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Constitutional Law (Survey of Virginia Case Law - 1955)

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CONSTITUTIONAL LAW

In the field of constitutional law, the decisions of the Supreme Court of Appeals of Virginia have been, for the most part, during the year 1955, definitive in nature. Some of the decisions are of especial interest based either on their fact situation or on their judicial history. Others are discussed with the viewpoint of showing the position of the Supreme Court of Appeals with respect to the problem with which they are confronted in relation to that held by other jurisdictions and the United States as a whole. Overall, the Virginia decisions reflect a continuity of judicial opinion.

I.

SEPARATION OF CHURCH AND STATE

State Aid to Private Schools. A recent Virginia decision, *Almond* v. *Day*,[1] which involved the payment of tuition, institutional fees, and other designated expenses to children of Virginia citizens who died or were disabled in military service,[2] has added further definition to the separation of church and state.

The Attorney General of Virginia sought to mandamus the issuance of warrants for such payments from the State Comptroller, who had refused to issue vouchers on the basis that issuance would contravene the provisions of Section 141 of the Virginia Constitution as applied to private schools, and would be violative of the provisions of the Virginia and Federal Constitutions granting religious freedom and separation of church and state. The Court, using the test of direct and indirect benefit, held the provisions of Item 210 were separable and that these provisions were void and unconstitutional to the extent that they purported to authorize payments for tuition, institutional fees and other designated expenses of eligible children who attended approved or designated private schools. Such payments were held to be of direct benefit to the schools (religions) and of only indirect benefit to the children concerned.

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[1] 197 Va. 419, 89 S.E.2d 851 (1955).

[2] Item 210, Appropriation Act of 1954.

The *Almond* case clarifies at least to some extent, the question of state aid to religions. The nine-year-old Supreme Court case of *Everson* v. *Board of Education*[3] established the very clear standard that the Constitution creates a high wall between church and state and that state aid even to all religions is forbidden. And in *Cantwell* v. *State of Connecticut*[4] it was said, "it is settled that the Due Process clause of the 14th Amendment has rendered the legislature of the states as incompetent as Congress to enact such laws."

The *Everson* case by a five-to-four decision held that public reimbursement to parents for bus fares to public and parochial schools was of direct benefit to the parents and of only indirect benefit to the Catholic religion. Ignoring this test, the United States Supreme Court held in *McCollum* v. *Board of Education*[5] that a released time program that was conducted in public school buildings was unconstitutional. However, where the released time program was not conducted in public school buildings, the Court thought it sufficiently differentiated in *Zorach* v. *Clauson*[6] so as to be constitutional. The distribution of Gideon Bibles[7] and the permissive reading of the Lord's Prayer[8] were held constitutionally different even though both cases required voluntary assent on the part of the participants. The distribution of Gideon Bibles was held to be a forbidden preference of one religion over another and unconstitutional; while permissive reading of the Lord's Prayer was held not to be sectarian and constitutional.

The *Almond* decision represents the adoption of the test utilized in the *Everson* case, the defining of constitutionality in terms of direct versus indirect benefit to religion. It is too early to tell whether this test is a valid test; but, in light of the decisions of the *McCollum* and *Zorach* cases and the *Doremus* and *Tudor* cases, the conclusion could be reached that attempted differentiations without the use of some test as a guide result in illogical distinctions. Should the *McCollum* and *Zorach* cases have been differentiated on the basis of the constitutionality of the

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[3] 330 U.S. 1 (1947). See Kauper, *Church, State and Freedom: A Review* (1954).
[4] 310 U.S. 296, 303 (1939).
[5] 333 U.S. 203 (1948).
[6] 343 U.S. 306 (1952).
[7] Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953).
[8] Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950).

use of a school building for a released time program or on the basis of the constitutionality of the released time program itself? It is possible that the decision of the Supreme Court might have been different had the court used the test of direct versus indirect benefit, for the above question would have had to be answered. The test utilized in *Almond* v. *Day* appears to better attain the defining of the boundary line separating church and state.

II.

PROCEDURAL RIGHTS

Revocation of Driver's License. Section 46-416.2 of the Motor Vehicle Safety Responsibility Act[9] makes it mandatory on the Commissioner of the Division of Motor Vehicles to revoke the license of any person, resident or non-resident, upon receipt of a record of his conviction of reckless driving and of any provision of law establishing the lawful rates of speed of motor vehicles when the offenses upon which the conviction are based were committed within a period of twelve consecutive months. As regards the right of appeal, Section 46-424 of the same Act[10] governs: "No appeal shall lie in any case in which the revocation of the license or registration was *mandatory* except to determine the identity of the person concerned when the question of identity is in dispute."[11] [Italics added]. The Supreme Court of Appeals has upheld the determination of the Commissioner in revoking a license under the terms of these sections in the case of *Lamb* v. *Curry*.[12]

Curry appealed the determination of the Commissioner in the lower court not on the basis of identity but on the basis that the provisions of the Code,[13] under which the revocation of his license took place, became effective[14] subsequent to his commission and conviction of the offenses charged. He was convicted of reckless driving on October 28, 1953, and of the offense of operating an automobile at an unlawful rate of speed on May 21, 1954,

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[9] Va. Code (1950) as amended by Act 1954. c. 538.
[10] Va. Code (1950), Acts 1952, c. 544.
[11] *Ibid.*
[12] 197 Va. 395, 89 S.E.2d 329 (1955).
[13] Section 46-416.2.
[14] *Ibid;* became effective on June 30, 1954.

the offenses having been committed within a twelve month period. The trial court held that the application of Section 46-416.2 to the present case would constitute *ex post facto* legislation and would be violative of Section 58 of the Constitution of Virginia, since this section (46-416.2) did not become effective until June 30, 1954. The lower court also found that it was not mandatory on the Commissioner to revoke a license for one offense of reckless driving and one offense of operation of an automobile at an unlawful rate of speed under the provisions of Section 46-416 which was in force at the time of the convictions, and that, therefore, the right of appeal granted to Curry under Section 46-424 was not restricted to identity.

The Commissioner, under the provisions of Section 46-424, appealed the lower court decision as an appeal of right to the Supreme Court of Appeals of Virginia. The Commissioner argued that Curry's right to appeal from the revocation was restricted to identity alone under Section 46-424, and that, since this point had not been relied upon by Curry, the decision of the lower court was erroneous.

The Supreme Court of Appeals in rendering their decision, which reversed that of the lower court and reinstated the decision of the administrative board, acknowledged the fact that until Section 46-416.2 became effective on June 30, 1954, there was "no provision in the Motor Vehicle Safety Responsibility Act making it mandatory that the Commissioner of Motor Vehicles revoke an operator's license after conviction of an offense of reckless driving and an offense of operating a motor vehicle at an unlawful rate of speed." [15] The Court then inexplicably reversed themselves and by their reliance upon *Dillon* v. *Joyner*[16] held, at least impliedly, that revocation was mandatory in the present case and that any appeal on the part of Curry was limited under the provisions of Section 46-424 to the question of the identity of the person involved. Thus the Supreme Court of Appeals found no error in the decision of the Commissioner in revoking Curry's license.

This writer finds it difficult to reconcile the holding of the Supreme Court of Appeals with the clearly-stated and unambigu-

[15] Lamb v. Curry, 197 Va. 395, 397 (1955).
[16] 192 Va. 559, 66 S.E.2d 583 (1951).

ous provisions of the Motor Vehicle Safety Responsibility Act on the following points:

1. Section 46-416 was in effect at the time of the commission and conviction of the offenses committed by Curry, but had no provision for mandatory revocation of an operator's license for such offenses;

2. *Dillon* v. *Joyner* is distinguishable from the present case in that mandatory revocation of an operator's license is provided for by Section 46-416 for conviction of two offenses of reckless driving within a twelve month period and was in effect at the time Dillon committed and was convicted of the offenses;

3. Section 46-424 allows an appeal of the Commissioner's action restricted to identity alone where revocation is mandatory;

4. Section 46-424 allows an appeal of the Commissioner's action where the revocation is not mandatory and does not restrict such appeal to identity alone;

5. Section 46-420 allows revocation of an operator's license by the Commissioner, where such revocation is discretionary and not mandatory, only after due hearing, upon the giving of not less than five days written notice by registered letter to the address given by the operator when applying for his license; and, in the instant case, no hearing was held nor notice given;

6. Section 46-416.2 was not in force at the time of the commission and conviction of the offenses of which Curry was adjudged guilty and the enforcement of its provisions would operate retrospectively upon him. The Trial Court clearly erred in holding that its application would constitute *ex post facto* legislation. *Calder* v. *Bull*[17] defined *ex post facto* as being any retrospective law imposing criminal punishment after the act, for which the punishment is being subscribed, had been committed. And *Prichard* v. *Battle*[18] interpreted revocation under the provisions of Section 46-416 to be civil in nature and not criminal, and in no sense penal in nature.[19] The application of Section 46-416.2 in the instant case serves to operate as a Bill of Attainder in that it is a legislative act which without judicial trial deprives named in-

[17] 3 Dallas (US) 386 (1798).
[18] 178 Va. 455, 17 S.E.2d 393 (1941).
[19] Anglin v. Joyner, 181 Va. 660, 26 S.E.2d 58 (1943).

dividuals, or groups easily ascertainable (i.e., persons upon whom it would operate retrospectively), of any right or privilege.[20] If legislation of this nature is allowed to operate retrospectively, the rights and privileges of every citizen will rest not on the rock of constitutional justice but on the shifting sands of legislative pleasure.

Statutes—Provision Unconstitutionally Vague. "The statute to be valid, must, by its language, fairly construed . . . supply the standard by which the guilt of the accused person is to be determined. If the statute does not thus supply such standard, it is invalid for vagueness and uncertainty . . ." [21]

In the case of *Booth* v. *Commonwealth*,[22] a lower court entered an order of interdiction based on Sections 4-51(a)[23] and 4-52(a)[24] against Booth by reason of the fact that he was an "improper person" to be allowed to purchase alcoholic beverages. This order was based on the vague and indefinite contentions of the Commonwealth that there was evidence of suspicious circumstances which tended to show that Booth was selling alcoholic beverages in violation of law and that it was possible that he had been convicted of driving an automobile while under the influence of alcohol. No direct evidence supported these contentions.

The Supreme Court of Appeals properly reversed and dismissed the action on appeal, sustaining the contention of Booth as to the unconstitutionality of the interdiction order because of the vagueness of the term "improper person." As the Court said at page 179: "We are of the opinion that the phrase "improper person" employed in the statute admits of such arbitrary interpretation as to make the provision unconstitutionally vague and indefinite." [25]

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[20] See Note 18 *supra*.

[21] Standard Oil Co. v. Comm., 131 Va. 830, 841, 109 S.E. 316 (1921).

[22] 197 Va. 177, 88 S.E.2d 916 (1955).

[23] Va. Code (1950) which allows interdiction of person convicted of illegal sale of alcoholic beverages.

[24] Va. Code (1950) which allows interdiction of person convicted of driving an automobile while intoxicated.

[25] Booth v. Comm., 197 Va. 177, 179 (1955). See also Kunz v. N.Y., 340 U.S. 290 (1950); State v. Klapport, 127 N.J.L. 395, 22 A.(2d) 877 (1941). For other unconstitutionally vague measures which have been declared violative of Due Process, see U.S. v. Cohen Grocery, 255 U.S. 81 (1920); Burstyn, Inc., v. Wilson, 343 U.S. 495 (1951).

Procedural Due Process—Escalator Clause in Rate Making. Although escalator clauses in gas rates do not have a long history in Virginia, the case of *City of Norfolk* v. *Virginia Electric and Power Company*[26] is by no means without Virginia precedent. The State Corporation Commission has authorized escalator clauses for two smaller gas utilities distributing propane gas and also for the Washington Gas Light Company.[27]

An escalator clause is nothing more than a fixed rule under which future rates to be charged the public are determined. It is merely the addition of a mathematical formula to the fixed schedule of the company so utilizing it under which the rates and charges fluctuate as the wholesale cost of gas to the company fluctuates. Thus, the resulting rates are as firmly fixed under the escalator clause as they would be if stated in terms of money.

In approving the escalator clause, after giving a hearing to those interested, the Commission did not fix rates retroactively. It authorized and prescribed a mathematical formula to be inserted in the schedule of the Virginia Electric and Power Company which was to serve as a guide, direction, or rule of action for determining future rates.

For these reasons, the Court held that the escalator clause did not deny procedural due process of law to the consumers because no public notice and hearing were given on each occasion the actual rate was increased. Nothing in the Code of Virginia requires such notice and hearing other than when changes take place in the filed schedules of rates, which are the underlying bases for the operation of the escalator clause computations. The operation of an escalator clause, therefore, does not violate any constitutional or statutory limitation.[28]

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[26] 197 Va. 505, 90 S.E.2d 140 (1955).

[27] For other states which have approved escalator clauses, see Re. Brooklyn Borough Gas. Co., 100 P.U.R.N.S. 271 (1953); Re Southern Calif. Gas Co., 99 P.U.R.N.S. 272 (Calif. P.U.C. 1952).

[28] See, In Re Virginia Railway and Power Company, 1921 S.C.C. 60; In Re Lynchburg Traction and Light Company, 1921 S.C.C. 137. Electric rates with fuel clauses were accepted by the Commission more than thirty years ago.

III.

REGULATION OF COMMERCE

Public Utility Valuation in Rate Making. In a recent case[29] concerning public utility valuation in rate making, the Supreme Court of Appeals of Virginia, following the decision as laid down in *Federal Power Commission* v. *Hope Natural Gas Company*,[30] which abandoned the "present fair value" formula in favor of the "original cost" or "prudent investment" standard advocated by Mr. Justice Brandeis,[31] upheld the application of the Net Cost Investment Theory in determining the rates to be charged by the Virginia Electric and Power Company.[32]

This decision by the Court is representative of the trend in the United States today since the *Hope* decision. In only one reported case,[33] which is still in the process of appeal, has this new standard been discarded in favor of a return to the old "present fair value" formula.

Police Power Versus Interstate Commerce. A factually interesting case was that of *Lasting Products Company, a Corporation* v. *Paul Genovese*.[34] The case involved the Virginia Paint Law[35] which requires persons selling or transporting paint for sale in Virginia to register annually with the Commissioner of Agriculture, and to label their products in a specified manner, violation being a misdemeanor. Its avowed and real purpose is to prevent fraud and deception.[36]

The Court held that since there was a substantial connection

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[29] Bd. of Supervisors of Arlington County v. VEPCO, 196 Va. 1102, 87 S.E.2d 139 (1955).

[30] 320 U.S. 591 (1943).

[31] Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276 (1922).

[32] C & P Telephone Co. v. Comm., 147 Va. 43, 136 S.E. 575 (1927); Norfolk v. C & P Telephone Co., 192 Va. 292, 64 S.E.2d 772 (1951); Bd. of Supervisors v. Comm., 186 Va. 963, 45 S.E.2d 145 (1947).

[33] New York Telephone Co. v. Public Service Comm., 286 App. Div. 28, 192 N.Y.S.2d 68 (3d Dep't., 1955).

[34] 197 Va. 1, 87 S.E.2d 811 (1955).

[35] Va. Code (1950) Sections 59-61.1 - 59-61.12.

[36] 10 M.J., *Interstate Commerce*, Sec. 6, p. 639; 10 Am. Jur., *Commerce*, §94, page 86.

between its purpose and its provisions, the law is a valid exercise of the State's police power,[37] though its provisions may affect products travelling in interstate commerce. The Court denied recovery to the Corporation of the balance due and owing from Genovese basing their denial on the rule that a contract made in violation of a statute enacted to protect the public against fraud, imposition, or to safeguard the public health or morals, is illegal and unenforceable by the guilty party.[38]

Delegation of Legislative Power. The question before the Virginia Supreme Court of Appeals in the case of *Chapel* v. *Commonwealth*[39] was whether the Legislature had delegated to an administrative board the power to make rules and regulations relating to the dry cleaning business without prescribing a standard or test to guide the board in the exercise of its discretion.[40]

The Court discussed the conflict in the United States today as regards the validity of statutes regulating the dry cleaning business. Some authorities hold such regulations valid, basing the validity on the exercise of the police powers of the state to effect public health;[41] other authorities hold such regulations not within the scope of public health and therefore invalid.[42]

From the evidence adduced, the Court rightfully found that the State Dry Cleaners Board had unfettered power as regards the promulgation of rules and regulations. Repeatedly, Virginia courts have held the grant of such broad discretion to administrative boards and lack of standards unconstitutional.[43] As regards

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[37] Minnesota Rate Cases, 230 U.S. 352, 33 S.Ct. 729. 57 L.Ed. 1511 (1912).

[38] See Cohen v. Mayflower Corp., 196 Va. 1153, 86 S.E.2d 860 (1955); Rohanna v. Vozzana, 196 Va. 549, 84 S.E.2d 440 (1954); Surf Realty Corp. v. Standing, 195 Va. 431, 78 S.E.2d 901 (1953); and Brown Electric Co., Inc., v. Foley, 194 Va. 92, 72 S.E.2d 388 (1952).

[39] 197 Va. 406, 89 S.E.2d 337 (1955).

[40] 1936 Acts, 537, as amended and codified in 1950 Code, Title 54, Chap. 9, Sections 54-201, to 54-216.

[41] Miami Laundry Co. v. Florida Dry Cleaning and Laundry Board, 134 Fla. 1, 183 So. 759 (1938).

[42] State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940).

[43] Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946); Kizee v. Conway, 184 Va. 300, 35 S.E.2d 99 (1945). And see 16 C.J.S., *Const. Law*, §138, p. 373, and cases cited, where it is said, "Where such a power is left to the unlimited discretion of a board, to be exercised without the guide of legislative standards, the statute is not only discriminatory but must be regarded as an attempted delegation of legislative function offensive both to the State and Federal Constitutions."

the mandatory requirement for cities and voluntary requirements for counties, the Court, basing their holding on the decision in *Eubank* v. *Richmond*,[44] decided that the legislature had no authority to levy a license tax on business conducted in one part of the State and to refrain from levying the same license tax on similar businesses in other parts of the State.

The Court distinguished the present case from those involving milk and those concerning transportation of liquor. Liquor has recognized evil propensities;[45] milk, because of its consumption by almost all citizens, affects the public health and safety.[46] It is apparent that the Court, while not deciding the point, is somewhat dubious of maintaining that the regulation of dry cleaning businesses is a proper exercise of the police power of the State in protecting the public health and safety.

In the main the Court relies on their decision in *Thompson* v. *Smith*,[47] where it is said: "It is a fundamental principle of our system of government that the rights of man be determined by the law itself and not by the let or leave of administrative officers or bureaus . . . the legislative branch of the government may not divest itself of this function or delegate it to executive or administrative officers."

Taxation of Interstate Commerce. A number of cases were decided during 1955 concerning interstate commerce and state taxation. The decisions of the Court are representative of the status of Virginia law in this field and conform to the majority view in the United States today.[48]

In *County Board* v. *Arcade Sunshine Company*,[49] the Supreme Court of Appeals, relying upon the recent cases of *Memphis Steam Laundry* v. *Stone, Chairman State Tax Commission*[50] and *Nippert* v. *Richmond*,[51] as being decisive, held that the tax

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44 226 U.S. 137 (1912).
45 Reynolds v. Milk Commission, 163 Va. 957, 179 S.E. 507 (1935).
46 Dickerson v. Comm., 181 Va. 313, 24 S.E.2d 55 (aff'd 321 U.S. 131 (1943).
47 155 Va. 367, 379, 154 S.E. 579, 71 A.L.R. 604 (1930).
48 For a definitive discussion of cases in this field, see Anderson, *State Taxation of Interstate Commerce*, 1 Wash. U. Law Quarterly 1 (1952).
49 196 Va. 916, 86 S.E.2d 162 (1955).
50 342 U.S. 389 (1951).
51 327 U.S. 416 (1945).

on laundry pick-up service constituted a burden on interstate commerce; but that a tax on local laundry pick-up stations for the privilege of doing business, on the authority of *Dunston* v. *City of Norfolk*,[52] did not constitute a burden on interstate commerce and was therefore valid. On the same reasoning, the Court reached a similar result in *County Board* v. *Kent Stores*[53] as regards local laundry pick-up stations.

The Court, in *Chesapeake and Potomac Telephone Company of Virginia* v. *City of Norfolk*,[54] held that a municipal tax on gross receipts of a telephone company "from local telephone exchange service" within the city was valid as a privilege tax[55] and was not a property tax contrary to the tax segregation statutes, Code 1950, Sections 58-9 and 58-10. The Court also found the municipal ordinance imposing such a tax was not violative of the commerce clause of the Federal Constitution since the tax imposed was restricted to receipts from intrastate business exclusively.[56]

With respect to the Gross Receipts Road Tax embodied in Section 58-638 of the Virginia Code (1950), the Supreme Court of Appeals of Virginia held, in *Express Company* v. *Commonwealth*,[57] that the tax imposed by the Code did not contravene the Commerce Clause of the Federal Constitution.[58] The Express Company was in the process of being sold to a Connecticut firm which had taken over its operation and claimed an exemption under granted reciprocity agreements[59] between Virginia and Connecticut. The Court found that title to the Company still rested in the Virginia resident seller and therefore the imposition of the tax was valid though the business was being operated by a foreign corporation. In the words of the Court in *Hunton* v.

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[52] 177 Va. 689, 15 S.E.2d 86 (1941).
[53] 196 Va. 929, 86 S.E.2d 44 (1955).
[54] 196 Va. 627, 85 S.E.2d 345 (1955).
[55] Railway Express Agency v. Comm., 347 U.S. 359 (1953); Railway Express Agency, Inc. v. Comm., 196 Va. 368, 83 S.E.2d 921 (1954).
[56] Postal Telegraph Cable Co. v. City of Norfolk, 101 Va. 125, 43 S.E. 207 (1903).
[57] 196 Va. 1007, 86 S.E.2d 818 (1955).
[58] Boggett Transportation Co. v. Comm., 195 Va. 359, 78 S.E.2d 702 (1953). For history of the reciprocity agreement see Atlantic & Danville Railway Co. v. Hooker, 199 Va. 996, 502, 74 S.E.2d 270, 275 (1953).
[59] Aero Mayflower Transit Co. v. Bd. of Railway Com'rs., 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (1947).

Commonwealth,[60] " . . . exceptions are strictly construed against the party asserting such exemption."

IV.

DUE PROCESS

Segregation. *Tate* v. *Department of Conservation and Development*[61] involved the admission of Negroes to Virginia State Parks. This suit was instituted in 1951 by the plaintiffs who sought a permanent injunction against the defendants, their lessees, agents and successors in office to restrain such defendants from henceforth refusing Negroes admission to Virginia State Parks. The case was continued and a hearing was not set until February 25, 1954; the trial was held June 29, 1955.

Historically, Virginia has had no separate but equal facilities as regards State Parks. Thus the United States Supreme Court decision abandoning the "separate but equal" doctrine[62] had no application. Prior to the commencement of this action, there had been no overt action on the part of the Commonwealth to lease the park lands to private individuals; but late in 1954 bids were received for such leases. At the time of trial, the negotiations were still pending.

The problem presented was whether the State could deprive or relieve itself of the constitutional obligation to afford colored citizens equal rights with those of white citizens in the use of the public recreational facilities constructed with public funds by leasing them to a private association. As was said in *Lawrence* v. *Hancock*:[63] "It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens. Having set up the swimming pool by authority of the legislature, the city, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without any such discrimination."

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[60] 166 Va. 229, 183 S.E. 873 (1936).
[61] 133 F.Supp. 53 (1955).
[62] Brown v. Bd. of Education, 347 U.S. 483 (1954); And see Saveatt v. Painter, 339 U.S. 629 (1950).
[63] 76 F.Supp. 1004, 1005 (1948).

"The power to lease does not include the power to discriminate against members of a minority race in the exercise of their constitutional rights" was said in *Culver* v. *City of Warren*,[64] involving a swimming pool operated by a veterans organization which refused membership to Negroes by utilizing a secret ballot.

The Court in granting the prayed-for injunction took notice of the intent of the legislature in attempting to lease these lands and the extreme likelihood of continued segregation if lands were leased to private individuals without a check and balance by the State in the lease regarding such segregation. The Court did not deny the right of the State to sell or lease in "absolute good faith," but warned that any such transaction would be minutely examined by the Court should the problem come before it. The contention on the part of the State that a normal lessor-lessee relationship should be permitted in leases of public property was held by the Court to have to give way to the constitutional rights of the citizens as a whole. "All lands, the title to which are in the Commissioner of Park Districts, are held in trust for the equal benefit of all the people of the State, . . . the facilities of park districts are for the equal benefit of all the people of the State, . . . park districts cannot operate their facilities or permit them to be operated in such a manner that a preferential use thereof is granted to any one person or to any group of persons." [65]

Police Power and Public Health. In Virginia, the creation of Sanitary Districts is authorized by both the general law[66] and by the Virginia Constitution.[67] Such acts and regulations are a legitimate exercise of the police power in the field of public health and safety.[68]

In *Weber City Sanitation Commission* v. *R. G. Craft*,[69] the evidence adduced showed that the district had no sewage disposal system, that the majority of wells in the area were contaminated, that the petitioner's well had at one time been declared contam-

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[64] 84 Ohio App. 373, 82 N.E.2d 82, 88 (1948).
[65] Lincoln Park Traps v. Chicago Park District, 313 Ill. App. 107, 55 N.E.2d 173, 176 (1944).
[66] Va. Code (1950).
[67] Section 147.
[68] C B & Q R R Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed 596 (1905).
[69] 196 Va. 1140, 87 S.E.2d 183 (1955).

inated, and that, in view of the situation presented, a sanitary commission or district was necessary in order to "prevent or reduce pollution of waters of the State in the area by the discharge of sewage and industrial waste therein and the providing of an adequate water supply for the inhabitants therein . . . for the preservation of the health of the people of said area . . ." [70]

"Even in the absence of such convincing evidence, it must be assumed that the legislature acted with wisdom and propriety in passing the legislation." [71] The Court held that a citizen holds his property subject to the proper exercise of police power by the General Assembly directly, or by municipal corporations or other agencies to which such power has been delegated. Such laws do not appropriate private property as the plaintiff contended in respect to his well but merely regulate its use and enjoyment by the owner. To effect the purpose of the act, it was necessary that all citizens, including Craft, connect with the water system. Craft contended that water rates were taxes within the meaning of Section 170 of the Virginia Constitution[72] as being taxes or assessments upon abutting property owners for local improvements. The Court held that such rates were neither taxes nor assessments and were therefore valid. "Creation of sanitary districts and the provisions promulgated by such bodies in the exercise of police power to regulate and protect the public health is not a denial of due process or equal protection of the laws, is not the taking of property without compensation, and notice of adoption is not required." [73]

The Court therefore reversed the finding of the trial court, which had been for Craft, and found in favor of the Sanitation Commission. "Unless state regulatory legislation is arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and, hence, an unnecessary and unwar-

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[70] Subsection 13, Section 6, Acts of Assembly, 1948, and Resolution, June 6, 1950.

[71] Gorieb v. Fox, 145 Va. 554, 134 S.E. 919 (1926).

[72] Hampton Roads Sanitary District Commission v. Smith, 93 Va. 371, 68 S.E.2d 497 (1893).

[73] Hutchison v. City of Valdosta, 227 U.S. 303, 57 L.Ed. 520, 37 S.Ct. 250 (1912). And see Mugler v. Kansas, 123 U.S. 623, 316 L.Ed. 205, 8 S.Ct. 273 (1887).

ranted interference with individual liberty, courts have refused to invalidate them as violative of due process." [74]

Miscegenation. An unusual case in relation to judicial history was presented in *Naim* v. *Naim*,[75] dealing with miscegenation statutes and the police power of the state to control marriage.

A suit was instituted by a white woman to annul her marriage to a Chinaman under the provisions of Section 20-54.[76] Section 20-54 states that it shall be unlawful for a white woman to marry any save a white person. The Circuit Court of Portsmouth rendered a decree declaring the marriage void. This was affirmed by the Supreme Court of Appeals of Virginia.[77] The United States Supreme Court[78] ordered that the judgment of the Supreme Court of Appeals be vacated and the cause remanded thereto for return to the Circuit Court for action consistent with the United States Supreme Court's opinion. The Supreme Court of Appeals,[79] per curiam, held their own decree was final and that they had no power to return the cause to the Circuit Court with directions to reopen the case, gather additional evidence, and render a new decision. Upon motion to recall the mandate and set the case down for oral argument, the United States Supreme Court in a memorandum decision[80] held that the decision of the Supreme Court of Appeals of Virginia in response to their order of November 14, 1955, left the case devoid of a properly presented Federal question.

There is nothing novel about the proposition that the state may regulate marriage.[81] Over half of the states of the union have miscegenation statutes and they have been repeatedly upheld[82] by both the state and federal courts. The importance of this case rests in its political nature.

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[74] Nebbin v. New York, 291 U.S. 502 (1933). See also Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, (1951); Olsen v. Nebraska ex rel Western Reference and Board Association, Inc., 313 U.S. 236 (1940).

[75] 197 Va. 80, 87 S.E.2d 749 (1955).

[76] Va. Code (1950).

[77] June 13, 1955.

[78] 350 U.S. 891 (Nov. 14, 1955).

[79] 90 S.E.2d 849 (Jan. 18, 1956).

[80] 350 U.S. 893 (March 12, 1956).

[81] Maynard v. Hill, 125 U.S. 190 (1887). And see Kinney v. Comm., 30 Grat. (Va.) 858 (1878).

[82] Wood v. Comm., 159 Va. 963, 166 S.E. 477, 85 A.L.R. 121 (1932). And see Toler v. Oakwood, etc., Corp., 173 Va. 425, 4 S.E.2d 364, 127 A.L.R. 430 (1939); 36 Am. Jur., *Miscegenation*, §3, p. 452.

In 1816, the United States Supreme Court was faced with one of the questions posed by the *Naim* case. In *Martin* v. *Hunter's Lessee*,[83] the United States Supreme Court decided that where a Federal decision and a State decision come in conflict, the State decision must give way to the supremacy of the Federal determination. The *Hunter's Lessee* case was also a Virginia decision. The Virginia Supreme Court of Appeals had to obey the mandate of the United States Supreme Court. The Supreme Court of Appeals of Virginia in refusing on January 18, 1956, to obey the mandate of the United States Supreme Court of November 14, 1955, on the grounds of procedural inability to comply with the mandate and the subsequent vacillatory action by the United States Supreme Court on March 12, 1956, in refusing either to set the case down for oral argument or to reissue the mandate and allowing the Virginia decision to stand, have reopened the doors closed by the *Hunter's Lessee* decision. For 140 years judges and lawyers alike had taken it for granted that the United States Supreme Court's decisions in matters where a federal question is involved is the supreme law of the land. This was a basic rock on which the Constitution stood. This decision of the United States Supreme Court may operate as an opening wedge for the individual states to renew with increased fervor the dying but not quite dead idea that the Federal government should be inferior to the state governments.

Another aspect of the decision in the *Naim* case which is of importance is the fact that this is the first recorded case decided in Virginia which seeks to extend the provisions of Section 20-54 beyond the limits of marriages contracted between white and colored persons so as to include Asiatics. In light of the recent trend of cases and decisions handed down by the United States Supreme Court in the field of education[84] and interstate commerce[85] as regards integration, it would appear that Virginia is of the opinion that the best defense is a good offense in combating federal encroachment on what are considered "state preserves."

The interpretation put on Section 20-54 by the Supreme Court of Appeals of Virginia in the present case would seem to

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[83] 1 Wheat. 304, 4 L.Ed. 97 (1816).

[84] See Note 62 *supra*. And see Bolling v. Sharpe, 347 U.S. 483, 74 S.Ct. 693 (1955).

[85] Fleming v. South Carolina Electric and Gas Co., 224 F.2d 452 (1955).

render this section repugnant to Section 52, Constitution of Virginia, 1902, as amended, and therefore void. Section 52[86] states: "No law shall embrace more than one object which shall be expressed in its title; nor shall any law be revised or amended with reference to its title; but the act revised or the section amended shall be re-enacted and published at length. That where an act embraces two objects, the whole act must be declared void. The title of an act must not be made a cover for surreptitious or incongruous legislation, nor be such as to mislead the legislature or the people but should fairly state the general subject covered by the body of the act." [87]

Section 54 is part of Chapter 4, Title 20, Code of Virginia (1950) and is one section of ten included in Chapter 4. The title of Chapter 4 is: COLORED PERSONS; MARRIAGE BETWEEN WHITE AND COLORED PERSONS. The sub-title of Section 54 is: *Intermarriage Prohibited; meaning of term "white persons"*. There is only the remotest possibility that a court could decide these titles are ambiguous. Lacking such ambiguity, it is plain that the legislature intended to prohibit intermarriage of white and colored persons. "The title to an act sets its bounds and to the extent that its provisions exceed those bounds they are void." [88] To the extent the body of Section 54 purports to extend such prohibition of marriage beyond the limits of colored and white persons so as to include Asiatics, Mongolians, Malayans, or any other racial group, it comes in conflict with the title of the act and renders the act void.

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[86] Constitution of Virginia, 1902, as amended.

[87] Comm. v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940).

[88] Wooding v. Leigh, 163 Va. 785, 177 S.E. 310 (1934). And see Irvine v. Comm., 124 Va. 817, 97 S.E. 769 (1919) where the title of an act being restrictive in nature (as in the instant case), it was held, with respect to enumerated matter expressed in the title and unenumerated matter included in the body of the act, that *inclusio unis est exclusio alterius* should be applied and therefore the act was void, to the extent it exceeded the bounds of this title.