. Kelley testify that once a month there would be a statement to the bank for services performed by his personnel and outside contractors and rent collected and the net paid to the bank?

A That's correct.

Q And of course, you had to put that check into the proper account at the bank?

A The income account. There were times when we did not have any, though, any income.

Q Are you saying that sometimes --

A The expenses exceeded the income.

THE COURT: Was that most of the time?

A Well, along the last few years, yes. I wouldn't say most of the time, but when we took into consideration what we were paying out, there was no income for the beneficiaries.

MR. LIVESAY:

Q During this period of time that the bank was acting as trustee under the Whitlock will, did the bank have any -- the trust department of the bank -- have any other residential rental properties it was managing for anybody or had in the trust department in any way?

A I do not believe so at this time.

Q This set was the only one?

A That's right.

THE COURT: That was the only property you all were involved in?

A We have real estate, but most of it is dividends by the beneficiaries.

MR. LIVESAY:

Q In other words, you are saying --

A I forgot. We do have one piece of commercial property.

Q I think you were trying to explain the bank -- someone may have left a home in a trust, but occupied by the widow?

A That's right.

Q In that case, you are not renting it or managing it; it's up to the life tenant to take care of it?

A That's right. I said we had one piece of commercial property. At this time we do have a whole interest in it, but most of the time we have had that in the trust department, we have only had half interest in it.

Q I assume you take in what the decedent leaves and treat all of the investments to periodic review; is that correct?

A That's right.

Q Whether it's real estate, stocks, bonds?

A That's right. The investment committee handles all investments.

Q Would it be true that this particular asset received no different attention than any other asset of the trust?

A That's right.

MR. TAYLOE: Your Honor, I might say, upon the answering of these question, as far as we are concerned, we are not going to present a case. The case will have been presented and we will be through.

CROSS-EXAMINATION

EXAMINED BY MR. KATZ:

Q Isn't it true that C. Roy Kelley Realty Company was the agent for the trustee in regards to these two buildings of rental property?

A The rental agent, right.

Q You made the statement that there were some periods of time when no income was produced. Isn't that a risk that the trust department runs as trustee with any assets acquired by the trustee?

A Well, I guess most prudent investments would

be silver, and that is safe enough to have income.

Q But this was an asset that the trustee acquired through some other means than the will?

A We acquired it because it was the only asset that was of any value at the time of the dissolution of the corporation. We would not have gone out and purchased it.

Q Isn't it true that this asset was not sold until 1976, some six years later?

A That's right, but not because we didn't want to.

Q You said seven years after -- I thought the man died in '62?

A He died in '62, but we dissolved the corporation and took it over in '69, the rental property.

Q For the information of the court, prior to 1969, one of the assets of the estate was stock in the Whitlock-Dunn Corporation?

A That's correct.

Q Which was a viable corporation that Mr. Dunn was still operating; is that not correct?

A Whitlock-Dunn was incorporated, was of course a business that we took. It was what Mr. Whitlock was involved in and they were running it together, and after Mr. Whitlock's death, he was the key man and there was

never as much business coming in, and the business just continued to drop off, and something had to be done.

Q So the decision was made to invest the portfolio of this stock and the two accounts?

A Acquiring anything we could get of any value.

Q Based on the decision, you took the assets you acquired; then isn't it true that whatever the business the decedent was in, the trust department does take it over and it's poured into the corpus of the trust?

A That's correct.

Q And that's true in all cases, regardless of whether that was a rental business or renting residential property?

A You take over the assets of the decedent if it was in his name, and we are named executor.

Q These records over here on the table in front of you, they basically represent all of the reports and dealings in regards to those two buildings for the seven-year period; is that not correct?

A That's correct.

Q Each monthly report that came to you or to the trust department, was not time and attention spent reviewing the reports?

A I did not review them. The other trust

officer who handled investments would review them as he did any investment.

Q It is my understanding that you were the administrator, so there was a two-fold, two different trust officers worked on this estate?

A No. My job as administrator, all I did was make sure the income was put in the right place and the reports were disbursed to the beneficiaries.

Q Your rental agent did not have the decision as to the buying or selling of this property; this was a decision that was made by the trust department?

A The trust committee.

Q Did he only act under the authority given him by the trust committee or the trustee? When I say "he", I mean your rental agent.

A I can't remember, but I believe he met with the total trust committee at the time. I was not a member of the trust committee at that time.

Q What was the function of the other trust officer in relationship to this residential rental property as an asset of the trust?

A As I just explained, he reviewed it as he did any investment, you know, when the reports came in, he checked them to see if they were correct.

Q He would have been the one cognizant and who

gave attention to the day to day reported operations?

A That's right. My duty was to inform him when there was not money sufficient to handle it.

Q Were reports also made to the Cestui Que Trust?

A Yes. We make annual reports.

Q Was there a one hundred dollar limit placed on the agent?

A I found a letter in my file, dated in December, stating that if there were any expenses in excess of a hundred dollars, to contact the trust department.

Q Mr. Pruden was a trust officer of the bank?

A That's right.

Q And that was in December of '75. Would you examine this document, please?

A It's the will of Francis E. Whitlock.

THE COURT: That was monthly expenses?

A No -- any one item -- monthly expenses always exceeded one hundred dollars.

THE COURT: So that was outside of normal operating expenses?

A At the time we were greatly overdrawn, and we put a limit on it for any one large expense, other than the regular operating expenses, any large repair, I assume

is what he meant. I have a copy of the letter. You can see it if you would like.

MR. KATZ:

Q During the operation of these buildings, were not in some units furniture provided and appliances?

A I would have to refer that to Mr. Kelley. When we got personal property tax forms, I would send them to him.

Q If I told you in those files there were bills for refrigerators and replacement for appliances, would that surprise you?

A No, it would not.

Q And all of those bills were forwarded with the monthly reports?

A Yes. I believe what you saw was the original reports Mr. Kelley gave us after he terminated.

MR. KATZ: We would like to introduce this. It's the will of Francis E. Whitlock.

THE COURT: The will of -- the copy of the will of Francis E. Whitlock will be received and admitted into evidence and identified as Defendant's Exhibit No. 2.

REDIRECT EXAMINATION

EXAMINED BY MR. LIVESAY:

Q Mr. Katz has talked to you in terms of a decedent leaving you a business, and I think you tried to answer him back with respect to assets on investments. Is it reasonably prudent for a trustee to operate a going business as a part of the trust?

A Yes.

Q What businesses if any do you operate?

A We do not have any businesses at this time.

Q So then, you don't operate businesses. If a man dies, running a business, and it gets thrown into your trust department, you would operate it?

A No, we would not, unless we had someone capable to run it. We would have to consider each account, but unless there was someone fully competent, it would have to be to the individual handling it, not us.

Q Would it be prudent for the Citizens Trust trust department to operate a going business?

A No.

Q What would be your action with respect to a going business if you didn't have this individual?

A Get out of it as fast as possible.

Q As far as the Whitlock-Dunn Corporation, when it was operating, you had Mr. Dunn operating it until

'69?

A That's correct.

Q In other words, if it took management of these apartments, he did it?

A Yes. He did everything.

Q Having cast upon the bank through the dissolution of Whitlock, did you consider -- did the bank consider that they had in their department the capability of managing these residential units?

A No, we did not. That's why we hired an agent. We knew we were not capable of handling it.

Q Would it require that degree of time, attention and labor that the trust department is not equipped or willing to devote to an investment?

A Yes, it would.

Q Now, you infer that you had tried to dispose of this particular asset of the trust prior to finding Mrs. Pilzer. Do you know how long you have been trying to get rid of that asset?

A Well, it was first discussed several years ago at the trust committee. You would have to refer to the minutes.

Q What would be the reason of getting rid of that asset at that time?

A Because it was not an income-producing asset.

Q And therefore, I would take it, you couldn't pass on to the Cestui Que Trust that there was any money?

A Of course, there were times she received money, but it was intermingled with her other assets. It was not a good asset.

Q In making the annual reports to the widow or decedent, whoever it may be, did those reports refer to just this one investment or all investments?

A All. We do an annual report that everything that happens during the year, and during that time we give her a report of her investment, an investment analysis.

MR. LIVESAY: No further questions.

RECROSS-EXAMINATION

EXAMINED BY MR. TAYLOE:

Q You state that you take the assets which a given estate gives you and you divest yourself if possible, if it's not a good investment?

A If possible.

Q In this particular case, you had a bad investment and you attempted to try to get rid of it over that period of time?

A That's correct.

Q This would be true of a restaurant -- you make a judgment whether to stay in business or you could

close down?

A Well, we had restaurants and we closed them immediately, because we were not able to handle them.

Q You made that business judgment to close them?

A Right.

Q If you had a manager of a restaurant, who over a period of years had been making money, might that not have affected your decision?

A Yes.

Q That would have been an asset of the bank if the agent owned it?

A I can't answer that.

Q But he would be working on behalf of the bank if the asset was in the trust department?

A If he was in no way connected with the trust department.

THE COURT: Regardless of what you call it, Mr. Kelley was under the complete control and direction of the trust department and officers of the Citizens Trust Bank, relative to the Whitlock estate?

A He was working for us, handling the asset for us.

THE COURT: The whole issue is whether or not the language of the ordinance puts you or the bank in the position of being an isolated instant of conducting business, considering the other facets, which carries me to that ultimate determination I have to make.

MR. LIVESAY: I think Your Honor has put your finger on one of the important points of the case.

THE COURT: I hope so.

MR. LIVESAY: We rest.

MR. TAYLOE: He rests, and the City rests for today.

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STATE OF VIRGINIA AT LARGE,

CITY OF PORTSMOUTH, to-wit:

I, Leslie F. Jolly, RPR, hereby certify that I was the court reporter in the Circuit Court of the City of Portsmouth, Virginia, on the 13th day of December 1976, at the time of the trial of the case of Citizens Trust Company vs. City of Portsmouth.

I further certify that the foregoing transcript is a true and accurate record of the testimony and other proceedings of the hearing herein.

Given under my hand this 20th day of December 1976.

Leslie F. Jolly, RPR

* * * * * * * * *

Present: Carrico, Harrison, Cochran, Harman, Poff and Compton, JJ.

CITY OF PORTSMOUTH

-v- Record No. 741178

CITIZENS TRUST COMPANY, TRUSTEE, ETC., ET AL.

OPINION BY JUSTICE GEORGE M. COCHRAN

Richmond, Virginia, March 5, 1976

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH
Robert F. McMurran, Judge

This appeal presents for our determination the question of the validity of two local ordinances levying license taxes on those engaged in the business of renting residential property.

On June 22, 1971, City Council of the City of Portsmouth adopted for the license tax year beginning May 1, 1972, and for subsequent tax years, Ordinance No. 1971-52[1], in which the

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[1] Ordinance No. 1971-52 provided:

* * *

"Section 87.1. Rental of Residential Property.

"Every person engaged in the business of renting residential property, including houses, apartments and dwelling units shall pay an annual license tax of $50.00 for the first four units and $12.00 for each additional unit in excess of four.

"For the purposes of this section a person shall not be deemed to be engaged in the business of renting residential property in the City unless such person shall rent four or more such residential units. The business of renting houses, apartments or dwelling units as used in this section shall be construed to mean the renting of buildings or portions thereof, each designed for residential occupancy as a single dwelling unit by one family but not hotels, motels, mobile home parks, lodging houses or boarding houses for which a license is otherwise required by this ordinance."

* * *

definition of those required to pay the tax paralleled the overly broad definition invalidated by us in Krauss v. City of Norfolk, 214 Va. 93, 197 S.E.2d 205 (1973).[2] Subsequently, on July 24, 1973, City Council amended the ordinance by adopting for the tax year beginning May 1, 1973, and for subsequent tax years, Ordinance No. 1973-97[3], which incorporated the common law definition of "engaged in business", set forth in Krauss, supra, 214 Va. at 95, 197 S.E.2d at 206-07.

Citizens Trust Company, Trustee, and twelve other taxpayers filed in the trial court, under the provisions of Code

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[2] In Krauss the ordinance provided that a person who rented four or more dwelling units was "deemed to be engaged in the business" of renting such property.

[3] Ordinance No. 1973-97 provided:

* * *

"Section 87.1. Rental of residential property.

"Every person engaged in the business of renting residential property, including houses, apartments and dwelling units, shall pay an annual license tax of $12.00 for each such unit.

"For the purposes of this section, the phrase 'engaged in business' shall mean a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit and implies a continuous and regular course of dealing, rather than an irregular or isolated transaction. The business of renting houses, apartments or dwelling units as used in this section shall be construed to mean the renting of buildings or portions thereof, each designed for residential occupancy as a single dwelling unit by one family but not hotels, motels, mobile home parks, lodging houses or boarding houses for which a license is otherwise required by this ordinance."

* * *

§ 58-1145, their petitions to correct alleged erroneous license tax assessments. The taxpayers, alleging that both the 1971 and the 1973 ordinances were invalid, sought refunds, with interest, of taxes which they had paid thereunder. The trial court, concluding that Krauss was controlling, ruled in favor of the taxpayers. By final orders the court restrained the city and its officials from collecting from these taxpayers any taxes under the ordinances, and directed that refunds be made, with interest and costs, of taxes previously paid by them. Upon the petition of the city, filed pursuant to Rule 5:23, we granted it a writ of error to all but one[4] of the judgment orders, and the matter was briefed and argued before us as a consolidated appeal.

The city enjoys the broad license taxing powers granted to local governing bodies by the General Assembly.[5] We recognized in Krauss that a city has been delegated the power to levy license taxes on those "engaged in business". Id. 214 Va. at 95, 197 S.E.2d at 206. We said in Bott v. Commonwealth, 187 Va. 745,

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[4] Because of procedural deficiences we refused to grant the city a writ of error to the judgment order entered in the trial court on August 1, 1974, in the proceeding therein styled Chelsea Corporation v. City of Portsmouth (Law No. L-73-302).

[5] Code § 58-266.1 (Cum. Supp. 1969) provides that the "council of any city ... may levy ... license taxes on businesses trades, professions, occupations and callings and upon the persons, firms, and corporations engaged therein within the city ... ."

48 S.E.2d 235 (1948), that the word "business" has a meaning broad enough to cover everything about which a person can be employed, including operation of an apartment building. Id. at 749, 48 S.E.2d at 237. See also Chesapeake & Potomac Tel. Co. v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955); and Fallon Florist v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950). We held in Krauss, however, that the city in that case had no authority, by its charter or by statute, to extend or enlarge the definition of "engaged in business" so as to contravene the common law.

We reject the taxpayers' argument that a tax on those who engage in the business of renting residential property is unconstitutionally discriminatory. The equal protection clause of the Fourteenth Amendment does not prevent a state from adjusting its system of taxation in all reasonable and proper ways. Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1889). Recognizing that the states possess broad power to classify according to occupation for purposes of taxation, the Supreme Court has held that equal protection does not compel identity of treatment but "only requires that the classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary". Walters v. City of St. Louis, Mo., 347 U.S. 231, 237 (1954). If the classification is reasonable and not arbitrary, uniformity and equality are not required. Town of Ashland v. Supervisors,

202 Va. 409, 415, 117 S.E.2d 679, 684 (1961); Langston v. City of Danville, 189 Va. 603, 608, 54 S.E.2d 101, 104 (1949). It is not necessary that legislative classifications be perfect, and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Sheek v. City of Newport News, 214 Va. 288, 291, 199 S.E.2d 519, 522 (1973).

In order to avoid the pyramiding of taxes, the City Council could reasonably place those engaged in the business of renting residential property in a different category from those expressly excluded. Thus, the ordinances excluded those engaged in the business of renting specified kinds of residential property, such as motels, for the operation of which licenses were otherwise required by the city. For the same reason the City Council could omit from the classification those engaged in the business of renting non-residential property. The classification is presumptively valid and will be upheld unless it is facially unreasonable or its unreasonableness has been established by clear and convincing proof. Sheek v. City of Newport News, supra, 214 Va. at 288, 199 S.E.2d at 521. Here, the presumption of validity has not been overcome.

The taxpayers further contend that this license tax will result in double taxation because real estate agents representing the owners' interests also pay a business license tax. This contention is based on the theory that any tax directly or indirectly affecting property is a tax on that property, a concept which we have repeatedly declined to approve. See Hunton v. Commonwealth, 166 Va. 229, 244, 183 S.E. 873, 879 (1936).

We conclude that the city could validly impose a license tax on those engaged in the business of renting residential property. It follows that the 1973 ordinance, which conformed to the guidelines enunciated in Krauss, is valid.

The validity of the 1971 ordinance, however, depends upon a determination whether in the second paragraph the definition of those "engaged in the business", arising implicitly from the exclusionary language, and conceded by the city to be invalid under our holding in Krauss, can be satisfactorily severed from the rest of the ordinance. The city contends that the ordinance is severable and that the proscribed definition may be excised without destroying the entire ordinance, because the first paragraph, the operative section describing the class to which this license tax applies, would remain intact, and the phrase "engaged in the business" contained therein would necessarily carry its common law meaning.

The record fails to support the city's contention that there is an applicable severability clause. Without such a provision the burden of proving severability devolves upon the supporter of the legislation. Hannabass v. Maryland Cas. Co., 169 Va. 559, 571, 194 S.E. 808, 813 (1938). Nevertheless, even in the absence of a severability clause, "the test of severability is whether the legislature would be satisfied with what remains after the invalid part has been eliminated". Waynesboro v. Keiser, 213 Va. 229, 235, 191 S.E.2d 196, 200 (1972). The intent of the lawmakers is controlling. Bd. Sup. James City County v. Rowe, 216 Va. 128, 147, 216 S.E.2d 199, 214 (1975).

There can be no uncertainty as to the legislative intent in the present case. Deletion of the invalid definition in the 1971 ordinance does not alter the effect of the ordinance in fulfilling the purpose expressed in its first sentence of levying the tax on "every person engaged in the business of renting residential property". Moreover, the City Council has since proceeded by amendment to substitute the approved common law definition for the invalidated definition. It has also changed the ordinance to provide that the tax will be levied in a specified amount for each residential unit, rather than in a specified sum for the first four units and in a different amount for each additional unit. We conclude that the 1971 ordinance is severable and that the trial court erred in ruling to the contrary.

The taxpayers have misconstrued the effect of our ruling on rehearing in Krauss. We did not resolve the question of severability because this issue was never raised before us except on rehearing, when it was too late. Therefore, we reaffirmed, without opinion, our previous decision. In the present cases, severability was an issue at every stage of the proceedings.

We agree with the taxpayers that the ordinances present difficult administrative and enforcement problems, but these problems raise questions as to the advisability,[6] rather than the validity, of the legislative enactments. An ordinance or a

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[6] By 1974 amendment, Acts 1974 c. 196, a new subdivision (6a) was added to Code § 58-266.1 to prohibit local governments from levying license taxes on those who, as others, engage in the business of renting certain kinds of residential property. Localities that had such a tax on January 1, 1974, however, were exempted from the provisions of the amendment.

statute is not fatally defective because questions may arise as to its applicability, or opinions may differ as to what falls within its terms, or because it is difficult to enforce. Fallon Florist v. City of Roanoke, supra, 190 Va. at 590, 58 S.E.2d at 329.

The judgment orders appealed from are reversed and the cases are remanded for further proceedings to determine whether the taxpayers were "engaged in the business of renting residential property" within the meaning of the ordinances and thus were subject to the license taxes in question.

Reversed and remanded.

This is to certify the following is a true and correct copy of Section 1-2, Code of the City of Portsmouth, Virginia.

Corinna B. Jeffreys
City Clerk

THE CODE OF THE CITY

OF

PORTSMOUTH, VIRGINIA

Chapter 1

GENERAL PROVISIONS

Sec. 1-2. Definitions, rules of construction.

In the construction of this Code and of all ordinances, the following rules shall be observed, unless such construction would be inconsistent with the manifest intention of the council.

The rules for the construction of statutes laid down by Sections 1-13.1 to 1-13.42 of the Code of Virginia, 1950, as the same are now or as they may be hereafter amended for the construction of such code and all statutes shall, so far as applicable, govern the construction of this Code. *

Person. The word "person" may extend and be applied to associations, firms, partnerships and bodies politic and corporate as well as to individuals.

* This is an excerpt using definition of "person" as utilized at trial.

Sec. 20-103. Professional occupations.

(a) Every person conducting or engaging in any of the following occupations shall pay an annual license tax of fifty dollars ($50.00) for the first five thousand dollars ($5,000.00) and seventy cents ($0.70) for each additional one hundred dollars ($100.00) of gross receipts of the occupation for the previous calendar year:

(1) Advertising agent or firm.

(2) Air-conditioning engineer.

(3) Appraiser or evaluator of real estate for others for compensation.

(4) Architect, landscaper.

(5) Artist.

(6) Assayer.

(7) Attorney at law.

(8) Auctioneer, all types.

(9) Auditing company or firm.

(10) Blueprinter.

(11) Bookkeeper, public.

(12) Broker, any type other than pawnbroker and loan broker listed elsewhere.

(13) Chemical engineer.

(14) Chemist.

(15) Chiropodist.

(16) Chiropractor.

(17) Civil engineer.

(18) Collection agent or agency.

(19) Common crier.

(20) Commission merchant.

(21) Consulting engineer.

(22) Contracting engineer.

(23) Dentist.

(24) Doctor of dentistry.

(25) Doctor of medicine.

(26) Electrical engineer.

(27) Furnisher of domestic or clerical help, labor or employment.

(28) Homeopathist.

(29) Industrial engineer.

(30) Land agent, rental agent.

(31) Lumber measurer.

(32) Manufacturer's agent.

(33) Mechanical engineer.

(34) Merchantile agent or agency.

(35) Metallurgist.

(36) Mining engineer.

(37) Naturopathist.

(38) Neurologist.

(39) Occulist.

(40) Optometrist.

(41) Orthodontist.

(42) Osteopath.

(43) Patent attorney or patent agent.

(44) Physician.

(45) Physiotherapist.

(46) Public accountant.

(47) Public relations counselor.

(48) Public stenographer.

(49) Publicity service furnisher, booking agent, concert manager.

(50) Radio engineer.

(51) Recorder of proceedings in any court, commission or other organization.

(52) Refrigerator engineer.

(53) Sales agent or agency.

(54) Sculptor.

(55) Surgeon.

(56) Surveyor.

(57) Veterinarian—Not operating a hospital.

(58) Other professional occupations. (Ord. No. 1969-24, § 87, 4-22-69)

Sec. 20-104. Rental of residential property.

(a) Every person engaged in the business of renting residential property, including houses, apartments and dwelling units, shall pay an annual license tax of twelve dollars ($12.00) for each such unit.

(b) For the purposes of this section, the phrase "engaged in business" shall mean a course of dealing which requires the time, attention and labor of the person so engaged for purpose of earning a livelihood or profit and implies a continuous and regular course of dealing, rather than an irregular or isolated transaction. The business of renting houses, apartments or dwelling units as used in this section shall be construed to mean the renting of buildings or portions thereof, each designed for residential occupancy as a single dwelling unit by one family but not hotels, motels, mobile home parks, lodging houses or boardinghouses for which a license is otherwise required by this chapter. (Ord. No. 1971-52, § 1, 6-22-71; Ord. No. 1973-97, § 1, 7-24-73)

C. ROY KELLEY REALTY COMPANY
4114 George Washington Highway
Portsmouth, Virginia 23702
Telephone 393-1015

MONTH-TO-MONTH APARTMENT LEASE

THIS LEASE, made this 27th day of May, 1975, between Citizens Trust Co., hereinafter called Owner, and Heidi Ann Sweeney, hereinafter called Resident, and C. Roy Kelley Realty Company, a Virginia corporation, hereinafter called Realtor.

WITNESSETH: Owner hereby leases to Resident and Resident hereby leases from Owner the premises known as Apartment No. 3, at the street address of 17 Wilson Avenue, Portsmouth, Virginia, for the sole occupancy of Resident and Resident's immediate family to be used as a private dwelling for no more than 1 persons and for no other purpose whatsoever, for the period commencing on the 1st day of July, 1975, and monthly from the first day of August, 1975, until this lease is terminated as hereinafter provided, at the rental of $135.00 per month, payable in advance without demand and without deduction or set-off, on or before the first day of each and every month during the term of the lease. Each installment of rent shall be paid at the address of Realtor or at such other place or manner as may be designated in writing by Realtor. The sum of $100.00 (Pd.) is hereby paid as a security deposit for the purpose of securing the prompt and faithful performance by Resident of all the obligations of this lease and return of the keys upon lease termination. The sum of $— is hereby paid as a non-refundable fee to Realtor for arrangement of premises inspections required by the local Minimum Housing Code.

The parties hereto, for themselves, their heirs, personal representatives, successors and assigns, covenant and agree as follows:

FIRST: Owner shall not be liable for failure to deliver possession of the premises herein leased at the stipulated time nor shall such failure excuse the Resident's obligation therein except that in event of delay the rent herein stipulated to be paid shall be abated for the period from the date of commencement specified in this lease to the day possession is tendered.

SECOND: Resident agrees that no persons other than those listed on the lease application shall be allowed to dwell in the premises without the prior written consent of Realtor for such occupancy.

THIRD: Resident agrees to arrange, in his own name, for utilities services, which are not provided by Owner, and agrees to promptly pay all bills for such utilities and telephone services incurred for said premises.

FOURTH: This lease may be terminated at any time by mutual consent of the parties hereto. Realtor or Resident may terminate this lease at high noon of the last day of any month during the term of this lease by giving notice in writing prior to the first day of the month in which termination is desired. Should Realtor give Resident one months notice in writing of its intention to change the terms of the lease and incorporates such terms in its notice and Resident holds over into another month, Resident shall be considered to have accepted the terms set forth in the notice and shall be considered a lessee under the new terms.

FIFTH: After notice of termination has been given by Realtor or Resident in accordance with this agreement, if Resident fails to surrender the premises at the end of the term he shall indemnify owner for all damages which Owner shall suffer by reason thereof and will indemnify Owner against all claims made by succeeding lessees against Owner founded upon the delay of Owner in delivering possession of the premises to said succeeding lessees, so far as such delay is occasioned by the failure of Resident to surrender the permises. And, Owner shall, at its option have the right to charge Resident as liquidated damages for the time such possession is withheld a sum equal to five times the amount of rent, or to treat such holding over as a renewal by Resident of the lease for another month with each and all the terms of this lease remaining in full force and effect for the renewal term.

SIXTH: All personal property placed on the leased premises or any other portion of the said building or any place appurtenant thereto shall be at the sole risk of Resident or the party owning the same and Owner shall in no event be liable for loss, destruction, theft or damage to such property. The cost of repairing any damage caused by the movement of Resident's personal property into and out of the building shall be paid by Resident.

SEVENTH: Resident shall pay the expense of replacing all glass and shall replace all keys lost or broken and shall keep the premises and the appliances, carpet, furnishings and equipment belonging thereto in good condition and repair. All repairs shall be made by Owner, its servants, or contractors approved by Owner. Such repairs due to normal use shall be at the expense of Owner. If due to neglect or misuse, such repairs shall be at Resident's expense. Resident shall notify Realtor promptly of any need of repairs to the premises, fixtures or furnishings. Resident agrees that at the termination of this lease or any renewal or extension thereof that he will deliver up the premises, fixtures and furnishings in as good condition as when received, ordinary wear excepted. It is specifically agreed that Resident shall be responsible for the expense of repair or replacement of carpet damaged by burns, stains or other cause. Owner shall not be liable for any damages arising out of the making of any repairs or failure to make the same, nor for any damage to persons or property of Residents or Resident's family, guests or employees or other persons upon the premises, or in the building at any time, however caused, whether through negligence or carelessness of an employee of Owner or otherwise.

EIGHTH: Resident shall not use or permit to be used the leased premises for any unlawful purpose or do or permit any unlawful act in or upon the leased premises, or other portions of the buildings and grounds. Resident covenants that he will so conduct himself as not to interfere with the rights, privileges, welfare and privacy of other occupants of the building. Resident shall not make or permit to be made any disturbing noises or commit any act which would reasonably interfere with the rights, comforts and conveniences of other occupants. Resident shall not play or allow to be played any phonograph, recorder, radio, television or other similar instruments in the leased premises before 8:00 o'clock a.m. or after 10:00 o'clock p.m. loud enough to disturb other occupants and shall not conduct or permit to be conducted vocal or instrumental practice or instruction at any time.

NINTH: Resident will not commit or permit to be done any immoral, illegal or criminal act in the leased premises or in any other portion of the buildings and grounds, and will conduct himself at all times in a proper manner as will his family, servants, employees and invitees, with due regard to the rights, privileges, welfare and privacy of the other occupants of the building. In the event the conduct of Resident, his family, servants, employees and invitees is, in the sole opinion of Owner or Realtor prejudicial to the interests of Owner and the rights, privileges, welfare and privacy of other occupants, then Realtor may terminate this lease at any time by serving upon Resident five days' written notice of its desire and intention to terminate this lease and upon the service by Realtor of such notice, this lease shall at the expiration of such five days cease and come to an end with the same force and effect as if the date stated in the notice was the date originally specified in the lease as the date of termination, without affecting the liability of Resident to Owner for any loss or damages suffered by Owner as a result of said breach, including loss of rents accruing after such termination.

TENTH: Resident shall make no alterations, additions, painting, decoration or improvements, or place any curtain rods, picture hangers, towel bars, clothes hooks, appliances, or items of like nature in or on the walls, floors, ceilings, cabinets, or doors, either inside or on the outside of the premises, or have a telephone installed in any other place than that designated for telephones; nor shall any awnings or other projections, except as installed by Owner, be attached to the building, and no blinds, shades, screens, attachment signs or any contrivance shall be attached to hang in or used in connection with any window or door of the premises; nor shall Resident install any radio or television aerial without the prior written consent of Realtor, and then only with materials and methods and by contractors or mechanics approved by Realtor.

All alterations or improvements placed within or without the leased premises by either of the parties shall become the property of Owner and shall be surrendered with the premises at the end of the term hereof. Resident shall be responsible for hanging appropriate window curtains or draperies as may be required; and, such installation shall be in strict compliance with installation and removal instruction as provided by Realtor.

ELEVENTH: Resident agrees that he will not obstruct hallways, stairs, sidewalks and other common areas with bicycles, waste cans or other personal property of any kind.

TWELFTH: No additional locks shall be placed upon any doors of the premises. Upon termination of this lease, Resident shall surrender to Realtor all keys to the premises.

THIRTEENTH: Owner shall be under no obligation to make any repairs whatsoever to the premises herein leased. Any repairs which Owner shall voluntarily make at Owner's expense at any one time and from time to time shall not be deemed a waiver of this agreement.

FOURTEENTH: If utilities services, kitchen appliances, heating and air-conditioning equipment and other services are furnished by Owner as conveniences to Resident, any temporary interruption, modification or discontinuance in the character of such services shall not be cause for damages or cause for termination of this lease or any reduction or rebate of the stipulated rent.

FIFTEENTH: The water closets and other water and sewer apparatus and fixtures shall not be used for purposes other than those for which they were designed and no sweepings, matches, rags, ashes, or other improper articles shall be disposed of therein. The cost of repairing any damage resulting from misuse of such facilities shall be borne by resident. Realtor reserves the exclusive right to select, or authorize the selection of, repair men required to repair such damage.

SIXTEENTH: Owner shall maintain a designated trash depository or area for use by Resident and other occupants. Resident agrees to place all trash and garbage in the depository. Garbage and trash cans shall not be kept in hallways or in common areas. Realtor shall have the right to impound any trash or garbage can or receptacle which is placed in hallways or common areas in violation of this regulation. Garbage disposalls may be provided for the disposal of wet garbage as instructed by the equipment manufacturer. The cost of repairs to the garbage disposall shall be borne by Resident; but, Realtor reserves the exclusive right to select or authorize the selection of repair men required to repair such equipment.

SEVENTEENTH: Resident shall adhere to provided instructions for the operation and use of the kitchen appliances and the heating and air conditioning equipment. Maintenance service on such equipment shall be performed only by repair men designated by Realtor. Resident shall bare the expense of any repairs necessary to such equipment due to the negligent operation or use thereof.

EIGHTEENTH: The failure of Owner or Realtor ro insist in any one or more instances upon a strict performance of any one or more of the rules and regulations herein set forth shall not be construed as a waiver or a relinquishment for the future strict performance of such covenants, rules and regulations, but the same shall continue and remain in full force and effect. The receipt by Realtor of rent, with knowledge of the breach of any covenent, rule and regulations hereof, shall not be deemed a waiver of such breach, and no waiver by Realtor of any provision hereof shall be deemed to have been made unless expressed in writing and signed by Realtor.

NINTEENTH: If storage space is provided by Owner to accommodate Resident in the storage of trunks or other articles, it is with the express understanding that the storage space is furnished at the sole risk of Resident and upon the express stipulation agreement that Owner shall not be liable for any loss, damage or injury whatsoever. Access to such storage space will be only at times as may be specified by Realtor and with the permission of Realtor. If an employee of Owner shall at the request of Resident or member of Resident's household move, handle, or store any such article in the storage space or remove any of the same therefrom, then and in every such case, such employee shall be deemed the agent of Resident, and owner shall not be liable for any loss, damage or expense that may be suffered or sustained in connection therewith.

TWENTIETH: Resident agrees to abide by the rules and regulations annexed to and made part of this lease, and such amendments, additions and modifications thereto as may from time to time be made by Realtor for the safety, comfort, convenience and welfare of the occupants, such rules and regulations be considered a part of this lease the same as if incorporated herein.

TWENTY FIRST: If Resident shall abandon the leased premises or quit and vacate the leased premises voluntarily or involuntarily, the same may be relet by Realtor, as agent for Resident, on such terms and conditions as Realtor may deem reasonable and advantageous; and, in the event of such reletting, Resident shall be and remain liable for any deficiency in rent and any expenses incident to such reletting as well as any damages which Owner may have sustained by virtue of Resident's use and occupation of the leased premises. Such damages shall include a fifty dollar reletting fee payable by Resident to Realtor.

TWENTY SECOND: Resident will, without any previous demand therefore, pay the rent at the time and in the manner herein provided. The time of payment of each monthly installment is made the essence of this agreement. Each and every installment of rent accruing under the provisions of this lease and all other sums of money payable hereunder by Resident shall bear interest at the rate of one and one half percent per month from the date when the same shall respectively become payable, under the terms of this lease, until the same shall be paid. If the rent is not received by Realtor on or before the first day of the month as due, a late charge of five dollars per day will be charged to Resident until the rent is received by Realtor. If the rent stipulated herein shall be at any time, in full or in part, be in arrears and unpaid, although no demand may have been made for the same, Owner may distrain or sue therefor. If Resident's check is returned by his bank to Realtor for insufficient funds or other reasons, a ten dollar bad check fee will be added to the rent due. If Resident shall fail to comply with any of the terms or conditions of this lease or notice under the terms hereof, or any rules or regulations herein or hereinafter adopted by Owner, Owner shall, in addition to other remedies provided by law, have the right and option to reenter and take possession of the premises at once either by force or otherwise, without being liable to any prosecution therefor, without further form or process of law, and such re-entry shall, at the option of Owner, constitute a termination of this lease. No such termination of this lease, however, nor recovering possession of the premises, shall deprive Owner of any other action or remedy against Resident for possession, for rent, or for damages. Upon enforcement of any provision of this section, Resident expressly waives all right to claim one months notice or other notice to quit or remove from the premises.

TWENTY THIRD: Resident shall not have the right to sublet, or offer to sublet, the leased premises or any part thereof, or to assign or transfer this lease without the written consent of Realtor. If subletting is arranged, Resident shall pay Realtor a fee of fifteen dollars for transfer services.

TWENTY FOURTH: Resident agrees to park his automobile only in designated parking areas. Only properly licensed vehicles will be allowed to remain in the parking areas. No trailers or boats of any type shall be placed or kept in the parking areas at any time. Motorcycles and motorbikes shall be kept on the premises only with the written consent of Realtor, and only in such area as may be designated by Realtor. Repairs, on the premises, of vehicles will not be permitted. Resident authorizes Realtor, at Resident's expense, to order the removal of any vehicle in violation of this section.

TWENTY FIFTH: Resident, in moving in and out, will not allow movers to drive vans or other vehicles over grass plots, curbs, or sidewalks. Resident will indemnify Owner for any damages caused by violation of this section.

TWENTY SIXTH: In the event that the leased premises are totally destroyed by fire, rain, wind or other cause beyond the control of Resident, this lease shall cease and terminate as of the date of such destruction. If the leased premises are injured by fire, rain, wind or other cause beyond the control of Resident, so as to render the same partially untentable or partially unfit for the use for which the same or hereby let, and are repairable within a reasonable time, then in the event, this lease shall remain in full force and effect, but there shall be an abatement in rent in the proportion that the damaged portion of the leased premises bears to the whole of said premises.

TWENTY SEVENTH: Realtor shall have the right at all reasonable times to enter the leased premises and inspect the same and to show the same to prospective tenants or purchasers. Realtor shall also have the right to enter the leased premises at all reasonable times to gain access to the mechanical equipment that is contained therein for the purpose of inspection, maintenance and repair of said equipment, or for any other lawful purpose.

TWENTY EIGHTH: In the event of the employment of an attorney by Owner or Realtor because of the violation by Resident of any term or condition of this lease, Resident shall pay all fees charged by such attorney. All notices and demands authorized or required to be given to Resident may be served upon Resident in person or by mail addressed to Resident at the leased premises or by deliverly of the notice or demands to the leased premises.

TWENTY NINTH: Realtor is authorized to charge any damages, occasioned by Resident's failure to fully and faithfully perform any of the terms, covenants, or conditions of this lease, against the security deposit paid by Resident. Resident agrees to leave the leased premises, appliances and furnishings, in a clean and orderly condition upon the termination of the lease, and failing to do so agrees to pay all cleaning expenses incurred to restore the premises appliances and furnishings to such condition. It is agreed that an inspection of the leased premises will be made by Realtor within a reasonable time after Resident vacates the premises and before occupancy by another party; and, within thirty days thereafter the security deposit or so much thereof that is unexpended for repair of damages, cleaning or other expenditures occasioned by the failure of Resident to perform the covenants and conditions of this lease, will be returned by mail to Resident.

THIRTIETH: Resident shall not keep, or allow to be kept, any dog, cat, or other animal or pet in the leased premises or anywhere on the property of Owner. Resident authorizes Realtor to order removal, at Resident's expense, of any animal or pet allowed on the leased premises in violation of this section. If such removal is required Resident shall pay Realtor a fee of fifteen dollars for arranging the removal; and, Resident shall pay Owner the full cost of exterminating the leased premises, and the building in which the leased premises are located, for fleas and insects as well as the cost to correct any damages which might have been caused by the animal or pet.

THIRTY FIRST: Resident has tendered this lease to Realtor on the basis of the representations contained in the application submitted by Resident to Realtor for the purpose of inducing Realtor to execute the lease agreement with Resident. In the event that any representations contained in the application shall be found by Realtor to be misleading, incorrect or untrue, Realtor shall have the right to forthwith cancel this lease and to repossess the leased premises.

THIRTY SECOND: The following utilities services are included in the rent: (NOTE: Each listed utility service must be initialed by Realtor)

+ heat and water furnished

WITNESS the following signatures and seals:

Realtor: G. ROY KELLEY REALTY COMPANY

By [illegible] (Seal)

Residents: Heidi Ann Sivecky (Seal)

(Seal)

The lease includes one pet - dog - 5 lbs
($200 pet deposit pd. 4-14-75)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY,
TRUSTEE, ETC., ET AL,

Petitioner,

AT LAW NO. L-73-298

v.

CITY OF PORTSMOUTH, a
municipal corporation,

Defendant.

ORDER

This cause came this day to be heard on the motion of the defendant, the City of Portsmouth, to have, in accord with the Rules of the Supreme Court of Virginia, Rule 5:9, the transcript of these proceedings made part of the record; and was argued by counsel;

And it appearing to the court that the testimony presented in this matter on December 13, 1976 was reported and transcribed by Leslie F. Jolly, Registered Professional Reporter, and same was filed with this court by the Defendant with letter of transmittal dated January 31, 1977 addressed to the Honorable R. Winston Bain, Judge of the Circuit Court of the City of Portsmouth, Virginia;

And it further appearing that by Order of this Court entered on April 21, 1977, that the transcription of the ruling of the Honorable R. Winston Bain, Judge was made a part of these proceedings:

WHEREFORE, it is ADJUDGED and ORDERED that the aforementioned transcriptions be and the same are hereby made a part of this Record.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY, Petitioner, vs. CITY OF PORTSMOUTH, VIRGINIA, Defendant	AT LAW NO. L-73-298

TRANSCRIPT OF TESTIMONY

Following is stenographic transcript of the testimony of Gordon Tayloe, Witness, taken in the above-entitled cause for the purpose of discovery, before Leslie F. Jolly, RPR and Notary Public, at the law offices of the City Attorney, One High Street, Portsmouth, Virginia, on the 22nd day of September 1976, at 2:00 p.m.

APPEARANCES: J. STANLEY LIVESAY, ESQ.,
SCHLITZ, LEVY & LIVESAY,
Counsel for Petitioner

STUART E. KATZ, ESQ.,
Assistant Attorney for the
City of Portsmouth

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GORDON TAYLOE, Witness called by Attorney for the Petitioner, having been first duly sworn, was examined and testified as follows:

EXAMINED BY MR. LIVESAY:

Q State your name, please.

A Gordon Tayloe.

Q What is your occupation?

A I am an attorney.

Q Where are you employed?

A As City Attorney of the City of Portsmouth.

Q Have you been so for what, a year?

A Believe it or not, it's almost a year and three-quarters.

Q Upon the Supreme Court of Virginia having decided the case of the City of Portsmouth vs. Citizens Trust Bank in the Court of Appeals, favorable to the City -- I forget when, but was it some time in the spring of 1976?

A I'm familiar with the decision.

MR. KATZ: I'm going to object to the question, and I should give you the courtesy to get the whole question out, but it sounds to me like you are asking for an expert opinion.

1 Are you willing to stipulate
2 this gentleman is an expert?
3 MR. LIVESAY: I am not
4 stipulating anything.
5 Q From that period, which was probably some
6 time in the spring of '76, which if any of the judges of
7 the Circuit Court of the City of Portsmouth have you
8 discussed the question of the rental tax of the City of
9 Portsmouth?
10 A I spoke on one occasion, I believe, with
11 Judge McMurran.
12 Q This was after the Supreme Court opinion?
13 A That's correct.
14 Q Any other judges of the court?
15 A Not that I remember.
16 Q What was the subject matter of your
17 discussion with Judge McMurran?
18 A I appeared before Judge McMurran with
19 Mr. Esleeck and discussed with him essentially what the
20 meaning of the definition -- of what the common law
21 definition of being in the business of rental property was.
22 Q Does this cause me to believe that Mr.
23 Esleeck didn't understand the common law definition of
24 doing business?
25 A I believe that whatever conversation that

I have had with Mr. Esleeck is a confidential relationship, and what he understands or does not understand has been given to me and it is privileged.

Q I would suggest to you that if you are claiming the attorney-client privilege, I thought you were the attorney for the City of Portsmouth; I didn't know you represented Mr. Esleeck; and if it is the attorney-client privilege, Mr. Esleeck is the one to assert it and not you.

A Until he has voluntarily waived it, I would suggest to you I would be breaking a confidence.

Q In other words, you refuse to answer the question?

A That's right.

MR. KATZ: I would object to this question because it calls for an opinion and not a statement of fact.

MR. LIVESAY:

Q Is it true that before going to talk with Judge McMurran, Mr. Esleeck had come to talk to you?

A On numerous occasions.

Q As to the application of the Supreme Court opinion to the persons and property subject to the rental tax?

A I again raise my attorney-client privilege, which if Mr. Esleeck wants to waive, he can.

Q Would it be true that your going to Judge McMurran was because you as an attorney had some question in your mind as to the common law definition of doing business?

A I have never had any problem with what the common law definition of being in business means.

Q Would you tell us what in your opinion doing business means under the common law?

A I would think that you were asking me as an expert in law.

Q I am asking you for an opinion of facts, not an opinion of opinion.

A Until you qualify me as an expert, I refuse to give my opinion.

Q Did you as a result of talking with Judge McMurran secure his factual determination of doing business?

A No, I did not.

Q Subsequent to you and Mr. Esleeck conferring with Judge McMurran, did you and Mr. Esleeck further confer amongst yourselves?

A We have had continuous conversations involving all matters which deal with the business of the

1 City and its potential revenue.

2 Q And I am speaking specifically now, of

3 course, as necessarily so, as to the rental tax ordinance.

4 A I have raised before and continue to do so

5 on a continuing basis, any communication I have had with

6 Mr. Esleeck --

7 Q Are you representing to me that you

8 represent Mr. Esleeck?

9 A I represent the Commissioner of the

10 Revenue when he seeks legal advice concerning City

11 Ordinances.

12 Q Do you give it to him?

13 A Yes. I am his attorney.

14 Q Subsequent to the ruling of the Supreme

15 Court in the cases we mentioned, have you discussed the

16 question of the definition -- of the common law definition

17 of doing business with the City Council of the City of

18 Portsmouth?

19 A I have an attorney-client relationship

20 with the Council of the City of Portsmouth, and so assert

21 it.

22 Q Have you discussed that same question with

23 the City Manager of the City of Portsmouth?

24 A I raise the same assertion.

25 Q Did you cause Mr. Esleeck to prepare or

1 did you help him prepare a questionnaire to send out to
2 certain persons or corporations who might be doing
3 business under the rental tax ordinance?
4 A I raise the same assertion.
5 Q Was such a paper sent out?
6 A I never sent any out.
7 Q I asked you was one sent out?
8 A I have no knowledge of it being sent out,
9 other than hearsay.
10 Q Did Mr. Esleeck at one time bring to you
11 a large number of such papers and ask your opinion on it?
12 A I assert I have an attorney-client
13 relationship.
14 Q Did you in fact, as Acting City Manager of
15 the City of Portsmouth, tell Mr. Esleeck not to tax a
16 certain party under the rental tax ordinance, and then
17 countermand that order within a day or two?
18 A I have no memory.
19 Q You are not asserting the privilege?
20 A I don't remember.
21 Q You don't recall acting as City Manager
22 during recent years?
23 A I do that every time the City Manager is
24 absent.
25 Q I ask you whether or not when you were acting

as City Manager, you issued a directive to Mr. Esleeck not to tax a particular person, and then countermanded it within several days?

A I don't recall it.

Q You don't deny it?

A I don't recall it.

Q You don't deny it?

A I don't recall it.

Q I assume that you read the local newspapers?

A On occasion.

Q Did you have occasion to read the paper of Sunday, June 6, 1976?

A I don't recall.

Q Have you ever discussed the subject matter that we have discussed just now with one Jack Dorsey of the newspaper?

A I have not.

Q You have not?

A I have not.

Q Have you discussed it with any reporter from the local newspaper?

A I have not.

Q So if Mr. Dorsey in the local newspaper quotes you as having said something about this rental tax ordinance, he is not telling the truth?

A If they quote me, they got it from a public City Council hearing, but not from an interview conversation.

Q I call your attention to Section I of the Ledger Star-Virginian Pilot, Sunday, June 6, 1976, where it is asserted that: "City Attorney Gordon B. Tayloe, who has been asked to render an opinion this week on just how the law should be applied, and Commissioner of the Revenue R. G. Esleeck, who will be trying to collect the revenue, have huddled over the issue for several weeks". Is Mr. Dorsey in the newspaper in error in reporting that fact?

A I have an attorney-client privilege with Mr. Esleeck, and I so assert my conversation and discussions with him.

Q Further in the article, the newspaper reporter says with reference to a Mr. Sullivan, "Sullivan's sentiments are actually shared by both Esleeck and Tayloe who agree the small property owner was never intended to be hurt by the tax." Do you have any idea how the newspaper reporter reached such a conclusion to put it in the paper?

A I do not.

Q Have you such a feeling, that a small property owner was never intended to be hurt by the tax?

A You are asking for my opinion?

Q Yes.

A As an expert?

Q No -- as a factual matter.

A I refuse to give it until I am qualified as an expert.

Q "Esleeck had asked Tayloe for an opinion, to which Tayloe answered that request last week, noting that the Supreme Court had defined that, 'being in the business at common law' is a 'course of dealing that requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit and implies a continuous and regular course of dealing."

"Tayloe's opinion went on to state that 'it has been contended by some taxpayers that the renting of one or two single family units or a duplex or triplex is an isolated transaction and cannot be considered a business.'

"I have considered this argument and conclude that a taxpayer who rents as many as ten dwelling units will be required to spend time, attention and labor on such endeavor. In addition, common sense dictates that any person who owns or rents as many as ten dwelling units will do it only if he is making a profit therefrom. Accordingly, I suggest that Section 20-104 of the Code of

1 the City of Portsmouth 1973, be administered as
2 presuming any person who owns ten or more dwelling units as
3 being in the business of renting residential property",
4 Tayloe said.
5 Has the newspaper quoted you accurately?
6 A I never spoke to the newspaper.
7 Q I asked you have they quoted you accurately,
8 to whomever you spoke?
9 A I have a legal-client privilege with
10 Mr. Esleeck.
11 Q Are you refusing to identify whether or not
12 you were quoted correctly at a public meeting which the
13 public newspaper refers to?
14 A I never gave that opinion at a public
15 meeting.
16 Q Where did you give it?
17 A I had conversations with Mr. Esleeck.
18 Q Was the newspaper man present?
19 A No, he was not.
20 Q Are you saying he has quoted you improperly
21 and falsely?
22 A If it was a conversation, he has, because
23 I never spoke to him on the subject.
24 MR. CATZ: For the purpose
25 of the record, I am going to object

1 to this line of questioning.
2 I don't think you have got the
3 best evidence in the public
4 newspaper. If you want to present
5 Mr. Dorsey of the newspaper to
6 give his account, then you may be
7 able to pursue interrogation under
8 this method.
9 MR. LIVESAY: Thank you for
10 your opinion.
11 Q Mr. Tayloe, did you ever see the article
12 that I have here in front of you?
13 A I have seen a similar-type article,
14 whether it is the same article, I'm not sure.
15 Q Did you call on the newspaper to retract
16 misquotations from you?
17 A They did not quote from me personally.
18 Q Did you call on them to retract anything
19 from the article I have been reading from?
20 A Since they did not quote me personally,
21 no, I didn't.
22 Q So your answer would be no, you didn't?
23 A The answer is what I gave.
24 MR. CATZ: Mr. Livesay, if
25 it is your intention to continue with

the very vein, I think my objection should be taken up with the Court.

MR. LIVESAY: I think it would be more orderly if all objections were taken up at one time.

Q I call your attention, if you will, to an article from the Virginian Pilot, Wednesday, June 9, 1975, and ask you if you are reading that article?

A I have seen it.

Q Now, this June 9, 1976 article, of course, this article didn't carry a byline of any particular reporter, but in it, it purports to say that, "Councilmen heard a plea", et cetera, and mentioned this Mr. Sullivan, and goes on to mention, "City Attorney Gordon B. Tayloe said that sentence outlined the landlord's right to challenge the assessment. 'Some people are not in business who own and rent real property', he said."

The newspaper has quoted you, and if I read the article correctly, they are quoting you in an open public meeting of the Portsmouth City Council.

MR. CATZ: For the purposes of the record, my objections will continue.

A I will answer that: Mr. Sullivan did appear at a City Council Meeting and did present a petition

seeking repeal of the ordinance. As far as any conversations that I made or quotes that I made, I don't recall them specifically and have no way of recollecting my thoughts because of no transcript being prepared of the meeting.

MR. LIVESAY:

Q May I say that you neither admit nor deny that you said in the public meeting of City Council, "Some people are not in business who own or rent real property"?

A I said I don't recollect.

Q Continuing in the article, it says, "Applying the provision to those only renting ten units or more are purely administrative", which can be abutted administratively. Did you say that?

A I don't recall.

Q Do you know what became of all these letters that were sent to various people to fill out forms and send them back to Mr. Esleeck as to how many units you had and what services you provided to the units, et cetera?

A You will have to ask Mr. Esleeck.

Q You have seen such forms, though, haven't you?

A I don't recall whether I have seen the

1 form or not.

2 Q Do you recall whether or not any person

3 who paid or was assessed a rental tax at any time by

4 the City of Portsmouth has been refunded or the tax

5 abated because it was determined that "He was not doing

6 business"?

7 A I don't know.

8 Q You don't know. Who would have the

9 authority to decide whether or not I or any of my

10 clients were "doing business" with respect to the rental

11 tax ordinance?

12 A I can only tell you, Mr. Livesay, that

13 the person who administers and collects taxes is the

14 Commissioner of Revenue.

15 Q Are you saying it would be his job,

16 prerogative and whatever to make that determination?

17 A It is my understanding of the law that

18 is what his job is.

19 Q And if the person was thought to be in

20 business by the Commissioner, he has a prerogative of

21 challenging that under the Code Section 58-whatever it

22 is, does he not?

23 A That's the procedure.

24 Q And likewise, if the Commissioner of

25 Revenue decided the matter adversely to the City of

Portsmouth, in your opinion, it would be your duty to do the same thing, to challenge him in court?

A I have never researched it as to whether I have that authority or not.

MR. LIVESAY: I have no further questions. Do you have any, Mr. Katz?

MR. KATZ: I have no questions.

MR. LIVESAY: Do you waive your signature to the deposition?

A I do.

* * * * * * * * *

* * * * * * * * *

STATE OF VIRGINIA AT LARGE,

CITY OF PORTSMOUTH, to-wit:

I, Leslie F. Jolly, RPR and Notary Public, do hereby certify that the foregoing deposition of Gordon B. Tayloe, Witness, was duly taken and sworn to before me at the time and place and for the purpose in the caption mentioned; that signature thereto and filing thereof were waived.

Given under my hand this 30th day of September 1976.

My commission expires December 3, 1977.

Leslie F. Jolly, RPR and Notary Public

* * * * * * * * *

Repeal of Rental Tax Asked by Civic League

VIRGINIAN-PILOT JUN 9 1976

PORTSMOUTH—Councilmen heard a plea for repeal of a rental property license tax Tuesday from a civic league representative who argued that the fees were placing a hardship on elderly homeowners using rentals to supplement fixed incomes.

"I realize that the city needs revenue," Leland L. Sullivan of the Port Norfolk Civic League said. "And I realize that your real target is not the small landowner. But regardless of your intent, the small landowner and the tenant are the ones who are going to be hurt."

Sullivan was objecting to a provision of the license tax ordinance that requires landlords to pay a $12 annual tax on each rental unit. The fees had gone uncollected for the last two fiscal years as the result of court suits against it.

In March, the Virginia Supreme Court ruled Portsmouth's version of the rental tax was valid, reversing an earlier Portsmouth Circuit decision.

City officials then began discussions of how to apply their reclaimed tax law, according to City Manager Robert T. Williams, and just recently decided to impose it on landlords renting 10 or more units.

Letters stating the city's intent of collecting two years worth of the tax were mailed to landlords in April. The letters included a sentence suggesting that if any landlord did not believe that he came under the legal definition of being "engaged in the business" of renting residential property, he should give reasons to the commissioner of the revenue why he should be exempt from paying the tax.

City Atty. Gordon B. Tayloe said that sentence outlined the landlord's right to challenge the assessment. "Some people are not in business who own and rent real property," he said.

Applying the provision only to those renting 10 units or more is purely an administrative guideline, "which can be rebutted administratively."

Williams said the idea of assessing only landlords with a large amount of rental property was arrived at last week in an effort to spare hardship on elderly people or others on fixed incomes. He said a numerical, "as in dollars," assessment plan is still under consideration.

Port Norfolk group pushes for repeal of rental tax law

VIRGINIAN-PILOT
JUN 6 1976

By JACK DORSEY

PORTSMOUTH — The City Council this week is to hear from a group of Port Norfolk residents who want an unsettled and unpopular rental tax ordinance repealed.

Leonard L. Sullivan, a member of the Port Norfolk Civic League, said he plans to ask council at its Tuesday night session to get rid of the law that burdens the small property owner.

Portsmouth is the only city in the state to have such a tax now.

Called a rental residence tax, the city attempts to charge $12 annually for each dwelling unit rented in the city. In the past the tax has meant as much as $96,000 a year to the city, but lately, because of court decisions that have seesawed the validity of the law, the tax revenue has been much less.

City Atty. Gordon B. Tayloe, who has been asked to render an opinion this week on just how the law should be applied, and Commissioner of the Revenue R. G. Esleeck, who'll be trying to collect the revenues, have huddled over the issue for several weeks.

Portsmouth's law is a three-year-old version of a former tax ordinance once used by other cities until it was challenged in Norfolk in 1970. Although upheld there, the decision was reversed by the Virginia Supreme Court Jan. 22, 1971 and declared void.

The Norfolk ordinance, which Tayloe found himself defending as a city attorney assistant there, provided for a $50 tax on persons who owned four rental units and a $12 tax for each additional unit they owned. Persons owning less than four rental units did not pay the tax.

As other cities, including Portsmouth, watched the path the Norfolk ordinance was taking, Portsmouth decided to amend its orginiual ordinance by eliminating the "four or more" clause and subjecting all persons who owned rental property to the tax.

Portsmouth's ordinance, in 1973, was then challenged in Portsmouth Circuit Court where Judge Robert F. McMurran declared the law void. The city was ordered to pay back the taxes it had collected. That year Portsmouth had collected $83,000 in rental taxes, Esleeck said.

Portsmouth appealed to the Virginia Supreme Court.

Meanwhile, the General Assembly got involved in the controversy and attempted to pass a bill that would disallow any license tax on rental property.

The legislators didn't pass the law exactly that way because they inserted a grandfather clause that permitted such an ordinance if it had been on the city books prior to 1974.

Meanwhile, other cities began repealing similar ordinances. But, since Portsmouth had amended its previous law, it kept the city legislation and became the only locality in the Commonwealth to still have the ordinance today.

After Tayloe came to Portsmouth as city attorney, he obtained a writ of error from the Virginia high court involving Judge McMurran's ruling and succeeded in having McMurran's earlier decision overturned.

The Portsmouth law suddenly was valid once again.

According to Esleeck, during all this court litigation, the would-be taxpayers got wise and didn't pay the tax. In fact, he said the city didn't attempt to even collect it in 1975.

What had been an $96,000 source of revenue in 1973 dropped off to a $43,000 revenue in 1974 and nothing in 1975, Esleeck said.

But the revenue commissioner said Friday that, armed with Tayloe's latest opinion on the matter, he will now begin efforts to recoup the taxes landlords owe the city from 1974, 1975 and obviously 1976. The taxes were due May 1.

Sullivan, whose Port Norfolk community has a number of widows and other landlords with small rental holdings, feels the tax is unfair.

Con't from pg. 171

"We will ask the City Council to repeal the law on the grounds we consider it inequitable. It hurts the small property owner and many of those on pensions who have to pay the higher costs to absorb the $12 tax," Sullivan said.

Sullivan's sentiments are actually shared by both Esleeck and Tayloe who agree the small property owner was never intended to be hurt by the tax. But they emphasize that it's their job to follow the law and collect the taxes owned the city.

Esleeck had asked Tayloe for an opinion concerning who would be in the business of renting residential property as defined in common law.

Tayloe answered that request last week noting that the supreme court has defined that "being in the business at common law" as "a course of dealing that requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit, and implies a continuous and regular course of dealing."

Tayloe's opinion went on to state that "it has been contended by some taxpayers" that the renting of one or two single-family units, or a duplex, or triplex is an isolated transaction and cannot be considered a business.

"I have considered this argument and conclude that a taxpayer who rents as many as 10 dwelling units will be required to spend time, attention and labor on such endeavors.

"In addition, common sense dictates that such a person who owns and rents as many as 10 dwellings units will do it only if he is making a profit therefrom.

"Accordingly, I suggest that section 20-104 of the Code of the City of Portsmouth 1973, be administered as presuming any person who owns 10 or more dwelling units as being in the business of renting residential property," Tayloe said.

"I just don't think these kind of people should be taxed, or licensed," he said. Esleeck said he was "all for it" for those who are actually in the business of renting property.

However, some observers believe that Tayloe's ruling concerning taxpayers owning less than 10 units is no different than the orignial Norfolk and Portsmouth law exempting those owning less than four rental units.

If there is no difference, then the entire matter could once again be thrown back into the courts.

The courts earlier ordered the city to return the tax money it had collected, once the law was declared invalid. But the city finally won that case. If it begins collecting the tax again and looses another court battle, the city may be forced to again pay back a portion of the revenues.

Esleeck said he sent landlords a letter advising them of the Virginia Supreme Court's recent decision. He asked them to reply if they felt they were not in the business of renting property and that he would consider their remarks.

"I got quite a few responses," he said. "They came back in basically two categories—the widow trying to stay off food stamps and welfare and from attorneys representing clients representing one, two, 10 and 20 units who claim they aren't in the rental business either.

"It's an impossible thing," Esleeck said.

CITY OF PORTSMOUTH

1976-47

June 3, 1976

Interdepartmental Correspondence Sheet

TO: Robert G. Esleeck, Commissioner of Revenue

FROM: Gordon B. Tayloe, Jr., City Attorney

COPIES TO: Honorable Mayor and Councilmen of the City of Portsmouth

SUBJECT:

Dear Mr. Esleeck:

As a result of the Supreme Court of Virginia decision in the case of City of Portsmouth v. Citizens Trust Company, Etc., et al, 216 Va. _____ (1976), you requested an opinion from me concerning who is in the "business of renting residential property" as defined at common law.

The Supreme Court has defined being in the business at common law as "a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit and implies a continuous and regular course of dealing, rather than an irregular or isolated transaction ...." See Slip Opinion at page 2.

It is contended by some taxpayers that renting of one or two single family dwelling units, or a duplex or a triplex, is an isolated transaction and cannot be considered as a business.

I have considered this argument and conclude that a taxpayer who rents as many as ten (10) dwelling units will be required to spend time, attention and labor on such endeavor. In addition, common sense dictates that such a person who owns and rents as many as ten (10) dwelling units will do so only if he is making a profit therefrom.

Accordingly, I respectfully suggest that Section 20-104, Code of the City of Portsmouth, 1973, be administered as presuming any person who owns 10 or more dwelling units as being in the business of renting residential property.

I hope this letter will satisfactorily give you a criterion to determine what persons are engaged in the business of renting residential property.

Very truly yours,

Gordon B. Tayloe, Jr.

Gordon B. Tayloe, Jr.
City Attorney

GBTjr/ms