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Chapter 9: Constitutional Law

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PART II

Public Law

CHAPTER 9

Constitutional Law

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§9.1. Right to fair yet speedy trial. *Commonwealth v. Geagan*[1] raised, among a number of other issues, a knotty problem as to the constitutional right of a defendant in a criminal case to a trial that is at once fair and speedy.[2] The case grew out of the 1950 robbery at the Boston terminal of Brink's, Incorporated, when the sum of $1,219,000 was taken. The defendants were arrested and indicted in January, 1956. They filed special pleas and motions to quash, alleging that the district attorney and "other officials of the Commonwealth" had issued news releases and other statements about the case that had resulted in widespread publication in newspapers and in radio and television broadcasts of sensational material which was calculated to convince the public in general, and prospective jurors in particular, of the guilt of the defendants. These publications were "mostly"[3] dated between January 12 and the end of February, 1956. The motions and pleas were heard on May 17 and 29, and June 1 and 4, 1956, and were severally denied on the latter date, at which time the trial was set for August 6, 1956. The trial, which began on the assigned date and lasted for several weeks, resulted in conviction. The judgments of conviction were affirmed.

In dealing with the defendants' point based upon pretrial publicity,

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§9.1. [1] 1959 Mass. Adv. Sh. 1107, 159 N.E.2d 870. The Supreme Court of the United States denied certiorari on November 16, 1959, 361 U.S. 80.

[2] The defendants relied upon Mass. Const., Declaration of Rights, Arts. I, XI, XII; U.S. Const., Amend. XIV; and a portion of the Civil Rights Act, 18 U.S.C. §241 (1952).

[3] 1959 Mass. Adv. Sh. 1107, 1116, 159 N.E.2d 870, 880-881.

the Supreme Judicial Court seemingly rested its decision upon the conventional[4] ground that the trial judge, without abuse of discretion, might have found in June that the effect of the publicity of January and February either had abated or would abate by August to an extent sufficient to permit a fair trial.[5]

The Court pointed out that the defendants had declined to move for a continuance[6] and it ruled that even if there was prejudicial publicity it did not follow that the defendants could never be brought to trial.[7] The opinion recited that on August 6, 1956, the date of the opening of the trial, the defendants filed further special pleas and motions to quash "which related to newspaper publications in the interval since the first special pleadings." As to these it was said, "These raise no new point and are governed by what has been hereinbefore said."[8] This might be construed as a ruling that the defendants, not having waived their right to a speedy trial, would not be heard to complain that pretrial publicity made their trial unfair.

A reading of the record,[9] however, reveals that the August 6 pleas and motions were based upon newspaper articles published during the month of June, so that the more likely meaning of the Court was that the trial judge could properly have concluded that the effect of these, as well as of the January and February publications, was sufficiently dissipated by the time the jury was selected to permit a fair trial. The case in this respect is distinguishable from *Delaney v. United States*,[10] in which the defense motions for continuance were supported by affidavits showing widespread publicity adverse to the defendant continuing up to the time of the trial.

At one of the pretrial hearings in the *Geagan* case there was some discussion, in a colloquy between the trial judge and counsel,[11] as to whether, if there were an attendant atmosphere of prejudicial publicity, the defendants might be required to elect to waive either the right to speedy trial or the right to fair trial. There was no ruling on the point, nor does there appear to be any reported case in which the point has been decided. At least one court, however, has ruled that a defendant, by proceeding to trial without objecting on the basis of

[4] In Stroble v. California, 343 U.S. 181, 72 Sup. Ct. 599, 96 L. Ed. 872 (1952), a "spate of newspaper publicity," engendered in part by the prosecutor's release to the press of a confession of the accused some six weeks prior to the trial, was held not to deprive the defendant of due process in the absence of a showing "that any community prejudice ever existed or in any way affected the deliberation of the jury."

[5] 1959 Mass. Adv. Sh. 1107, 1118, 159 N.E.2d 870, 881.

[6] 1959 Mass. Adv. Sh. at 1117, 159 N.E.2d at 881.

[7] Ibid. In this respect, the Court followed Delaney v. United States, 199 F.2d 107, 111, 112 (1st Cir. 1952), where denial of a motion to dismiss indictments was sustained, although denial of a motion for continuance was held erroneous.

[8] 1959 Mass. Adv. Sh. 1107, 1118, 159 N.E.2d 870, 881-882.

[9] Summary of Record and Assignment of Errors, Vol. 2, p. 687.

[10] 199 F.2d 107 (1st Cir. 1952).

[11] See Brief for Appellants, pp. 165-167.

current adverse publicity, must be deemed to have waived whatever rights he may have had in the premises.[12]

Courts and legislatures generally seem not disposed to face up squarely and realistically to the problem of reconciling the constitutional ideal of trial before a truly fair and impartial fact finder with the fact of pretrial publicity which, to greater or lesser extent, but always to some extent, tends to affect the judgment of prospective jurors.[13] The prevalent judicial attitude, well exemplified by the present case, is one of recognizing that, in certain circumstances, it is impossible to give as fair and impartial a trial as would be desirable, but resolving to give as fair and impartial a trial as can be given in the circumstances. It is probable that the problem is not one which courts can effectively solve, but is one that calls upon other agencies of social control to devise ways and means of eliminating the circumstances that tend to frustrate fair and orderly law administration.[14]

§9.2. Substantive due process: Rights of the individual. An advisory opinion[1] and a decision[2] of the 1959 SURVEY year have revived the uncertainty as to how far notions of individual freedom of choice will be indulged in Massachusetts as limitations upon the scope of legislative power.

It is familiar history that the early years of the present century were characterized by a practically universal judicial tendency to read into constitutions, both state and federal, provisions for the inviolability of an exaggerated class of "natural rights." [3] These rights could be subordinated, by legislation, to dramatically enough portrayed claims of public health and safety,[4] but "liberty of contract [was] the general rule and restraint the exception." [5] Even after the Supreme Court of the United States began to relax the application of this extreme concept of individual liberty, the Massachusetts Supreme Judicial Court

12 Palakiko v. Harper, 209 F.2d 75, 98 (9th Cir. 1953).

13 See Justices Jackson and Frankfurter, concurring specially in Shepherd v. Florida, 341 U.S. 50, 71 Sup. Ct. 549, 95 L. Ed. 740 (1951), and Mr. Justice Frankfurter, dissenting, in Stroble v. California, 343 U.S. 181, 198, 72 Sup. Ct. 599, 608, 96 L. Ed. 872, 885 (1952). The fact that Mr. Justice Jackson did not join in the dissent in the latter case may indicate his view that there was a significant difference of degree in the effect of publicity in the two cases.

14 See Note, Controlling Press and Radio Influence on Trials, 63 Harv. L. Rev. 840 (1950). See also the separate opinion of Mr. Justice Frankfurter in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 70 Sup. Ct. 252, 94 L. Ed. 562 (1950).

§9.2. 1 Opinion of the Justices, 337 Mass. 796, 151 N.E.2d 631 (1958).

2 Paquette v. Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959).

3 See Coppage v. Kansas, 236 U.S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441 (1915); Lochner v. New York, 198 U.S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832 (1897).

4 See Muller v. Oregon, 208 U.S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551 (1908); Holden v. Hardy, 169 U.S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780 (1898).

5 Adkins v. Children's Hospital, 261 U.S. 525, 546, 43 Sup. Ct. 394, 397, 67 L. Ed. 785, 791 (1923).

continued to apply the principle rigidly.[6] This was explained upon the ground that the Court must observe the limitations of the state, as well as the federal, constitution.[7]

In 1934 the United States Supreme Court began[8] a line of decisions that culminated in repudiation, not mere relaxation, of the doctrine that the legislature is impotent save in exceptional cases.[9] There was thus substituted for the doctrine that gave primacy to "liberty of contract" [10] a test of reasonableness of legislation, under which a heavy burden was cast upon the party questioning the validity of the legislature's judgment.[11]

While the new doctrine of substantive due process of law was developing in the Supreme Court of the United States, it had little effect upon the Massachusetts Court. In 1938 the justices rendered an advisory opinion[12] upon a proposal to restrict the days and hours that barbershops may be kept open for business. The opinion advised that the proposal would, if enacted, be unconstitutional because it would unduly inhibit the freedom of barbershop proprietors. As to the recitals in the bill's preamble concerning the impact of barbershop operation upon public health, it was considered adequate to note that the bill did not limit the hours of work of individual barbers, but restricted only the hours of operation of shops, which might employ more than one shift of barbers.

In recent years the Massachusetts Court's view of substantive due process limitations upon legislative power has become more closely attuned to that of the United States Supreme Court. The Supreme Judicial Court has found no constitutional obstacles to the exercise of legislative power to provide for urban redevelopment programs,[13] to prohibit advertising by dental laboratories to the general public,[14] to require conformity to aesthetic standards in private buildings,[15]

[6] Compare Rast v. Van Deman & Lewis Co., 240 U.S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679 (1916), with Sperry & Hutchinson Co. v. Director of Necessaries of Life, 307 Mass. 408, 30 N.E.2d 269 (1940); Daniel v. Family Security Life Insurance Co., 336 U.S. 220, 69 Sup. Ct. 550, 93 L. Ed. 632 (1949), with Opinion of the Justices, 322 Mass. 755, 79 N.E.2d 883 (1948).

[7] See Lowell Gas Co. v. Department of Public Utilities, 324 Mass. 80, 84 N.E.2d 811 (1949).

[8] Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

[9] See Berman v. Parker, 348 U.S. 26, 75 Sup. Ct. 98, 99 L. Ed. 27 (1954); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 72 Sup. Ct. 405, 96 L. Ed. 469 (1952).

[10] This doctrine is, of course, not to be confused with the Thomistic *jus naturale*. Cf. Snee, Leviathan at the Bar of Justice, in Government Under Law 92, n.2 (Sutherland ed. 1956).

[11] See Williamson v. Lee Optical Co., 348 U.S. 483, 75 Sup. Ct. 461, 99 L. Ed. 563 (1955).

[12] Opinion of the Justices, 300 Mass. 615, 14 N.E.2d 953 (1938).

[13] Papadinis v. Somerville, 331 Mass. 627, 121 N.E.2d 714 (1954).

[14] Perlow v. Board of Dental Examiners, 332 Mass. 682, 127 N.E.2d 306 (1955).

[15] Opinions of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); 333 Mass. 783, 128 N.E.2d 563 (1955).

and to authorize resale price maintenance for trade-marked commodities.[16]

In the light of these developments it was not surprising that the Court sustained an ordinance setting minimum standards for occupancy of dwelling facilities.[17] The ordinance required that such facilities be equipped with hot water, lavatory basin and bathtubs or showers, room heating facilities and electrical outlets, and conform to room-area standards and the like. The record showed that about 5 percent of the dwelling accommodations in the city were "cold water flats," which had been constructed and used prior to the enactment of the ordinance in 1955. In rejecting the landowners' argument against the validity of the ordinance the Court, through Chief Justice Wilkins, stated:

> It is true that the determination by the Legislature, or here by the city, "as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." . . . But the decision as to what measures are necessary for the preservation of life, health and morals is in the first place a matter for the legislative authority, and every presumption must be made in favor of the validity of statutes or ordinances enacted to further those objectives. . . .
>
> There are no findings in the master's report which rebut the presumption of validity. That there is no finding that the plaintiffs' "cold water flats" constitute a menace to the health, safety, or morals of the public is without significance.[18]

Exactly six months before this decision, however, the justices rendered an advisory opinion[19] in a second barbershop case, in which they expressly "adopt[ed] and reaffirm[ed] the reasoning" of the 1938 opinion[20] in which they had advised that a legislative limitation of the hours of operation of barbershops would be invalid. Both in their own recital[21] that such a limitation "was an unreasonable interference with the pursuit of a vocation" and in their implied approval of a number of opinions of other state courts which reached the same result,[22] there are indications that the justices have not completely departed from the pseudo-natural-law approach to problems of substantive due process of law.[23]

16 General Electric Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652 (1956).

17 Paquette v. Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959). For further comment on this case, see §12.8 *infra*.

18 338 Mass. at 376, 155 N.E.2d at 780.

19 Opinion of the Justices, 337 Mass. 796, 151 N.E.2d 631 (1958).

20 Opinion of the Justices, 300 Mass. 615, 14 N.E.2d 953 (1938).

21 337 Mass. 796, 798, 151 N.E.2d 631, 632 (1958).

22 Ibid.

23 It may be that, in dealing with barbers, the Court feels bound to accord great constitutional weight to their economic interests by reason of its pre-1954 decision in Saveall v. Demers, 322 Mass. 70, 76 N.E.2d 12 (1947).

Limitation of hours and days of operation of barbershops generally seeks to find its justification in the theory that it facilitates inspection in aid of enforcement of sanitation regulations.[24] The argument runs that, if barbershops are allowed to keep open only during hours when inspectors are on duty, the danger of violation of regulations is reduced. One of the few courts that have addressed themselves to this phase of the problem dismissed the point out of hand, remarking that inspection can be carried on equally well when shops are closed as when they are open.[25]

Other courts, exhibiting a clearer understanding of the factual problem, have posed a very narrow question as to the degree of deference to which a legislative judgment is entitled. Thus, according to the Supreme Court of Indiana, "It is absurd to hold that facility of inspection, or in other words, the convenience of the inspector, who visits a shop perhaps four times a year, is sufficient reason for shortening, or lengthening, the daily hours of business." [26] But the other side of the coin is shown in an opinion of the Supreme Court of New Jersey, where it was said: "To allow barber shops to remain open to the public at all hours of the night might well be regarded as rendering ready and adequate inspection inconvenient or difficult or even impossible, and consequently detrimental to public health. Such considerations are for the fair determination of the municipal authorities, and we cannot say that the regulation in the instant case is unreasonable." [27]

Whatever the merits of the issue drawn between the Indiana and New Jersey courts, the drawing of the issue points up the dangers of basing declarations of limitations on legislative power upon broad (sometimes even extravagant) generalizations of individual rights in the abstract. More particularly, it may point up the need for improvement in the Massachusetts advisory opinion procedure, whether by way of extending the practice of inserting informative preambles in legislative bills, or requiring greater care and precision in the drafting of questions put to the justices, or giving interested persons opportunity to render assistance to the justices in the form of briefs amici curiae or otherwise.

§9.3. Motor vehicle excise tax: Vehicles used in interstate commerce. The validity of the Motor Vehicle Excise Tax Act,[1] as applied

[24] The 1958 proposal which was dealt with in the advisory opinion was not framed on this theory, although the 1938 proposal was. The justices might well have contented themselves with only dealing (as they did in part, 337 Mass. 796, 798-799, 151 N.E.2d 631, 633 (1958)), with the problem of delegation. As the bill was submitted, however, it might have presented some difficult questions as to the propriety of legal regulation of competition among barbers.

[25] People ex rel. Pinello v. Leadbitter, 194 Misc. 481, 85 N.Y.S.2d 287 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 864, 89 N.Y.S.2d 924 (2d Dept. 1949), *aff'd*, 301 N.Y. 695, 95 N.E.2d 51 (1950).

[26] State Board of Barber Examiners v. Cloud, 220 Ind. 552, 555, 44 N.E.2d 972, 977 (1942).

[27] Falco v. Atlantic City, 99 N.J.L. 19, 21, 122 Atl. 610, 611 (Sup. Ct. 1923).

§9.3. [1] G.L., c. 60A.

to interstate buses, was brought into question in *O'Brien v. State Tax Commission.*[2] The statute imposes upon every vehicle registered under G.L., c. 90, an ad valorem tax at the average state rate for the calendar year. The trustee in reorganzation of a motor carrier, several of whose vehicles, although principally garaged in Hartford, Connecticut, were registered in Massachusetts, was assessed under the statute and appealed from a denial of his petition for abatement of the tax. The principal contention was that the imposition of the tax in respect of the vehicles, which were used in interstate commerce,[3] violated the commerce[4] and due process[5] clauses of the United States Constitution.

Without deciding upon the objective merits of the statute the Supreme Judicial Court rejected the contention. It pointed out that the statute, even as applied to vehicles that are operated in other states as well as in Massachusetts, is not invalid on its face, absent a showing that it produced more revenue than was needed to meet the expenses of the Commonwealth and its municipalities with reference to highways and the operation of motor vehicles thereon. Thus, even though the proceeds of the tax are not earmarked, as are some revenues,[6] for highway purposes, the excise may find constitutional justification, although applied to vehicles that are operated in interstate commerce, as an exaction for the use of the highways of the Commonwealth.[7]

Beyond this point, however, the Court refused to consider the carrier's contention. It ruled that he had either failed to show injury or waived his rights since, for all that appeared in the record, he had been under no obligation to register the vehicles with respect to which the tax had been assessed. Had he lawfully refrained from registering the vehicles, he would not have been subject to the excise on the privilege of registration. Having voluntarily registered the vehicles, he was in no position to complain of the consequent excise.

The case thus leaves unsettled a serious question as to the validity of the statute in a substantial area of its application. The opinion cites, in general support of the statute, *Capitol Greyhound Lines v. Brice,*[8] which sustained a state excise law measured by the value of the vehicles (including those from out of state) that were used on the state highways. That case, however, is not conclusive of the issues that may be raised.

As the Court pointed out,[9] G.L., c. 60A is an excise imposed upon motor vehicles in lieu of the property tax imposed upon chattels generally.[10] It has long been held, in the case of railroad rolling stock, which may move through many states during the course of a year, that

2 1959 Mass. Adv. Sh. 631, 158 N.E.2d 146.
3 There was also a small intrastate operation of the carrier.
4 U.S. Const., Art. I, §8, cl. 3.
5 Id., Amend. XIV.
6 Mass. Const., Amend., Art. LXXVIII.
7 1959 Mass. Adv. Sh. 631, 639, 158 N.E.2d 146, 153.
8 339 U.S. 542, 70 Sup. Ct. 806, 94 L. Ed. 1053 (1950).
9 1959 Mass. Adv. Sh. 631, 638, 158 N.E.2d 146, 153.
10 G.L., c. 59, §4. Cf. id. §5, cl. 35.

any given state may impose a property tax only upon some portion of its value.[11] The alternative would be liability to multiple taxation of the same value, and this has been held to be violative of due process.[12] This, it should perhaps be noted, is different from the doctrine that would invalidate, in the name of the commerce clause, a state tax that is susceptible of duplication elsewhere.[13] The latter doctrine is applicable to taxes upon the doing of business, as contrasted with those upon movable property.

River boats and barges[14] and possibly aircraft[15] have been held to be subject to a similar limitation of property taxability. Whether there is an exception to this limitation, allowing the domiciliary states of railroads and aircraft to tax the full values of the vehicles, has not been made explicitly clear.[16] That there is no such exception in the case of non-oceanic vessels has been established.[17] As to buses that operate in more than one state, there appears to be no clear-cut decision as to whether either a domiciliary state or a non-domiciliary state must apportion its property taxes. The nearest analogy is to be found in two cases, one of which holds that an excise measured by valuation of the vehicles apparently need not be apportioned,[18] the other holding that a tax measured by gross receipts must be apportioned, only those receipts allocable to transportation within the state being taxable.[19]

In the *O'Brien* case the Court also refrained from ruling as to whether the motor vehicle excise tax, although assessable in lieu of property tax, would have to be treated as a property tax, rather than an excise for use of the highways, for purposes of resolving federal constitutional issues.[20]

11 Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150 (1905); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 (1891).

12 Braniff Airways v. Nebraska Board, 347 U.S. 590, 598-599, 74 Sup. Ct. 757, 762-763, 98 L. Ed. 967, 976 (1954); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150 (1905).

13 Adams Manufacturing Co. v. Storen, 304 U.S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365 (1938); Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355 (1910).

14 Standard Oil Co. v. Peck, 342 U.S. 382, 72 Sup. Ct. 309, 96 L. Ed. 427 (1952); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 Sup. Ct. 432, 93 L. Ed. 585 (1949).

15 Braniff Airways v. Nebraska Board, 347 U.S. 590, 74 Sup. Ct. 757, 98 L. Ed. 967 (1954).

16 Northwest Airlines v. Minnesota, 322 U.S. 292, 64 Sup. Ct. 950, 88 L. Ed. 1283 (1944); New York ex rel. New York Central & H.R.R. Co. v. Miller, 202 U.S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155 (1906). See T[homas] R[eed] P[owell], Northwest Airlines v. Minnesota: State Taxation of Airplanes, 57 Harv. L. Rev. 1097 (1944).

17 Standard Oil Co. v. Peck, 342 U.S. 382, 72 Sup. Ct. 309, 96 L. Ed. 427 (1952).

18 Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 Sup. Ct. 806, 94 L. Ed. 1053 (1950).

19 Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 68 Sup. Ct. 1260, 92 L. Ed. 1633 (1948).

20 1959 Mass. Adv. Sh. 631, 642, 158 N.E.2d 146, 155.

§9.4. Freedom of expression. The Supreme Judicial Court has extended its earlier denunciation of official restriction of freedom of expression. In 1955 it struck down legislation that would subject exhibition of a motion picture to the discretionary licensing power of an officer.[1] In *Commonwealth v. Moniz*[2] it widened the area of protected expression by overriding a jury verdict that a motion picture exhibited by the defendants was "obscene, indecent and impure."[3] The film depicted activities in a nudist colony and it contained scenes showing both men and women unclothed. The Court viewed the film and concluded that, although the jury might accurately have found it deficient in meeting contemporary standards of good taste, it could not be found to be "obscene" in the sense that it "deals with sex in a manner appealing to prurient interest."[4]

A few weeks earlier, the Court had, by implication, brought the use of radio and television receivers and the playing of records on juke boxes within the area of constitutionally protected expression.[5] In sustaining the provisions of the statute[6] which provides for the licensing of entertainment by such devices in restaurants and similar establishments, it emphasized that the licensing officer had no power of censorship of the content of the entertainment, his function being limited to that of preserving public order and preventing public nuisances.[7]

§9.5. Public funds: Incidental private purpose. "Public purpose," the phrase conventionally used to describe the constitutionally imposed limitation upon the use to which public funds may be put, was expounded and applied in an advisory opinion[1] and in a decided

§9.4. [1] Brattle Films, Inc. v. Commissioner of Public Safety, 333 Mass. 58, 127 N.E.2d 891 (1955); Times Film Corp. v. Commissioner of Public Safety, 333 Mass. 62, 127 N.E.2d 893 (1955).

[2] 338 Mass. 442, 155 N.E.2d 762 (1959).

[3] G.L., c. 272, §§28A, 32. There was also an indictment laid under G.L., c. 136, §3, which forbids offering entertainment on the Lord's Day unless it is "in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four. . . ." This was not specifically discussed in the opinion, but the Court treated the cases under all the indictments as presenting the single issue, whether the film could be found to be obscene. 338 Mass. 442, 443, 155 N.E.2d 762, 763 (1959).

[4] It was in these terms that the Supreme Court of the United States described the sort of publication which is not entitled to protection against official suppression or punishment. Roth v. United States, 354 U.S. 476, 487, 77 Sup. Ct. 1304, 1310, 1 L. Ed. 2d 1498, 1508 (1957).

[5] Mosey Cafe, Inc. v. Licensing Board for the City of Boston, 338 Mass. 199, 154 N.E.2d 585 (1958).

[6] G.L., c. 140, §183A, implemented by Revised Ordinances of Boston, c. 40A, §1, cl. 92 (1947).

[7] 338 Mass. 199, 204, 154 N.E.2d 585, 590 (1958). The opinion contains an informative discussion of the necessity of statutory standards controlling licensing officers in their exercise of delegated powers. Cf. Commonwealth v. Maletsky, 203 Mass. 241, 89 N.E. 245 (1909).

§9.5. [1] Opinion of the Justices, 337 Mass. 800, 152 N.E.2d 90 (1958).

case.[2] In the former, after the New Haven Railroad had announced its intention to exercise its right, under a bankruptcy reorganization plan, to discontinue service on the Old Colony lines serving southeastern Massachusetts, it was proposed to pay the railroad some $900,000 as an inducement to continue service for a year. Part of the consideration for the payment was the railroad's agreement to extend an option, which the Commonwealth had under the reorganization plan, to purchase parts of the Old Colony lines in the event of discontinuance of service by the railroad. The money for the payment was to be raised by assessments upon Boston and the other cities and towns served by the railroad on the Old Colony lines. The justices ruled that the preservation of rail transportation in the area involved was a public purpose.[3] The proposal was enacted into law.[4]

In the *Merchants National Bank* case the question involved was the validity of notes of the City of Boston under legislation[5] authorizing construction of a municipal auditorium. It was argued that the proposed building was being designed for rental for conventions and for an exhibition hall for private exhibitions and shows. The Court, however, pointed out that the building was also designed for public exercises and hearings, political rallies and exhibitions of a public character, such as those in connection with public school and civil defedense activities. Provision for the latter uses was, it was held, clearly a public purpose not derogated from by the dual character of the building. The Court apparently felt bound by an earlier precedent[6] to go on and assert that public uses of the sort indicated would be the predominant uses of the building, to which the private uses would be but incidental. There is at least a suggestion[7] that if, upon construction of the auditorium, non-public uses should become "dominant" the situation would be judicially reviewable.

§9.6. Equal protection of the laws. In three instances there were rulings upon the equal protection clause,[1] and in each the actual or proposed legislation was sustained.

Mosey Cafe, Inc. v. Mayor of Boston[2] grew out of the legislative treatment of the Lord's Day statute[3] to meet the constitutional objections raised by the Supreme Judicial Court in 1955.[4] The statute originally required Sunday licenses for public entertainment which consisted of motion picture exhibitions or the use of radio, television or juke boxes. The license, issued by the mayor, was subject to the

2 City of Boston v. Merchants National Bank, 338 Mass. 245, 154 N.E.2d 702 (1959).
3 337 Mass. 800, 805, 152 N.E.2d 90, 93 (1958).
4 Acts of 1958, c. 541.
5 Acts of 1954, c. 164, as amended by Acts of 1957, c. 718.
6 Wheelock v. Lowell, 196 Mass. 220, 81 N.E. 977 (1907).
7 338 Mass. 245, 249, 154 N.E.2d 702, 706 (1958).

§9.6. 1 U.S. Const., Amend. XIV.
2 338 Mass. 207, 154 N.E.2d 591 (1958). This was a companion case to Mosey Cafe, Inc. v. Licensing Board, 338 Mass. 199, 154 N.E.2d 585 (1958), discussed in §9.4 *supra*.
3 G.L., c. 136, §4.
4 See §9.4 *supra*, especially note 1.

qualification that the proposed entertainment should have been approved by the Commissioner of Public Safety "as being in keeping with the character of the day and not inconsistent with its due observance." The 1955 amendment[5] made the qualification inapplicable to Sunday licenses for motion pictures, radio and television, but left it applicable to Sunday licenses for juke boxes. A holder of a Sunday juke box license sued for a declaratory decree that the license requirement was invalid as to him. The Court ruled, however, that, since the licensing standards went to the type of entertainment, rather than to the specific content of the entertainment, it could not be said that the classification of juke boxes into one category and of motion pictures, radio and television into another for this purpose was unreasonable.

In another case[6] the selectmen of Brookline had made supplemental safety regulations[7] applicable to lodging houses and convalescent homes, but not to hotels. The Court ruled that "[d]ifferences in purpose, use, construction, size and the like afford a rational basis for a differentiation between lodging houses and hotels with respect to these fire safety regulations." [8] Finally, in an advisory opinion[9] the justices ruled that there would be no improper classification in a requirement that, in any case arising under the Anti-Injunction Act,[10] a panel of three justices would be assigned to hear and determine the matter. The proposed bill was subsequently enacted into law.[11]

§9.7. Due process of law. Due process of law was held to be denied in *Commonwealth v. Page.*[1] The respondent had been sentenced to a correctional institution following his conviction of crime. The day before the expiration of his term the district attorney instituted proceedings for his commitment under the statute providing for the care, treatment and rehabilitation of sex offenders.[2] At a hearing before a judge, the respondent's motion for a jury trial was denied and, while it apparently was made to appear that the respondent was a "sex offender" within the meaning of the statute, it also appeared that no treatment center had been established as required by the statute. The respondent was committed for an indefinite period to the correctional institution, where he was housed with the general prison population. The Supreme Judicial Court did not rule directly upon the validity of the statute insofar as it provided for involuntary

5 Acts of 1955, c. 742.

6 Maher v. Town of Brookline, 1959 Mass. Adv. Sh. 807, 158 N.E.2d 320. For a further discussion of this case, see §12.8 *infra.*

7 As authorized by G.L., c. 143, §46, which provides for local regulations in addition to the specific safety requirements set forth in the statute.

8 1959 Mass. Adv. Sh. 807, 811, 158 N.E.2d 320, 323.

9 Opinion of the Justices, 1959 Mass. Adv. Sh. 775, 158 N.E.2d 354.

10 Acts of 1935, c. 407, as amended, appearing in G.L., c. 149, §§20B, 20C, 24, c. 150A, and c. 214, §§9A, 9B.

11 Acts of 1959, c. 600, adding a new §30 to G.L., c. 212.

§9.7. 1 1959 Mass. Adv. Sh. 915, 159 N.E.2d 82.

2 G.L., c. 123A.

confinement of "sex offenders" for treatment, except to suggest[3] that it might be analogous to statutes providing for compulsory non-penal treatment of mental defectives and "psychopathic personalities." [4] On the record of the *Page* case, however, it was held that the disposition appeared on its face to be penal, rather than remedial, and the confinement provisions of the statute could not, consistently with standards of due process, be executed unless treatment facilities had in fact been established.

Another due process point was raised and rejected in *Massachusetts Society for the Prevention of Cruelty to Animals v. Commissioner of Public Health.*[5] A recent statute[6] authorizes certain institutions, under license from the Commissioner, to requisition impounded lost and strayed dogs and cats from their custodians for the purpose of scientific investigation, experiment or instruction. Various humane societies, which habitually are custodians of such animals and which object to the animals being used for the purposes outlined in the statute, instituted proceedings to prevent enforcement of the statute. Their theory was that, as "finders" of the lost and strayed animals in their custody, they had property rights in the animals[7] of which they could not be deprived by requisitions made under the statute. The Court, however, pointed out that, whether or not the asserted common law doctrine was applicable in favor of the societies, the doctrine itself was subject to change by legislation.[8]

§9.8. Lord's Day Statute. A United States District Court composed of three judges[1] held (with one judge dissenting) that the so-called Lord's Day Statute[2] of Massachusetts was invalid as applied to the operator of a kosher market and classes of persons composed of Orthodox Jewish customers of the market and of rabbis who service kosher markets in accordance with Jewish dietary laws.[3] The case, whose pendency was noted a year ago,[4] ruled that the statute infringes the Fourteenth Amendment in that (1) it "is a law respecting the [*sic*] establishment of religion and denying [*sic*] the free exercise of religion"; (2) it deprives the market owner of property, and the customers and rabbis of liberty, without due process of law; and (3) by reason of

3 1959 Mass. Adv. Sh. 915, 917, 159 N.E.2d 82, 85.

4 Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 Sup. Ct. 523, 84 L. Ed. 744 (1940); Dubois, Petitioner, 331 Mass. 575, 120 N.E.2d 920 (1954).

5 1959 Mass. Adv. Sh. 815, 158 N.E.2d 487.

6 G.L., c. 49A, inserted by Acts of 1957, c. 298, noted in 1957 Ann. Surv. Mass. Law §31.5.

7 McAvoy v. Medina, 11 Allen 548 (Mass. 1866).

8 1959 Mass. Adv. Sh. 815, 824, 158 N.E.2d 487, 494.

§9.8. 1 The court sat pursuant to 28 U.S.C. §§1331, 1343, 2281, 2284 (1952).

2 The opinion referred generally to G.L., c. 136, but the decision clearly was made with reference to Section 5 thereof.

3 Crown Kosher Super Market of Mass., Inc. v. Gallagher, 176 F. Supp. 466, supplemental dissenting opinion, 178 F. Supp. 336 (D. Mass. 1959).

4 1958 Ann. Surv. Mass. Law §11.2 at 116.

the many exemptions[5] from the prohibitions of the statute, it denies equal protection of the laws.[6]

An appeal has been taken from the decision to the Supreme Court of the United States.[7] If the Court decides to hear argument and to pass upon the constitutional questions presented,[8] a decision will not be forthcoming, in all likelihood, until some time in October Term, 1960.[9] There is pending before the Court an appeal from a decision of the Maryland Court of Appeals,[10] which sustained a Maryland Sunday observance statute against contentions that it involved "an establishment of religion" and that it was unlawfully discriminatory. More recently, a Pennsylvania Sunday statute was sustained by a three-judge federal court,[11] which rejected the reasoning of the court that decided the *Crown Kosher Super Market* case.[12]

[5] G.L., c. 136, §6.

[6] 176 F. Supp. 466, 471, 475 (D. Mass. 1959).

[7] Gallagher v. Crown Kosher Super Market, No. 532, October Term, 1959. It was erroneously reported, in 28 U.S. Law Week 3173, that a petition for certiorari had been filed.

[8] Conceivably the case could be disposed of on a jurisdictional issue, as to whether the District Court should have declined to act and should have awaited a determination of the points by the state court. This was part of the basis of the dissent. 176 F. Supp. 466, 479 (D. Mass. 1959).

[9] The Court's schedule for October Term, 1959, will preclude the hearing, at this term, of practically all cases in which certiorari is granted or probably jurisdiction noted subsequent to December 14, 1959.

[10] McGowan v. State, — Md. —, 151 A.2d 156 (1959), *appeal pending sub nom.* McGowan v. Maryland, No. 438, October Term, 1959.

[11] Two Guys from Harrison-Allentown, Inc. v. McGinley, 179 F. Supp. 944 (E.D. Pa. 1959), noted, 28 U.S. Law Week 1081, summarized, id. 2250 (1959).

[12] Appeal pending, No. 699, and certiorari sought, No. 700, October Term, 1959.