Chapter 11: Constitutional Law

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§11.1. Standing to raise issues of constitutionality. Five lawyers, in the case of *Kaplan v. Bowker*, brought a petition for mandamus against the members of the special commission established by the legislature to investigate Communism and subversive activities. The petitioners alleged that they brought their action as citizens, taxpayers, and lawyers interested in the execution of the laws and in the enforcement of the Constitution. They claimed that the resolve, in calling upon the commission to list all persons concerning whom "creditable" evidence had been received that such persons were or are members of the Communist Party, Communists or subversives, violated the Constitution in several respects, and they sought to have the commission ordered not to make such a report.

The petition was dismissed on the ground that the petitioners had no standing to sue. They expressly disclaimed any expected investigation of themselves or any expected injury to themselves, but sought to assert a public right. The Supreme Judicial Court emphasized the rule that only persons who have suffered an injury, or who are in danger of doing so, can put in issue the validity of an act of the legislature, and cited many cases to that effect.

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2 Resolves of 1954, c. 123.
Petitioners sought to bring themselves within an exception to the rule as exemplified in such cases as *Brewster v. Sherman*\(^3\) and *Sears v. Treasurer and Receiver General*,\(^4\) where a public officer owes a duty to the public to perform some act or administer some law for public benefit, any member of the public may enforce such duty by mandamus. The Court found no such duty imposed on the respondent commission, but only a duty to investigate and report to the General Court.

It must be confessed that it is sometimes hard to draw the line between the rule and the exception as stated by the Court. The decision does make it clear that an official's duty to uphold the Constitution is not sufficient to bring into play a citizen's right to seek mandamus.

\textbf{§11.2. Freedom of expression.} Two cases and two statutes during the 1956 Survey year involved the provisions for freedom of speech and press in the United States and Massachusetts Constitutions.

*Commonwealth v. Jacobs*\(^1\) concerned a Quincy city ordinance, requiring a license to be obtained before holding a public meeting or giving a public speech. Defendant operated a sound truck under hire by a labor union to urge listeners not to buy the products of a concern involved in a strike. A Superior Court conviction of violation of the ordinance was reversed. The Supreme Judicial Court, through Chief Justice Qua, said in part:

> We are of opinion that the ordinance is unconstitutional on its face. It is a complete and indiscriminate prohibition of all public address on all public streets or grounds without a previous permit. . . . All public address without previous censorship is placed under the ban regardless of its character, attributes, or consequences.\(^2\)

At the end of the opinion, a wry paragraph suggested that, if not bound by federal precedents based on the Fourteenth Amendment, the Massachusetts Court might consider sound trucks so likely to become public nuisances that a complete prohibition of them in public places might be upheld.

*Krebiozen Research Foundation v. Beacon Press, Inc.*\(^3\) involved proposed publication of a book concerning plaintiff's alleged cancer cure. Claiming that irreparable harm was threatened by allegedly false, fraudulent, and malicious statements in the book, plaintiff sought to prevent its publication. The Superior Court denied an injunction and plaintiff appealed. The higher Court stated that liberty of the press is constitutionally basic and that permitting prior restraint, provided only that the judge

\(^4\) 3195 Mass. 222, 80 N.E.2d 821 (1943).
\(^3\) 327 Mass. 310, 98 N.E.2d 621 (1951).
believes the proposed publication to be false, amounts to unconstitutional censorship.\(^4\)

The Court reviewed cases in which it was proved that defendant was actuated solely by malice in making continued attacks on a plaintiff and in which an injunction was granted. It stated that while equity jurisdiction extends to libel and slander cases, the area must be greatly limited because of the constitutional protection of free speech and the public interest in the discussion of many issues.

In the Krebiozen case, the Court found an important public interest to be served in the discussion of cures for cancer, and further found that there was here no question of protecting the lewd, obscene, profane, or the merely libelous. Both the right of free press and the public interest led to the affirmation of the lower court’s denial of an injunction.

In the 1955 Annual Survey,\(^4\) the cases of Brattle Films, Inc. v. Commissioner of Public Safety\(^5\) and Times Film Corp. v. Commissioner of Public Safety\(^6\) were discussed. These cases struck down as unconstitutional the Sunday censorship statute.\(^7\) In 1956 the legislature has attempted to save the licensing statute by permitting to films, as to jukeboxes, annual licenses, and leaving other forms of public entertainment subject to prior licensing for each occasion.\(^8\)

A careful reading of the Brattle Films case certainly does not lead to the conclusion that the prior licensing provisions of the act can be validly applied to any form of public entertainment entitled to First Amendment protection.

The 1956 legislature also passed an act\(^9\) further regulating the distribution and sale of publications depicting crime and torture. These new sections, a complete revision of this subject, seem aimed, at least in part, at what are known as “horror comic books” being sold to young children.

The former Section 30 concerned distribution to minors of “a book, pamphlet, magazine, newspaper or other printed paper devoted to the publication or principally made up of criminal news, police reports or accounts of criminal deeds, or pictures and stories of lust or crime. . . .” The new section is concerned with distribution to a child under eighteen years of “any pamphlet, magazine, comic book,

\(^4\) For a good discussion of prior censorship, and whether enjoining, after a full adversary hearing, further distribution of an admittedly obscene book constitutes unconstitutional prior censorship (the Court held that it does not), see Brown v. Kingsley Books, 1 N.Y.2d 177, 134 N.E.2d 461 (1956), now on appeal to the U.S. Supreme Court.


\(^7\) G.L., c. 136, §4.


\(^9\) Acts of 1956, c. 724, amending G.L., c. 272 by striking out §30 and adding a new §30 and §30A. The old §30 was cited by Mr. Justice Frankfurter in his dissenting opinion in Winters v. New York, 333 U.S. 507, 522, 68 Sup. Ct. 665, 673, 92 L. Ed. 840, 853 (1948), as being invalidated by the decision.
picture, picture book, ballad or other printed or written material which contains in its text, title, illustration or accompanying advertisements, a fictional description or illustration of sadism, masochism, sexual perversion, bestiality or lust, or of the physical torture of human beings."

Also in the new act knowledge by the defendant of the offensive description or picture contained in the literature is not necessary. The statute states also that

It shall be prima facie evidence of offering such literature for sale to a child under eighteen if —

(a) It is displayed upon a newsstand, counter or shelf in a store frequented by children under eighteen or adjacent to a primary school or public playground; and

(b) If the words of the text or dialogue, exclusive of proper names, are written in the vocabulary of the seventh grade or below.

There is a new Section 30A aimed at tie-in sales which makes the distributor jointly responsible with the retail dealer who violates the section unless the retailer purchased by written order specifying the publication by title.

In the report of the special commission which recommended this legislation it is said that this legislation is designed primarily to meet the objections posed by the United States Supreme Court in the Winters case.\(^\text{10}\) The commission went on to say that the members disapprove of censorship per se, but "do think that there must be a legal, constitutional manner in which to afford protection against pure license as purveyed by certain publishers."\(^\text{11}\)

Two constitutional questions arise in regard to this bill. The first is whether the terms sadism, masochism, etc. are sufficiently definite so that an "honest distributor of publications could know when he might be held to have ignored such a prohibition."\(^\text{12}\) This requirement has to be met, of course, whether the prohibition of sale of the publication is limited to minors or not.

Another dubious phrase is that restricting the effect of the statute to a text written in the vocabulary of the seventh grade.

As to the second question the fact of limited prohibition may be important. The question is whether the sale of these publications can be constitutionally prohibited. It would seem that they could not if the prohibition related to all persons.\(^\text{13}\) The fact that the restriction is intended to be limited to distribution to minors (under eighteen) would seem to eliminate the constitutional objection as long as a fictional description of physical torture of human beings would surely seem to be constitutionally protected.

\(^\text{10}\) House No. 3205, p. 24 (1956).
\(^\text{11}\) Ibid.
\(^\text{13}\) A fictional description of physical torture of human beings would surely seem to be constitutionally protected.
as the prohibition does not unreasonably restrict adult access to the publications.\textsuperscript{14}

\section*{§11.3. Federal pre-emption: Control of sedition.} The question of whether state action was permitted, or whether federal legislation had occupied a certain area to the exclusion of state law, arose in a number of decisions.\textsuperscript{1}

\textit{Commonwealth v. Gilbert}\textsuperscript{2} and \textit{Commonwealth v. Hood}\textsuperscript{3} were prosecutions involving the so-called Anti-Anarchy Act of 1919,\textsuperscript{4} as amended, and the so-called Anti-Communist Act of 1951.\textsuperscript{5} The defendant in the former case was indicted for conspiring to advocate the violent overthrow of the governments of the United States and of Massachusetts. Hood was prosecuted for belonging to and contributing to the Communist Party, knowing it to be a subversive organization as defined in the 1951 act. Both cases were reported without decision to the Supreme Judicial Court, on motions to quash the indictments, under a 1954 statute, which for the first time in criminal cases permitted before trial such a report of important questions of law.\textsuperscript{6}

Inasmuch as a Pennsylvania case\textsuperscript{7} was then pending before the United States Supreme Court, the Massachusetts Court postponed decision until on April 2, 1956, the Pennsylvania case was decided,\textsuperscript{8} holding that the Smith Act,\textsuperscript{9} the Internal Security Act of 1950,\textsuperscript{10} and the Communist Control Act of 1954\textsuperscript{11} indicated an intent on the part of Congress to occupy exclusively the field of sedition at least where the offense charged is a federal crime. The United States Supreme Court specifically did not pass on that part of the Pennsylvania statute covering overthrow of the state government.

The Massachusetts Court dealt first with the argument that a common law charge of sedition, as well as a conspiracy to violate the Anti-Anarchy Act, had been asserted. It declined to pass on the suggestion, since, in its view, federal pre-emption applied both to common law and statute. As to the charge of conspiracy to overthrow the state government, it was held that the indictment and particulars disclosed the "familiar paraphernalia of Communist agitation for the overthrow of government in general [which] cannot be directed separately and exclusively against the government of this Commonwealth."\textsuperscript{12}

\textsuperscript{14} On the problem see Note, 68 Harv. L. Rev. 489 (1955); Butler v. Michigan, 352 U.S. —, 77 Sup. Ct. 524, 1 L. Ed. 2d 412 (1957).

\section*{§11.3.} \textsuperscript{1} In addition to cases discussed herein, see §14.3 infra.
\textsuperscript{4} G.L., c. 264, §11.
\textsuperscript{5} G.L., c. 264, §§19, 23.
\textsuperscript{8} 250 U.S. 497, 76 Sup. Ct. 477, 100 L. Ed. 640 (1956).
\textsuperscript{10} 50 U.S.C. §§781 et seq. (1952).
\textsuperscript{11} 50 U.S.C. §841 (1952).
While holding that the nature of the accusations made brought the case within the scope of Commonwealth v. Nelson, the opinion was not without reservation.

"We do not wish to be understood as saying that there can never be any instance of any kind of seditious direction so exclusively against the State as to fall outside the sweep of Commonwealth v. Nelson." 13

The Court had even less trouble in finding that the charges in Commonwealth v. Hood fell within the area exclusively pre-empted by United States statutes.

It appears that in no case, in the present state of law, can the 1951 statute be upheld, while the 1919 statute, as to sedition exclusively against the state, retains effectiveness in a very limited area.

§11.4. Due process and equal protection. Contentions of denial of due process and equal protection of the laws were made in a variety of cases. Two of these, Commonwealth v. Chapin1 and Commonwealth v. Makarewicz,2 were first degree murder convictions. The latter case is examined in the chapter on criminal law. 3 Two other cases, however, deserve treatment here.

In Commonwealth v. Antonio,4 a husband and wife, graduates of a school of chiropractic, were convicted of practicing medicine without being registered. Since, in Commonwealth v. Zimmerman,5 a chiropractor had been convicted under a similar, predecessor act to the present medical registration statute, the defendants had the heavy burden of persuading the Court to overrule that case, in which the assertions of constitutional violation had been rejected.

It was argued that because pharmacists, Christian Science practitioners, and others were exempted from the medical registration statute, equal protection of the laws was denied in withholding from chiropractors a similar exemption. Evidence had been introduced to show that chiropractic is permitted in forty-four states and is far more firmly established than it was forty years ago when the Zimmerman case was decided. Hence it was argued that altered circumstances had made void a once valid statute.

In affirming the conviction, the Court said that the arguments made were more appropriately to be addressed to the legislature, and that they did not affect the constitutionality of the statute.

Dehydrating Process Co. of Gloucester v. City of Gloucester6 came up on defendant's appeal from a final decree on a bill for declaratory decree. Plaintiffs were two corporations occupying space on the State Fish Pier at Gloucester. Pursuant to statute,7 the Commonwealth

13 Ibid.
built the Fish Pier, and leased it to a nonprofit organization to administer in the public interest. The Gloucester Community Pier Association, Inc., the nonprofit corporation, sublet facilities on the pier to various enterprises. Open space was sublet to plaintiffs, which erected buildings and tanks.

Purporting to act under G.L., c. 59, §3A, which provides for taxation to the lessee of real estate owned by the Commonwealth or a city or town, and used for other than public purposes, the Gloucester assessors levied taxes on plaintiffs' buildings and tanks, but not on the land underlying them, and on none of the other land or buildings on the pier.

The plaintiffs asserted a number of objections, two of which were upheld by the Supreme Judicial Court. First, it was said that under G.L., c. 59, §3 a building cannot be taxed apart from the land it occupies.

Second, plaintiffs' claims of denial of equal protection of the laws, and that the taxes were not proportional and reasonable as required by Part II, c. 1, §1, Art. IV of the Massachusetts Constitution were upheld. The fact that only two out of a much larger number of occupants were assessed for taxes was said by the Court to be arbitrary, unjust, and discriminatory.

It is plain from the decision that all of the tenants were subject to tax, and it is not entirely clear why the Gloucester assessors sought to tax only the plaintiffs.

§11.5. Validity of the Fair Trade Laws. General Electric Co. v. Kimball Jewelers, Inc.\(^1\) was a decision on a bill in equity brought to enjoin defendant from selling plaintiff's trade-marked appliances at prices lower than minimum prices stipulated in fair trade contracts between plaintiff and numerous retail dealers. The suit was brought under the Massachusetts fair trade law.\(^2\)

Defendant has no contract with plaintiff. It attacks the validity of plaintiff's contracts with other dealers, and claims that the state and federal fair trade acts are void.

The suit was reported from the Superior Court without decision. The Supreme Judicial Court after extended discussion held the contracts under attack to be valid and that plaintiff was not to be denied relief because of asserted inequitable conduct.

On the constitutional issue, the Court cited several Federal Circuit Court cases to the effect that no federal constitutional difficulty exists in enforcing state fair trade laws, and that the McGuire Act\(^3\) has validly extended immunity from the antitrust laws to permit action under state laws against dealers who have not signed contracts. The great majority of state cases, collected in a footnote to the Court's opinion,\(^4\) have held state fair trade laws valid and not violative of

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\(^{2}\) G.L., c. 93, §§14A-14D.
federal or state constitutions as a denial of due process or an unlawful delegation of power.

The Court granted an injunction restraining defendant from underselling plaintiff's minimum prices as set in its fair trade agreements.

The fair trade laws have been a prolific breeder of litigation, and while Massachusetts has now joined the majority of states in upholding the application of the law to non-signers, substantial constitutional and public policy arguments are to be found in cases reaching the contrary result. The temptation of a retailer to undersell his competitor, when he has not agreed to refrain from doing so, is so strong that the fair trade act, constitutional or not, presents wide-scale problems of enforcement.

§11.6. More on urban redevelopment: Area-wide taking and discrimination. McAuliffe & Burke Co. v. Boston Housing Authority put in issue provisions of the land redevelopment statute already passed on and held valid in Papadinis v. City of Somerville and Dispatchers' Cafe, Inc. v. Somerville Housing Authority. The precise point of the McAuliffe case was not passed on in the previous cases, although it was latent in the facts as presented.

The plaintiff, McAuliffe & Burke Company, sought a declaratory decree to prevent its land and buildings from being taken as part of a substandard and decadent area to be redeveloped. The principal complaint of plaintiff was that seven parcels within the area were excluded from the taking, and that the Housing Authority was empowered only to take all or none of the land in a designated area. Therefore, said the plaintiff, this discrimination as to certain parcels invalidated the taking.

The plaintiff further contended that ample provision was not made for those displaced, as the statute required.

The case was reported to the Supreme Judicial Court without decision. Both the plaintiff's contentions were rejected, and a decree was ordered upholding the taking.

On the plaintiff's second point, it was held that the facts showed a proper plan for persons displaced.

On the issue of the validity of taking less than all of the area, the Court held that plaintiff had standing to object, but that there was no violation of the governing statute, and also that the omission of certain parcels did not invalidate the taking of the balance. "Structures suitable to and consistent with the new use to which the area is to be put need not be destroyed merely because they happen to be located within a substandard and decadent area."

§11.7. Automobile insurance: The "Merit Rating System." Mention should be made of certain Opinions of Justices which dealt with a number of constitutional issues.

§11.6. 1 1956 Mass. Adv. Sh. 447, 133 N.E.2d 493; see also §1.4 supra.
2 G.L., c. 121, §§26JJ-26MM.
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In one, the Court advised that a law requiring a refund to motor vehicle owners of insurance surcharges under the so-called “point system,” after the repeal of that portion of the act doing away with future surcharges, would be an attempt to create new substantial rights based wholly on past events, and would be an attempt to take the property of the insurance companies which had received the surcharges, and bestow it upon private persons without compensation for a purpose not public. It would therefore be in violation of the Fourteenth Amendment of the United States Constitution and Articles X and XII of the Declaration of Rights of the Commonwealth.

The facts were that while some persons who had been surcharged had paid higher insurance rates, others had therefore paid rates which were lower, and a return of surcharges to the persons penalized would adversely affect the insurance companies and give undue benefits to the persons insured.

§11.8. Public nonprofit corporations: The Port Authority. In a long opinion considering the proposed Massachusetts Port Authority Act, in which thirty-four questions posed by the state Senate were passed upon, the Supreme Judicial Court decided that the proposed authority would not be a private corporation, but a nonprofit organization for a public purpose. The appointment of its members by the Governor, its powers and duties in relation to public facilities, its nonprofit setup, all were important features of the authority which led to the Court’s conclusion.

With the nature of the authority determined, the answers to the many questions followed almost automatically as to whether the authority’s charter would be subject to amendment and revocation. The Court replied that, subject to such constitutional prohibitions as that against taking property without compensation or without due process of law, no irrevocable contract was created any more than in the establishment of a municipal corporation. A further question was whether under Article LXVI of the Amendments to the Constitution this corporation could be created if it were not placed in one of the twenty executive and administrative departments prescribed by the Amendment. The Court replied that a corporation in its own right need not be placed in one of these departments. It was ruled, in response to further questions, that no unlawful delegation of power by the General Court was shown in the proposed statute.

The whole opinion conforms to a trend that has in recent years marked the approval of independent governmental bodies created to supervise housing, redevelopment of decadent land areas, and special problem areas such as that of the port of Boston, with which this opinion concerned itself.

§11.9. Public nonprofit corporations: Tax benefits. In another advisory opinion the Justices answered questions involving the validity


§11.10 of a proposed bill 2 exempting real and personal property of urban re
development corporations from ordinary property taxes and imposing
upon them excise taxes payable to the Commonwealth and distribut
able to the municipalities in which the property is located. The Court
held that, since urban redevelopment corporations perform functions
for the public benefit, property owned by them and used in such serv
ice may be favored over the ordinary business corporation in the
matter of taxation. 9 In so holding, the Justices distinguished this
situation from that dealt with in a 1955 Opinion of the Justices. 4
There it was held that the dominant purpose of the plan under
question was resale to private interests to which interests some of the
tax advantages were to be extended. Here the tax advantages are con
tinued only so long, not exceeding forty years, as the project con
tinues to operate under public regulation and for the public benefit.
The Court also said that the redevelopment of a “blighted open
area” 5 is a public purpose for which urban redevelopment corpora
tions may be formed. In Papadinis v. City of Somerville 6 the Court
had reserved judgment on this issue. In this opinion the judges ex
pressed themselves because “the questions here presented may involve
a ‘blighted open area.’ ” 7

§11.10. Right to trial by jury: Defective delinquent commitment
procedure. Various aspects of the new procedure under G.L., c. 123,
§113 for commitment of so-called defective delinquents have been
dealt with by the Supreme Judicial Court in the recent past 1 and
were discussed in the 1954 Annual Survey. 2 In Commonwealth v.
Bigwood, 3 decided in the 1956 Survey year, the defendant raised the
issue of his right to trial by jury afforded by Article XV of the Declara
tion of Rights. 4 The defendant, who had been found guilty in the
juvenile court of the crime of contributing to the delinquency of a
minor, was not sentenced but, after general continuance of his case,
was committed to the Department of Defective Delinquents for ob
servation and, subsequently, after return to the court of the required
sworn medical certificate, was ordered committed to that department

2 House No. 2879 (1956). This bill was substituted for by Senate No. 3205 which
was passed and signed by the Governor as Acts of 1956, c. 640, amending G.L., c.
121A, §10.
3 See Mass. Const., Declaration of Rights, Art. X, and id., Part II, c. 1, §1, Art. IV
in relation to proportional taxes.
5 As defined in G.L., c. 121A, §1, appearing in Acts of 1953, c. 647, §1.
6 31 Mass. 627, 121 N.E.2d 714 (1954). This case and the problem are discussed

§11.10. 1 Dubois, Petitioner, 331 Mass. 575, 120 N.E.2d 920 (1954); Tardiff, Peti
tioner, 328 Mass. 265, 103 N.E.2d 265 (1952); O’Leary, Petitioner, 325 Mass. 179, 89
N.E.2d 769 (1950).
4 Mass. Const., Declaration of Rights, Art. XV.
as a suitable subject. No further action was taken in connection with the charge of contributing to the delinquency of a minor.\textsuperscript{5} The order of commitment was appealed to the Superior Court and after a hearing without jury the Superior Court ordered the defendant committed as a defective delinquent.

Upon report by the then chief justice of the Superior Court\textsuperscript{6} the defendant claimed that he had been deprived of his statutory and constitutional right to trial by jury.

In view of the fact that the defendant made no request for framing of jury issues and that it appeared he had waived his right to a jury in writing on the question of his commitment, the Supreme Judicial Court found that he had not been deprived of his statutory right to trial by jury or his constitutional right, if such a right existed. The Court was careful to point out that it did not intimate that the provisions of the Constitution applied to an issue of mental deficiency. The report itself was dismissed on the ground that there had been no "conviction" of the defendant as required for a report by G.L., c. 278 §30.

The Court's remarks in connection with its citing of the Dubois case\textsuperscript{7} indicate that the Court considers it to be doubtful that a constitutional right to trial by jury in commitment proceedings brought under the defective delinquent statute exists. In Dubois the Court, referring to another statute\textsuperscript{8} similar and supplementary to G.L., c. 123, §113, said: "In no sense is it a criminal or penal statute. It does not purport to define a crime and it imposes no penalty. Commitment under its provisions is not in the nature of a punishment."\textsuperscript{9} Earlier, in Bashaw v. Willett,\textsuperscript{10} the Court held in connection with guardianship proceedings that Article XV of the Declaration of Rights did not entitle one alleged to be an insane person to a jury trial on the issue of his sanity.

Both in Dubois, Petitioner,\textsuperscript{11} and Commonwealth v. Bigwood\textsuperscript{12} the noncriminal nature of the proceedings for commitment under G.L., c. 123, §113 is emphasized.\textsuperscript{13} It would appear that, as defective delin-

\textsuperscript{5} General Laws, c. 123, §113 provides for the filing of an application for commitment as a defective delinquent by a district attorney at, "any time prior to the final disposition of [any criminal] case" other than a capital case and further provides, "If a person has been committed as a defective delinquent in accordance with this section, such commitment shall be a final disposition of any criminal offence charged."

\textsuperscript{6} The case went to the Supreme Judicial Court upon report under G.L., c. 278, §30. The Court was of the opinion that the case was not properly there by report since §30 applied only to cases in which the defendant was "convicted" but went on to discuss the case on the merits nevertheless since the practical result under the holding of the Court would be the same.

\textsuperscript{7} 331 Mass. 575, 120 N.E.2d 920 (1954).

\textsuperscript{8} Acts of 1953, c. 645.

\textsuperscript{9} 331 Mass. at 578, 120 N.E.2d at 922.

\textsuperscript{10} 327 Mass. 569, 99 N.E.2d 42 (1951).

\textsuperscript{11} 331 Mass. 575, 578, 120 N.E.2d 920, 922 (1954).


\textsuperscript{13} "The provision that his commitment as a defective delinquent 'shall be final disposition of any criminal offense charged' does not mean that his commitment is

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sequent commitment proceedings are considered to be noncriminal in nature and as the Court had already recognized in Bashaw v. Willett that no right to jury trial existed in another class of civil proceedings involving an issue of mental deficiency, the Court will hold, should the issue be directly raised in the future, that no constitutional right (as distinguished from a statutory right) exists under the statute considered in the Bigwood case.

§11.11. The police power. General Laws, c. 138, §25C provides a comprehensive scheme for the fixing by the Alcoholic Beverage Commission of minimum prices for the sale at retail of intoxicating liquors in package stores. In Supreme Malt Products Co. v. Alcoholic Beverage Control Commission the plaintiff in a bill in equity to enjoin the enforcement of a six-day suspension of its package store license and petitioners for writs of certiorari to quash similar penalties contended that the statutory scheme did not bear a real and substantial relation to the public health, safety, morals, or general welfare and was therefore an unlawful exercise of the police power under both the federal and state constitutions. There were also subsidiary contentions that Section 25C was discriminatory and that the power in the Commission to fix prices had been unlawfully delegated.

The Court upheld the statute, relying mainly on the ground that the liquor traffic is sui generis in respect to its potential danger to the community. The alleged fact that the legislation prohibiting price cutting had been sponsored by an organization said to represent twelve hundred package stores was held not to render the statute null and void if it was otherwise valid.

So far as the other contentions of the plaintiff and the two petitioners were concerned, that is, that the statute was discriminatory and that there had been an unlawful delegation of legislative power to the Commission, the Court held: (1) that there was no discrimination since the legislation applied uniformly to a “separate and distinct branch of the liquor business,” and (2) that there had been no unlawful delegation since the statute set out the general policy and was de-

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1956 ANNUAL SURVEY OF MASSACHUSETTS LAW §11.11


3 "The power of the State to protect itself by an exercise of the police power is commensurate with the nature of the evil which it seeks to eliminate. If the Legislature came to the conclusion that the establishment of retail prices for customers of package stores would tend to promote temperance, to stabilize the package store business, to avoid price wars and cut throat competition, and to instill more observance for the law in those engaged in the business and would better protect the public, we cannot say its belief was so irrational that none of these objects would result from the passage of the act." 1956 Mass. Adv. Sh. 485, 485, 133 N.E.2d 775, 778.

http://lawdigitalcommons.bc.edu/asml/vol1956/iss1/15
tailed sufficiently to guide the Commission in maintaining existing prices.

The emphasis of the Court on the "danger" and "evil" either potentially or presently existing in the liquor traffic could conceivably give rise to the thought that the Court might hesitate to sustain minimum price regulation in a business with less noxious overtones. Yet the *Supreme Malt Products Co.* case and the other state cases sustaining the fixing of minimum prices for sales of liquor fall in the same class with *Nebbia v. New York,* in which the United States Supreme Court upheld the fixing of minimum prices for sale of milk to consumers. The Court said in that case:

So far as the requirement of due process is concerned and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to protect public welfare, and to enforce that policy by legislation adopted to its purpose. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . .

**§11.12. Due process: vested rights.** The plaintiffs in *Boston Real Estate Board v. Department of Public Utilities* contended that an order of the Department prohibiting, except with the Department's approval, after a specified period and with certain exceptions, Edison Electric Company's practice of supplying at wholesale rates electricity for resale deprived the plaintiffs of constitutionally vested rights in the practice and the benefits therefrom and, therefore, amounted to a taking of property without due process of law.

During Edison's development it had, for the purpose of securing off-peak customers without a corresponding increase in generating capacity, supplied electricity at wholesale rates to owners of real estate for resale to their tenants, and to so-called "block plants" whose chief business was, as in the case with Quaker Building Company, the plaintiff in the second of the two bills in equity, to resell electricity to buildings and occupants thereof in particular city blocks. The effect during this period was to induce self-generators of electricity to stop that business and instead buy electricity from Edison. As circumstances changed, the practice became disadvantageous to Edison from

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7 291 U.S. at 537, 54 Sup. Ct. at 516, 78 L. Ed. at 957.

**§11.12.** 1956 Mass. Adv. Sh. 987, 136 N.E.2d 243. This case was actually two bills in equity against the Department of Public Utilities under the review procedure set forth in G.L., c. 25, §5. The plaintiffs in the first case were owners, managers, and operators of rental real estate in Boston. The business of the record plaintiff, Quaker Building Co., is described in the text.
a revenue point of view and the Department, in its findings in the
instant case, ruled that the practice was against the public interest
inasmuch as Edison was deprived thereby of revenue which it must
obtain by additions to bills to its other customers.

Recognizing that the practice had enabled the plaintiffs to conduct
profitable businesses for many years and that the order affected the
value of property used in the business as well as obligations under
existing contracts, the Supreme Judicial Court nevertheless was of the
opinion that the benefits enjoyed were merely collateral to a practice
that had been for a time in the general public interest but was no
longer so. Such opportunities for profit as the plaintiffs had did not
carry with them any constitutional assurance of continuance. Citing
Brand v. Board of Water Commissioners of the Town of Billerica2
and Weld v. Board of Gas and Electric Light Commissioners3 the Court
emphasized that such rights to service by a utility as exist, exist only
insofar as they are claimed through the public and are in the public
interest. No such incidental private advantages as were enjoyed by
the plaintiffs could be said to be vested in them.

That being so there has not been, as the plaintiffs contend, a tak­
ing, but merely a diminution or destruction of the value of property
not taken which is permitted under the police power so long as the
action taken is reasonable and non-arbitrary.

With respect to the “reasonableness” of the order, the Court points
out that the detriment to other Edison customers and to the general
interest resulting from the availability of a profit-yielding rate struc­
ture to Edison’s competitors is sufficient to support the conclusion that
the order is reasonable.

Specific exceptions to the order were objected to by the various
plaintiffs on the grounds that the exceptions discriminated against and
denied equal protection of the laws to them. These exceptions are
classified by the Court: (1) as provisions with the lawful purpose of
ameliorating the effect of the police power change, and (2) as not dis­
criminatory since such classes of customers as may be treated differ­
tently than the plaintiffs are reasonably classified.

The main constitutional ground of the Court’s decision, that is, the
absence of vested rights in continuance of the practice, is in line with
decisions of other courts cited in the opinion.4

§11.13. Eminent domain: Public parking lots. Whether or not
land already used by private owners for a public parking lot may be
taken by eminent domain for the purpose of constructing a city-owned
parking lot was the question answered in the affirmative in Tate v.

3 197 Mass. 556, 84 N.E. 101 (1908).
aff’d without opinion, 303 N.Y. 995, 106 N.E.2d 70 (1952); Sixty-Seven South Munn,
Inc. v. Board of Public Utility Commissioners of New Jersey, 106 N.J.L. 45, 147 Atl.
735, aff’d, 107 N.J.L. 386, 152 Atl. 920 (1930), cert. denied, 283 U.S. 828, cited in
City of Malden. A decree holding the taking null and void was reversed and a decree ordered to be entered adjudicating the validity of the taking. The taking was made under a special statute by which the city of Malden was authorized to take land and buildings at certain specified locations and also on "any other streets in said city as the city council may determine." To the contention of the plaintiffs that this was an unlawful delegation as to any location in the city other than those specified, the Supreme Judicial Court held that the statute was sufficient authorization to take land or buildings on any street in the city.

With respect to the contention that there was no necessity for the exercise of the power of eminent domain since the land was already devoted to public use as a parking lot, the Court answered logically that there was no certainty that the land could not at any moment be sold for other purposes or devoted to other uses. This is distinguishable from the situation in Cary Library v. Bliss, in which the Supreme Judicial Court held that there was an improper exercise of the power of eminent domain in taking land already permanently held "for a public use" under a trust, for another similar public use. Here the Court is sound in pointing out that there was no such permanent commitment.

Finally the Court, citing cases from other jurisdictions, holds that provision of off-street parking places is a public purpose for which land may be taken under the eminent domain power. The parking lot has the status of a "public utility."