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Chapter 11: Constitutional Law

John D. O'Reilly Jr.

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Public Law

CHAPTER 11

Constitutional Law

JOHN D. O'REILLY, JR.

§11.1. General. During the course of the 1958 SURVEY year the Supreme Judicial Court had occasion to rule upon a number of constitutional issues. Most of these rulings were of a rather routine nature and did not make significant contributions to the body of constitutional law. They are, however, worthy of note, since they will carry the value of precedent and some of them will doubtless constitute parts of the masonry out of which the meaningful doctrine of the future will be constructed.

The "public purpose," towards which official action must be directed, had to be defined in two cases. In the first of these [1] the Massachusetts Turnpike Authority [2] had made a taking of certain land so as to leave the balance of the landowner's property without access to any highway. To correct this situation the Authority condemned an easement and gave the owner of the landlocked property a private way thereover to a public way. The Supreme Judicial Court ruled that the taking of the easement was for a public purpose, although it did not relate directly to the turnpike itself. The case also presented a difficult problem of statutory construction, since the enabling act, unlike the general act for laying out highways,[3] did not contain express authorization to acquire easements of the sort here involved.

JOHN D. O'REILLY, JR., is Professor of Law at Boston College Law School and a member of the Bars of Massachusetts, the District of Columbia, and the United States Supreme Court.

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§11.1. [1] Luke v. Massachusetts Turnpike Authority, 1958 Mass. Adv. Sh. 567, 149 N.E.2d 225.

[2] Acts of 1952, c. 354.

[3] G.L., c. 81, §7A.

The second case was an advisory opinion [4] in which the justices ruled that the celebration of the anniversary of a historic event, such as the Civil War or the Spanish-American War, is a public purpose for which funds may be appropriated and expended out of the public treasury. This advisory opinion also covered a number of other points. It indicated that when a legislative body seeks an advisory opinion, both the proposed legislation and the questions concerning it must be phrased clearly and specifically enough to enable the justices to give a specific answer. Failure in these respects will result either in the justices declining to answer, or in their giving no better than a qualified answer. The opinion also ruled that it would not be permissible to authorize expenditure of public funds by an unpaid commission, composed in part of nominees of unofficial organizations. The justices also ruled that the doctrine of separation of powers, as set forth in Article XXX of the Declaration of Rights, does not forbid the legislature to provide that the Governor shall be, ex-officio, a member of a commission established to plan celebration of the anniversary of a historic event.

Another advisory opinion [5] ruled that, despite dicta in some earlier cases,[6] there is no constitutional objection to modification of the common law of dower and curtesy by providing that, from the effective date of legislation, a surviving spouse shall have dower (or curtesy, as the case may be) only in such land as was owned by the deceased spouse at the time of death. The bill was subsequently enacted by both houses of the General Court, but was subjected to pocket veto by the Governor after prorogation.

In *Commonwealth v. Ries* [7] a witness declined to answer a question concerning his dealings with the defendant on the ground that the answer might tend to incriminate him. The Supreme Judicial Court ruled that the defendant was properly forbidden to comment, in argument to the jury, upon the claim of privilege, since the privilege is personal to the witness, and no inferences, favorable or unfavorable, may be drawn, with respect to the defendant, from the claim of privilege by the witness.

Due process of law in criminal proceedings was the subject of rulings in two cases.[8] Separate indictments were returned against the defendants in these cases for participation in the same criminal episode. The indictments were handed up in May and August, 1952. Each of the accused was apprehended in 1953, and each was prosecuted for other crimes, convicted and sent to prison. They were not brought to trial on the 1952 indictments until May, 1955. Both defendants moved, at that time, to quash the indictments on the ground that they had been

[4] Opinion of the Justices, 1958 Mass. Adv. Sh. 887, 150 N.E.2d 693.

[5] Opinion of the Justices, 1958 Mass. Adv. Sh. 1071, 151 N.E.2d 475.

[6] Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, 107 N.E. 426 (1914); Dunn v. Sargent, 101 Mass. 336 (1869).

[7] 1958 Mass. Adv. Sh. 851, 150 N.E.2d 527.

[8] Commonwealth v. Hanley, 1958 Mass. Adv. Sh. 653, 149 N.E.2d 608; Commonwealth v. Drolet, 1958 Mass. Adv. Sh. 665, 149 N.E.2d 616.

denied the constitutional right of speedy trial.[9] The Supreme Judicial Court agreed that the Massachusetts Constitution gives a defendant in a criminal case the right to a speedy trial, but decided that in the *Hanley* and *Drolet* cases the defendants had waived the right, since they had not affirmatively claimed it, and the record showed no disability on their part to demand trial during the period between arrest and arraignment on the indictments in question.

In the *Drolet* case the defendant, who was charged with armed assault with intent to rob, after arraignment but before trial represented that he was indigent and desired counsel. The trial judge appointed counsel but the defendant refused to allow the appointed attorney to represent him. When the trial opened, the judge refused to appoint another attorney for the defendant. The Supreme Judicial Court held that this did not involve a denial of any constitutional right of the defendant, particularly since it did not appear that he was constitutionally entitled to the assistance of assigned counsel on the ground that

> . . . by reason of youth, inexperience, or incapacity of some kind, or by reason of some unfair conduct by the public authorities, or of some complication of issues, or of some special prejudice or disadvantage . . . [he was] in need of counsel in order to secure the fundamentals of a fair trial.[10]

Contentions that equal protection of the laws had been denied were rejected in two cases. In *Pierce v. Town of Wellesley*,[11] the zoning by-law of a town was amended so as to include "municipally owned or operated public parking lots" among the permitted uses of premises in single residence districts. It was contended that this was an unlawful discrimination against privately owned or operated parking lots but the Court rejected the contention, pointing out that the public interest in traffic control afforded a rational basis for permitting public operation of parking lots in areas where private operation of such lots is prohibited. In the other case, the justification of discriminatory treatment under the law was not made so clear. In *Colgate-Palmolive Co. v. Elm Farm Foods Co.*[12] it was decided that retailers who sell fair-traded goods at the established fair-trade price and give purchasers of these goods trading stamps or other premium-yielding artifacts are subject to injunction for violation of the Fair Trade Law.[13] The defendants objected that the law thus construed discriminates against merchants who sell for cash by forbidding them to give their customers

9 Mass. Const., Declaration of Rights, Art. XI. The defendants also contended that similar rights accrued to them under the Fourteenth Amendment of the United States Constitution. The Court's disposition of the cases made it unnecessary to discuss this point.

10 1958 Mass. Adv. Sh. 665, 667, 668, 149 N.E.2d 616, 618, citing and quoting Allen v. Commonwealth, 324 Mass. 558, 562, 87 N.E.2d 192, 195 (1949).

11 336 Mass. 517, 146 N.E.2d 666 (1957).

12 1958 Mass. Adv. Sh. 471, 148 N.E.2d 861.

13 G.L., c. 93, §§14A-14D.

trading inducements similar in value to the credit extended to customers by merchants who accept deferred payments. The Court recognized that the law treated the two classes of merchants differently but concluded, without articulating the point, that this did not constitute a deprivation of equal protection of the laws.

The question of whether a state law impaired the obligation of contract was considered and resolved in *New Bedford v. New Bedford, Woods Hole, etc. Steamship Authority*.[14] The authority, a public corporation, was created to provide adequate transportation between the mainland and the islands of Nantucket and Martha's Vineyard.[15] Its vessels operate between the islands and the mainland city of New Bedford and the town of Falmouth (Woods Hole). Because the islands are summer resort areas, the patronage of the authority's vessels is much greater in the summer than in other seasons, and the practice of the authority was to suspend service to and from New Bedford during the autumn and winter months. This, it has been held, was within the power of the authority.[16] The authority's vessels and other property have been financed by revenue bonds, of which some $6,500,000 are outstanding. The enabling act [17] provides that, "While any bonds issued by the Authority remain outstanding, the powers, duties or existence of the Authority shall not be diminished or impaired in any way that will affect adversely the interests and rights of the holders of such bonds." A 1956 statute[18] requires the authority to provide throughout the year daily service to and from New Bedford, as well as Falmouth and the islands. The Supreme Judicial Court rejected the contention that this statute impaired the obligation of the authority's contract with the bondholders by increasing the possibility of operational deficits and thus reducing the ability of the authority to pay bond interest and principal. The Court pointed to the section of the enabling act [19] which provides that if the authority's income and reserves shall be insufficient to pay debt service on its bonds, the amount of the deficiency shall be payable out of the state treasury, to be reimbursed by a tax levy on the communities served by the authority. This undertaking on the part of the Commonwealth, the Court concluded, is the ultimate security of the bondholders, and as long as this security remains unimpaired the rights of bondholders are not affected adversely.

[14] 336 Mass. 651, 148 N.E.2d 637 (1958). On October 20, 1958, the Supreme Court of the United States dismissed an appeal "for want of a substantial federal question." Boston Five Cent Savings Bank v. New Bedford, 358 U.S. 53, 79 Sup. Ct. 95, 3 L. Ed. 2d 46 (1958).

[15] Acts of 1948, c. 544.

[16] New Bedford v. New Bedford, Woods Hole, etc. Steamship Authority, 330 Mass. 422, 114 N.E.2d 553 (1953).

[17] Acts of 1948, c. 544, §6.

[18] Acts of 1956, c. 747. The justices had already rendered an advisory opinion that the statute was valid. Opinion of the Justices, 334 Mass. 765, 138 N.E.2d 212 (1956). In the New Bedford case it was pointed out that advisory opinions are not binding, and that questions resolved by such opinions are subject to examination anew in actual litigation.

[19] Acts of 1948, c. 544, §9.

§11.2. Lord's Day Statute: "Establishment of religion." The validity of the "Observance of the Lord's Day" statute[1] in the light of provisions of the Massachusetts Constitution [2] concerning religious liberty and equality was considered and sustained in *Commonwealth v. Chernock.*[3] The defendant operated a kosher market which, because of his religious convictions, was closed every Saturday, as well as on Jewish holidays. On several Sundays, after ten o'clock in the forenoon, he kept the market open and sold kosher meats and groceries. These sales did not come within the statutory provision [4] that permits sales of kosher meat on Sundays by persons such as the defendant between the hours of six and ten in the morning. The defendant was, accordingly, convicted under the statutory provision [5] which forbids the keeping open of a shop on Sunday. His exceptions were overruled.

On the constitutional point the Supreme Judicial Court sustained the statute, as applied to the defendant, upon the authority of *Commonwealth v. Has.*[6] That case sustained an earlier version of the statute over objection based upon Article XI of the Amendments, which provides (among other things) that ". . . all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law." In *Chernock* the Court inferentially, by its citation [7] of *Glaser v. Congregation Kehillath Israel,*[8] ruled that there is no more force in an objection to the statute based upon Section 1 of Article XLVI of the Amendments, "No law shall be passed prohibiting the free exercise of religion."

In *Has* the Sunday laws were treated as labor laws, designed to promote public health and welfare by providing a mandatory periodic respite from work. This is the theory subsequently summarized in the classic dictum of Mr. Justice Field, speaking for the Supreme Court of the United States:[9] "Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities, and their validity has been sustained by the highest courts of the states." [10]

The Massachusetts Court, in *Has,* pointed out that the Sunday laws imposed no obligation to participate in religious ceremonies or to participate in any form of worship, and that, as to one who chooses another day of the week for religious observance, the burden imposed by the Sunday laws ". . . is not occasioned by any subordination of his

§11.2. 1 G.L., c. 136, §5.
2 Mass. Const., Amend. XI and XLVI.
3 336 Mass. 384, 145 N.E.2d 920 (1957).
4 G.L., c. 136, §6.
5 Id. §5.
6 122 Mass. 40 (1877).
7 336 Mass. 384, 386, 145 N.E.2d 920, 922 (1957).
8 263 Mass. 435, 437, 161 N.E. 619, 620 (1928).
9 Soon Hing v. Crowley, 113 U.S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145 (1885).
10 113 U.S. at 710, 5 Sup. Ct. at 734, 28 L. Ed. at 1147.

religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community." [11]

When, however, a Sunday law came before the Supreme Judicial Court in another context, it was viewed as something more than a provision for promotion of the physical and material welfare of the people.[12] In ruling upon the civil consequences of violation of such a law the Court said: "Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements." [13] There are cases in other jurisdictions in which similar sentiments are expressed,[14] but perhaps the more prevalent judicial viewpoint is that Christian religious attitudes form a background for Sunday legislation which can be constitutionally justified on the basis of conventional "police power" doctrine.[15]

These matters may have been thrown into a different perspective in consequence of the determination, in 1947, of the Supreme Court of the United States that the substance of the "an establishment of religion" clause of the First Amendment is, by virtue of the Fourteenth Amendment, a limitation upon state action.[16] Although the actual decision in *Everson* sustained the validity of the state act of using public funds to pay for transportation to Catholic parochial schools, there occurs in the course of the opinion the following dictum:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[17]

This dictum seemed to receive literal implementation in *McCollum v. Board of Education,*[18] in which a program for giving religious instruction to pupils in public schools, available to all faiths which desired to participate, was held to be repugnant to the Constitution of the United States. Subsequently, however, by a literal reading of *McCollum,* the Supreme Court seems to have receded from the position of literal adherence to the *Everson* dictum.[19] In *Zorach,* the United States Supreme Court refused to disapprove a program for giving reli-

[11] 122 Mass. 40, 42 (1877).

[12] Davis v. Somerville, 128 Mass. 594 (1880).

[13] 128 Mass. at 596.

[14] O'Donnell v. Sweeney, 5 Ala. 467 (1843); Brimhall v. Van Campen, 8 Minn. 1 (1858); Commonwealth v. American Baseball Club, 290 Pa. 136, 138 Atl. 497 (1927).

[15] Carr v. State, 175 Ind. 241, 93 N.E. 1071 (1911); Levering v. Board, 134 Md. 48, 106 Atl. 176 (1919); Moore v. Owen, 58 Misc. 332, 109 N.Y. Supp. 585 (Sup. Ct. 1908); State v. Barnes, 22 N.D. 18, 132 N.W. 215 (1911).

[16] Everson v. Board of Education, 330 U.S. 1, 67 Sup. Ct. 504, 91 L. Ed. 711 (1947).

[17] 330 U.S. at 15, 67 Sup. Ct. at 511, 91 L. Ed. at 723.

[18] 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948).

[19] Zorach v. Clauson, 343 U.S. 306, 72 Sup. Ct. 679, 96 L. Ed. 954 (1952).

gious instruction to public school pupils away from the school premises.

What bearing these developments will have upon the Sunday observance laws of the various states remains to be seen. Prior to the *Everson* case of 1947, when the principles of the First Amendment were first considered in connection with the prohibitions of the Fourteenth, the Supreme Court had, in three cases, considered constitutional objections to Sunday observance laws and, on all three occasions, rejected the objections. In those cases the unsuccessful objections to the laws were based upon asserted improper state regulation of interstate commerce,[20] excessive exercise of police power,[21] and denial of equal protection by virtue of the exemptions contained in the statute.[22]

Since the First Amendment provisions with respect to religion have been recognized as Fourteenth Amendment limitations upon the states, there has been no articulate decision of the United States Supreme Court concerning the validity of Sunday laws. In one case the New York Court of Appeals sustained a Sunday law similar to that involved in the *Chernock* case over objections based, in part, upon the United States Constitution.[23] An appeal was taken to the Supreme Court, but it was dismissed "for want of a substantial federal question." [24] The appeal seems to have been based upon an asserted interference with "free exercise" of religion, rather than upon the "an establishment of religion" provision.[25]

There may be discerned a disposition on the part of the Supreme Court, since the *Zorach* case,[26] not to delve further into the implications of the constitutional provisions with respect to religion. In addition to dismissing the appeal in the New York case, it has denied certiorari in two other cases, in one of which official action was held violative of constitutional limitations in favor of religion,[27] and in the other of which official action was sustained as not being so violative.[28] If such a disposition proves to exist, the validity of Sunday observance laws will remain a question for state courts of last resort. To date, no case has been found in which objection to Sunday observance laws, as such, has been sustained.[29]

20 Hennington v. Georgia, 163 U.S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166 (1896).

21 Petit v. Minnesota, 177 U.S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716 (1899); Soon Hing v. Crowley, 113 U.S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145 (1885).

22 Petit v. Minnesota, note 21 *supra*.

23 People v. Friedman, 302 N.Y. 75, 96 N.E.2d 184 (1950).

24 Friedman v. New York, 341 U.S. 907, 71 Sup. Ct. 623, 95 L. Ed. 1345 (1951).

25 See Summary of petition in Friedman v. New York, No. 640, October Term, 1950, in 19 U.S. Law Week 3271 (1951). Harper and Etherington, What the Supreme Court Did Not Do During the 1950 Term, 100 U. Pa. L. Rev. 354, 386 (1951).

26 343 U.S. 306, 72 Sup. Ct. 679, 96 L. Ed. 954 (1952).

27 Tudor v. Board, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied sub nom.* Gideons International v. Tudor, 348 U.S. 816 (1954).

28 Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228 (1955), *cert. denied,* 349 U.S. 947 (1955).

29 Sunday observance laws may present constitutional problems growing out of constitutional provisions other than those dealing with religion. The fairly prev-

A new facet of the problem could possibly develop in a case which has been filed in the United States District Court for the District of Massachusetts,[30] but which is undecided as of the date of this writing. The defendant in this case has sought, on federal constitutional grounds, an injunction against enforcement of the statute which was the basis of his conviction. Whether the federal court will extend the *McCollum* [31] doctrine to Sunday observance laws, and whether the Supreme Court will be more receptive to "religion" questions coming from lower federal courts than it has been to such questions coming from state courts, can only be speculated upon at this time.

§11.3. Criminal appeals: Right to free transcript of evidence at trial. *Guerin v. Commonwealth*[1] grew out of a convict's collateral attack, by petition for writ of error,[2] upon the judgment which had been rendered against him. In support of his petition he filed a motion that the Commonwealth furnish him a free transcript of the evidence taken at the trial at which he had been convicted. The motion contained the uncontroverted allegation that the petitioner was indigent. The single justice before whom the case came allowed the motion, but stayed further proceedings and reported to the full bench the question of the correctness of his order. The order was reversed.

The motion for the free transcript was based upon the decision of the Supreme Court of the United States in *Griffin v. Illinois*,[3] which held that when adequate review in a criminal case, available under a state's criminal procedure, requires the availability of a transcript of the trial evidence for consideration by the appellate court, a convicted defendant for whom a transcript is not available solely because he cannot afford to pay for one, and who is thereby denied adequate review of his conviction, is denied equal protection of the laws in violation of the Fourteenth Amendment.

In the *Guerin* case, the Supreme Judicial Court found the *Griffin* doctrine not applicable. As the Court pointed out, review in criminal cases may take many forms under Massachusetts procedure. There may be appeal from a judgment on the common law record,[4] or report of questions of law by the trial judge either before [5] or after trial,[6] or exceptions [7] to various acts occurring during or after trial. When appropriate pre-trial ruling has been made, there may be appeal upon

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alent practice of sprinkling the statutory prohibitions with exceptions of various activities has occasioned much litigation based upon constitutional provisions for equal protection of the laws. See Annotation, 57 A.L.R.2d 975 (1958).

30 Crown Kosher Super Market v. Gallagher, C.A. No. 58-471-M, U.S. District Court (D. Mass.).

31 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948).

§11.3. 1 1958 Mass. Adv. Sh. 525, 149 N.E.2d 220.
2 G.L., c. 250, §1.
3 351 U.S. 12, 76 Sup. Ct. 585, 100 L. Ed. 891 (1956).
4 G.L., c. 278, §28.
5 Id. §30A.
6 Id. §30.
7 Id. §31.

the common law record, plus a transcript of the evidence and assignment of errors.[8] This procedure was not invoked at the trial, although the defendant was represented by experienced counsel. The only review sought by the petitioner through his trial counsel was an appeal to the Appellate Division of the Superior Court for revision of the sentences on the five indictments of which the petitioner had been convicted.[9]

As the Court pointed out, the scope of the writ of error is a relatively narrow one, and is ordinarily limited to matters of law apparent on the record of the proceeding under review.[10] Accordingly, the evidence introduced or excluded at the trial is not ordinarily pertinent in this type of review.[11] Thus, even if a petitioner for a writ of error can afford to purchase a transcript of the evidence at the trial, he would not be able to use it. In these circumstances, refusal to furnish the petitioner a transcript at public expense does not operate in any way as a discrimination against the petitioner because of his indigence.

The Court recognized that in some exceptional cases, even on writ of error, it may be necessary to have a transcript in order to evaluate a petitioner's claim of fundamental error in the trial.[12] But, ruled the Court, in order to bring himself within the area of such extraordinary procedure on writ of error, the petitioner has the burden of setting forth affirmatively and explicitly the facts which necessitate the use of a transcript of the evidence. In the *Guerin* case the Court concluded that the allegations in the petition were too "vague and sweeping" [13] to sustain this burden.

Although the posture in which the *Guerin* case was presented obviated the necessity of inquiry into the conformity of Massachusetts law with the standard set in the *Griffin* case, the raising of the issue points up the necessity of ultimate inquiry into that question. Although one writer,[14] in commenting upon the impact of the *Griffin* case upon state criminal procedure, classified Massachusetts as a state making transcripts available free of charge to all defendants in all criminal cases, that statement was apparently based upon a mistaken reading of G.L., c. 278, §33. This statute provides for preparation, at public expense, of papers relative to a question of law which arises "upon appeal, exception, report or otherwise." The reference, however, is undoubtedly

8 Id. §§33A-33G.

9 Id. §§28A-28D.

10 Dolan v. Commonwealth, 304 Mass. 326, 23 N.E.2d 904 (1939).

11 Berlandi v. Commonwealth, 314 Mass. 424, 50 N.E.2d 210 (1943).

12 Brown v. Commonwealth, 335 Mass. 476, 140 N.E.2d 461 (1957).

13 1958 Mass. Adv. Sh. 525, 530, 149 N.E.2d 220, 224.

14 Comment, The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law, 25 U. Chi. L. Rev. 161, 162, 172 (1957). This comment lists and classifies the laws of all the states, as of the date of the Griffin decision, concerning free transcripts of evidence in criminal appeals. The author places such laws in four categories: (1) all defendants in all criminal cases (6 states); (2) all indigent defendants convicted of any criminal offense (27 states); (3) all indigent defendants convicted of a capital offense (8 states); (4) no defendants in any criminal proceeding (7 states).

to appeals under Section 28, exceptions under Section 31, and reports under Sections 30 and 30A, none of which contemplates use of transcripts of evidence. In the one review procedure in which provision is made for a transcript of the evidence[15] the statute expressly provides that the defendant "shall pay for the expense of his transcript unless the court otherwise directs." [16] No statutory criteria exist for the trial court's exercise of the power to absolve the defendant from the burden of paying for the transcript, nor is provision made for payment of this expense out of the public treasury.

Former Chief Justice Qua considered, in an extra-judicial statement,[17] some of the practical implications of the *Griffin* decision, and pointed out some of the considerations that should be taken into account in bringing state criminal procedure into accord with it. Chief among the problems which he listed in this respect are, how to prevent abuse of the right to a transcript at public expense by demanding a costly transcript in support of a "frivolous" appeal, and whether to extend the right to a free transcript, in cases of indigent defendants, to misdemeanor as well as to felony cases.

The latter question is nearly academic in Massachusetts, since the statute[18] permits use of transcripts in misdemeanor appeals only when the misdemeanor was "tried with a felony." The former question, however, is an extremely difficult one. Since the *Griffin* case, the United States Supreme Court has held that denial of a free transcript to an indigent defendant upon a federal district judge's determination that the proposed appeal was not being taken in good faith is reviewable upon appeal, and that the defendant is entitled to such review in forma pauperis.[19] This doctrine would seem applicable to state court proceedings, particularly in the light of a more recent case in which a state court was reversed because the trial court had refused a free transcript on the ground that the appeal was not meritorious, although the prosecution conceded that the questions sought to be raised were "substantial." [20]

Since the date of the *Griffin* decision, one state by rule of its Supreme Court,[21] another by judicial decision,[22] and others by statutory enact-

15 G.L., c. 278, §§33A-33G.

16 Id. §33B.

17 Qua, Griffin v. Illinois, 25 U. Chi. L. Rev. 143 (1957).

18 G.L., c. 278, §33A.

19 Johnson v. United States, 352 U.S. 565, 77 Sup. Ct. 550, 1 L. Ed. 2d 593 (1957).

20 Eskridge v. Washington State Prison Board, 357 U.S. 214, 78 Sup. Ct. 1061, 2 L. Ed. 2d 1269 (1958).

21 Illinois Supreme Court Rule 65-1, 9 Ill. 2d 11 (1956), Ill. Ann. Stat., c. 110, §101.65.1. And see People v. Griffin, 9 Ill. 2d 164, 137 N.E.2d 485 (1956).

22 Petition of Patterson, 317 P.2d 1041 (Colo. 1957). It may be inferred that the Supreme Court of North Dakota would be prepared to reach the same result. In State v. Moore, 82 N.W.2d 217 (N.D. 1957), an indigent defendant who had been convicted claimed a free transcript of the trial evidence under N.D. Rev. Code §27-0606 (1943), which authorizes the trial court to order a transcript at public expense "whenever in his judgment there is reasonable cause therefor." The opinion indicates a belief that if an indigent defendant can show the necessity of a transcript

ments[23] have made explicit provision for making transcripts of evidence available free of charge to indigent defendants on a basis of equality with persons able to pay for transcripts. It would seem desirable that the Massachusetts General Court should take steps to clarify the right of an impecunious defendant in a case to which G.L., c. 278, §33A is applicable to receive a transcript of the trial evidence at public expense, and to seek to hedge this clarification with whatever safeguards against abuse can be devised.

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for adequate review of his conviction, the provision of a free transcript would be mandatory. As in the Guerin case, however, it was held that the defendant had failed to sustain the burden of making such a showing.

[23] Md. Ann. Code, Art. 5, §15A (1957), added by Md. Acts of 1958, c. 68; Minn. Stat. §611.07(3) (1957), added by Minn. Laws of 1957, c. 498; N.J. Stat. Ann., tit. 2A, §§152-17, 152-18, added by N.J. Laws of 1956, c. 134, p. 555. See also Maine Resolves of 1957, c. 146, providing funds to be used for operation of a system of judicial review in criminal cases of indigent persons involved in felonies, to be administered under rules to be adopted by the Supreme Judicial Court of Maine.