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Chapter 22: Constitutional Law

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P A R T I I I

Public Law

C H A P T E R 2 2

Constitutional Law

JOHN D. O'REILLY, JR.

§22.1. "Taking" of private property for public uses: Compensation. The ever-vexing question of whether state action which adversely affects private property is an "appropriation to public uses"¹ for which compensation must be paid was raised in *Sullivan v. Commonwealth*.² The Commonwealth undertook the construction of an aqueduct for distribution of water. At one point it was necessary for the contractor to blast through rock. This was done "in a careful and approved manner" but it set up vibrations through a stratum of rock which extended to the area beneath the plaintiff's home, causing considerable damage through the cracking of plaster and the breaking of a water pipe. The blasting took place from April, 1948, to August, 1949.

The plaintiff claimed compensation under the eminent domain statute³ on the theory of damage to land not taken by the public body but incident to construction of a public work. This theory was rejected with the explanation that this statute did not create a right to compensation but only provided the procedure for obtaining compensation payable under some other statute, and no statute applied in this case. The Court also disposed of the plaintiff's theory that he was entitled to recover damages for nuisance; the short answer to this con-

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§22.1. ¹ Mass. Const., Declaration of Rights, Art. X.

² 335 Mass. 619, 142 N.E.2d 347 (1957).

³ G.L., c. 79, §§9, 10.

tion was that the Commonwealth has not consented to be sued in tort. The Court also rejected the plaintiff's theory based on constitutional grounds, namely that the impact of the aqueduct construction project upon the plaintiff's property constituted a "taking" for which compensation must be paid, and sustained a directed verdict for the Commonwealth.

The distinction between what government may do without paying for the privilege and what it may do only upon condition of payment is not spelled out in detail in either state⁴ or federal⁵ Constitution. In applying the distinction courts have, to paraphrase a famous dictum from an entirely different context, tended to govern themselves by analogies to "recondite niceties of property law."⁶

Government may "take" property for which it has to pay although it does something far less than invest itself with a private owner's "title." Thus, the practice of firing artillery projectiles over land adjoining the site of the gun emplacements constitutes a "taking" because it imposes a "servitude."⁷ Pennsylvania was denied the power to forbid the mining of coal so as to cause subsidence of the surface unless the state paid the mine owner;⁸ Mr. Justice Holmes, writing for the majority, pointed out that the question was one of degree⁹ but he also emphasized that the statute before the Court would destroy a sub-surface right that the local law classified as an estate in land.¹⁰ When the noise of planes from a neighboring military airport frightens to death the chickens on a poultry farm, there is a compensable taking because the United States has, again, established a "servitude."¹¹ But when a retreating United States army destroys private property so that the advancing enemy will not obtain its logistic value, there is a loss to the owner but not a "taking" in the constitutional sense.¹² So also, when the tranquility of the private citizen's island retreat is broken by the government's use of a neighboring island for aircraft

⁴ Mass. Const., Declaration of Rights, Art. X: "And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

⁵ U.S. Const., Amend. V: "... nor shall private property be taken for public use, without just compensation." This clause is applicable only to the United States. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (U.S. 1833). But Amendment XIV, prohibiting state deprivation of property without due process of law, has the effect of imposing substantially this limitation upon the states. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979 (1897).

⁶ Mr. Justice Frankfurter, insisting upon realistic interpretation of the estate tax statute in *Estate of Rogers v. Helvering*, 320 U.S. 410, 414, 64 Sup. Ct. 172, 174, 88 L. Ed. 134, 138 (1943).

⁷ *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 Sup. Ct. 135, 67 L. Ed. 287 (1922).

⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 Sup. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922).

⁹ 260 U.S. at 416, 43 Sup. Ct. at 160, 67 L. Ed. at 326.

¹⁰ 260 U.S. at 414, 43 Sup. Ct. at 159, 67 L. Ed. at 325.

¹¹ *United States v. Causby*, 328 U.S. 256, 66 Sup. Ct. 1062, 90 L. Ed. 1206 (1946).

¹² *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 73 Sup. Ct. 200, 97 L. Ed. 157 (1952).

bombing tests, there is no compensable "taking."¹³ In the *Sullivan* case the Court rules out obligation to pay because whatever nuisance the aqueduct project amounted to, it was not "great" enough to amount to a taking.¹⁴ Unfortunately, the concept of "greatness of nuisance" as a criterion of "taking" in the constitutional sense is not developed in the opinion, and the Court simply concludes that the case does not fall within the "taking" precedents because there was no intention on the part of the Commonwealth to derogate from the plaintiff's use of his property for any length of time.¹⁵

A cynic is tempted to expect that this disposition of the case will pave the way for some litigant to claim compensation because governmental action impaired his use of his property for eighteen or twenty instead of sixteen months. Lines of this sort cannot (or, at least, should not) be drawn in resolving claims of constitutional right.

Unlike many provisions in bills of rights, which are directed against recurrence of specific historical abuses of governmental power, American constitutional provisions for compensation for property subjected to public use seem to stem directly from authoritative speculations of great jurists on the subject.¹⁶ Judicial decisions under these constitutional mandates consist in determinations of the extent to which government's moral obligation to recompense the individual for loss caused by its action will be enforced. In part these determinations involve decision as to whether the existence of this moral obligation is to be resolved by the legislature or by the judiciary. It is to be regretted that for the making of such determinations the law provides no more appropriate criteria than the analogies of "estates" and "servitudes."

§22.2. Gross receipts from interstate commerce and state taxation. After some initial confusion,¹ it has been a settled rule of thumb since 1887² that gross receipts from interstate commerce are not subject to state taxation. Like many rules of thumb, however, this one has limited value in the solution of specific problems. Thus, a state may be able to impose a tax upon the gross receipts of sales of goods from elsewhere to consumers within the state if the tax is nondiscriminatory.³ And a tax upon gross receipts from the carrying on of interstate commerce within a state can be sustained if it is made clear that the gross receipts

¹³ *Nunnally v. United States*, 239 F.2d 521 (4th Cir. 1956).

¹⁴ 335 Mass. 619, 627, 142 N.E.2d 347, 353 (1957).

¹⁵ 335 Mass. at 629, 142 N.E.2d at 353.

¹⁶ See the quotations from Grotius, Pufendorf, Heineccius, Bynkershoek, Vattel and Blackstone in 1 Thayer, *Cases on Constitutional Law* 946-952 (1895).

§22.2. ¹ *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. Ed. 164 (U.S. 1873); *Case of the State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146 (U.S. 1873).

² *Philadelphia & Southern Mail S.S. Co. v. Pennsylvania*, 122 U.S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200 (1887).

³ *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565, 128 A.L.R. 876 (1940). But cf. *Freeman v. Hewit*, 329 U.S. 249, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946).

are used as an index of the value of the property used in the state in carrying on the commerce.⁴

In *State Tax Commission v. Breck, Inc.*⁵ the appellee Massachusetts corporation contended that the rule of thumb required substantial abatement of the domestic business corporation excise tax⁶ assessed against it since its income was derived in part from sales of Massachusetts goods to Massachusetts purchasers, in part from sales of Massachusetts goods to out-of-state purchasers and in part from sales of out-of-state goods to out-of-state customers, deliveries in the last two instances being made out of state.

The tax statute provides for taxation of a corporation's taxable net income.⁷ "Net income" is defined, in substance, as gross income less deductions allowed by federal tax law.⁸ (When net income is derived from business outside as well as within the Commonwealth, the portion of net income taxable by the Commonwealth is to be determined by application of a somewhat involved formula.⁹) In substance, the formula provides that there shall be taxed that portion of the taxpayer's total net income which equals the average of three ratios: (1) the ratio of the value of the taxpayer's tangible property located in Massachusetts to that of all of its tangible property located everywhere; (2) the ratio of the taxpayer's payroll in Massachusetts to its payroll everywhere; and (3) the ratio of the gross receipts assignable to Massachusetts to total gross receipts. The statute goes on to provide¹⁰ that there shall be assignable to Massachusetts, for purposes of the formula, gross receipts from all sales, "except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth." The Court¹¹ construed this definition of gross receipts to include all sales of goods manufactured in Massachusetts negotiated by salesmen not shown to be connected with or supervised by sales offices outside Massachusetts.¹²

⁴ Pullman Co. v. Richardson, 261 U.S. 330, 43 Sup. Ct. 366, 67 L. Ed. 682 (1923).

⁵ 1957 Mass. Adv. Sh. 929, 144 N.E.2d 87.

⁶ G.L., c. 63, §32.

⁷ Ibid. The Court construed this to be a tax on corporate privileges designed to reflect solely Massachusetts values. 1957 Mass. Adv. Sh. 929, 951, 144 N.E.2d 87, 102. Had it been a tax "on" net income instead of one simply "measured by" net income, perhaps all of the net income of a domestic corporation could have been reached as far as constitutional limitations would be concerned. See United States Glue Co. v. Oak Creek, 247 U.S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918). Such a construction of the statute, however, might have created difficulties in administration of the other ingredients of the corporate excise. G.L., c. 63, §32(1).

⁸ Id. §30(5).

⁹ Id. §38 (2).

¹⁰ Id. §38(6).

¹¹ 1957 Mass. Adv. Sh. 929, 949, 144 N.E.2d 87, 101.

¹² In any multi-state business operation a certain degree of arbitrariness is inevitable in the process of making the artificial determination of "locating" a constituent part of the operation in a given place for tax purposes. The Supreme

The Appellate Tax Board ruled that, to the extent that gross receipts from sales of Massachusetts goods to out-of-state customers were considered in computation of the tax, the tax was one on gross receipts from interstate commerce and was invalid under the United States Constitution.¹³

The Supreme Judicial Court reversed, holding that the tax was not on gross receipts from interstate commerce but on local activities measured by net receipts allocated to Massachusetts by a formula under which the relative amount of gross receipts was used as a measuring factor.

The principle upon which the Court acted is easy of statement but is frequently difficult of application. Oversimplified, it is that a state may (tax local activity) but it may not tax the doing of interstate commerce. But the question of what is being taxed is not necessarily answered by the words of the statute. Thus, when the statute recites that a tax is imposed on the doing of local business by a telegraph company and measures the tax by all of the capital stock of a company, *Western Union*, which does both local and interstate business in the state, may escape payment because the very measure of the tax makes it one on the interstate as well as local business of that particular company.¹⁴ Had the state adopted a formula by which a fraction of the capital stock of *Western Union* is made the base of the tax the exaction may stand.¹⁵ The principal requirement is that the formula fairly reflect elements of value which are properly taxable by the state.¹⁶

Logically, perhaps, a state should be able to impose an excise or franchise tax upon a properly allocated fraction of gross receipts derived from business which includes transactions in interstate commerce, but the United States Supreme Court has as yet done no more than state a few dicta to that effect.¹⁷ Meanwhile, legislatures and

Court has never read the Constitution as requiring any "State to adopt an iron rule of equal taxation." *The Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892 (1890). That mathematical precision is not the test is clear. Thus where a multi-state operator showed by its own system of cost accounting that its California operations resulted in a net loss, California was allowed to apply a formula by which a portion of the company's over-all net profit was allocated to California for corporate franchise purposes. *Butler Bros. v. McCoolgan*, 315 U.S. 501, 62 Sup. Ct. 701, 86 L. Ed. 991 (1942).

¹³ *John H. Breck, Inc. v. State Tax Commissioner*, 1956 Mass. A.T.B. Adv. Sh. 1 Doc. No. 31403, Oct. 10, 1956.

¹⁴ *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355 (1910); *Cooney v. Mountain States Telephone & Telegraph Co.*, 294 U.S. 384, 55 Sup. Ct. 477, 79 L. Ed. 934 (1935).

¹⁵ *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 60 Sup. Ct. 273, 84 L. Ed. 304 (1939).

¹⁶ See *Union Tank Line v. Wright*, 249 U.S. 275, 39 Sup. Ct. 276, 63 L. Ed. 602 (1919), where the Court invalidated a tax based upon an allocation formula which gave an obviously distorted value to the local interest which the state purported to tax.

¹⁷ *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 667, 69 Sup. Ct. 1264, 1266, 93 L. Ed. 1613, 1620 (1949); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653,

courts must,¹⁸ as in the *Breck* case, lay or sustain taxes on the ground that the subjects of the taxes, as evidenced by their measure, are within the power of the state. Net income is apparently a "safe" measure of a tax, for it is sufficiently different from gross income to indicate that the tax is on a local activity, even though it is derived in some measure from interstate activity,¹⁹ as long as it is also traceable in some part to intrastate activity.²⁰

In a somewhat related field the United States Supreme Court has, in recent years at least, developed a more realistic approach than it has shown in cases similar to *Breck*. Since *McCulloch v. Maryland*²¹ a state may not tax an instrumentality of the United States, including its bonds and notes. But when a taxpayer owns United States bonds, the value of which enters into the computation of a tax, the Court endeavors to appraise realistically what it calls the "legal incidence" of the tax. If it is upon the bonds, it is forbidden;²² if, however, it is upon something else and merely measured in part by the value of the bonds, it is permitted.²³ Keeping in mind the futility of seeking a completely mechanical formula for determining constitutional issues, it may be that extending the approach of these cases to the cases of taxes impinging on commerce may help clarify some of the fiscal problems of the states.

§ 22.3. Standing of parties in constitutional litigation. *Home Budget Service, Inc. v. Boston Bar Assn.*¹ sustained the statute² which outlaws "debt pooling plans," i.e., the furnishing of advice or services by non-lawyers in behalf of a debtor in arranging payments or settle-

662, 663, 68 Sup. Ct. 1260, 1266, 92 L. Ed. 1633, 1641 (1948); *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 311, 58 Sup. Ct. 913, 915-916, 82 L. Ed. 1365, 1369, 117 A.L.R. 429, 433 (1938).

¹⁸ The imperative is used here out of deference to the practicalities of the matter. Fiscal needs of the states are so pressing that only the most calculated of risks as to the validity of a tax program properly can be run. The Supreme Court's analysis of cases and rationalization of results in this area are constantly changing so that it is never certain that the reasoning which was used yesterday to produce a given result will be applicable tomorrow to produce the logical corollary.

¹⁹ *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918).

²⁰ As to taxpayers who are engaged exclusively in interstate activity within a state, there is authority seemingly to the effect that even their net incomes cannot be reached by the state tax gatherer on an apportioned basis. See *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 Sup. Ct. 508, 95 L. Ed. 573 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916, 44 A.L.R. 1219 (1925). Whether these cases flatly stand for this proposition is a question beyond the scope of the present comment.

²¹ 4 Wheat. 316, 4 L. Ed. 579 (U.S. 1819).

²² *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143, 75 Sup. Ct. 607, 99 L. Ed. 950 (1955); *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665, 70 Sup. Ct. 413, 94 L. Ed. 439 (1950).

²³ *Werner Machine Co. v. Director of Taxation*, 350 U.S. 492, 76 Sup. Ct. 534, 100 L. Ed. 634 (1956).

§22.3. 1 335 Mass. 228, 139 N.E.2d 387 (1957).

2 G.L., c. 221, §46C.

ments with his creditors. The statute was challenged upon two grounds: (a) that it restricted unreasonably an individual's choice of occupation; and (b) that it violated the doctrine of separation of powers.

As to the first point, the Supreme Judicial Court had no difficulty in determining that the operation of a debt pooling plan can properly be classified as the practice of law and can properly be forbidden to all but members of the bar. Had the case presented simply a question as to the permissible scope of the police power, this result could have been predicted in the light of the current Court attitude towards the police power.³

This particular issue, however, is complicated by the doctrine that it is exclusively the function of the judiciary to determine who may practice law.⁴ This doctrine has never been literally applied and the Court here, as it has done on other occasions, reconciled the statute with the exclusive-judicial-function doctrine by characterizing it as an "enactment in aid of the court's power."⁵

A more intriguing problem that might have been raised in the case was not litigated by the parties nor discussed by the Court. The statute provides that non-lawyer debt pooling may be enjoined upon suit by the Attorney General, by any bar association or by three or more members of the bar. The present case was instituted by a number of debt pool operators under the Declaratory Judgment Act against the Attorney General and two bar associations. Upon demurrer the suit was dismissed as to the Attorney General. No appeal was taken and the suit proceeded against the bar associations. The latter filed a counterclaim asking injunctive relief pursuant to the statute.

It is familiar practice to have the constitutional validity of a statute determined in an injunction suit brought by a person who would be adversely affected against the public officer charged with its enforcement.⁶ In a proper case mandamus may also lie for the same purpose.⁷ Likewise, the Attorney General or some other appropriate public officer may have power to maintain mandamus or a suit in equity against another public officer to compel execution of the latter's duties in accordance with the law.⁸ Even private individuals, usually qua taxpayers, are frequently authorized to maintain suits against

³ *General Electric Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956); *Opinion of the Justices*, 333 Mass. 783, 128 N.E.2d 563 (1955); *Opinion of the Justices*, 333 Mass. 773, 128 N.E.2d 557 (1955); *Perlow v. Board of Dental Examiners*, 332 Mass. 682, 127 N.E.2d 306 (1955).

⁴ *Opinion of the Justices*, 279 Mass. 607, 180 N.E. 725, 81 A.L.R. 1059 (1932).

⁵ 335 Mass. 228, 233, 139 N.E.2d 387, 391 (1957), and the cases there cited.

⁶ *Ex parte Young*, 209 U.S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714 (1908); *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed sub nom.* *General Outdoor Advertising Co. v. Callahan*, 297 U.S. 725, 56 Sup. Ct. 495, 80 L. Ed. 1008 (1936); *Shuman v. Gilbert*, 229 Mass. 225, 118 N.E. 254, L.R.A. 1918C 135 (1918).

⁷ *Sears v. Treasurer and Receiver General*, 327 Mass. 310, 98 N.E.2d 621 (1951).

⁸ *Attorney General v. Trustees of Boston Elevated Railway*, 319 Mass. 642, 67 N.E.2d 676 (1946).

public officers for this purpose.⁹ Such individuals have been described as "private Attorney Generals."¹⁰ No other case has been found, however, in which a private individual has been able to obtain a declaratory judgment of constitutionality of a statute by suit against a "private attorney general." This situation may suggest the desirability of enacting into Massachusetts law a provision parallel to that in the federal code¹¹ under which the Attorney General must be notified whenever the constitutionality of a statute is drawn in question and must be allowed to intervene as a party for the purpose of litigating the constitutional question.

§ 22.4. **Due process of law: Summary conviction for contempt.** The power of a court to punish summarily for contempt, considered recently in *Crystal, Petitioner*,¹ was again considered in *Garabedian v. Commonwealth*.² Garabedian, a clerk in a law office, during the absence of his employer interviewed a woman who had come to the office for the purpose of getting a divorce. He made notes of her statement of facts and drafted a libel, which was presented to the employer upon his return. The libel was filed, the libellee defaulted and an uncontested hearing was held in the Probate Court. The libellant testified that she and her husband had last resided together in Massachusetts.³ The judge then examined the libellant's mother in French, a language not understood by Garabedian's employer, who was trying the case; Garabedian himself was not present in the courtroom. The hearing was then concluded.

Subsequently, at a casual meeting of the attorney and the judge, the latter stated that he doubted whether the parties to the divorce suit had actually lived together in Massachusetts, and that he had asked the state police to investigate. Still later, the attorney received a telephone notice to appear in court. Garabedian happened to be in the courthouse at the time and, upon hearing that his employer had a case in the Probate Court, he went there to observe. He had not been called to appear.

In the Probate Court, the libellant and her mother stated that the libellant and her husband had lived together in Massachusetts. A state police officer, however, stated (the witnesses in this hearing were not sworn) that he had made an investigation and had received information that the parties to the marriage had lived together in Texas

⁹ See, for example, the following provisions of the General Laws: c. 29, §63 (legality of state disbursements); c. 31, §§15C, 47E (civil service law enforcement); c. 35, §35 (county commissioners); c. 40, §53 (legality of municipal appropriations); c. 62, §31 (income tax returns); c. 71, §34 (school appropriations); c. 164, §69 (municipal gas and electric plants); c. 214, §3 (enforcement of terms of gifts to municipalities).

¹⁰ *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

¹¹ 28 U.S.C. §2403 (1952).

§22.4. 1 330 Mass. 583, 116 N.E.2d 255 (1953).

² 1957 Mass. Adv. Sh. 753, 142 N.E.2d 777.

³ This is an essential jurisdictional fact. G.L., c. 208, §4.

but not in Massachusetts. The attorney called Garabedian to the stand and the latter testified as to his interview with the libellant, and stated that she had told him that she and her husband had last resided together in Massachusetts. The judge then said to Garabedian, "I didn't believe a word you said. I sentence you to thirty days in jail." A formal finding of contempt was made and Garabedian was committed to jail.⁴ On writ of error the judgment was reversed.

The Court, as it did in the *Crystal* case, relied upon the decision of the United States Supreme Court in *In re Oliver*⁵ to support its conclusion that the conduct of the probate judge constituted a denial of due process of law. In the *Oliver* case a Michigan circuit judge, sitting as a "one-man grand jury," summarily convicted a witness of contempt for giving perjured testimony. The perjurious character of the testimony was not evident upon its face but could be inferred only from the testimony of other witnesses, whom the defendant had no opportunity to confront or cross-examine.

In the *Garabedian* case, the Court pointed out that substantially the same circumstances were present. The judge's conclusion must have been based, at least in part, upon demeanor and testimony given at the earlier divorce hearing at which Garabedian had not been present. In placing its decision upon this ground, the Court did not reach the further question as to whether Garabedian's testimony, even if false, constituted a contempt in the absence of an affirmative showing that there was or could have been an obstruction of justice.⁶

§ 22.5. Segregation and discrimination: "Publicly assisted housing accommodations." Legislation forbidding segregation and discrimination based upon such matters as race, creed, color or national origin contains the seeds of constitutional litigation. Rudimentary legislation on this subject has been in the Massachusetts statute books for many years. Originally it did little more than codify the common law requirements of such persons as innkeepers, common carriers and the like to render equal treatment to all who seek their services.¹ In the past quarter century, however, and particularly in the past dozen years, the coverage of such prohibitory legislation has been greatly broadened.

Places of public resort have been forbidden to advertise or solicit in a discriminatory way.² The category of places at which discrimina-

⁴ 1957 Mass. Adv. Sh. at 757, 142 N.E.2d at 780. He actually served the full thirty days in jail. The case was not moot, however, the Court saying: "Although there is no way to restore time lost while serving sentence, a person is entitled to an effacement of the obloquy and stigma of an illegal conviction."

⁵ 333 U.S. 257, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948).

⁶ The federal cases cited by the Court indicate that a showing of such obstruction must be made in order to sustain a finding of contempt, whereas there are Massachusetts dicta, also cited, indicating that it is sufficient if the false testimony has reasonable tendency to obstruct. 1957 Mass. Adv. Sh. 753, 758, 759, 142 N.E.2d 777, 781.

§22.5. ¹ G.L., c. 272, §98.

² Id. §92A.

tion is forbidden has been widened.³ Group libel has been denounced as a crime.⁴ Discriminatory employment on public works is unlawful.⁵ Tenant selection in public housing, including urban redevelopment and urban renewal projects, is forbidden.⁶ Discrimination in private employment and in admission to schools and colleges is unlawful.⁷

The 1957 session of the General Court carried the scope of prohibition still further when it forbade discrimination in tenant selection in "publicly assisted housing accommodations."⁸ This is defined, in general, as property which enjoys tax concessions, or is on land assembled by public authority, or sold by public authority below cost and also privately owned housing, either of the "multiple family" type or part of a development located on contiguous parcels of land, when acquisition, construction, repair or maintenance is financed by a loan guaranteed or secured by the Federal Government.

None of the above-described modern legislation has resulted in constitutional litigation, at least none that has reached and been disposed of by a court whose decisions are reported.⁹ This is, perhaps, attributable to the form in which the legislative prohibitions have been couched. The grosser forms of discrimination, such as refusal of equal treatment at public places, slanted bigoted advertising and group libel, have criminal sanctions, and until now violations have probably either been overlooked or have been disposed of at the trial court level. With the increase made by the 1953 amendment¹⁰ in the number of places required to accord equal treatment to all comers, it is perhaps inevitable that the validity of the legislation will be challenged if it is seriously sought to be enforced. The requirement of nondiscriminatory tenant selection in public housing will undoubtedly find enforcement through political pressures and is not likely to provoke litigation.

The prohibitions of discrimination in employment and in education are administered in the first instance by the Commission Against Discrimination,¹¹ whose policy has been to seek compliance with rather than to impose enforcement of the legislation. Its practices of education and negotiation have been successful, if judgment can be based upon the nonexistence of cases before the Supreme Judicial Court. The Commission is now entrusted with administration of the new statute

³ *Ibid.*, as amended by Acts of 1953, c. 437, incorporated by reference in G.L., c. 272, §98.

⁴ *Id.* §98C.

⁵ *Id.* §98B.

⁶ *Id.*, c. 121, §26FF (e).

⁷ *Id.*, cc. 151B, 151C.

⁸ Acts of 1957, c. 426, amending G.L., c. 151B.

⁹ G.L., c. 272, §98, as it stood before the 1950 amendment (Acts of 1950, c. 479, §3) and the 1953 amendment of G.L., c. 272, §92A (Acts of 1953, c. 437) was held applicable to the proprietor of a barroom who discriminated against a would-be patron on account of his color. *Bryant v. Rich's Grill*, 216 Mass. 344, 103 N.E. 925, Ann. Cas. 1915B 869 (1914). The opinion in this case contains a history of the statute up to that date.

¹⁰ Acts of 1953, c. 437.

¹¹ The Commission was created by G.L., c. 6, §56.

regulating discrimination in the rental of privately owned but "publicly assisted" housing.

The next logical step in the program of the opponents of discrimination is likely to be legislation of the type adopted in New York City just before this SURVEY volume went to press, whereby owners of all multiple housing, whether or not financially assisted by government, would be forbidden to discriminate in the process of tenant selection.¹²

§22.6. Separation of powers: Wire tapping. A separation-of-powers conclusion was expressed in an advisory opinion¹ upon a proposed amendment to the wire tapping statute.² The present statute imposes criminal punishment for certain kinds of eavesdropping, including "tapping" of telephone wires, except under written authority of the Attorney General or of a district attorney. The proposed amendment would have, in substance, required an order of a justice of the Supreme Judicial or Superior Court, based upon a showing of probable cause to believe that evidence of crime may be thus obtained, to legalize wire tapping. The House of Representatives propounded questions asking, in effect, if such provisions would be violative of Article XXX of the Declaration of Rights.

The justices answered in the negative. They felt, chiefly upon the analogy of the issuance of search warrants, that the authorizing or validating of wire taps to obtain evidence may properly be classified as the exercise of a judicial function. This appears to be an accepted view elsewhere.³

The justices were careful to point out that their opinion expressed no views as to the relevance or effect upon the proposed amendment of the Federal Communications Act,⁴ which forbids persons not authorized by the sender to intercept and divulge communications. That the Communications Act may have the effect of rendering nugatory state laws authorizing wire taps under official sanctions was intimated by the United States Supreme Court on December 9, 1957,⁵ when it ruled that evidence obtained by wire tapping by state law-enforcement officers, without participation by federal officers and in accordance with state authority, was not admissible in evidence in a criminal trial in a federal court.

After the advisory opinion was received in the House, the proposed amendment was consolidated in a Senate bill⁶ which was killed by being referred to the next annual session.

¹² New York City Administrative Code §X 41-1.0.

§22.6. ¹ Opinion of the Justices, 1957 Mass. Adv. Sh. 739, 142 N.E.2d 770.

² G.L., c. 272, §99.

³ See, e.g., N.Y. Const., Art. I, §12; N.Y. Code of Criminal Procedure §813a.

⁴ 47 U.S.C. § 605 (1952).

⁵ *Benanti v. United States*, 355 U.S. 96, 78 Sup. Ct. 155, 2 L. Ed. 2d 126 (1957).

⁶ Senate No. 63 (1957), referred to next annual session on May 21, 1957.