Witness Subpoena

Commonwealth of Virginia:
County of Rockingham, to-wit:

To the Sheriff of said County, Greeting:

You are hereby commanded, in the name of the Commonwealth of Virginia to summon George G. Shiflett

to appear before The County Court of said County, sitting at Harrisonburg, Virginia, in said County, on the 21st day of January, 1957, at the hour of 2 P.M. of that day to give evidence in behalf of Com'th

in the pending case of Com'th

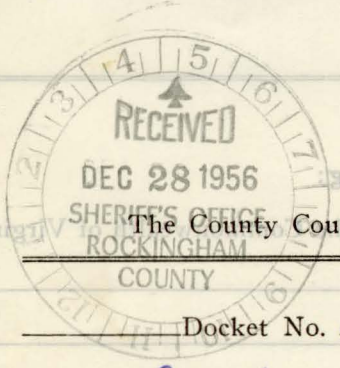
v. Robert S. Jenkins

Given under my hand this 28th day of Dec, 1956

Ada C. Swartz

~~Clerk~~
Asst. Clerk

6-56-5M-Garrison



The County Court

Docket No. 22632A

Com.th

V. (Witness Subpoena

Robert S. Jenkins

To January 21, 1957 10 AM

EXECUTED 1-2-57 IN THE COUNTY OF ROCKINGHAM BY DELIVERING A TRUE COPY OF THE WITHIN Summons TO George Shifflett IN PERSON.

A. L. STRAWDERMAN
SHERIFF
ROCKINGHAM COUNTY

by Deputy Sheriff

TRIAL JUSTICE COURT

Criminal Docket **No 22632 A**

#3393

Com'th

V.

Robert S. Jenkins
Defendant

R.W. Appearance Date 12-21-56

Trial Date 1-21-57

To- 3-4-57 2: P.M.

Under advisement

3-31-58

4/10/58

Appeal-Noted, GRANTED - 3-31-58 DRG. Judge

Mr. C. E. Enos to file Memorandum. 4-4-57.

Under advisement 3-4-57

DRG. Judge

Comp. Form 18

STATE OF VIRGINIA
COUNTY OF Harrisonburg
City

To-Wit: No.

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, George G. Shiplett

has this day made complaint and information on oath before me, John G. Leake (Name)

Justice of The Peace (Title) of the said City County, that Robert S. Jenkins in the said Rockingham County

did on the 16th day of October, 19 56: Unlawfully exhibit for compensation without a license as required by Section 58-272 of the 1950 Code of Virginia, certain birds, snakes and wild animals in violation Section 58-271 of the 1950 Code of Virginia, against the peace and dignity of the Commonwealth of Virginia

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Rockingham Trial Justice Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon

_____ color _____ Address _____ ☐

_____ color _____ Address _____ ☐

_____ color _____ Address _____ ☐

_____ color _____ Address _____ ☐

_____ color _____ Address _____ ☐

as witnesses.

Given under my hand and seal, this 17th day of December, 19 56

John G. Leake (Seal)
(Title of Issuing Officer)
JUSTICE OF THE PEACE

STATE OF VIRGINIA—COUNTY OF Rockingham, to-wit:

I, Richard M. Moore a Judge of the County Court Trial Justice Justice of the Peace in and for the County aforesaid, State of Virginia, do certify that Robert S. Jenkins and Mrs. Earl S Jenkins, as his suret We, have this day each acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Two Hundred and Fifty and ~~no~~ Dollars ($ 250.00), to be made and levied of their respective goods and chattels, lands, and tenements to the use of the Commonwealth to be rendered, yet upon this condition: That the said Robert S. Jenkins, shall appear before the ~~Circuit~~ Trial Justice Court of Rockingham County, on the 21st day of Dec., 1956, at 2:00 P. M., at Harrisonburg, Virginia, and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court; and upon the further condition that the said Robert S Jenkins shall keep the peace and be of good behavior for a period of ____ days from the date hereof. Nonappearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand, this 19th day of Dec 1956.

Richard M Moore Judge ~~Trial Justice~~ J.P.

Bond Dec. 21-2PM

DOCKET NO. 22632-A

COMMONWEALTH

vs.

WARRANT OF ARREST

Robert S. Jenkins

New Market

Executed this, the 19 day of Dec, 1956, by Lucy S. Sheetz, Const. SDE

Upon the examination of the within charge, I find the accused not guilty. Given under my hand this 21 st day Dec. 1956.

Richard M. Moore

Judge Trial Justice

Upon the examination of the within charge, I find the accused guilty. Given under my hand this 31 st day Dec. 1956.

Richard M. Moore

Judge Trial Justice

Fine $ 10.00

Costs $ 1-21-57 2:P.M.

Total $ Nol Pr.

The following witnesses were recognized to appear before the ~~Circuit~~ Trial Justice Court of ____ County, Virginia, at ____, Virginia, on the ____ day of ____, 19__, at ____ M., on the ____ day of ____, 19__, under penalty of $ ____

COSTS

Warrant	$ 1.00
Trial	2.00
Bail	1.00
Arrest	Free.
Mileage	1.08
Clerk	1.25
Jail Fee and Board	
Witness Attendance	
Summoning Witnesses	.50
Commonwealth Attorney	5.00
Total Costs	$ 11.83
Fine	
Total	$

APR 1958

Docket No. 3393.

COMMONWEALTH of VIRGINIA

VS.) Misdr. (appeal) by Atty. for Commonwealth

ROBERT S. JENKINS

George S. Aldhizer II p. d.

Own (x) Appointed ( )

1958
April 10. Docketed.

May 2 v. Case submitted to court on oral Stipulation of facts; defendant found guilty & $50.00 fine. 10/55.

Penalty 10.00
Court 6.25
T. T. 2.00
Clerk 1.00 1.00
Sheriff

CIRCUIT COURT OF ROCKINGHAM COUNTY, VA.

Keystone Envelope Co., Phila., Pa.

IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY, VIRGINIA:

Commonwealth

v.) Memo. of Opinion

Robert S. Jenkins

After acquittal of defendant in County Court on warrant charging the exhibiting of certain birds, snakes, and wild animals for compensation without a license, under Sections 271 and 272 of Title 58 of the Code of Virginia, the Commonwealth appealed, as is permitted in revenue cases.

Conceding that the accused was in fact publicly operating such a display of tropical birds and reptiles for a fixed price of admission, the case was submitted by the parties to the Court for decision, without a jury, on the limited question of law as to whether or not the statute mentioned is broad enough to include in its application such an enterprise as a "Snake farm".

Section 271 of Title 58 reads as follows:

> "No person shall, without a license authorized by law, exhibit for compensation any theatrical performance or any performance similar thereto or any panorama or public performance or exhibition of any kind* * *."

In addition to providing expressly for a license tax on theatrical performances "or performances similar thereto", the statute also expressly subjects to such license "any panorama or public performance or exhibition of any kind."

IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY, VIRGINIA:

COMMONWEALTH

v.) Memo. of Opinion

Robert S. Jenkins

After sedulous of deliberance in County Court on motions
overruling the exhibiting of certain pleas, snakes, and writ animals
for compensation without a license, under Sections 512 and 513 of
Title 58 of the Code of Virginia, the Commonwealth appealed, as
is permitted in revenue cases.

Counsel for the accused was in fact buffalo obersc-
ration on the appellate such as entertains as a "Snake Item."

Section 513 of Title 58 reads as follows:

"No person shall, without a license authori-
zed by law, exhibit for compensation any
theatrical performance or any performance
similar thereto or any panorama or buffle
performance or exhibition of any kind* * *."

In addition to provisions expressly for a license tax on
theatrical performances "or performances similar thereto," the
statute also expressly applies to such license "any panorama or
buffle performance or exhibition of any kind."

There can hardly be any question that a snake farm, bird or animal exhibit, so operated, constitutes an exhibition within the usually accepted meaning of that word. "Exhibitions", as used in licensing ordinance, relate only to entertainments where the exhibition itself is the principal thing, and from which the exhibitor derives or expects to derive profit - a place where the public attends for the purpose of seeing the exhibits. 3 Words and Phrases 2584.

The operation of such a sweeping clause is not to be restricted by an application of the maxim "ejusden generis" nor by the rule of "noscitur a sociis", where from the whole enactment a larger intent may be gathered. Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70, where city ordinance provided for licensing of theatres, shows, amusements, and all other public exhibitions for gain. Held, to include race track for horse races, to which public was admitted for fixed price.

In the Virginia case of Harris v. Com., 81 Va. 240, the accused, who was prosecuted for a like violation, operated a skating rink, for which there was an admission charge of ten cents that entitled each admission to the privilege of skating, with an additional charge of ten cents if rink skates were hired for use. Some visitors, who did not skate, attended as spectators. The majority opinion of a divided court (3-2) Held, the Harris rink was not within the application of such license law, because it was not shown to be conducted as a public performance or exhibition.

If the first ten cents in the Harris case did not include the skating privilege, but merely the privilege of watching as a spectator the amateur skaters present, I have no doubt but what such showing would have been held to constitute a public performance or exhibition and, as such, subject to the license tax in question.

The accused is accordingly found guilty of the violation charged, and fined Fifty Dollars ($50.00).

Hamilton Haas, Judge

May 16, 1958.

VIRGINIA: IN THE CIRCUIT COURT OF SHENANDOAH COUNTY

COMMONWEALTH OF VIRGINIA

v.

THE VIRGINIA LIVE FUR PARADE, INCORPORATED

and

COMMONWEALTH

v.

FRANK B. CHILDRESS

OPINION

Both of these cases involve substantially the same facts and questions of law and can be combined for the purpose of this opinion

Each of the defendants operates a wild animal exhibit in Shenandoah County. Although it is contended that the operations have some educational value and school children are admitted free of charge, there is no question that profit is the main purpose. The animals are confined for display in cages or other enclosures. The spectators pay a fee for admittance and, unaccompanied by guides, pass by the cages viewing the animals, which are totally untrained. There is no performance of any kind. These businesses have been in existence for some years and there has been no attempt to exact from them the license fees required by Code Secs. 58-271 and 272 until 1956, when demand was made and upon refusal criminal warrants were issued against the defendants.

The defendants moved to strike out all of the evidence on the ground that

it has not been shown that their businesses are included under the provisions of the statutes in question.

Chapter 7 of the Tax Code now provides for State licensing of almost every conceivable business enterprise, the main purpose being the collection of revenue. The Code Sections in question are contained under Taxation, Article 2, which is entitled "Amusements."

Both of these sections were included in the original licensing act of 1884, Acts 1883-4, p. 593. The language is almost identical. In fact we can find no changes which would alter the construction which is required in these proceedings.

"Theatres.

"80. No person shall, without a license authorized by law, exhibit for compensation any theatrical performance, or any performance similar thereto, panorama, or any public performance or exhibition of any kind, lectures, literary readings and performances, except for benevolent or charitable purposes. Whenever a theatrical performance shall be licensed, the actors acting thereat under the license shall be exempt from an assessment; but unless the performance shall be so licensed, each person engaged therein shall be liable to the penalty for the violation of this section."

In the same Act, p. 594, we find immediately following a requirement for the licensing of menageries.

"Shows, Circuses and Menageries.

"82. No person shall, without a license authorized by law, exhibit any show, circus performance, or any menagerie or such like exhibition or performance; but this section shall not be construed to prohibit a resident mechanic or artist from exhibiting any production of his own art or invention without compensation. Whenever such show, exhibition or performance, circus or menagerie shall be licensed, those engaged therein and operating under the license shall be exempt from a license tax for performing or acting thereat."

There can be no doubt that the businesses in question would have been subject to license under the provisions of Secs. 82, 83 and 84 and not under Secs. 80 and 81 (Acts 1884). Webster defines the word menagerie:

> "1. A collection of wild or strange animals kept in cages or enclosures, especially for exhibition.
> 2. A place where such animals are kept." (Webster's New Twentieth Century Dictionary, 2nd Ed. Unabridged.)

Section 82 remained essentially unchanged until 1910 when it was amended as to the pertinent portion as follows:

> "107. Every person, firm, company or corporation who exhibits or gives performances in a side show, dog and pony (or either) show, trained animal show, circus, menagerie and circus, or any other show, exhibition or performance similar thereto, shall procure a license therefor....." (Acts 1910, p. 387)

As we have observed, it is obvious that prior to 1910 a menagerie not operated in conjunction with a circus and involving no "performances" would be subject to the license, but the 1910 amendment unquestionably excluded such enterprises. The probable reason is that almost no menageries were operated independently of a circus, and the tax was so high as to render such a business unprofitable. Whatever the reason the legislature excluded businesses such as those in the instant case.

The present statute, Code Sec. 58-276, is in substantially the same language as the 1910 Act, and, for the same reason, the defendants' businesses are not covered thereunder.

Could it be said that the legislature, by its exclusion of independent menageries under the Code Section specifically designed for them, intended to include them under the theatre licensing provision? Such a purpose is conceiv-

able, but extremely unlikely. A menagerie is remotely akin to a theatre, but once the legislature singled it out for special treatment in a separate category with circuses and like amusements, the mere fact of its elimination from that category would not carry with it the design to include it in another, especially in view of its much closer relationship to the members of the class from which it has been excluded.

The probable key to the problem is that both Code Secs. 58-271 and 276 contemplate only amusements involving active performances or, at least, some human activity of some character. In both sections each of the enumerated businesses involves either some kind of acting, reading or manual operation. Even a panorama (271) involved a person who shifted the scenes in the machine producing the panoramic display, and an interlocutor or lecturer who identified and explained the significance of the views displayed.

The only phrase contained in Sec. 58-271 which might conceivably be construed to cover a menagerie involving no performance is "or exhibition of any kind." The menageries involved in these cases are, of course, "exhibitions" in the broad sense of the word. But the phrase "exhibition of any kind" may not be taken in its general sense to include any businesses not possessing the characteristics of those specifically included in the statute. The rule of ejusdem generis and the broader maxim noscitur a sociis, of course, apply in the construction of all statutes. As to penal statutes the unquestioned rule of strict construction against the Commonwealth requiring the resolving of all un-

certainties in favor of the defendants requires special scrutiny of the specifically described subjects of the statute to determine whether the defendants' businesses were intended to be included in the general language following. In this connection it should be noted that the word performance is used four times in the sentence describing the businesses subject to license; in fact, as we have observed, every business specifically named expressly involves a performance except a "panorama" which requires something closely akin thereto. If the term "exhibition of any kind" does not require a performance or at least a human act or manipulation of some kind during the exhibition it is the only instance contemplated by the statute.

For these reasons I am of the opinion that the defendants' businesses are not included in those contemplated under the licensing statutes in question and I will enter judgment of not guilty in each prosecution.

I have not cited any authorities for the principles which I have enunciated because of their universal and unquestioned recognition. There are no Virginia cases specifically in point, but, of course, many which unanimously support the rules and maxims of construction which have been applied.

_____
Judge of the Circuit Court of
Shenandoah County

March 29, 1957

March 25, 1921

_____
Name of the Grantee Corporation
by
Authorized Officer

Attest:

Secretary

[illegible]

The Grantee hereby covenants and agrees that it will not use the premises described in the aforesaid license for any purpose or purposes other than those specifically set forth in the said license, and that no construction which may be made under the said license shall be used for any purpose other than that specifically set forth in the said license, unless the Grantee shall have first obtained the written consent of the Grantor to such other use or purpose, and to such construction as may be required therefor.

The Grantee further covenants and agrees that it will not assign the said license, nor any interest therein, nor any of the rights or privileges thereby granted, without first obtaining the written consent of the Grantor to such assignment.

The Grantee further covenants and agrees that it will not sell, assign, transfer or convey the said premises described in the said license, nor any part thereof, without first obtaining the written consent of the Grantor to such sale, assignment, transfer or conveyance, and that any such sale, assignment, transfer or conveyance made without such consent shall be void and of no effect.

The Grantee further covenants and agrees that it will not permit the said premises described in the said license to be used for any purpose or purposes other than those specifically set forth in the said license, without the written consent of the Grantor first had and obtained, and that any use of said premises for any purpose or purposes other than those specifically set forth in the said license, without such consent, shall be void and of no effect.

The Grantee further covenants and agrees that it will not erect, maintain or permit any structure or thing upon the said premises described in the said license which may interfere with the navigation of the waters of the Chicago River, or with the proper use of the said premises for the purposes specified in the said license; and that it will remove any such structure or thing which may be so erected, maintained or permitted, upon the written request of the Grantor, its successors or assigns, and will restore the said premises to the condition in which they were before the erection of such structure or thing.

The Grantee further covenants and agrees that it will not at any time hereafter make any claim against the Grantor, its successors or assigns, for any loss or damage which it may sustain by reason of the termination of the said license, or by reason of the exercise by the Grantor, its successors or assigns, of any of the rights or powers reserved to the Grantor in the said license, or by reason of any action taken by the Grantor, its successors or assigns, in pursuance of any of the rights or powers reserved to the Grantor in the said license.

The Grantee further covenants and agrees that it will indemnify and save harmless the Grantor, its successors and assigns, from any and all claims, demands, costs, expenses, losses, damages and liabilities which may arise out of or be connected with the exercise of the rights and privileges granted by the said license, or with the construction, maintenance, repair, use, operation, condition or dismantling of the premises described in the said license, or with any act or omission of the Grantee, its agents, servants, employees, licensees or invitees, or with any accident, injury or damage occurring to any person or property upon the premises described in the said license, or upon any of the approaches thereto, from any cause whatsoever, and will pay all judgments rendered against the Grantor, its successors or assigns, in any suit or proceeding which may be brought against the Grantor, its successors or assigns, on account of any such claim, demand, cost, expense, loss, damage or liability, and will pay all expenses and attorneys' fees incurred by the Grantor, its successors or assigns, in connection with any such claim, demand, suit or proceeding, or in connection with any appeal thereof.

The Grantee further covenants and agrees that it will, at its own cost and expense, maintain and repair the said premises described in the said license, and every part thereof, in a good and workmanlike manner, and will keep the said premises described in the said license, and every part thereof, in a safe condition, and will make all necessary renewals, replacements, alterations, additions, betterments and improvements thereto, so that at all times the said premises described in the said license, and every part thereof, shall be in a safe condition and good repair, and in compliance with all applicable laws, ordinances, regulations, orders and requirements of all federal, state, county and municipal authorities now or hereafter in force, and with the rules and regulations of the Board of Underwriters of the Pacific Fire Rating Bureau, or any other body exercising similar functions which may hereafter be created, and will indemnify and save harmless the Grantor, its successors and assigns, from any penalty or damage or charges imposed for any violation of any such laws, ordinances, regulations, orders, rules or requirements, whether occasioned by the neglect of the Grantee or those holding under it, and will at all times

VIRGINIA: IN THE CIRCUIT COURT OF SHENANDOAH COUNTY

COMMONWEALTH OF VIRGINIA	
v.	Appeal From Shenandoah County Court
THE VIRGINIA LIVE FUR PARADE, INCORPORATED	

MEMORANDUM OF AUTHORITIES

The Virginia Live Fur Parade, Incorporated, a Delaware corporation, admitted to do business in Virginia, 1955 and 1956 maintained and operated a place of business on U. S. Highway No. 211, east of New Market, in Shenandoah County, Virginia, where it kept in captivity, pursuant to a permit issued by the Commission of Game and Inland Fisheries of the State of Virginia, game birds and animals. A copy of the permit under which the corporation was permitted to hold such birds and animals in captivity was filed with the Court as "Defendant's Exhibit A". It will be recalled that Mr. Alfred B. Eichleman, Treasurer of the corporation, testified that this was the first such permit to be issued by the Commission and to the best of his knowledge and belief the only one now outstanding. It will be further observed that the permit authorizes the holding of game birds and game animals in captivity only under the following conditions, inter alia:

"(1) Game birds and animals be exhibited only by an individual or a corporation incorporated for the specific and primary purpose of operating a quality animal exhibit, educational in scope. (italics ours)

"(2) That all individual Virginia school children under the age of twelve and all Virginia organized youth groups, such as Boy and Girl Scouts, school classes, Sunday School groups, etc., appearing as a group, be admitted free. * * *

"(5) That the exhibit include representatives of all major animal groups, such

WHARTON, ALDHIZER & WEAVER
ATTORNEYS AT LAW
HARRISONBURG, VA.

HARRISONBURG, VA.
ATTORNEYS AT LAW
& MEAVEY
WHARTON, ALDHIZER

VIRGINIA: IN THE CIRCUIT COURT OF SHENANDOAH COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	Appeal from Shenandoah County Cont
	)	
THE VIRGINIA LIVE FUR FARADE, INCORPORATED	)	

MEMORANDUM OF AUTHORITIES

The Virginia Live Fur Parade, incorporated, a Delaware corporation, admitted to do business in Virginia, 1952 and 1959 maintained and operated a place of business on U. S. Highway No. 211, east of New Market, in Shenandoah County, Virginia, where it kept in captivity, pursuant to a permit issued by the Commission of Game and Inland Fisheries of the State of Virginia, game birds and animals. A copy of the permit issued with the Court as "Defendant's Exhibit A." It will be recalled that Mr. Alfred B. Fichtenau, Treasurer of the corporation, testified that this was the first such permit to be issued by the Commission and to the best of his knowledge and belief the only one ever outstanding. It will be further observed that the permit authorizes the holding of game birds and game animals in captivity only under the following conditions, inter alia:

"(1) Game birds and animals be exhibited only by an individual or a corporation incorporated for the specific and primary purpose of operating a quality animal exhibit educational in scope. (Italics ours)

"(3) That all individual Virginia school children under the age of twelve and all Virginia organized youth groups, such as Boy and Girl Scouts, school classes, Sunday School groups, etc., appearing as a group be admitted free. * * *

"(2) That the exhibit include representatives of all major animal groups, such

as furbearers, grazing and browsing animals, carnivors, and marsupials, but no reptiles."

On October 4, 1956, H. A. Martindale, State License Inspector, caused a warrant to be issued against The Virginia Live Fur Parade, Incorporated, alleging that the defendant, on the 15th day of August, 1956, and various other dates, operated a licensable business and failed to buy a State Exhibition License in violation of Section 58-271 of the Code of Virginia.

From a decision of the Shenandoah County Court trying the warrant, which dismissed the warrant, the Commonwealth of Virginia appealed.

I. THE LAW IN QUESTION

Section 58-271 of the Code of Virginia reads as follows:

> "No person shall, without a license authorized by law, exhibit for compensation any theatrical performance or any performance similar thereto or any panorama or public performance or exhibition of any kind or give any lecture, literary reading or other performance, except for benevolent, charitable or educational purposes. Whenever a theatrical performance shall be licensed, the actors acting thereat under license shall be exempt from a license tax; but unless the performance shall be so licensed, each person engaged therein shall be liable to the penalty for the violation of this section. Every license shall be for each performance, but a license for a theatrical performance or panorama may, if the person applying for the same desire it, be for the term of one week. For any violation of this section every person so offending shall pay a fine of not less than fifty dollars nor more than five hundred dollars for each offense."

Section 58-272, which sets forth the amount of the theatrical performance, etc., tax, must also be considered in arriving at the merits of this case. This section reads as follows:

> "On every theatrical performance or any performance similar thereto or any panorama or public performance or exhibition of any kind, except for benevolent, charitable or educational purposes there shall be paid five dollars for each performance or fifteen dollars for each week of continuous performance or an annual tax of five hundred dollars; provided, that in towns or cities of less than fifteen thousand inhabitants there shall be paid two dollars for each performance or six dollars for each week of continuous performance or an annual tax of two hundred dollars; but nothing herein shall be construed as taxing games of football, baseball, basketball or kindred ball games."

In form Sections 58-271 and 58-272 are almost identical to the provisions of the law enacted by the General Assembly in 1883-84, page 593; Chapter 148 of the Acts of

WHARTON, ALDHIZER
& WEAVER
ATTORNEYS AT LAW
HARRISONBURG, VA.

HARRISONBURG, VA
ATTORNEYS AT LAW
S. WEAVER
MARTIN, ALDHIZER

the law enacted by the General Assembly in 1983-84, page 293; Chapter 148 of the Acts of

In form sections 58-371 and 58-372 are almost identical to the provisions of

pasepall, paskelpall or kindred ball games.";

or six dollars for each week of continuous performance to an annual tax of two hundred dollars; but nothing herein shall be construed as taxing sports of football,

annual tax of five hundred dollars; provided, that in towns of cities of less than fifteen thousand inhabitants there shall be paid two dollars for each performance performance of fifteen dollars for each week of continuous performance or an

ofent, ghastlaple of educational purposes there shall be paid five dollars for each

any panorama or duplicate performance or exhibition of any kind, except for penev-

"On every theatrical performance or any performance similar thereto or

as follows:

etc.," tax, must also be considered in arriving at the merits of this case. This section reads

Section 58-372, which sets forth the amount of the theatrical performance,

then fifty dollars nor more than five hundred dollars for each offense."

any violation of this section every person so offending shall pay a fine of not less

If the person applying for the same desire it, be for the term of one week. For

each performance, put a license for a theatrical performance or panorama way,

liable to the penalty for the violation of this section. Every license shall be for

the performance shall be so licensed, each person engaged therein shall be

actor acting thereat under license shall be exempt from a license tax; but nuless

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interary, tending or other performance, except for penevolent, charitable or edu-

as fraternal, praising and promoting animals, carnivore, and marsupials, but no reptiles."

On October 4, 1989, H. A. Martindale, state license inspector, caused a

warrant to be issued against The Virginia Live Fur Trade, Incorporated, alleging that the

defendant, on the 12th day of August, 1989, and various other dates, operated a licensable

business and failed to pay a State Exhibition License in violation of Section 58-371 of the

Code of Virginia.

From a decision of the Shenandoah County Court finding the warrant, which

dismissed the warrant, the Commonwealth of Virginia appealed.

I. THE LAW IN QUESTION

Section 58-371 of the Code of Virginia reads as follows:

"No person shall, without a license authorized by law, exhibit for com-

peration any theatrical performance or any performance similar thereto or any

panorama or duplicate performance or exhibition of any kind or drive any tectrue.

the Assembly approved April 16, 1903, as subsequently re-enacted by Chapter 396 of the Acts of the Assembly of 1924, and subsequent amendments.

II. CONSTRUCTION OF THE LAW

Although the prosecution is on a revenue law, yet it is a penal statute and must be strictly construed like other criminal laws.

> "A revenue law imposing penalties for its violation is a penal statute and therefore is to be strictly construed, and no man is to be subjected to its penalties unless he comes clearly within the spirit and letter of the statute." 17 M. J., Statutes, Section 66.

> "Penal statutes are construed strictly against the state and favorably to the liberty of the citizen. It is a rule of general application that such statutes are not to be extended by construction, but must be limited to cases clearly within the language used. Every case charged as a violation must come within the letter, spirit and purpose of the statute. And a penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter though within the reason and policy of the law. To constitute the offense the act must be both within the letter and spirit of the statute defining it. * * *

> "The basis for the rule of strict construction is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is vested in the legislature and not in the judicial department. * * *" 17 M. J., Statutes, Section 67.

Tax Statutes Strictly Construed

> "Laws imposing taxes must be sonstrued strictly and most strongly against the state, and all doubts must be resolved in favor of the taxpayer. * * *

> "Taxes are never held to have been imposed unless by express statutory enactment or by necessary implication therefrom. The intent of a legislative body enacting a tax law must be found in the language used. * * * Thus, tax laws are always to be construed liberally in favor of the taxpayer and they are not to be extended by implication. If there is a substantial doubt it must be resolved in favor of the taxpayer." 18 M. J., Taxation, Section 10.

It is admitted that in this case no theatrical performance or performance similar thereto, or any panorama or public performance of any kind is given, and the only conceivable way in which the defendant could be held liable for the tax would be under the words "or exhibition of any kind".

Webster's New Collegiate Dictionary defines the word "exhibition" as

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the Assembly approved April 18, 1903, as subsequently re-enacted by Chapter 350 of the

Acts of the Assembly of 1954, and subsequent amendments.

II. CONSTRUCTION OF THE LAW

Although the prosecution is on a revenue law, yet it is a penal statute and

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the offense the act must be both within the letter and spirit of the statute defining
it. * * *

"(1) Act or instance of exhibiting. (2) That which is exhibited. (3) Any public display, as of works of art, manufacture, commerce, or of feats of skill."

It appears obvious that the legislature could not have intended that this section apply to anything of such broad definition, and that the adjective "public" preceding the word "performance" is also implied before the word "exhibition", so that any exhibition to become subject to the provisions of the statute must be a public exhibition.

III. DECISIONS ON THE SUBJECT.

Harris v. The Commonwealth, 81 Va. 240, decided December 17, 1885, is one of the earlier cases on the subject. Briefly, this case held that skating rinks were not enumerated in the act requiring licenses to be taken out for public performances or exhibitions and unless they were conducted so as to be clearly shown that they are properly "public performances or exhibitions", they could not be brought within the act.

In this case the Court properly held that penal statutes are to be construed strictly and are never to be extended by implication, and quoted with approval the opinion of Chief Justice Marshall in United States v. Wiltberger, 5 Wheat 76, where he said:

> " 'The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. * * * It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.' "

At the end of the opinion in this case, the Court said:

> "If, in the judgment of the legislature, a license tax ought to be paid, under all circumstances, for the privilege of conducting a skating rink for compensation, it is competent for that body, by altering the statute, to so provide. We can only construe it as it is."

This statement appears to fit the instant case exactly and if, in the judgment of the legislature a license tax should be paid by The Virginia Live Fur Parade, Incorporated

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of the legislature a license tax should be held by the Virginia Live Fat Parade, incorporated

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> "It, in the judgment of the legislature, a license tax ought to be paid, under all circumstances, for the privilege of conducting a skating rink for consideration, it is competent for that body, by altering the statute, to so provide. We can only construe it as it is."

Hartis v. The Commonwealth, 18 Va. 340, decided December 17, 1888, is one of the earlier cases on the subject. Briefly, this case held that skating rinks were not enumerated in the act requiring licenses to be taken out for public performances or exhibitions and unless they were conducted so as to be clearly shown that they are properly "public performances or exhibitions," they could not be brought within the act.

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This statement appears to fit the instant case exactly and it, in the judgment

of the legislature a license tax should be held by the Virginia Live Fat Parade, incorporated

for the privilege of conducting its business, it is competent for that body, and only for that body, by altering the statute, to so provide.

The Harris case has been followed and cited in a number of subsequent decisions.

Combined Saw and Planer Co. v. Flournoy, Sec'y, 88 Va. 1029, held that statutes levying taxes on citizens are construable most strongly against the government and a doubt should relieve the taxpayer. This opinion carried the following quotation from Dwarris on Statutes, Ed. 1885:

> " 'It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public, will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown.' Dwarris on Statutes, 255-789, Ed. 1885. 'In the revenue laws where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject, for the plain reason that the legislature is ever at hand and explains its own meaning, and to express more clearly what has been obscurely expressed.' Dwarris on Statutes, 251, Ed. 1885."

Brown v. Commonwealth, 98 Va. 366, held that laws imposing a license or tax are strictly construed and all doubts as to the meaning or scope of such laws are resolved against the government and in favor of the citizen.

Klass v. Commonwealth, 103 Va. 864, which exempted the defendant from buying a peddler's license, affirmed earlier decisions of the Court in stating that insofar as a revenue law which imposes penalties for its violation is concerned, it is a penal statute and is to be strictly construed and no man is to be subjected to its penalties unless he comes clearly within the spirit and letter of the statute.

In Elliott's Knob Iron, Steel and Coal Company v. State Corporation Commission, 123 Va. 63, the Court (page 82 of the opinion), cited with approval the cases of Combined Saw and Planer Co. v. Flournoy, Sec'y, Brown v. Commonwealth, Harris

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for the privilege of conducting its business, it is competent for that body, and only for that body, by altering the statute, to so provide.

The Harris case has been followed and cited in a number of subsequent decisions.

Campbell Dem and Harvey Co. v. Harmon, Sec'y, 88 Va. 1050, held that statutes levying taxes on citizens are construable most strongly against the government and a court should relieve the taxpayer. This opinion contrast the following quotation from Dwarris on Statutes, Ed. 1832:

" 'It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. Where there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown.',
Dwarris on Statutes, 538-539, Ed. 1882. "In the revenue laws where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject, for the plain reason that the legislature is ever at hand and explains its own meaning, and to express more clearly what has been operatively expressed.", Dwarris on Statutes, 521, Ed. 1882."

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Klose v. Commonwealth, 103 Va. 804, which examined the defendant from paying a beggar's license, affirmed earlier decisions of the Court in stating that inroad as a revenue law which imposes penalties for its violation is concerned, it is a penal statute and is to be strictly construed and no man is to be subjected to its penalties unless he comes clearly within the spirit and letter of the statute.

In Elliott's Knob Iron, Steel and Coal Company v. State Corporation Commission, 152 Va. 23, the Court (page 28 of the opinion), cited with approval the cases of Campbell Dem and Harvey Co. v. Harmon, Sec'y, Brown v. Commonwealth, Harris

v. Commonwealth, and Kloss v. Commonwealth, supra.

In McKay v. Commonwealth, 137 Va. 826, which involved the conviction of a second offense under the State prohibition law, the Court, in passing upon seciont 4 of the prohibition act, stated that said section was a penal statute and must be strictly construed. It further statdd that a penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter though within the reason and policy of the law.

The Court stated further that to constitute the offense the act must be both within the letter and spirit of the statute defining it, and that those who contend that a penalty is imposed must show that the words of the act distinctly cover the case. The Court further stated that no conviction can be had if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.

The Court citing Sutherland on Statutory Construction, 350, 352-353, held that "If a penal statute be so ambiguous as to leave reasonable doubt of its meaning, it is the duty of the court to refuse to impose the penalty."

Said the Court:

> "It would be contrary to reason and natural justice the language of the statute being susceptible of two constructions, to hold that a 'first conviction' under the ordinance is a sufficient basis to make a second conviction under the statute a felony, when a second conviction under the ordinance is a misdemeanor."

In another prohibition case, Faulkner v. Town of So. Boston, 141 Va. 517, the Court cited with approval McKay v. Commonwealth, supra, and Enoch v. Commonwealth, 141 Va. 411, which had held that if there is a reasonable doubt about the construction of a criminal act, the accused is entitled on appeal to the benefit of it, for he is as much entitled, at least in the appellate court, to the benefit of a reasonable doubt about the law as about the facts.

Mr. Justice Epes, in his dissenting opinion in Macke v. Commonwealth, 156 Va. 1015, 1031, said:

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The Court ruling Shifrin and Statutory Construction, 320, 325-333, held that "If a penal statute be so ambiguous as to leave reasonable doubt of its meaning, it is the duty of the court to refuse to impose the penalty."

Said the Court:

> "It would be contrary to reason and natural instinct for the language of the statute being susceptible of two constructions, to hold that a first conviction, under the ordinance is sufficient peril to make a second conviction under the statute a felony, when a second conviction under the ordinance is a misdemeanor."

In another prohibition case, Faulkner v. Town of So. Boston, 141 Va. 512, the Court acted with approval Mackey v. Commonwealth, supra, and Enoch v. Commonwealth, 141 Va. 411, which had held that if there is a reasonable doubt upon the construction of a criminal act, the accused is entitled on appeal to the benefit of it, for he is as much entitled, at least in the appellate court, to the benefit of a reasonable doubt upon the law as upon the facts.

Mr. Justice Epes, in his dissenting opinion in Mackey v. Commonwealth, 129 Va. 1012, 1031, said:

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"In Kloss v. Commonwealth, 103 Va. 864, 49 S. E. 655, 656, Buchanan, J., says: 'The rule is universale, except where otherwise provided by statute, that penal statutes are to be construed strictly, and are never to be extended by implication. This rule applies with full force to a case like the present, for while the statute on which the prosecution is based is a revenue law, yet in so far as it imposes penalties for a violation of its provisions, it is a penal statute, and must be construed accordingly.'

"In discussing the rule of construction applicable to revenue statutes, Endlich on the Interpretation of Statutes, section 346, p. 481, says: 'The proper rule probably is, as pointed out by an eminent writer (Bishop), that, in the accomplishment of their primary object, the mere collection of duties, proportionate contributions to the public burden, these enactments are not to be construed with the rigid strictness applicable to penal laws; but that, so far as they create crimes, they require the strict construction of such laws.' "

IV. CONCLUSIONS.

(1) It appears obvious that the statute as originally enacted and as subsequently amended, was not intended, designed, or written so as to include the operations of the defendant, The Virginia Live Fur Parade, Incorporated, it obviously being the intention of the statute to include only theatrical performances or performances in which a definite act or public performance takes place. A strict construction of the statute being required, it cannot be stretched to include things which were not even in existence and which were not even thought of at the time of the enactment of the statute.

(2) That Section 58-271 was so intended is further borne out by the provisions of Section 58-272, which assesses a tax of $5.00 for each performance, or $15.00 for each week of continuous performance, or an annual tax of $500.00; provided that in towns or cities of less than 15,000 there should be paid $2.00 for each performance, or $6.00 for each week of continuous performance, or an annual tax of $200.00. Obviously the amount of tax was established to cover public performances, lectures, the giving of literary readings and such other performances as might require the putting on of an act or exhibition in connection therewith. It was not designed to include the operations of The Virginia Live Fur Parade, Incorporated, snake farms, and other attractions which came into being subsequent to the enactment of the statutes.

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of the statute to include only theatrical performances or performances in which a definite act or bodily performance takes place. A strict construction of the statute being required, it cannot be stretched to include things which were not even in existence and which were not even thought of at the time of the enactment of the statute.

(5) That section 58-377 was so intended is further borne out by the provisions of section 58-375, which assesses a tax of $2.00 for each performance, or $12.00 for each week of continuous performance, or an annual tax of $200.00; provided that in towns of cities of less than 15,000 there should be paid $3.00 for each performance, or $6.00 for each week of continuous performance, or an annual tax of $300.00. Obviously the amount of tax was established to cover bodily performances, locations, the giving of itinerary readings and such other performances as might require the putting on of an act or exhibition in connection therewith. It was not designed to include the operation of the Virginia Live Fun Parade, incorporated, snake farms, and other attractions which came into being independent to the enactment of the statutes.

IV. CONCLUSIONS.

(1) It appears obvious that the statute as originally enacted and as subsequently amended, was not intended, designed, or written so as to include the operation of the Virginia Live Fun Parade, incorporated, it obviously being the intention of the defendant, as independent to the enactment of the statutes.

"In Klose v. Commonwealth, 103 Va. 864, 49 S. E. 622, 623, Grafenau, J., says: 'The rule is universal, except where otherwise provided by statute, that penal statutes are to be construed strictly, and are never to be extended by implication. This rule applies with full force to a case like the present, for while the statute on which the prosecution is based is a revenue law, yet in so far as it imposes penalties for a violation of its provisions, it is a penal statute, and must be construed accordingly.'

"In discussing the rule of construction applicable to revenue statutes, English on the Interpretation of Statutes, section 346, p. 481, says: 'The proper rule broadly is, as pointed out by an eminent writer (Blatch), that, in the accomplishment of their primary object, the mere collection of duties, proportionate contributions to the public purses, these enactments are not to be construed with the rigid strictness applicable to penal laws; but that, so far as they create crimes, they require the strict construction of such laws.', "

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(3) Even if the statute as now written were broad enough to cover the operations of a game farm, such as that operated by the defendant, it would, nevertheless, be exempt from the payment of taxes because of the provision "except for benevolent, charitable or educational purposes". (Italics ours) The very permit under which defendant operates, filed as an exhibit herein, charges the defendant with "operating a quality animal exhibit educational in scope". (Italics ours) Said permit further prescribes that "all individual Virginia school children under the age of twelve and all Virginia organized youth groups, such as Boy and Girl Scouts, school classes, Sunday School groups, etc., appearing as a group, be admitted free".

(4) It might well be that defendant and others operating similar businesses, should be required to pay a reasonable license tax for operating a business in Virginia; however, the levying of any such tax lies solely with the legislature and not with the Court.

For the reasons previously assigned, it is respectfully submitted that the warrant against the defendant should be dismissed.

GEORGE S. ALDHIZER, II
406 First National Bank Building
Harrisonburg, Virginia, Attorney for
The Virginia Live Fur Parade, Incorporated

A copy of the foregoing Memorandum of Authorities was this day mailed to Robert D. Bauserman, Commonwealth's Attorney of Shenandoah County, Woodstock, Virginia.

January _____, 1957.

Attorney for The Virginia Live Fur Parade, Incorporated

GEORGE S. ALDHIZER, II
400 First National Bank Building
Harrisonburg, Virginia, Attorney for
The Virginia Live Ftr Forage, Incorporated

A copy of the foregoing Memorandum of Authorities was this day mailed to Robert D. Farnsworth, Commonwealth's Attorney of Shenandoah County, Woodstock, Virginia.

January _____, 1971.

Attorney for the Virginia Live Ftr Forage, Incorporated

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& WEAVER
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warrant against the defendant should be dismissed.

For the reasons previously assigned, it is respectfully submitted that the

(3) Even if the statute as now written were broad enough to cover the operations of a dairy farm, such as that operated by the defendant, it would, nevertheless, be exempt from the payment of taxes because of the provision "except for penevolent, charitable or educational purposes". (Italics ours) The very terms under which defendant operates, filed as an exhibit herein, charges the defendant with "operating a dual type animal exhibit educational in scope." (Italics ours) Said terms further prescribe that "all individual Virginia school children under the age of twelve and all Virginia organized youth groups, such as Boy and Girl Scouts, school classes, Sunday School groups, etc., abbearing as a group, be admitted free".

(4) It might well be that defendant and other operating similar pastimes, should be required to pay a reasonable license tax for operating a pastime in Virginia; however, the levying of any such tax lies solely with the legislature and not with the Court.