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Recent Decisions

RECENT DECISIONS

Administrative Law—PRIVILEGED COMMUNICATIONS—WITNESS' TESTIMONY IN HEARING WHERE JUDICIAL SAFEGUARDS NOT PRESENT LIMITED TO QUALIFIED PRIVILEGE FOR SLANDER.—*Elder v. Holland,* 208 Va. 15, 155 S.E. 2d 369 (1967).

Elder brought an action for slander[1] against Holland, a state policeman, arising out of the latter's testimony in a hearing conducted by the superintendent of state police. The hearing had been called to determine the propriety of Elder's dismissal from the force for alleged misconduct. Holland demurred to Elder's bill of particulars[2] which conceded that the testimony was offered during a hearing. The trial court sustained the demurrer without giving reasons. On appeal, *held,* reversed and remanded to give plaintiff an opportunity to prove actual malice.[3] Although defendant's statement was made in the course of a hearing, it was entitled to only a qualified privilege under the law of libel and slander.

Statements by participants in both judicial[4] and quasi-judicial[5] proceedings are absolutely privileged for slander and libel.[6] When a proceeding

[1] The plaintiff's action was also brought under the Statute of Insulting Words, VA. CODE ANN. § 8-630 (1957), but ". . . this section is treated precisely the same as an action for slander . . . for words actionable per se . . . except that no publication is necessary." Carwile v. Richmond Newspapers, 196 Va. 1, 6, 82 S.E.2d 588, 591 (1954).

[2] VA. SUP. CT. APP. R. 3:18(a): "All bills of particulars . . . are pleadings."

[3] Subsequent to the demurrer, the parties stipulated that the transcript of the hearing ". . . insofar as . . . relevant . . . constitutes evidence . . . taken without objection and available to . . . either party for any purpose before this court or upon appeal." Elder v. Holland, 208 Va. 15, 17, 155 S.E.2d 369, 371 (1967). The court held that the facts disclosed by the transcript could be considered by it on appeal in ruling on the demurrer, *citing* Smith v. Wolsiefer, 119 Va. 247, 250, 89 S.E. 115, 116 (1916), where the trial court's consideration of a deed of lease in ruling on a demurrer was upheld since all the parties ". . . appear[ed] to have consented for the trial court to consider . . . [it] as a part of the declaration." 208 Va. at 18, 155 S.E.2d at 372.

The court also held that defendant's status as an employee of the state did not render him immune from liability for his intentional acts done in the course of employment.

[4] Ginsberg v. Black, 192 F.2d 823 (7th Cir. 1951), *cert. denied,* 343 U.S. 934 (1952), *reh. denied,* 343 U.S. 958 (1952).

[5] Robertson v. Industrial Ins. Co., 75 So.2d 198, 45 A.L.R.2d 1292 (Fla. 1954); Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889 (1955).

[6] "The [absolute] privilege extends [as well] to pleadings and other papers made a part of a judicial or quasi-judicial proceeding even though such proceeding is in its preliminary stage and no formal judicial action has been taken." Ramstead v. Morgan, 219 Ore. 383, 347 P.2d 594, 599 (1959); Reagan v. Guardian Life Ins. Co. of Texas, 155

is neither judicial nor quasi-judicial, the statements made therein are usually held entitled to a qualified privilege for defamation, *i.e.*, privileged in the absence of actual malice.[7] The absolute privilege in judicial and quasi-judicial proceedings exists so long as the statement is relevant to the issue at hand.[8] An absolute privilege is accorded such statements because it is felt that the need for free discussion to reach a just result outweighs the attendant danger of defamation.[9] A "judicial proceeding" for the purpose of granting an absolute privilege for defamation is a hearing before a court of established jurisdiction and procedure to decide the rights of parties before it.[10] The term "quasi-judicial," and the concomitant absolute privilege for

S.W.2d 950, 953 (Tex. Civ. App. 1941), *aff'd*, 140 Tex. 105, 166 S.W.2d 909 (1942) (written statement filed with insurance commissioner); RESTATEMENT, TORTS § 587, at 231 (1938); *see* Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518, 520 (1888) (petition filed with court asking that party be punished for contempt); *cf.* RESTATEMENT, TORTS, § 586, at 229 (1938).

7 Story v. Norfolk Newspapers, Inc. 202 Va. 588, 590-91, 118 S.E.2d 668, 670 (1961): "[I]f a communication is one of qualified privilege the onus is cast upon the person claiming to have been defamed to prove the existence of [actual] malice." New York Times Company v. Sullivan, 376 U.S. 254, 279-80 (1964), states that "actual malice" is present when the statement is made with actual knowledge of its falsity or with reckless disregard of whether it is false.

While the factors entitling the statement to a qualified privilege are often not spelled out, the decision to grant a qualified privilege is usually sustainable on at least one ground, such as the fact that the statement: was made by a public officer in the discharge of his official duty [City of Mullens v. Davidson, 133 W. Va. 557, 57 S.E.2d 1, 6 (1949)]; concerned the official conduct of a public official, [New York Times Company v. Sullivan, 376 U.S. 254 (1964); Reaves v. Foster, 200 So.2d 453, 456 (Miss. 1967)]; was made to a group of persons sharing with the publisher a common interest in the subject matter [McKinnon v. Smith, 52 Misc. 2d 349, 275 N.Y.S. 2d 900 (1966); RESTATEMENT, TORTS § 596, at 255 (1938)]; was a comment on a matter of public interest [RESTATEMENT, TORTS § 596, at 260-61 (1938)]. *See generally* PROSSER, TORTS § 110, at 805 (1964). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964), which makes the qualified privilege for comment in the press on the official conduct of a public official, granted in New York Times Company v. Sullivan, *supra*, applicable to a *criminal action* for libel.

8 Penick v. Ratcliffe, 149 Va. 618, 635, 140 S.E. 664, 669 (1927); Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505, 506-07 (1888); Burgess v. Turtle and Co., 155 Minn. 479, 193 N.W. 945, 947 (1923) suggests as a test of relevancy, "Was an allegation so palpably wanting in relation to the subject matter that no reasonable man could doubt its irrelevancy and impropriety?" *See also* Annot., 123 Am. St. Rep. 631, 649 (1909), suggesting that the "privilege of a witness extends beyond that of counsel, for it is not his business to consider whether the subject under inquiry is relevant or not . . . if no objection is made, or being made is overruled, it is the duty of the witness to assume it is relevant . . . and for his answer he cannot be held liable. . . ." *Contra* Matthis v. Kennedy, 67 N.W.2d 413, 417 (Minn Sup. Ct. 1954).

9 *See* Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518, 520 (1888); Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889, 891 (1955); Matthis v. Kennedy, 67 N.W.2d 413, 417 (Minn. 1954).

10 Penick v. Ratcliffe, 149 Va. 618, 628, 140 S.E. 664, 667 (1927).

defamation, applies to those administrative and regulatory proceedings which share with judicial proceedings safeguards tending to inhibit the making of defamatory statements.[11] One such safeguard is the mandatory requirement of attendance by witnesses[12] which aids in a thorough investigation of the issues involved and enables the defamed party to face his accusers, permitting him to vindicate himself in the same proceeding.[13] The presence of criminal liability for perjured testimony[14] and the amenability of the

[11] Engelmohr v. Bache, 66 Wash.2d 103, 401 P.2d 346, 347 (1965) (by implication); Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889, 894 (1955). *But see* J. D. Construction Corp. v. Isaacs, 95 N.J. Super. Ct. 122, 230 A.2d 168 (1967), *cert. granted,* 50 N.J. 290, 234 A.2d 399 (1967), an action for slander and libel arising out of the contents of a letter sent by defendant to members of a township committee charging plaintiff with improper conduct in connection with an application for a zoning change. At a meeting of the township committee the letter was read aloud with defendant's permission and thus made part of the proceedings. On appeal, the plaintiff objected to the granting of an absolute privilege for defamation to the letter's contents on the ground that the meeting had lacked judicial safeguards. Stating that defendant had "read too much" into the requirement of Ranier's Dairies v. Raritan Valley Farms, *supra,* that a quasi-judicial proceeding must contain judicial safeguards, the court found the hearing quasi-judicial for the following reasons: defendant could be regarded as a "party," *i.e.,* a participant, in the proceeding, since it was "appropraite" to have given him notice and hearing, even though these were not in fact given him; a presiding officer was in control of the meeting (nothing, however, is said regarding his powers over the proceeding's participants); the decision was reviewable both on its law and facts by a court; the subject matter of the hearing was quasi-judicial and of "substantial public importance." The court prefaced its decision with the observation that the border separating quasi-judicial proceedings from other proceedings is a "penumbral" one. Should the New Jersey Supreme Court sustain the lower court's decision, however, there will have emerged a clear line dividing those jurisdictions which demand for a quasi-judicial proceeding the presence of some safeguards mitigating the danger of defamation from those which are satisfied with the presence of other quasi-judicial features.

In Corbin v. Washington Fire and Marine Insurance Company, 278 F. Supp. 393 (D.C.S.C. 1968), the court granted defendant's motion for summary judgment on the ground that its statement of facts in a private arbitration proceeding had been absolutely privileged for libel. Noting the strong public policy in favor of settling disputes by means of arbitration, the court stated that were such statements not so privileged, the ensuing fear of defamation actions could hamper the development of a full record which is necessary for effective arbitration. The court dismissed as unimportant the fact that the arbitration proceeding had come about by private agreement rather than under statute. Moreover, the absence of a hearing officer with supervisory power over the proceedings would not negate the privilege, since even in a judicial proceeding the scope of the privilege may extend beyond the court's power to restrain the participants.

[12] Guardian Life Ins. Co. of Texas v. Reagan, 155 S.W.2d 950, 953 (Tex. Civ. App. 1941), *aff'd,* 140 Tex. 105, 166 S.W.2d 909 (1942); Jenson v. Olson, 141 N.W.2d 488, 490 (Minn. Sup. Ct. 1966). *See* RESTATEMENT, TORTS § 588, comment *a* at 233 (1938), "The compulsory attendance of witnesses makes the protection afforded the more necessary." Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 COLUM. L. REV. 463, 486 (1909).

[13] Veeder, *supra* note at 486.

[14] *See* Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518, 520 (1888); RESTATEMENT,

participants of the proceeding to contempt process[15] are other highly regarded safeguards which tend to keep statements within tolerable bounds without unduly restricting free discussion.[16] Another factor indicating that a hearing is quasi-judicial is the availability to a defamed party of an alternative remedy to an action for defamation.[17] While malicious prosecution has been suggested as an alternative remedy,[18] not all jurisdictions permit this action in response to every wrongfully instituted civil proceeding.[19] Also, it does not lie where the defendant can show probable cause for initiating the proceeding, even though his subsequent testimony is deliberately slanderous.[20] Moreover, the availability of an action for malicious prosecution presupposes both that the defaming party helped initiate or encouraged the proceeding and that the party defamed therein was also the defendant.[21]

TORTS § 588, comment *a* at 233 (1938) ("The witness is subject to the control of the trial judge in the exercise of the [absolute] privilege. For the abuse of it, he may be subject to criminal prosecution for perjury and to punishment for contempt.") *cited in* Jenson v. Olsen, 141 N.W.2d 488, 490 n.3 (Minn. Sup. Ct. 1966); Veeder, *supra* note 12, at 470.

15 *See* Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222, 225 (1954); RESTATEMENT, TORTS § 588, comment *a* at 233 (1938). *But see* Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889, 894 (1955).

16 Veeder, *supra* note 12, at 470.

17 Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222, 225 (1954); Veeder, *supra* note 12, at 470. *See also* Harper, *Malicious Prosecution, False Imprisonment and Defamation,* 15 TEX. L. REV. 157 (1937).

18 Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889, 896 (1955). *See also* Novick v. Becker, 4 Wis. 2d 432, 90 N.W.2d 620 (1958). In Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518, 520 (1888), defendant's petition filed with court was absolutely privileged as a statement made in the course of a judicial proceeding and *abuse of process* was not available as an alternative remedy, regardless of the petitioner's malice and knowledge of the falsity of its averments, since the petition was filed for the very purpose for which such petition was intended to be used.

19 12 MICHIE'S JURISPRUDENCE, *Malicious Prosecution* § 15, at 319 (1950); "[The] groundless and malicious institution of even civil suits will furnish a basis of action where it is accompanied by arrest of the person, seizure of property, injury to business, or other special damage.", *citing* National Surety Co. v. Page, 58 F.2d 145 (4th Cir. 1932), *reh. denied* 59 F.2d 370 (1932). *See also* Petrich v. McDonald, 44 Wash.2d 211, 266 P.2d 1047, 1050, 1052 (1954) holding plaintiff could not recover in action for malicious prosecution when he failed to show "special injury" (also called "special damage") which the court said did not include any injury which is the "necessary result of all similar suits."

20 *See* PROSSER, TORTS § 113, at 852-53 & § 114, at 874 (1964).

21 *See,* PROSSER, TORTS § 113, at 854-55 (1964). *See also* Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio 123, 177 N.E. 203, 81 A.L.R. 1117 (1931) (testimony given before a grand jury absolutely privileged and inadmissible in a subsequent action for malicious prosecution).

In Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889, 895 (1955),

In addition to the foregoing tests courts have asked whether the proceeding dealt with issues of significant public concern, but the presence of such issues, without more, has not led them to find statements of its participants absolutely privileged.[22] However, proceedings aimed at determining whether a party's license to engage in certain activity should be granted, suspended, or revoked have often been held to be of a quasi-judicial nature.[23] The fact that a proceeding is conducted pursuant to statutory provisions is often a significant factor, though not a decisive one.[24] Proceedings from which a party may appeal of right to a court of law have generally been held to be quasi-judicial.[25]

Prior to *Elder,* in *Lightner v. Osborn,*[26] plaintiff in a libel action had sought to introduce defendant's testimony offered in a previous judicial proceeding as evidence of his malice in making accusations in a letter whose contents were covered by a qualified privilege. Holding the testimony from the previous trial admissible, the court said defendant's privilege as a witness had been a "limited" one.[27] However, since the court found the

the court recognized approvingly that malicious prosecution is a more limited remedy than slander or libel stating, "If the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and *quasi*-judicial proceedings is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label."

22 *Compare* Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889, 894 (1955); Lininger v. Knight, 123 Colo. 213, 226 P.2d 809, 813 (1951), *with* Engelmohr v. Bache, 66 Wash. 103, 401 P.2d 346 (1965); *cf.* Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 815 (1890); RESTATEMENT, TORTS § 598, at 260 (1938).

23 Robertson v. Industrial Ins. Co., 75 So.2d 198, 45 A.L.R.2d 1292 (Fla. 1954); Powers v. Vaughan, 312 Mich. 297, 20 N.W.2d 196 (1945); Ranier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889 (1955); Guardian Life Ins. Co. of Texas v. Reagan, 155 S.W.2d 950, 953 (Tex. Civ. App. 1941), *aff'd,* 140 Tex. 105, 166 S.W.2d 909 (1942). *But see* Engelmohr v Bache, 66 Wash. 103, 401 P.2d 346 (1965); Meyer v. Parr, 69 Ohio App. 344, 37 N.E.2d 637 (1941).

24 *Compare* Penick v. Ratcliffe, 149 Va. 618, 631, 140 S.E. 664, 668 (1927); Burgess v. Turtle and Co., 155 Minn. 479, 193 N.W. 945, 947 (1923), *with* Engelmohr v. Bache, 66 Wash. 103, 401 P.2d 346 (1965), *petition for cert. dismissed,* 382 U.S. 950 (1965). *But see* Meyer v. Parr, 69 Ohio App. 344, 37 N.E.2d 637 (1941).

25 J. D. Construction Corp. v. Isaacs, 95 N.J. Super. Ct. 122, 230 A.2d 168, 172 (1967), *cert. granted,* 50 N.J. 290, 234 A.2d 399 (1967); Guardian Life Ins. Co. of Texas v. Reagan, 155 S.W.2d 950, 953 (Tex. Civ. App. 1941), *aff'd,* 140 Tex. 105, 100 S.W.2d 909 (1942); *cf.* Veeder, *supra* note 12, at 486. *Contra,* Meyer v. Parr, 69 Ohio App. 344, 37 N.E.2d 637, 640 (1941), where the court denied an absolute privilege for defamation to an affidavit filed with the state board of embalmers. The court stated that the provision for judicial review of contested cases in the statute creating the board did not mean that the board exercised "judicial power." Rather this provision was said to be a recognition that "under the due process clauses of the state and federal constitutions it is not possible to confer absolute power upon executive or administrative officers."

26 142 Va. 19, 127 S.E. 314 (1925).

27 *Id.* at 24, 127 S.E. at 316.

testimony to have been irrelevant to the issues at the earlier hearing wherein it was given, its holding was consistent with the existence of an absolute privilege.[28] In the later case of *Penick v. Ratcliffe,* a petition filed in a circuit court charging election irregularities formed the basis for a libel action. Stating that the definition of a judicial proceeding was "broad and comprehensive," the court held that, while the hearing was neither a suit in equity nor an action at law, the petition's allegations were entitled to an absolute privilege.[29] The *Elder* case presented for the first time in Virginia the issue of whether to grant the absolute privilege to testimony in an administrative hearing, and the court applied the criteria heretofore noted in reaching its decision. The court stressed its uncertainty about whether false testimony by any witness in the hearing could have made the latter criminally liable for perjury.[30] This uncertainty is justified in view of *Commonwealth v. Calvert* where the quashing of an indictment for perjury was upheld because the particular court did not have "legal and competent authority" to administer the oath in question.[31] Assuming, *arguendo,* that defendant's testimony at the superintendent's hearing was false, it is still questionable whether it was material as required by the Virginia statute defining perjury.[32]

The *Elder* court noted that attendance at the hearing had not been mandatory and that the declarant, whose statement defendant claimed to be repeating, had declined to attend.[33] Also noting that the rules of evidence had not been applied and that defendant's allegedly slanderous statement was hearsay,[34] the court contrasted the hearing with those held under the General Administrative Agencies Act.[35] In the latter hearings, witnesses can be subpoenaed and hearsay testimony received only when a declarant is not readily available as a witness and when judicial review is afforded.[36] The court, however, expressly withheld opinion about whether a witness' testimony in a hearing pursuant to this act would qualify for an absolute privilege.[37] Calling attention to the hearsay nature of defendant's statement served to dramatize the greater likelihood of defamatory statements oc-

[28] Cases cited note 9 *supra.*

[28] Cases cited note 9, *supra.*

[30] 208 Va. at 22, 155 S.E.2d at 374.

[31] 3 Va. (1 Va. Cas.) 265, 267 (1809).

[32] VA. CODE ANN. § 18.1-273 (1960). *See* Commonwealth v. Crump, 75 Va. 922 (1822).

[33] 208 Va. at 16, 155 S.E.2d at 374.

[34] *Id.* at 22, 155 S.E.2d at 374.

[35] VA. CODE ANN. §§ 9-6.1 to -6.14 (1964).

[36] VA. CODE ANN. §§ 9-6.10, 9-6.11 & 9-6.13 (1964).

[37] 208 Va. at 22 n. 3, 155 S.E.2d at 374 n. 3.

curring in proceedings where the rules of evidence are not applied. Doubtless, the court did not mean to suggest that a witness' testimony ceases to be absolutely privileged when it transgresses so technical an evidence rule, since this would inhibit the flow of free discussion which the absolute privilege seeks to encourage.

In *Allen v. Crofoot,* a New York court held that slanderous testimony is absolutely privileged even though not given in a judicial proceeding provided the defaming party reasonably believes such a proceeding is in progress.[38] Similarly, conceding that the hearing involved in *Elder* was not quasi-judicial, there remains the issue of whether the defendant was justified in believing it to be such in view of its ostensible features: plaintiff was represented at the hearing by counsel; an Assistant Attorney-General represented the Commonwealth's interests;[39] all testimony was given under oath, transcribed by a court reporter,[40] and subject to cross-examination.[41] In dictum the *Penick* court had noted sympathetically that "witnesses who detail their own version of facts seldom pause to ponder the jurisdiction of the court," [42] but the *Elder* court apparently viewed the issue as mooted here by the presiding officer's warning at the outset of the proceeding that it was "not a hearing before a Court of law." [43]

Discrimination—HOSPITALS—ANY SEGREGATION OF PATIENTS BY RACE WITHIN WARDS OF A PUBLICLY SUPPORTED HOSPITAL IS A PATENT VIOLATION OF THE LAW.—QUALIFIED NEGRO PHYSICIANS SHALL NOT BE DENIED STAFF PRIVILEGES AT A PUBLICLY SUPPORTED HOSPITAL BECAUSE OF THEIR RACE. *Cypress v. Newport News General and Nonsectarian Hospital Association,* 375 F. 2d 648 (4th Cir. 1967).

A Negro physician's application for staff privileges at defendant hospital was rejected by a secret ballot vote of the all-white staff, although he was ostensibly well qualified. The hospital, which received substantial fed-

38 2 Wend. (N.Y.) 515, 20 Am. Dec. 647 (1829); *see* Harper, *Privileged Defamation,* 22 VA. L. REV. 642, 649-50 (1936):

> In practically all cases of privilege in the law of torts the existence of a privilege depends upon facts as they appear to the person whose liability is in question. . . . In the law of defamation it would be extraordinary if the facts as they reasonably appeared to the defendant would not beget the privilege.

39 Elder v. Holland, 208 Va. 15, 16, 155 S.E.2d 370-71 (1967).

40 *Ibid.*

41 Record, Vol. 208, Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967)

42 Penick v. Ratcliffe, 149 Va. 618, 631, 140 S.E. 664, 668 (1927).

43 Elder v. Holland, 208 Va. 15, 22, 155 S.E.2d 369, 374 (1967).

eral and state aid under the Hill-Burton Act,[1] also segregated patients within its wards and rooms by race. The physician and two of his patients brought a class action to enjoin the racially discriminatory policies and practices of the defendant hospital in Newport News, Virginia; specifically: (1) from segregating races within individual wards and rooms, and (2) from denying staff privileges to qualified Negro physicians. The district court denied relief.[2] On appeal, *held,* reversed and remanded for the entry of an order of injunctive relief. Segregation of the races within wards of publicly supported hospitals is unconstitutional, moreover, qualified Negro physicians shall not be denied staff privileges at a publicly supported hospital because of their race.[3]

Since the decision of the United States Supreme Court in *Brown v. Board of Education,*[4] courts have held compulsory segregation of the races in a variety of situations to be a violation of the rights guaranteed by the Fifth and Fourteenth Amendments.[5] Hospitals which receive substantial

[1] 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291 (1964). Grants are made by the federal government to public and private hospitals to assist in the construction of new hospital facilities. These grants are made in accordance with a statewide plan submitted by an authorized state agency after it has made an inventory of existing needs and developed construction priorities according to federal standards. In several previous cases, a hospital's participation in the Hill-Burton federal-state aid program has been held to bring it within the purview of the Fifth and Fourteenth Amendments' prohibition against racial discrimination. Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963); Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963)

[2] Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n, 251 F. Supp. 667 (E.D. Va. 1966).

[3] The court, per Sobeloff, J., held that, since the hospital had not given a reasonable explanation showing that the denial of staff privileges was not based on the race of the applicant, that an inference of racial discrimination had not been rebutted. The inference was compelled by the fact that seventy per cent of the white physicians in the community were members of the hospital staff (a prerequisite for admitting their patients), while none of the Negro physicians were. *Cypress* follows a line of recent cases holding likewise. Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966) (School teachers who were dismissed without explanation showed that they had all the objective qualifications. The burden of proof was then on the school board to produce evidence meriting dismissal.); Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966), *noted in* 65 MICH. L. REV. 549 (1967) (Where two doctors on an all-white staff of the dental society had to recommend new members, Negro applicants were unduly burdened, but not white applicants.); *see* Note, *Racial Integration of Professional Associations,* 18 U. FLA. L. REV. 490 (1965); and Note, *Working Rules For Assuring Nondiscrimination In Hospital Administration,* 74 YALE L. J. 151 (1964).

[4] 347 U.S. 483 (1954).

[5] Loving v. Virginia, 388 U.S. 1 (1967) (anti-miscegenation statutes); Reitman v. Mulkey, 387 U.S. 369 (1967) (housing); Watson v. City of Memphis, 373 U.S. 526 (1963) (public parks and playgrounds); Boynton v. Virginia, 364 U.S. 454 (1960)

federal or state aid have previously been held to come within the purview of the Fifth or Fourteenth Amendment's guarantees of due process and equal protection of the laws.[6] Most previous decisions have dealt with segregation in "hospital facilities" offered to patients seeking admission.[7] These decisions have uniformly held that patients of both races must be *admitted* without racial discrimination to hospitals which are publicly supported. The principal case concerns another problem, namely, the patient's rights after admission to the hospital. More precisely, the question is whether one's constitutional rights have been violated if, after being admitted to a racially integrated hospital, he is placed in a ward exclusively with members of his own race. *Cypress* holds that this is unconstitutional racial discrimination per se. Yet a hospital patient has another possibly conflicting right—that of a reasonable degree of care from his physician and the hospital in providing for his recovery; specifically, in providing surrounding conditions which promote the equanimity necessary for convalescence and recovery.[8]

Only two cases other than *Cypress* have dealt specifically with the narrow issue of discrimination within individual wards after admission to the hospital. In *Rackley v. Board of Trustees of the Orangeburg Regional Hospital,*[9] the Court conceded that "psychological factors are an important element in patient recovery," [10] but added, nevertheless, that "[r]acial classifications are irrelevant and invidious." [11] The court also said that "[j]ustification to segregate on the basis of alleged . . . 'differences' is no longer

(seating in courtrooms); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966) (collecting cases on school desegregation).

[6] Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963); Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963).

[7] Flagler Hosp., Inc. v. Hayling, 344 F.2d 950 (5th Cir. 1965); Lewter v. Lee Mem. Hosp. No. 65-47-Civ. T. (M.D. Fla. 1965), 11 RACE REL. L. REP. 1425; Eaton v Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963); Meltsner, *Equality and Health,* 115 U. PA. L. REV. 22, 28 (1966).

[8] *Cf.* McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549 (1959); Note, *Hospital Tort Liability and Immunity,* 49 VA. L. REV. 622 (1963).

[9] 238 F. Supp. 512 (E.D.S.C. 1965), 10 RACE REL. L. REP. 297.

[10] *Id.* at 518, 10 RACE REL. L. REP. at 302, *citing* Brown v. Board of Educ., 347 U.S. 483 (1954).

[11] *Id.* at 519, 10 RACE REL. L. REP. at 302. This unbending principle of law was first used in a 1944 case involving a labor contract and the phrase actually used was, "*Here* the discriminations based on race alone are obviously irrelevant and invidious." (Emphasis added.) Steele v. Louisville and Nashville Ry. Co., 323 U.S. 192, 203 (1944). This phrase, although frequently misapplied, became extremely popular after the *Steele* decision. It has since been used in at least two school cases, Goss v. Board of Educ., 373 U.S. 683, 687 (1963), and Randall v. Sumter School Dist. No. 2, 232 F. Supp. 786, 789 (E.D.S.C. 1964). *Rackley* quoted the phrase, citing *Randall* as its source.

permissible; *the issue is no longer litigable.*" [12] (Emphasis added.) Although it is debatable whether school desegregation cases are in point,[13] the Court relied on many of them in enjoining the defendant hospital from maintaining racially segregated wards.

In *Cypress,* Judge Bryan dissented in part,[14] stating that a doctor's professional obligation to provide for a patient's recovery should be allowed to override the general policy of integration in certain cases. Where integration of the races within a hospital room would be injurious to the condition of either a white or a Negro patient because of actual although unfounded prejudice, a physician, using his professional discretion, should be allowed to place the patient in a room with members of his own race.

The other case on discrimination within wards after admission to the hospital lends support to Judge Bryan's view. In *Rax v. State Department of Hospitals,*[15] the Court ordered the defendant hospital to cease and desist from maintaining segregation of the races in any part of the hospital, including wards. The Court went one step further and added:

> [N]othing herein contained shall operate to or be construed as prohibiting the re-assignment of any patient, following such patient's admission . . . on an individual case basis, to a different ward, room, or residential area, where such re-assignment is made by the patient's physician or physicians based solely upon therapeutic, medical or psychiatric considerations and evaluations in the best interest of the patient.[16]

In the principal case it was said that a hospital has practiced unconstitutional racial discrimination per se if it places Negro patients in one ward

[12] *Id.* at 519, *quoting* Goss v. Board of Educ., 373 U.S. 683, 687 (1963).

[13] The Supreme Court said in Brown v. Board of Educ., 347 U.S. 483, that separate educational facilities were inherently unequal. Separate schools cannot have the same teachers or even equal teachers, but hospital wards can have the same nurses and doctors. Furthermore, students racially segregated in schools are denied the opportunity of communication and association, an integral element of education guaranteed by the Constitution. Patients in hospitals, on the other hand, seemingly could receive treatment or convalesce equally well without communication or discussion among themselves. Education is a process of interaction, whereas patient treatment is administered to individuals, not *en masse.* Therefore, there may be a denial of a necessary element in education where schools are racially segregated but a denial of no element of treatment where hospital wards are segregated in a racially integrated hospital. Thus, cases which deal with constitutional rights in schools may not be applicable to controversies which arise in facilities operated for other purposes. *Cf.* Nichols v. McGhee, 169 F. Supp. 721, 724 (N.D. Cal.), *appeal dismissed,* 361 U.S. 6 (1959).

[14] Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n, 375 F.2d 648, 661 (1967).

[15] Civ. Action No. 3265 (E.D. La. 1965), 11 RACE REL. L. REP. 384.

[16] *Id.* at 385.

and white patients in another. In addition, relying on a recent Alabama case holding the segregation of prisoners unconstitutional,[17] Judge Sobeloff, writing for the majority, states:

> Any distinction made on the basis of race in a publicly supported institution is a patent violation of the law, not to be tolerated by a court that is controlled by the Constitution of the United States.[18]

He then concludes that, if the Constitution will not tolerate racial segregation of prisoners, then it would more emphatically deny segregation of patients in a publicly supported hospital.[19] Prison cases should be more persuasive in hospital litigation than school cases are. The purposes of the two former institutions are somewhat similar, one being to provide for recovery, the other for rehabilitation. As in hospital cases, the prison cases hold that arbitrary racial discrimination is unconstitutional.[20] Most of these cases concede, however, that racial segregation in prisons is necessary and not forbidden by the Constitution under certain circumstances, namely, when necessitated to insure security and discipline.[21] By analogous reasoning, the *Rax* decision[22] and Judge Bryan's dissent[23] conclude that there are exceptions to constitutional guarantees in hospitals also.

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[17] Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968).

[18] Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n, 375 F.2d 648, 656 (4th Cir. 1967).

[19] *Ibid.* n. 15.

[20] Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967); Board of Managers of the Ark. Training School for Boys v. George, 377 F.2d 228 (8th Cir. 1967); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968); Nichols v. McGhee, 169 F. Supp. 721 (N.D. Cal. 1959), *appeal dismissed,* 361 U.S. 6 (1959); *see* Comment, *The Rights of a Prisoner While Incarcerated,* 15 Buffalo L. Rev. 397 (1965).

[21] Lee v. Washington, 390 U.S. 333 (1968), *aff'g* 263 F. Supp. 327 (M.D. Ala. 1966). In a per curiam opinion, the Court stated that it found the district court's opinion "unexceptionable." The district court opinion upon which the court relied in *Cypress* conceded that "there was merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period." A separate concurring opinion by Justices Black, Harland, and Stewart stated that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Accord,* Toles v. Katzenbach, 385 F.2d 107, 109 (1967); Board of Managers of the Ark. Training School for Boys v. George, 377 F.2d 228, 232 (8th Cir. 1967); Nichols v. McGhee, 169 F. Supp. 721, 725 (N.D. Cal. 1959), *appeal dismissed,* 361 U.S. 6 (1959); *see* Comment, *The Rights of a Prisoner While Incarcerated,* 15 Buffalo L. Rev. 397, 417 (1965).

[22] Rax v. State Dept. of Hosp., Civ. Action No. 3265 (E.D. La. 1965), 11 Race Rel. L. Rep. 384.

[23] Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n, 375 F.2d 648, 661 (4th Cir. 1967).

The majority of the cases in the field of prisons and some of those involving hospitals seem to be developing a doctrine reminiscent of Justice Holmes' "clear and present danger" test applied in a different context.[24] Thus, the application of the Court's stringent interpretation of the Constitution in the principal case is apparently not in accord with the weight of authority.

Municipal Corporations—STANDING TO SUE—RIGHT OF LOCAL TAXPAYERS TO CHALLENGE EXPENDITURES OF PUBLIC FUNDS. *Gordon v. Board of Supervisors,* 207 Va. 827, 153 S.E. 2d 270 (1967).

Plaintiffs filed a bill of complaint in a declaratory judgment proceeding, on behalf of themselves and all other taxpayers similarly situated, to challenge the statutory power of the Board of Supervisors[1] to lend money to the Fairfax County Airport Authority.[2] The trial court dismissed plaintiffs' complaint and they appealed. On appeal, the Board challenged plaintiffs' standing to appeal. *Held,* taxpayers not only have standing to challenge an expenditure of public funds by a locality,[3] but also have standing to appeal.[4]

Although taxpayers do not presently have standing to challenge the expenditure of funds by the federal government,[5] they can challenge state

[24] Schenck v. United States, 249 U.S. 47, 52 (1918).

[1] Va. Acts of Assembly 1964, ch. 642, at 967-75.

[2] This Authority was created by the Fairfax County Board of Supervisors under power vested in it by the Act, *supra* note 1, with the purpose of planning, financing, and acquiring property for an airport. The Gordons and other landowners were enjoined in a prior suit from obstructing Authority representatives who desired to make tests on their lands. The Gordons unsuccessfully maintained that the Authority could not compensate them for any damages caused by the tests. Although the Gordons had an individual economic interest as landowners in the prior suit, and they mentioned this interest in seeking standing to appeal in the present appeal, the Supreme Court of Appeals appraised appellants' standing as a taxpayer and not as a landowner. It was upon this taxpayer interest that they were granted standing to appeal.

[3] Surveys of taxpayer suits note no difference between suits against counties and municipal corporations (both hereinafter referred to as "locality"). *See* Comment, *Taxpayers' Suits: A Survey and Summary,* 69 YALE L. REV. 895, 896 n. 7 (1960); Note, *Taxpayer's Suits as a Means of Controlling the Expenditure of Public Funds,* 50 HARV. L. REV. 1276 n. 5 (1937). No distinction can be found in Virginia.

[4] The Court also held that 1) the prior injunction suit by the Authority was not res judicata as to whether the Board had authority to lend the Authority money; 2) Va. Acts of Assembly 1966, ch. 132, at 231, which allows a local government to lend money to any Authority it created, did not retroactively cure the Board's inability to loan money under the 1964 Act, *supra* note 1; 3) although the Board did not have express power to lend, such power would be inferred from the 1964 Act, for without it the Authority would be ineffective.

[5] Frothingham v. Mellon, 262 U.S. 447 (1923). A federal taxpayer, because of his remote economic interest, does not have standing to challenge federal expenditures

expenditures in at least thirty-four states,[6] and local expenditures in almost

which would increase the burden of future taxation and thereby take his property without due process of law. *But see* United States v. Butler, 297 U.S. 1 (1936), *and* Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937), where earmarking of the proceeds of a particular tax was said to establish a basis in a taxpayer's suit for judicial review of the validity of that particular expenditure. Authorities have criticized *Frothingham. See, e.g.,* Davis, *Standing to Challenge Governmental Action,* 39 MINN. L. REV. 353, 387-91 (1955); Jaffee, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265, 1294 (1961). In Flast v. Gardner, 271 F. Supp. 1, (S.D.N.Y. 1967), *petition for appeal filed,* 36 U.S. L. WEEK 3061 (U.S. July 25, 1967) (No. 416), taxpayers who are contesting federal expenditures as violative of the Establishment Clause attack the *Frothingham* standing requirements. Professor Lewis in *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV., 433, 436-41 (1962), suggests that federal taxpayers might establish standing to obtain judicial review of federal expenditures by proving an actual invasion of a constitutionally protected interest. Such a method of establishing standing might circumvent the *Frothingham* standing requirements which Professor Sutherland finds modified by the impact of Engel v. Vitale, 370 U.S. 421 (1962). Sutherland, *Establishment According to Engel,* 76 HARV. L. REV. 25, 26 (1962).

[6] Comment, 69 YALE L. REV., *supra* note 3, at 895 n. 6. Although Virginia taxpayers have not been granted express standing to challenge state actions, several decisions indicate that such standing might exist. A joint suit may be brought by two or more parties of a class for the benefit of all those similarly situated. Bull v. Read, 54 Va. (13 Gratt.) 78 (1855). A suit against a state officer is not necessarily a suit against the state. Blanton v. Southern Fertilizing Co., 77 Va. (2 Hans.) 335 (1883). When a Virginia corporation sought to enjoin state officials on behalf of all other Virginia taxpayers from acting under a statute, the question of standing to sue was not raised. Shenandoah Lime Co. v. Governor, 115 Va. 865, 80 S.E. 753 (1914). The Supreme Court of Appeals has allowed a Virginia county, as representative of milk consuming inhabitants to challenge an order of the State Milk Commission, in an unreported per curiam decision filed January 26, 1953, *aff'd per curiam,* 346 U.S. 932 (1954), *discussed in* Note, *The Supreme Court, 1953 Term,* 68 HARV. L. REV. 96, 132 (1954).

These cases form a foundation upon which a taxpayer's standing to challenge misappropriation of state funds could be based. This standing could be created in several ways: 1) allow taxpayers in a class action to challenge state expenditures; 2) alternatively, if taxpayers themselves are not given standing, allow local governments to challenge expenditures on their behalf; 3) establish that taxpayer suits are not directed against the state itself, but against state officials who misuse funds, thus avoiding the immunity problem. State immunity from suits which are instituted without express consent of the state should not extend to suits against individuals who illegally invade or threaten to invade pecuniary or property rights of taxpayers, even though they purport to act under state authority. *E.g.,* Terr v. Jordon, 232 N.C. 48, 59 S.E.2d 359 (1950). The need for taxpayer suits as a means to remedy illegal action by state officials continues due to the failure of the election process, public prosecution, and public exposure to provide a satisfactory substitute.

> True, the taxpayer's contribution to the state treasury may be a lesser percentage of the total than his municipal tax payments, and his interest in state affairs might therefore be said to be more remote. But no overriding considerations—such as the need for executive flexibility on the national level in foreign affairs and defense—make review of state action less desirable than review of the affairs of local government.

69 YALE L. REV. at 902.

every jurisdiction.[7] A Virginia taxpayer, who has suffered no out-of-pocket loss, may sue on behalf of a locality to recover funds which have been misappropriated by an individual public official, subject to the requirement that he first request the locality to sue and that it refused, or allege facts to show that such a request would be unavailing.[8] Local taxpayers without special interest do not have standing in equity to challenge land assessment reports in condemnation proceedings,[9] remove tie breakers from county board of supervisors,[10] or challenge the selection of school sites.[11] In such suits, taxpayers lack standing because of insufficient injury from the challenged act.[12] However, taxpayers do have standing to enjoin a locality itself from making unauthorized appropriations of local funds,[13] or illegal dispositions of local property.[14] But they could not appeal if the only wrong

[7] Crampton v. Zabriskie, 101 U.S. 601 (1879). For a collection of cases and jurisdictional holdings, see Comment, 69 YALE L. REV. *supra* note 3, at 895 n.7. *See also* 4 DILLON, MUNICIPAL CORPORATIONS § 1579-91 at 2763-91 (5th ed. 1911) [hereinafter cited as DILLON]; 2 ANTIEAU, LOCAL GOVERNMENT LAW § 16.16-17, at 503-14 (1967) (taxpayer suits against municipal corporations) [hereinafter cited as ANTIEAU]; 4 ANTIEAU § 40.07, at 254-57 (taxpayer suits against counties); RHYME, MUNICIPAL LAW § 31-3, at 792-94 (1967); 18 McQUILLIN, MUNICIPAL CORPORATIONS § 52.02 (3rd ed. 1950); Jaffee, *supra* note 5, at 1265.

[8] Sauer v. Moore, 171 Va. 421, 199 S.E. 487 (1938), *discussed in* 2 ANTIEAU § 16.14 at 496 & n. 46.

[9] Culpeper v. Gorrell, 61 Va. (20 Gratt.) 484 (1871).

[10] Nicholas v. Lawrence, 161 Va. 589, 171 S.E. 673 (1933).

[11] Brown v. Baldwin, 112 Va. 536, 72 S.E. 143 (1911).

[12] The interest required for Virginia taxpayer standing today is the product of standards demanding an economic injury produced by the misuse of public funds. The parties who sued in cases cited in notes 9, 10, and 11, *supra*, lacked this interest. There has been no recent litigation to allow the Supreme Court of Appeals to reappraise the interest required for taxpayer standing. The current trend in other jurisdictions, however, is to recognize that a taxpayer has an interest in good government, and that courts should protect this interest by judicial review of local actions without a showing of substantial impact on interests personal to the taxpayers. Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965). In recognizing this trend, *Gordon* might indicate a relaxation of requirements for taxpayer standing which would expand the field of illegal local actions which taxpayers can challenge.

[13] Bull v. Read, 54 Va. (13 Gratt.) 78, 86 (1855). *See also*, Campbell v. Bryant, 104 Va. 509, 52 S.E. 638 (1905); Johnson v. Black, 103 Va. 477, 49 S.E. 633 (1905); Lynchburg & Rivermont St. R. R. Co. v. Dameron, 95 Va. 545, 28 S.E. 951 (1898); Redd v. Supervisors of Henry Cty., 72 Va. (31 Gratt.) 695 (1879); Eyre v. Jacob, Sheriff, 55 Va. (14 Gratt.) 423 (1858); Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245 (1828); Goddin v. Crump, 35 Va. (8 Leigh) 120 (1837). For the advantages of suing in equity, *see* Shenandoah Valley R.R. Co. v. Supervisors of Clarke Cty., 78 Va. (3 Hans.) 269 (1884). For alternative methods of challenging local actions, *see* 4. DILLON § 1570-1601.

[14] Roper v. McWhorter, 77 Va. (2 Hans.) 214 (1883) (standing to sue municipality for illegal disposition of its property). *See* Appalachian Elec. Co. v. Town of Galax, 173 Va. 329, 4 S.E.2d 390 (1939) (standing to sue for illegal disposition of funds);

they sustained was that in common with all other taxpayers.[15] This appeal prerequisite is now rejected in Virginia in favor of identical requirements for standing to sue and standing to appeal.[16]

Equity has jurisdiction when a proper party seeks to enjoin the unlawful acts of local officials.[17] A taxpayer's standing as a proper party has been based on the economic threat of an unjustified increase in his tax burden,[18] and by analogy to a shareholder in a private corporation.[19] The most persuasive argument for taxpayer standing, however, is the lack of other effective alternatives to control local misappropriation of funds, which are necessitated by distrust of self-restraint on the part of the locality in the use of its spending power. This necessity seems to outweigh the threat of over-burdening court dockets. A taxpayer's standing effectuates a system of checks and balances which places official action under the scrutiny of judicial review.[20] Such suits are designed to enable representative class actions brought on behalf of all taxpayers to challenge governmental action which otherwise would go unchallenged.[21] It would be as unreasonable to demand that a taxpayer sue only for his minute portion of illegally expended funds as it would be to require all taxpayers to join in a suit. One authority has suggested that there should be a single form of citizen action,

Lynchburg & Rivermont St. R.R. Co. v. Dameron, 95 Va. 545, 28 S.E. 951 (1898) (standing to sue for illegal creation of a debt), *cited in* 13 MICHIE'S JURISPRUDENCE, *Municipal Corporations*, § 131, at 491 nn.3 & 4 (1951); Vaughan v. Town of Galax, 173 Va. 335, 4 S.E.2d 386 (1939), and Cundiff v. Jeter, 172 Va. 470, 2 S.E.2d 436 (1939) (Taxpayers have standing to challenge elections held for determining whether bonds should be issued as illegal.).

[15] VA. CODE ANN. § 8-462 (3)(c) (1957) provides in part that ". . . any *person* thinking himself aggrieved . . . by any final judgment, decree, or order in any civil case, may appeal" (emphasis added). If the jurisdiction of the Supreme Court of Appeals to hear an appeal is questioned, an appellant must show that he is such a "person." The degree of interest required to make an appellant a person within the purview of § 8-462(3)(c) has varied with judicial interpretation. "Person" was first defined as one having a collateral interest in the suit. Sayre v. Grymes, 11 Va. (1 Hen. & M.) 403 (1807). Subsequently, it was interpreted to mean an individual with a substantial, immediate, pecuniary interest exceeding that of the ordinary taxpayer. Nicholas v. Lawrence, 161 Va. 589, 171 S.E. 673 (1933). The *Nicholas* interpretation of person destroyed a taxpayer's power to appeal a challenge of illegal local expenditures. *Gordon* resolved the conflict by defining a person under § 8-462(3)(c) as one who has standing to sue in the lower court. Thus, having standing to sue, a taxpayer can initiate a suit without fear of having insufficient interest to appeal.

[16] Gordon v. Board of Supervisors, 207 Va. 827, 153 S.E.2d 270 (1967).

[17] A proper party is one with sufficient individual interest to justify standing in court. Note, 50 HARV. L. REV. *supra* note 3, at 1276.

[18] Frothingham v. Mellon, 262 U.S. at 486-87.

[19] 4 DILLON § 1580.

[20] Note, 78 HARV. L. REV., *supra* note 12.

[21] Howard v. City of Boulder, 132 Colo. 401, 290 P.2d 237, 238 (1955).

which would be competent to test state and local official conduct whether or not the relief sought is positive (mandamus) or negative (injunction) in form.[22] Virginia has not reached this point, but *Gordon* has firmly entrenched the taxpayer's standing to challenge local expenditures without fear of having insufficient interest to appeal. The principal case also suggests similar decisions in suits against the state for illegal expenditure of public funds.

Taxation—EXEMPTION—LEASEHOLD IN TAX EXEMPT LAND SUBJECT TO TAX IF USED FOR PRIVATE OR COMMERCIAL PURPOSE—AGREEMENT IN LIEU OF TAXES UNCONSTITUTIONAL. *Chesapeake Industrial Development Authority v. Suthers,* 208 Va. 51, 155 S.E. 2d 326 (1967).

The Chesapeake Industrial Development Authority was created by the City Council of Chesapeake, Virginia, under an enabling act passed by the Virginia General Assembly.[1] The aim of the Authority was to encourage industry to locate in the Chesapeake area. To further their goal, the Authority purchased a suitable tract of land and entered into a twenty-five year lease with an out-of-state industry.[2] The land was to be paid for by revenue bonds issued in the Authority's name,[3] and the lessee agreed to

[22] Jaffee, *supra* note 5, at 1296.

[1] VA. CODE ANN. §§ 15.1-1373 through 15.1-1390 (1964) (Additional Supp. 1966). In the words of the Supreme Court of Appeals of Virginia, "The Act authorizes the governing body of any county, city, or town to create by ordinance an industrial development authority as a political subdivision of the Commonwealth, with such public and corporate powers as are set forth in the Act to acquire, own, lease, and dispose of properties for the promotion of industry and the development of trade in such county, city, or town." Chesapeake Industrial Development Authority v. Suthers, 208 Va. 51, 52, 155 S.E.2d 326, 328 (1967).

[2] This Authority succeeded to the interest of the Chesapeake Port and Industrial Authority (which had originally encouraged the out-of-state industry to locate in Virginia) in an Interim Financing Agreement. The agreement specified that the Virginia National Bank would lend two million dollars to the Authority to pay for the land, and the Authority would repay the Bank from the proceeds of the sale of tax-exempt revenue bonds.

[3] Revenue bonds were to be issued in the amount of three million dollars to be secured by an Indenture of Mortgage and Deed of Trust. With the bonds in the Authority's name and payable from a fund established by the lessee's rental payments, they constituted a debt of the Authority and not the City of Chesapeake. This fully satisfies the Credit Clause of § 185 of the Constitution of Virginia. VA. CONST. art. XIII, § 185 (1902). Chesapeake Industrial Development Authority v. Suthers, 208 Va. 51, 57, 58, 155 S.E.2d 326, 332 (1967); Button v. Day, 208 Va. 494, 500, 158 S.E.2d 735, 739 (1968) (dictum).

Tax-exempt industrial revenue bond financing is an accepted practice in most states today. *See generally* Pinsky, *State Constitutional Limitations On Public Industrial Fi-*

pay a fixed amount of rent in lieu of, and equal to, local property taxes to the Authority.[4] In order to insure the sale of the revenue bonds by testing the Constitutionality of the Acts creating the Authority,[5] its Chairman refused to sign the lease, and the Authority brought a writ of mandamus to force his signature.[6] *Held,* writ of mandamus denied. Although the land itself may be tax-exempt, a leasehold interest whose beneficial use is for private or commercial purposes is subject to taxation, and any Act which provides for an agreement in lieu of taxes is unconstitutional.

Historically, commercial leaseholds severed from the public domain have been held the proper subject of taxation.[7] Even under the interdiction of *McCulloch v. Maryland,*[8] the Supreme Court of the United States has held that land leased by the Federal Government for commercial purposes, may be subjected to a state tax based on the value of the land.[9] The Supreme Court hinges its decisions on the amount of control exercised by the Federal Government over the leased property. With a limited amount of governmental control, the leased property may be taxed, even though the burden of the tax ultimately falls on the government.[10]

In Virginia, the localities are the recipients of real estate taxes,[11] and prior to 1955, they were unable to tax a leasehold interest because it was a chattel

nancing: A Historical and Economic Approach, 111 U. PA. L. REV. 265 (1963); Note, *The Public Purpose of Municipal Financing For Industrial Development,* 70 YALE L. J. 789 (1961); Spiegel, *Financing Private Ventures With Tax Exempt Bonds: A Developing "Truckhole" In The Tax Law,* 17 STAN. L. REV. 223 (1965). For a brief discussion of Virginia's attitude, *see* Harris & Russell, *Taxation, 1966-1967 Annual Survey of Virginia Law,* 53 VA. L. REV. 1844, 1853 (1967).

[4] Pursuant to VA. CODE ANN. § 15.1-1382 (1964) (Additional Supp. 1966), which reads in part:

> Included in the rental payments to be made by any lessee to the authority shall be an amount in lieu of and equal to local property taxes and assessments upon property of the authority so leased. . . . Notwithstanding anything contained herein to the contrary, the authority and the political subdivision in which all or any part of the property for a particular facility of the authority is located may agree at any time to a definite sum to be paid as local property taxes and assessments throughout the duration of the lease of a particular project.

[5] VA. CODE ANN. § 15.1-1382 (1964) (Additional Supp. 1966).

[6] VA. CODE ANN. § 8-714 (1957). The Attorney General is given statutory authority to bring a writ of mandamus to require an officer of the State to perform his official statutory function. The officer, in refusing to act, questions the validity of the statute, thereby bringing its constitutionality before the Court. Almond v. Day, 197 Va. 782, 785, 91 S.E.2d 660, 661 (1956).

[7] Trimble v. Seattle, 231 U.S. 638, 690 (1914); *see* Annot., 23 A.L.R. 248, 250 (1923).

[8] 17 U.S. (4 Wheat.) 316 (1819).

[9] United States v. City of Detroit, 355 U.S. 466 (1958).

[10] United States v. Muskegon, 355 U.S. 484, 486 (1958); *accord,* United States v. Boyd, 378 U.S. 39, 46 (1964).

[11] VA. CONST. art. XIII, § 171 (1902); VA. CODE ANN. § 58-9 (1959).

real and taxed as personalty.[12] At that time the term "taxable real estate" was redefined to include ". . . a leasehold interest in every case in which the land . . . [was] exempt from assessment for taxation to the owner." [13] To complicate matters, however, the Virginia Constitution provides that all land owned directly or indirectly by the State is tax exempt,[14] and, before 1955 there had been no determination of what indirect ownership meant.[15] If the Supreme Court of Appeals of Virginia had decided that a leasehold interest for private or commercial purposes in state land was owned indirectly by the State, the localities would still be unable to tax this interest, and one of the beneficial effects of the 1955 Amendment would be nullified.

In several recent decisions, the Supreme Court of Appeals eliminated the ambiguity. The Court defined indirect ownership by the State as ownership in that property whose "beneficial use is vested in a public corporation created, managed, and controlled by the State." [16] In applying this definition, the Court has determined that there must be substantial state control before there is indirect ownership.[17] Specifically, the Court held that a leasehold owned by private individuals and leased to them by a State hospital, was subject to local property taxes, even though the hospital had dictated the use of the property.[18]

The Virginia Supreme Court of Appeals extended the above reasoning to the *Suthers* decision, thereby further enlarging the scope of "taxable real estate." To arrive at their decision, the Court held a statute providing for rental payments in lieu of taxes unconstitutional, even though the payments were to be equal to local property taxes.[19] What gave impetus to the Court's decision was further statutory language providing for an agreement between the municipality and the Authority, as to the amount of local property taxes to be paid by the lessee.[20] The Court reasoned that,

[12] *See* Prince William County v. Thomason Park, 197 Va. 861, 867, 868, 91 S.E.2d 441, 446 (1956); Sager, *Property Classification For Taxation,* 43 VA. L. REV. 1323, 1332 (1957).

[13] VA. CODE ANN. § 58-758 (1959).

[14] VA. CONST. art. XIII, § 183 (1902).

[15] Sager, *supra* note 12, at 1332.

[16] Citizens Foundation v. R.P.I., 207 Va. 174, 179, 148 S.E.2d 811, 815 (1966). In this case a State college was in possession of the leased property; thus, there was sufficient State control.

[17] *See* Shaia v. City of Richmond, 207 Va. 885, 153 S.E.2d 257 (1967), discussed briefly in Harris & Russell, *supra* note 3, at 1845.

[18] Shaia v. City of Richmond, 207 Va. 885, 153 S.E.2d 257 (1967). It is interesting to note that the lessees argued that their agreement with the hospital was not a lease but a contract for services. The Supreme Court of Appeals, nevertheless, treated the agreement as a lease.

[19] VA. CODE ANN. § 15.1-1382 (1964) (Additional Supp. 1966).

[20] VA. CODE ANN. § 15.1-1382 (1964) (Additional Supp. 1966).

if there were an agreement as to the amount of local property taxes to be paid by the lessee, this, in effect, could lead to a grant of tax immunity to the industry.[21] Furthermore, if the taxes agreed upon were considerably lower than taxes on other industrial property, then the statute was repugnant to the General Levy and Uniform Taxation Clauses of § 168 of the Virginia Constitution.[22]

It is nothing less than a truism to say that any agreement as to taxes, in and of itself, violates the General Levy Clause of § 168. Yet the Court's second contention as to tax uniformity requires amplification. The Court contends that an agreement as to taxes will, in all probability, lead to taxes for this particular leasehold interest which are not uniform with the taxes that would have been assessed had the agreement not been made. This argument implies that, if there were no agreement, the leasehold interest would be taxed by the municipality in the same manner as other industrial property.[23] Section 168 of the Virginia Constitution, however, refers to uniformity as to *classes* of taxable property,[24] and it could be argued that a leasehold acquired by an industrial authority for an avowed public purpose is a distinct class of taxable real estate. It follows, then, that a municipality might classify this leasehold interest distinctly for tax purposes, with the result that taxes assessed thereon could be below that of other industrial property, and remain within the constitutional limitations of § 168. If the purpose of the agreement as to taxes provision of the enabling statute was to entice industries to Virginia by means of a tax break, the purpose might be fulfilled in this manner, consistent with the Constitution. With the broad scope of the *Suthers* decision, however, municipalities may now feel that lessees of industrial authorities are not in a distinct real estate tax class, and, therefore, the ramifications of *Suthers* take on greater significance.

Other ramifications of the opinion must be viewed in the light of Vir-

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[21] Chesapeake Industrial Development Authority v. Suthers, 208 Va. 51, 61, 155 S.E.2d 326, 333 (1967).

[22] VA. CONST. art XIII, § 168 (1902) provides in part as follows:

> . . . all taxes, whether state, local, or municipal, shall be uniform upon the same classes of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general law.

[23] The Court also contended that there would be a lack of tax uniformity as to other industrial authority leaseholds similarly situated. This argument ignores the entire function of industrial development authorities. They are not created to provide new sources of tax revenue for the localities, but to stimulate industrial growth and economic activity. Furthermore, only the Authority and the municipality were to agree as to taxes, not the various lessees, and the Authority could establish a uniform classification.

[24] VA. CONST. art. XIII, § 168 (1902).

ginia's inducements to out-of-state industry,[25] and the establishment of Industrial Development Authorities which have been consistently held to be for a public purpose.[26] This acceptance remains unaffected by the *Suthers* opinion. The Virginia Constitution specifically provides that the General Assembly may allow localities to exempt manufacturers from tax as an inducement.[27] A few states, under appropriate statutes, exempt land used for a public purpose,[28] but businessmen and economic authorities do not see the need for this type of incentive.[29] Businessmen do not consider tax exemptions one of the five major inducements to industrial location,[30] nor were exemptions considered of major importance in an advisory report to the Virginia State Legislature in 1957.[31]

Looking at the *Suthers* opinion, the Supreme Court of Appeals has

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[25] VA. CONST. art. XIII, § 189 (1902) reads as follows:

> The General Assembly may, by general law, authorize the governing bodies of cities, towns, and counties to exempt manufacturing establishments and works of internal improvements from local taxation for a period of not exceeding five years, as an inducement to their location.

S.J. Res. 11, 12, ACTS OF ASSEMBLY 1114 (1958) aimed at encouraging a "healthy business climate in Virginia." *See also* Note, *Legal Limitations On Public Inducements To Industrial Location,* 59 COLUM. L. REV. 618 n.6 (1959). From a historical viewpoint the Colony of Virginia, in 1662, offered a bounty of five pounds of tobacco for each yard of woolen cloth made in the Colony. Pinsky, *supra* note 3, at 266 n.4.

[26] *See, e.g.,* Fairfax Industrial Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966); *Cf.* Harrison v. Day, 202 Va. 967, 121 S.E.2d 615 (1962); Harrison v. Day, 200 Va. 764, 107 S.E. 2d 594 (1959). *But see* Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968), where the Supreme Court of Appeals held a fund established by the State to guarantee loans for industrial projects to be a violation of the Credit Clause of § 185 of the Virginia Constitution. For a review of decisions in other jurisdictions, *see* State v. Barczak, 34 Wis.2d 57, 148 N.W.2d 683 (1967).

[27] VA. CONST. art XIII, § 189 (1902). Virginia's enabling statute was repealed in 1944.

[28] *See, e.g.,* Graf v. Warren, 10 Ohio St.2d 33, 225 N.E.2d 633 (1967); Appeal of Allegheny County, 425 Pa. 578, 229 A.2d 890 (1967); Wayland v. Snapp, 334 S.W.2d 633 (Ark. 1960). In support of the arguments advanced in these cases, it should be pointed out that, although the development authorities are created for an avowed public purpose, it is the private industry which carries out that purpose. The industry provides jobs and thereby reduces unemployment, and the industry boosts the economy, not the authority.

[29] *See* Antieau, *Municipal Power To Tax: Its Constitutional Limitations,* 8 VAND. L. REV. 698, 734, 749-50 (1955); Stimson, *The Exemption Of Property From Taxation In The United States,* 18 MINN. L. REV. 411 (1934); Garwood, *Taxes And Industrial Location,* 5 NAT'L TAX J. 361, 365 (1952); Eiteman, *Effect Of Franchise Taxes Upon Corporate Location,* 9 SO. ECON. J. 234 (1943); Steiner, *The Tax System And Industrial Development,* BULL. NAT'L TAX ASS'N 98 (1938).

[30] Garwood, *supra* note 29, at 368, lists markets, materials, labor, available sites and plant facilities, and climate.

[31] REPORT OF FISCAL STUDY COMMITTEE, ADVISORY COUNCIL ON THE VIRGINIA ECONOMY 32 (1957).

obviously weighed the needs of the localities against the inconclusive showing of tax exemption benefits on industrial location. Analytically, the Court's holding was a policy decision, built upon a strict interpretation of those sections of the Virginia Constitution which provide for tax exemption and uniformity of taxation. Although the effect of the Court's opinion may be negligible as regards Virginia's inducements to out-of-state industry, the opinion will provide new sources of tax revenue for the localities. Yet, what the Court has overlooked in its zeal to enlarge the scope of taxable real estate, is the primary purpose of industrial development authorities. These Authorities serve to stimulate industrial growth and boost the State's economy by encouraging industry to locate in Virginia.

In the past, it never has been the principal goal of industrial financing programs (in Virginia or elsewhere) to produce tax revenue for the localities.[32] This still remains the attitude of industrial authorities, unchanged by the *Suthers* opinion. The changes effected by *Suthers* will come in the attitude of the Virginia General Assembly toward tax exemptions on industrial location. In the past, the Assembly has considered tax exemptions as a major inducement to out-of-state industry. For the future, before it makes any major constitutional or legislative changes exempting industrial authority leaseholds from taxation, the Assembly should remember that tax exemptions are only *an* inducement to industry, not *the* inducement.

[32] Pinsky, *supra* note 3, at 320.