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Chapter 13: Constitutional Law

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CHAPTER 13

Constitutional Law

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The survey year was marked by an unusually large number of cases disposing of constitutional issues. These ran the gamut from the question of the validity of a parking ordinance to that of the legality of the urban redevelopment law.

In the interest of avoiding duplication, some decisions involving constitutional law matters are discussed in other chapters.

§13.1. **Constitutional litigation.** A case involving some fundamental general principles of constitutional pleading and litigation was *Wright v. Peabody*.[1] Wright, who was proprietor of a trailer coach park, had collected from the owners of the trailers which occupied his park the monthly license fees provided in General Laws, Chapter 140, Section 32G, and had tendered the money to the local tax collector. The collector refused the tender on the ground that the trailers had been assessed as real estate, and Wright, as owner of the land on which they were located, was liable for the real estate tax under General Laws, Chapter 59, Section 3. Wright brought suit against the city and its officers for a binding declaration of the validity of General Laws, Chapter 140, Section 32G, which provided, in effect, that payment of the license fees which the park operator was to collect from trailer owners was to be in lieu of property taxes on the trailers themselves.

The answer of the defendants set forth simply that the statute is "invalid and unconstitutional." The Attorney General was notified because a constitutional question was involved.[2] The facts were agreed

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§13.1. [1] 1954 Mass. Adv. Sh. 175, 118 N.E.2d 68.
[2] G.L., c. 231A, §8.

upon, and the trial judge reported the case without decision. Before the Supreme Judicial Court, both Wright and the Attorney General argued for the validity of the statute, but the defendants made no appearance, and offered neither brief nor oral argument.

In ordering a decree for the plaintiff which required the defendants to comply with the statute, the Court rebuked the defendants, who "have flouted the act of the Legislature but have not troubled to come into this court to present their views." [3]

On the question of invalidity of the statute, the Court went on to say, "The categorical assertion of unconstitutionality in the answer is of no help in deciding the case. We have not even been told whether the allusion is to the State or Federal Constitution or to both." [4] The Court nevertheless proceeded to inquire into the legislative history and rationale of the statute and to consider a possible basis[5] for the contention that the statute is invalid. Not finding any sound basis for such a contention, the Court ruled that the statute was valid.[6]

Apparently, ignoring the general allegation of unconstitutionality is not the only sanction against inadequate presentation of constitutional issues, for in the *Wright* case the Court ordered a decree which would provide for costs, including costs of appeal, against the defendant.

The opinion does not spell out affirmatively the proper method or methods of raising the issue of the constitutionality of a statute. Nor would it be feasible to spell out a technique of pleading which could be used in all cases to raise such issues. Where, as in the *Wright* case, a plaintiff is suing for enforcement of rights accruing under a statute which the defendant conceives to be invalid, the issue might be raised in a variety of ways. The defendant might demur to the declaration or bill. It is less than clear, however, whether it would be sufficient to aver as the ground of demurrer the conventional recital that the bill does not set forth a case upon which relief can be granted, or whether it is necessary to state specifically that the demurrer is grounded on the invalidity of the statute on which the plaintiff's claim of right is based.

If the issue to be raised is one of validity under the Federal Constitution, and Supreme Court review is anticipated, it would, of course, be the part of wisdom to get into the record at this early stage a statement of the claim of federal right, so as to comply with the Supreme Court's jurisdictional requirements.[7] As far as state practice is concerned, it may well be that a general demurrer, or, as in *Wright,* a general allegation in the answer, when *supported and particularized*

[3] 1954 Mass. Adv. Sh. 175, 177, 118 N.E.2d 68, 70.

[4] Ibid.

[5] 1954 Mass. Adv. Sh. at 178, 118 N.E.2d at 70.

[6] "At most, the only question presented is whether the statute is unconstitutional because other people's trailer coaches can no longer be taxed to a park owner as part of his real estate. Lacking any support for the affirmative of the proposition, we need merely state that we are unable to perceive any constitutional objection." 1954 Mass. Adv. Sh. at 178, 118 N.E.2d at 71.

[7] Michigan Sugar Co. v. Michigan, 185 U.S. 112, 22 Sup. Ct. 581, 46 L. Ed. 829 (1902).

by brief and oral argument (which was *not* the case in *Wright*), would be effective to bring the constitutional issue before the Court. The careful pleader, however, will heed the possible implication of the *Wright* opinion, and will see to it that his petition, declaration, demurrer, or answer, as the case may be, recites clearly the challenge of the constitutionality of the statute and the grounds upon which the challenge is made.[8]

The Court might, in the *Wright* case, have said an authoritative word on a point which the Massachusetts cases leave rather obscure. There is considerable doubt as to the standing of a public body or a public officer to question the validity of legislation. In *Hingham and Quincy Corp. v. Norfolk County*[9] it was indicated that a county could not challenge legislation except as it impinged upon the proprietary interest of the county in its corporate character.[10] In some of the other states there is a substantial body of case law on this point.[11]

§13.2. Legislative power: Acquisition and sale of real estate. Two cases presented issues involving the scope of the power to transfer publicly owned real estate to private ownership.

Loomis v. Boston[1] was a not unusual type of case, where the legislature[2] had determined that a parcel of land in Boston, originally acquired for park purposes, was no longer needed for those purposes, and that the city might sell or lease it to Sears, Roebuck and Co., which desired to acquire the land for a parking area as an adjunct to its retail store. Two groups of taxpayers filed petitions for mandamus and injunction to prevent the transfer which had been authorized by the statute.

The Court had little difficulty in denying the petitions. Although the deeds conveying part of the land contained the words "for the purposes of a public park," the Court did not find it necessary to inquire whether the proposed transfer would impair the obligation of contract, since it concluded that the words in the deeds did not establish a trust, the city having paid a substantial consideration for the deeds. The only issue remaining was whether the legislature had "arbitrarily or whimsically" exercised its power to determine that the land in question was no longer needed for park purposes. The Court ruled that, on the record, the petitioners had failed to sustain the burden of proof.

A much more serious problem, with implications of widespread application, was involved in *Papadinis v. Somerville*.[3] This case pre-

[8] On the general subject of pleading in constitutional litigation, see Culp, Methods of Attacking Unconstitutional Legislation, 22 Va. L. Rev. 723, 891 (1936).
[9] 6 Allen 353, 357, 358 (1863).
[10] See also Greenaway's Case, 319 Mass. 121, 123, 55 N.E.2d 16, 17 (1946).
[11] 16 C.J.S. 172 et seq.

§13.2. [1] 1954 Mass. Adv. Sh. 141, 117 N.E.2d 539.
[2] Acts of 1951, c. 199.
[3] 1954 Mass. Adv. Sh. 725, 121 N.E.2d 714.

sented the question of the validity of the urban redevelopment law.[4]

Under that statute the power of eminent domain may be used to facilitate real estate development by private owners. The statutory scheme is for a local housing authority, after executing a "co-operation agreement" with the city, to acquire, by purchase or condemnation, the land in a "substandard" or "decadent" area.[5] The land cost would be paid partly out of city funds, pursuant to the cooperation agreement, and partly by a federal grant.[6] The same would be true of the cost of clearing the land. Once the land has been acquired and cleared, the housing authority may sell it to a private person for development and operation pursuant to a "redevelopment plan" approved by the authority.

A "jurisprudence of labels" might characterize this as condemnation of land for private use and find it invalid. Certainly, if the city had acquired the land involved in the *Loomis* case for the purpose of making it available to Sears, Roebuck and Co., the project would have been of extremely doubtful validity.[7]

In *Papadinis* the Court sustained the statute on the narrow ground that slum clearance is a proper objective of governmental power. That, of course, had already been determined.[8] That the land was ultimately to be turned over to private ownership, the Court went on to hold, was merely incidental to the main purpose of slum clearance, and was therefore not forbidden.

Urban redevelopment legislation is a radical cure for a cancerous growth which has afflicted all of our larger cities, and even most of our smaller communities. Inept land-use developments, neglect, and financial difficulties have combined to make large urban areas blighted. By hindsight, much, if not all, of this could have been prevented by good city-planning legislation, which would undoubtedly have been within the police power of the state.[9] But there was no planning legislation when our cities were growing. The result has been unregulated development, and most planning laws can provide only patchwork regulation. The best they can do is to retard the growth of existing blight, not excise it.

The new type of legislation embodied in the urban redevelopment law uses the power of eminent domain to supplement the police power, by enabling public authority to take affirmative action in establishing stability of property values.

An over-all evaluation of urban redevelopment might well be made

[4] G.L., c. 121, §§26JJ-26MM.

[5] Id. §26J.

[6] 42 U.S.C. §§1451 et seq.

[7] See Salisbury Land and Improvement Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619 (1913). But the two cases are not parallel in any real sense.

[8] Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939).

[9] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016 (1926); Zahn v. Los Angeles, 274 U.S. 325, 47 Sup. Ct. 594, 71 L. Ed. 1074 (1927).

in the light of a much broader perspective than that in which the subject was viewed in *Papadinis*. There should be taken into account not only the negative benefit to the community from the elimination of slums, but also the other advantages, both economic and imponderable,[10] of properly planned use. Also not irrelevant is the fact that the private parties to whom publicly condemned land is sold pursuant to a redevelopment plan will be in most, if not all, cases limited dividend companies organized under General Laws, Chapter 121A, which will be subject to rather close supervision in the public interest, or companies operating under similar special acts.

In *Papadinis* the Court expressly reserved judgment on the validity of that portion of the law which provides for application of the statutory scheme to an "open blighted area," i.e., one from which there is no slum to remove, because there is nothing to be removed. Whether the factors suggested above would be decisive of this point is not clear, but it is to be hoped that they will be considered when the issue is presented to the Court.

§13.3. Federal-state relations: Fishery regulation. *Commonwealth v. Trott* [1] involved a variety of problems under the commerce, treaty, and equal protection clauses of the Federal Constitution.

The case was a prosecution for fishing with trawls in a manner prohibited by state conservation law[2] in the waters off Monomoy Island. Title to the island was in the United States by virtue of a condemnation decree under the Migratory Bird Conservation Act,[3] but state jurisdiction had not been ceded either by the general cession act[4] or by any other statute.

It being agreed that most of the fish caught in Massachusetts waters by the defendants "enter into the stream of interstate commerce," the defendants argued that the statute, as applied to them, violated the commerce clause by diminishing the total quantity of fish which would go into commerce. The Court rejected this contention, stating that the statute is a conservation measure, not a regulation of commerce. Citing cases which dealt with state taxes on interstate carriers, the Court stated, "Not every law that affects commerce is a regulation of it in a constitutional sense." [5]

Although the quotation is subject to criticism as being made out of context, the conclusion is unquestionably sound. A state is not to be forbidden to regulate a commodity before it becomes an article of commerce simply because it is or may be destined for interstate shipment. Although the reasons for the decision set forth in the opinion

[10] General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935).

§13.3. [1] 1954 Mass. Adv. Sh. 559, 120 N.E.2d 289.
[2] Acts of 1936, c. 238.
[3] 16 U.S.C. §§715 et seq.
[4] G.L., c. 1, §7.
[5] 1954 Mass. Adv. Sh. 559, 563, 120 N.E.2d 289, 292, citing Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U.S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031 (1908); City of Chicago v. Willett Co., 344 U.S. 574, 73 Sup. Ct. 460, 97 L. Ed. 559 (1953).

in *Kidd v. Pearson*[6] would hardly be persuasive today, there is no reason to believe that the decision itself (that a state may forbid the manufacture of alcoholic beverages, even for shipment outside the state) is not good law, regardless of the Twenty-first Amendment. The commerce clause does not forbid the states to regulate potential subjects of commerce within their boundaries; it simply forbids regulation of them in a discriminatory way.[7]

The next argument of the defendants in *Trott* was that the statute was inapplicable because the vessels from which the fishing complained of was done were enrolled and licensed under federal law.[8] This contention was also rejected, since it differs little from the contention made and rejected in *Smith v. Maryland*.[9] In any event, said the Court, the Act of Congress "does not purport to regulate the taking of fish, but deals only with the subject of shipping." [10]

The next contention of the defendants posed a more difficult problem. By proclamation the President established a national policy of preventing depletion of fishery resources by the making of international agreements, where appropriate, and by the establishment of conservation areas where only American nationals are allowed to engage in coastal fishing. By supplemental executive order the appropriate cabinet secretaries were requested to suggest conservation zones to be defined by future executive orders. The defendants contended that by the proclamation and the executive order the Federal Government had "occupied the field" of conservation of the coastal fisheries, so that the state laws on the subject were superseded. The Court rejected this contention on the ground that no specific executive orders appear to have been issued to implement the policy declared in the proclamation and executive order above referred to.

A similiar contention by the defendants was based upon the signing by the United States of the International Convention for the Northwest Atlantic Fisheries. This contention was rejected because the Convention expressly provided that it should become operative "upon the deposit of instruments of ratification by the four signatory Governments," an event which did not take place until after the date of the offense complained of.

In rejecting these latter two contentions, the Court did not advert to the confusion which exists in the decisions on the issue as to when the Federal Government may be said to have occupied a given field so as to make inoperative existing or future state laws in the field. There is authority that state power ends when Congress makes a determination of policy, even though its actual exercise of regulatory

[6] 128 U.S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346 (1888).

[7] Compare Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 55 Sup. Ct. 497, 79 L. Ed. 1032 (1935); Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 Sup. Ct. 528, 83 L. Ed. 752 (1939), rehearing denied, 306 U.S. 669 (1939); H. P. Hood & Sons v. Du Mond 336 U.S. 525, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949).

[8] 46 U.S.C. §§251, 263, 319.

[9] 18 How. 71, 15 L. Ed. 269 (U.S. 1855).

[10] 1954 Mass. Adv. Sh. 559, 563, 120 N.E.2d 289, 292.

power is postponed until a later date.[11] On the other hand, it has been held that mere expression of federal policy is not enough; there must also be direct imposition of federal authority before state laws are rendered ineffective.[12] Very likely many of the cases in these two lines of authority are distinguishable from one another. The *Trott* decision does not explain why the second doctrine, rather than the first, is applicable in the fisheries situation.

An alternative ground of decision on the treaty point was that, in any event, the Massachusetts statute was not inconsistent with the terms of the treaty. In this matter, too, there is more than one current of authority. In some instances a state law has been superseded by the enactment of an act of Congress on the same subject, even though the two statutes are substantially alike.[13] In other instances a state law which in substance adds state sanctions against violations of a federal law within the state has been sustained.[14] Selection of the appropriate rule is important in a number of areas. For example, of current interest is the question of the validity of the antisubversion laws in many of the states in the light of not inconsistent federal laws on the subject — a question which, at the present writing, is pending before the Supreme Court of the United States.[15]

A final defense contention in the *Trott* case was based on the equal protection clause of the Federal Constitution. The Massachusetts statute forbade dragging for fish with beam or otter trawls. It did not forbid the use of nets or seines, which may have a much greater capacity than trawls. Thus, it was argued, the statute made a classification which was unrelated to a conservation objective. The Court was not persuaded. For all that appears, it reasoned, the statute may represent a legislative determination that a small mobile trawl is likely to gather in more fish than a larger stationary net. The Court was unable to say that such a determination would have been unreasonable.

§13.4. The "Iron Curtain" statute. The Massachusetts "Iron Curtain" statute[1] was sustained in *Petitions of Mazurowski*[2] against the contention that it was in conflict with a treaty with Poland[3] and with the due process clause of the Federal Constitution.

The statute provides that where a legacy or distributive share cannot be paid to the person entitled thereto, or where such person may not

[11] Erie R.R. Co. v. New York, 233 U.S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L.R.A. (N.S.) 266 (1914).

[12] H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 59 Sup. Ct. 438, 83 L. Ed. 500 (1939).

[13] See Hines v. Davidowitz, 312 U.S. 52, 61 Sup. Ct. 399, 85 L. Ed. 581 (1941).

[14] See California v. Zook, 336 U.S. 725, 69 Sup. Ct. 841, 93 L. Ed. 1005 (1949), rehearing denied, 337 U.S. 921 (1949).

[15] See Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133 (1954); cf. Nelson v. Wyman, — N.H. —, 105 A.2d 756 (1954).

§13.4. [1] G.L., c. 206, §27A. See editorial note, Estates and "the Iron Curtain," 35 Mass. L.Q., No. 2, p. 34 (1950).

[2] 1954 Mass. Adv. Sh. 35, 116 N.E.2d 854.

[3] 48 Stat., Pt. 2, 1507 (1933).

receive or have the opportunity to obtain such legacy or distributive share, the Probate Court may order the money deposited in a bank. When the claimant resides outside the United States, the court may require the personal appearance of the claimant "in order to assist in establishing such claimant's identity, right and opportunity to receive such fund." [4]

Mazurowski, whose nationality is not revealed by the record, died a resident of Massachusetts. His next of kin were Polish nationals and resided in Poland. Through the Polish Consul General they brought petitions for their distributive shares. The probate judge, on his own motion, made inquiries of the United States Department of State and was advised that dollar remittances to Poland are retained by the Polish Government, which pays to the persons to whom the remittances are directed Polish currency at the rate of four zlotys to the dollar. (The Supreme Judicial Court, in response to a similiar inquiry addressed to the Department of Justice, was informed that the prevailing "free" rate of exchange was approximately twenty zlotys to the dollar.) The probate judge thereupon made an order requiring the personal appearance in court of the claimants, and continued the case until they should appear. He found as a fact that, at the present time, it is practically impossible for any of the claimants to come from Poland to Massachusetts.

The statute, as thus applied, was attacked as being inconsistent with the terms of the treaty. That instrument provided that nationals of either government should have power to dispose of their personal property, and that their heirs and legatees, wherever resident, should succeed to such property and might take possession thereof.

The Supreme Judicial Court pointed out that, in the first place, there was no showing that the decedent was a Polish national, so that there was some question of the relevance of the treaty provision. But, in any event, the Court went on, the treaty "did not purport to create special rights of succession in favor of aliens." [5] The Polish heir must pursue his right to obtain possession of his distributive share in accordance with the general laws of the state governing the distribution of the estates of deceased residents. The statute in question, the Court concluded, is such a general law. It regulates the distribution of estates by establishing a procedure designed to insure that the persons entitled will actually receive their distributive shares. There is, thus, no conflict with the treaty.

The claimants' alternative contention was that the statute denied due process because, in its practical operation, it entirely deprives legatees and next of kin resident in Poland of their legacies and distributive shares. The Court felt that this was an unduly pessimistic position to take. Pointing out that in form the order was simply a temporary suspension of distribution, the Court refused to agree that it amounted, as yet at any rate, to a denial of the right to distribution.

[4] G.L., c. 206, §27A.
[5] 1954 Mass. Adv. Sh. 35, 38, 116 N.E.2d 854, 857.

The opinion of Chief Justice Qua hopefully speculates: "The world is still in a state of flux and uncertainty. It is still possible that more nearly normal relations will be resumed between nations. It is possible that a more realistic rate of exchange will be officially adopted in Poland. Many unforeseen events may profoundly alter present conditions." [6]

Neither the language of the statute nor that of the opinion deals with the basic legal relations and problems involved. The statute is, fundamentally, a protest and a device of retaliation against the sumptuary and oppressive measures of the Soviet Government and its satellites. Viewed in this light, it would raise many complex problems under our constitutional division of labor between the nation and the states. The decision to view it in another light is suggestive of, or perhaps suggested by, the technique of sustaining such things as federal regulation of intrastate gambling by pointing out that the regulation is a by-product of an exercise of the taxing power.[7]

§13.5. Tenure of school teachers and the privilege against self-incrimination. The scope and implications of the constitutional privilege against self-incrimination were before the Court in *Faxon v. School Committee of Boston.*[1] Faxon, a master in a Boston public school, had been asked questions by a United States Senate subcommittee concerning membership in and/or connection with the Communist Party. He declined to answer, asserting his privilege under the Fifth Amendment of the United States Constitution. The school committee determined that this was "conduct unbecoming a teacher" or "other good cause" within the meaning of General Laws, Chapter 71, Section 42, and dismissed him. Faxon brought mandamus for reinstatement, and the Court ordered the petition dismissed.

Faxon contended that (1) the school committee improperly drew inferences of guilt from his refusal to testify, and (2) the action of the school committee was in derogation of his privilege under the Fifth Amendment.

To the first contention the Court retorted that ". . . the question here is not one of guilt or innocence." [2] Pointing to the broad discretionary power of school committees under Chapter 71 of the General Laws, and to the fact that no legal controls could prevent members of the public from drawing their own inferences from refusals to testify, the Court stated: "The school committee could find that a great many parents and others would be seriously disturbed if the petitioner were allowed to continue teaching, and that this would undermine public confidence and react unfavorably upon the school system." [3] In this light, the argument continued, the case is the same as if the

[6] 1954 Mass. Adv. Sh. at 41, 116 N.E.2d at 859.

[7] United States v. Kahriger, 345 U.S. 22, 732 Sup. Ct. 510, 97 L. Ed. 754 (1953), rehearing denied, 345 U.S. 931 (1953).

§13.5. [1] 1954 Mass. Adv. Sh. 613, 120 N.E.2d 772.

[2] 1954 Mass. Adv. Sh. at 615, 120 N.E.2d at 774.

[3] Ibid.

teacher had been dismissed because he had suffered "a terribly disfiguring personal injury." In either case, "the best interests of the schools are paramount." [4]

To the second contention there was a flatter retort. This was another case for application of the well-known epigram of Mr. Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [5]

It has become settled law that, subject to rather indefinite limitations,[6] a person taking or continuing in public employment may, as a condition thereof, be required to waive some of his constitutional rights.[7] It was contended by Faxon that the waiver which may be required must be set forth in a statute, ordinance, or regulation. He argued that, because there was at the time he was interrogated by the Senate subcommittee no regulation of the school committee forbidding teachers to claim privilege, it was improper for the school committee to dismiss him for claiming the privilege. This contention seems to be based upon the apparent development of a pattern of statutory provisions or administrative regulations governing public employees or particular categories of such employees. Thus, the New York City Charter[8] provides for dismissal of a municipal employee who, when subjected to questioning, claims privilege or refuses to sign a waiver of immunity.[9] The City of Los Angeles Charter[10] establishes ineligibility for municipal office or employment of those who advise, advocate, or teach, or become "affiliated" with any organization which advises, advocates, or teaches violent overthrow of government. The charter was implemented by an ordinance[11] requiring employees to take oaths that they do not and will not, while employees, advise, advocate, or teach, nor are or will become members of or affiliated with organizations which advise, advocate, or teach violent overthrow of government. The ordinance also requires affidavits with respect to present or past membership in the Communist Party.[12]

The Court rejected Faxon's contention, saying, *"In a constitutional sense* it seems to us to make no difference whether a teacher is dismissed because of statutory provisions expressly providing for such dismissal or, as in the present case, by an order of a public board acting within its statutory authority." [13] (Emphasis supplied.)

The soundness of this proposition, at least in a context of asserted

[4] 1954 Mass. Adv. Sh. at 616, 120 N.E.2d at 774.

[5] McAuliffe v. Mayor and Aldermen of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

[6] See United States v. Lovett, 328 U.S. 303, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946).

[7] United Public Workers v. Mitchell, 330 U.S. 75, 67 Sup. Ct. 556, 91 L. Ed. 754 (1947).

[8] Chapter 903.

[9] Daniman v. Board of Education, 306 N.Y. 532, 119 N.E.2d 373 (1954).

[10] California Stat., c. 67 (1941).

[11] Los Angeles Ordinance No. 94,004.

[12] See Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 71 Sup. Ct. 909, 95 L. Ed. 1317 (1951).

[13] 1954 Mass. Adv. Sh. 613, 618, 120 N.E.2d 772, 775.

federal constitutional rights, may be debatable. In the *Los Angeles* case[14] the Supreme Court was careful to point out that its decision sustaining the requirement of oaths by municipal employees was limited to cases where the oath was required with reference to periods of time subsequent to the date of the amendment of the charter.[15] There was a strong intimation, though not a positive decision, that there would be constitutional difficulties with an oath requirement which would entail dismissal for advising, advocating, or teaching violent overthrow of government at a time before the enactment of the statute.[16]

Indeed, the Supreme Court felt it necessary to "assume" that the oath requirement was substantially qualified, and that it would not be construed "as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiant's affiliation." [17]

The Court in the *Faxon* case recognized that the aphorism that there is no "constitutional right to be a policeman" is not, alone, a sufficient basis of decision of the constitutional problem posed in the case. There is, for example, a difference between disbarring an attorney[18] or removing a judge[19] and discharging a teacher or a policeman[20] for assertion of privilege or refusal to sign a waiver of immunity. It was indicated by the Court that public authority may insist upon surrender by public officers and employees of "constitutional rights the exercise of which was deemed inconsistent with obligations voluntarily assumed in connection with their public employment."

In the *Faxon* case the Court felt that "the inconsistency between the duty of a teacher in the public schools and the exercise of the right not to incriminate oneself with respect to association with communist organizations is fully as great as in the instances of a policeman or a fireman who asserts similar rights with respect to other activities." [21]

The *Faxon* case will probably be only one of a series of cases which will have to be brought to determine the extent of the power of government to refuse employment or to discharge employees for heterodox (including subversive) activities or opinions.

§13.6. Religious test in adoption. In *Petitions of Goldman*[1] the

[14] Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 71 Sup. Ct. 909, 95 L. Ed. 1317 (1951).
[15] 341 U.S. at 720, 71 Sup. Ct. at 913, 95 L. Ed. at 1323.
[16] 341 U.S. at 720, 721, 71 Sup. Ct. at 913, 95 L. Ed. at 1323.
[17] 341 U.S. at 723, 71 Sup. Ct. at 914, 95 L. Ed. at 1323 (1951).
[18] Matter of Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940).
[19] In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941).
[20] Daniman v. Board of Education, 306 N.Y. 532, 119 N.E.2d 373 (1954).
[21] 1954 Mass. Adv. Sh. 613, 617, 120 N.E.2d 772, 775.

§13.6. [1] 1954 Mass. Adv. Sh. 745, 121 N.E.2d 843.

Court faced issues based on the provisions of the federal and state constitutions concerning an "establishment of religion" and the "free exercise thereof." These involved the requirement[2] that, in making orders for the adoption of children the adoption court must "when practicable," give custody only to persons of the same religious faith as that of the child.

The Goldmans, a Jewish couple who were otherwise qualified to adopt a child, filed petitions for the adoption of twin infants whose mother was a Catholic. (The statute provides that, if the religion of a child is in dispute, its religion shall be deemed to be that of its mother.) The mother assented to the petitions, knowing that the petitioners were Jewish and that the children were to be raised in the Jewish faith. There was evidence that there were in the area Catholic couples who were qualified and who were desirous of adopting children of the type of the twins. The trial judge made findings that it would not be to the best interests of the children to issue a decree of adoption, and dismissed the petitions.

The petitioners' principal contentions were that (1) the statute abridges the mother's free exercise of religion by limiting her freedom to determine the religious faith in which her children be reared, and (2) the statute, by requiring identity of religious faith of adopting parents and adopted children, violates the constitutional prohibition of "an establishment of religion." The Court rejected both contentions, and affirmed the dismissal of the petitions.

Chief Justice Qua did not find it necessary to determine to what extent a parent has a constitutional right to direct the religious upbringing of his child.[3] The point, he held, was not reached because, under the statute, an adoption terminates a natural parent's control of the child.[4] In making this disposition of the contention, the Court did not discuss the petitioners' standing to put into issue the constitutional rights of the mother, who was not a party to the proceeding.[5]

The other contention, that the statute involves a forbidden establishment of religion, was disposed of as briefly. Said the Court: "All religions are treated alike. There is no 'subordination' of one sect to another. No burden is placed upon anyone for maintenance of any religion. No exercise of religion is required, prevented, or hampered." [6]

The Court did not enter explicitly into a discussion of the formula of the "wall of separation of church and state," and the esoteric applications of that formula made by the Supreme Court of the United States.[7]

[2] G.L., c. 210, §58.

[3] Pierce v. Society of Sisters, 268 U.S. 510, 45 Sup. Ct. 571, 69 L. Ed. 1070 (1925).

[4] G.L., c. 210, §6.

[5] Tileston v. Ullman, 318 U.S. 44, 63 Sup. Ct. 493, 87 L. Ed. 603 (1943); Pierce v. Society of Sisters, *supra* note 3.

[6] 1954 Mass. Adv. Sh. 745, 749, 121 N.E.2d 843, 846.

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

The opinion points out that the adoption statutes of many other states contain requirements that adopting parents be of the same religious faith as their adopted children.[8] It is not clear whether this reflects a belief that *Zorach* (which involved "dismissed time" from the public schools for religious instruction) signifies a practical ending of the Supreme Court's attempts to effect a complete disassociation of church and state under the "wall of separation" formula, or if it regards the widespread acceptance of the religious faith test in adoption statutes as evidence that this, like dismissed time, is by common acceptance one of the grounds on which church and state may meet.

The decision seems a more realistic approach to whatever church-state problems the constitutions pose than those which attempt literal application of the sweeping generalization of Mr. Justice Black in the *Everson* case: "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." [9]

§13.7. Miscellaneous references. Constitutional questions generally arise in terms of the substantive law of various other fields of law. Because of space limitations and the topical scheme of development of the material in the SURVEY, various significant constitutional law matters are discussed in other chapters. Some of the more important matters are pointed out in the conclusion of this chapter.

The prohibition of laws impairing the obligation of contract was the basis of two cases [1] which challenged the validity of the repeal of legislation which extended the benefits of retirement pension systems to members of the legislature, to the executive council, and to elected constitutional officers who desired to avail themselves of such benefits. These cases, which sustained the repealer, are discussed in Chapter 24.[2]

Cases involving procedural due process in criminal cases and the pretrail conduct of public officers are examined in Chapter 15.[3]

Questions involving the powers of legislative committees and commissions to punish for contempt, and power of one General Court to bind another General Court on the employment of assistants to standing committees are discussed in Chapter 24.[4]

McCollum v. Board of Education, 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948); Zorach v. Clauson, 343 U.S. 306, 72 Sup. Ct. 679, 96 L. Ed. 954 (1952).

[8] See 54 Col. L. Rev. 376 (1954), referring to the Zorach case *supra*.

[9] 330 U.S. 1, 15, 67 Sup. Ct. 504, 511, 91 L. Ed. 711, 723 (1947). See, for an extreme example, People ex rel. Bormat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 (1950). See also Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953), cert. denied sub nom. Gideons International v. Tudor, 348 U.S. 816, 75 Sup. Ct. 25, 99 L. Ed. Adv. Sh. 27 (1954).

§13.7. [1] Roach v. State Board of Retirement, 1954 Mass. Adv. Sh. 43, 116 N.E.2d 850; McCarthy v. State Board of Retirement, 1954 Mass. Adv. Sh. 47, 116 N.E.2d 852.

[2] Section 24.6.

[3] Sections 15.4-15.6.

[4] Sections 24.1 and 24.6 respectively.