Annual Survey of Massachusetts Law

Volume 1960

Article 13

1-1-1960

Chapter 10: Constitutional Law

John D. O'Reilly

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Constitutional Law Commons

Recommended Citation

§10.1. Public authorities and public works financing. Increasingly, in the past quarter of a century, there has been financing and operation of public works projects by public "authorities," which are official agencies separate and distinct from the Commonwealth and its conventional political subdivisions. Thus, local housing authorities,1 redevelopment authorities,2 the Metropolitan Transit Authority,3 the New Bedford, Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority,4 the Massachusetts Turnpike Authority,5 and the Massachusetts Port Authority,6 to make an incomplete catalog, are in-

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

The author wishes to acknowledge the research assistance of Arthur J. Caron, Jr., of the Board of Student Editors of the ANNUAL SURVEY.

§10.1. 1G.L., c. 121, §26K, originally inserted by Acts of 1938, c. 484.
6Acts of 1956, c. 465. The enabling legislation covering this authority is set forth as an appendix (§§1-1 to 1-35) following Chapter 91 in Mass. General Laws Annotated. The Port Authority has perhaps the most comprehensive jurisdiction of all the authorities created in Massachusetts. It has been commissioned to take over the Logan and Hanscom Airports, formerly administered by the Airport Management Board as an agency of the Commonwealth (G.L., c. 91A, inserted by Acts of 1948, c. 637), the Sumner Tunnel, owned by the City of Boston, and a parallel tunnel to be constructed by the authority, the harbor facilities once under the Port of Boston Authority (Acts of 1945, c. 619) and more lately under the Port of Boston Commission (Acts of 1953, c. 608), and the facilities of the Mystic River Bridge Authority (Acts of 1946, c. 562). The enabling act also gives the authority potential jurisdiction over a variety of matters in Boston and the metropolitan area.
dependent entities that have constructed or acquired, and operate, hundreds of millions of dollars worth of public works, the capital and operational costs of which are not primary obligations of the Commonwealth or of the various cities and towns.

The general pattern of financing by these authorities is the issuance of long-term bonds, secured by earmarking the revenues from the projects for the benefit of bondholders. In some instances, deficit operations are underwritten by the Commonwealth or by designated municipalities. In such instances, the guarantee of the governmental body is part of the security of the bondholders.

The reasons for conducting public works programs through authorities rather than through state or municipal government departments are manifold. In some states, one obvious purpose is to avoid debt limitations imposed by the state constitution. Whether this particular phase of an authority’s function be characterized as “avoidance” or “evasion,” there are other reasons for conducting public programs through authorities. The financing of some programs by authority revenue bonds reduces the total amount that would otherwise have to be financed directly by government, so that state and municipal bonds may be able to command more favorable interest rates. Again, the authority may be a flexible administrative device when the projected public work crosses municipal or state boundary lines. Still again, the use of an authority may be an effective means of providing exceptions to the civil service laws that regulate generally the employment of personnel in the public service.

The legislature, at its 1958 session, created a “nonprofit” corporation called the Massachusetts State Office Building Association. The function of the association was to obtain a site and to erect thereon a
building to provide office space and appurtenant facilities for the Commonwealth and its various departments and agencies. The building was to be leased to the Commonwealth by the association. Site acquisition and construction were to be financed by bonds of the association, payable "solely from the funds of the Association." The association was authorized to pledge rents receivable under the lease to the Commonwealth as security for payment of its bonds. Upon the retirement of the association's bonds the building was to become the property of the Commonwealth.

In accordance with the terms of the statute, the association entered into a lease with the Commonwealth for a term of years, at an annual rental first payable in the year of the projected completion of the building, plus "additional rent" in amounts required to satisfy claims against the association.

Ayer v. Commissioner of Administration was a statutory taxpayers' suit to enjoin performance of the contract of lease. The Supreme Judicial Court granted the relief sought, and held that the enabling act violated Article 62, §3, of the State Constitution, since its enactment had not been by a two-thirds vote in each house of the legislature.

The Court ruled that the proposed bond issue of the association, which was the core of the operation, was in reality a borrowing by the Commonwealth because, notwithstanding the separate entity of the association, "viewing the project as a whole, the Association is nothing more than a mere intermediary to carry out only one purpose," and, "In substance, the corporation is a device for payments by the Commonwealth to bondholders. . . ." It concluded, "Viewing realities, we consider that the so called 'rentals' are not really rentals at all, but in practical effect are instalment payments on account of a purchase by the Commonwealth of an office building, with full title to be acquired at an indefinite future date." Earlier cases, in which authorities had been held separate in substance as well as in form from state and municipal governments, were distinguished as follows: "These entities all exist for more than a single, temporary purpose. They perform services for others than the sovereign itself. They acquire income from those for whom their services are performed: the Gloucester pier association from sublessees; the housing authorities from tenants; and the port and turnpike authorities from users of their facilities." Whether this is more than a verbal distinction may be debatable.

15 G.L., c. 29, §63. Declaratory relief was also sought and granted. G.L., c. 231A, §6.
16 Mass. Const., Amend., Art. LXII, §3: "In addition to the loans which may be contracted as before provided, the commonwealth may borrow money only by a vote, taken by the yeas and nays, of two-thirds of each house of the general court present and voting thereon. . . ."
18 340 Mass. at 594, 165 N.E.2d at 890.
19 Ibid.
The Supreme Court of Pennsylvania, when faced with a similar constitutional objection to a plan whereby an authority constructed a school building and leased it to a school district upon a rental that could be paid only from the proceeds of local taxes and state contributions, said: "It is plain enough that to be self-liquidating within the intent of the decisions of this Court, under various of the Authority Acts, a project need not directly pay for itself out of returns received therefrom by way of tolls or rates charged individual users of the facility." 21

This statement, of course, could be put down as a judicial fiat, just as readily as could the propositions of the Massachusetts Court in the Ayer case. Indeed, it could be pointed out, as it was in the Ayer opinion, 22 that there is a substantial body of precedent holding that "bootstrap" financing through public authority bonds is violative of debt limitation provisions of state constitutions.

The fact is that measuring the validity of new public financing techniques by earlier constitutional provisions for debt limitations is essentially a Procrustean process. It judges the new techniques as they do or do not fit into categories that were never designed to include them. Of course, the process of constitutional exposition is frequently one of adapting ancient criteria to new phenomena, but ideally the new phenomena should be examined in full perspective before it is determined whether they are adaptable to the old text.

The point of quoting the Pennsylvania doctrine on authority revenue bonds is that it expresses the culmination of an evolutionary course of deliberation about the legal status of authorities. When the matter originally came before it, the Pennsylvania Court came to the seemingly obvious conclusion that authority financing was an evasion of the constitutional prohibition of excessive public indebtedness. 23 Subsequently, however, the same court, after examination of all of the factual implications of the relatively new financing method, overruled its initial decision. 24

The Ayer decision leaves unanswered many questions as to the extent to which the ingenuity of legislative draftsmen will make possible "bootstrap" financing through authority revenue bonds by introducing formal differences between the organization of new authorities and that of the State Office Building Association. That question, however, is not likely to come up in the context of financing the construction of a state office building. After the decision on the Ayer case, the legislature enacted a statute 25 creating a Government Center Commission as an independent agency in the Department of Public Works, which is to erect a state office building and several other buildings, all to be financed through bonds of the Commonwealth.

§10.2. Improvement of urban areas and tax concessions. During the 1960 Survey year the constitutional problems involved in effective planning for the rehabilitation of a large segment of Boston's Back Bay area were finally resolved, and a useful pattern for municipal replanning was established. The problem of planning the growth of the Back Bay section became acute shortly prior to 1955, when the Boston & Albany Railroad announced the imminent abandonment of its Huntington Avenue yards, a substantial area then devoted to railroad uses. A plan was devised whereby the land would be purchased by the City of Boston, acting through a Back Bay Development Commission, and then sold to a corporation that would undertake to develop it in accordance with a plan to be approved by the Commission. As an inducement to the developer, the tax liability of the development was to be limited during at least the first forty-five years of its existence.

An advisory opinion declared that the proposal was subject to constitutional infirmities. The tax concession feature of the proposal was said to be violative of the constitutional requirements that taxes be equal, and proportional and reasonable. Furthermore, the Justices, implementing a dictum in an earlier case, ruled that the taking of vacant land for the purpose of preventing its maldevelopment was not a taking for a public purpose.

Subsequently, the Prudential Insurance Company of America made known its purpose of constructing on the railroad site and on the land formerly occupied by the Mechanics Building a large complex of buildings consisting of office, hotel, commercial, and residential buildings. The practicality of the project, however, was contingent upon the developer receiving assurance that the tax liability of the project would be limited for a period of eighty years.

In order to supply this contingency, a proposal was drafted whereby the site of the project would be acquired by the Massachusetts Turnpike Authority, which would be authorized to construct thereon a public truck terminal and a public garage, in connection with the construction of the Massachusetts Turnpike into Boston. The proposal envisaged that the authority might then lease the air space above its buildings to Prudential, which in turn could construct thereon its projected buildings. The proposal went on to fix an annual amount that would be payable in lieu of taxes to the city of Boston until the

2 Mass. Const., Declaration of Rights, Art. X.
3 Id., Part 2, c. 1, §1, Art. IV.
7 The proposal was that there should be paid in lieu of taxes the annual sum of $3 million, plus an additional amount as determined by an involved formula calculated upon gross rentals.
year 2040. The proposal sought to meet the constitutional objection to tax concessions on the theory that, with ownership of the fee in the authority, the authority could be given tax exemption, as it was in its enabling act, and there would be no difficulty about tax concessions as to the buildings, since buildings are not taxed apart from the land upon which they are built.

An advisory opinion, however, ruled that the proposal was subject to a constitutional defect. Although the Justices, in 1956, had taken a closer look at the decision of the Supreme Court of the United States in *Berman v. Parker* and modified that portion of their 1955 opinion in which they had ruled that the taking of a blighted open area for the purpose of controlling future development thereof was not a taking for a public purpose, they nonetheless ruled that the proposed acquisition of the Back Bay land was not demonstrably for a public purpose. They pointed out that the authority was merely authorized, not required, to construct the road, the truck terminal, and the garage, all of which were clearly “public purposes.” They went on to intimate that, apart from this, it failed to appear that the private benefit to Prudential would not far outweigh whatever benefit there might be to the public from the road, the terminal, and the garage.

Although they rejected the proposed plan, the Justices interpersed throughout the opinion some unusually broad hints as to the form of a plan that would be constitutionally acceptable. In consequence, a new plan was drawn up. It proposed modifications of the Urban Redevelopment Corporation Law by providing that “blighted open areas” need not, as formerly, be developed for predominantly residential uses, and by making various administrative modifications of the statute.

Since the 1956 advisory opinion had ruled that limited dividend redevelopment corporations, operating projects approved by local planning authorities and subject to extensive public regulation, could properly be given tax concessions, the theory of the proposal was that the Prudential project could be accomplished by undertaking it through an urban redevelopment corporation, organized for the purpose. In an advisory opinion the Justices agreed. They pointed out, with specific reference to the Prudential project, such public advantages as:

... the elimination of grave doubts as to the future use of a great area, now largely vacant or occupied by a nearly obsolete,
unsightly, railroad freight yard; covering over a railroad right of way; improvement to neighboring properties; the encouragement of prompt action unlikely to be undertaken by private enterprise in the foreseeable future; stimulation of other building and opening a new opportunity for urban growth at what might be a time which is appropriate but of short duration; and new facilities made available to public use.\(^1\)

These considerations, in addition to the limited dividend character of the developing corporation and the degree of public control over the basic project plan and its operation provided in the Urban Redevelopment Corporation Law, apparently sufficiently offset the private benefits accruing to the developer to warrant characterization of the project as predominantly one for a public purpose.

After the advisory opinion, the legislature enacted the proposal into law,\(^1\) amending G.L., c. 121A, with special provisions applicable to Boston, notably the abolition of the local planning board and the investment of the Boston Redevelopment Authority with its former functions.

**§10.3. Pre-emption under the United States Shipping Act.** *Bay State Stevedoring Co. v. Boston & Maine Railroad*\(^1\) was a suit brought under the common law of restraint of trade and the Massachusetts Anti-trust Law\(^2\) to restrain an alleged conspiracy to monopolize stevedoring and related services at piers controlled by the railroad. Prior to January 1, 1959, the plaintiff, along with other stevedoring companies, rendered stevedoring services at the piers in accordance with contractual arrangements made between the respective stevedoring companies and various steamship companies. On that date there became effective an agreement among the railroad, Universal Terminal and Stevedoring Company, and their subsidiaries, by which Boston Marine Terminal Corporation, a subsidiary of Universal, would exclusively perform all cargo handling, including stevedoring, at the piers. Berths at the piers were denied vessels that would not use the services of Boston Marine. In consequence, one vessel that had a stevedoring contract with the plaintiff for unloading was refused a berth at the piers.

The Supreme Judicial Court held that the suit was properly dismissed, on the ground that the United States Shipping Act\(^3\) conferred upon the Federal Maritime Board exclusive primary jurisdiction of the subject matter of the suit, so that state, as well as federal, courts lack jurisdiction over such a matter.

The Shipping Act covers not only common carriers by water, but also “other persons subject to this chapter,” a term including any per-

\(^{1}\) Acts of 1960, c. 652.


\(^{2}\) G.L., c. 93, §§2-4.

son, "who carries on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." The act further provides that "Every common carrier by water and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing or delivering of property." It goes on to provide that the Maritime Board may entertain complaints of violation of the act, and may, if it finds a complaint warranted, make such order as it deems proper.

In one important respect this appears to be a case of first impression. It has been held that a railroad company that owns a pier is an "other person subject to this chapter" and so subject to the jurisdiction of the Maritime Commission with respect to a regulation concerning "free time" on the pier for cargo removed by truck. And, as the opinion in Bay State documents, it is well established that when the Maritime Board has jurisdiction, its primary jurisdiction is exclusive. The reported cases, however, all appear to deal with regulations and practices directly impinging upon the relation between carrier and shipper, such as collusive rate fixing, unreasonable demurrage charges, discriminations against shippers or ports, and the like.

What is here decided, apparently for the first time, is that what is basically a dispute between rival stevedoring companies, with more or less remote impact upon the carrier-shipper relationship, is taken out of the domain of state law by the Shipping Act. This conclusion seems to be drawn from a literal reading of the Shipping Act, without inquiry as to whether it requires interpretation.

In other areas of federal regulation, it has been customary to subject congressional enactments to a detailed, sometimes esoteric, process of analysis prior to resolution of the question whether they supersede state laws. Acts of Congress regulating railroad equipment, food and drugs, and subversive activities, to name but a few instances, were critically construed before their effect on the operation of state laws was determined. In the field of labor relations, the most litigious

---

battleground of the federal pre-emption issue, there was a process of extremely close determination of statutory meaning, beginning, say, with the *Briggs-Stratton* case down to the apparently definitive decision in *San Diego Building Trades Council v. Garmon*. Of course, the end result of the *Bay State* case might well have been the same, even if the Court had scrutinized the Shipping Act and had found that it does not supersede the state laws. There was a ruling that the plaintiff stevedoring company was engaged in interstate and foreign commerce, so that the Court might have been called upon to reconsider or distinguish its earlier decision in *Commonwealth v. McHugh* and dismiss the bill on the ground that the dispute was governed by the federal anti-trust laws.

§10.4. General. During the Survey year a number of other cases hinged upon points of constitutional doctrine. While they do not appear to call for extended discussion, they should be noted at this point.

The conviction in the *Brinks Robbery Case* was subjected to an unsuccessful collateral attack in the Federal District Court. The defendants renewed the contentions, made at the trial and before the Supreme Judicial Court, that their rights to Fourteenth Amendment due process had been invaded by massive pre-indictment and pre-trial publicity stimulated by public officials.

Assuming, arguendo, the truth of the pleaded allegations concerning the massiveness and the official inspiration of the publicity, Judge Wyzanski found it unnecessary to take evidence in support of the allegations, and proceeded on the record made in the state court. He found entirely wanting in merit the contention that influence of the publicity upon the grand jury affected constitutional rights of the accused. As to the contention based upon exposure of trial jurors to the publicity, the judge ruled that, in the circumstances, it fell short of establishing a trial wanting in due process, since (1) the defendants had declined to move for a continuance or for a change of venue, and (2) the record showed a careful examination of jurors on the voir dire. The final contention of the defendants was that to penalize them for


failure to move for a continuance would be to force them to waive their right to speedy trial. This, too, was rejected, the Court pointing out that the concept of speedy trial was such a fluid one that it could not be assumed that at least one postponement of trial on account of the anticipated effect of massive publicity upon trial jurors would have been incompatible with the standard of speedy trial.

An appeal has been heard by the Court of Appeals for the First Circuit, but at the time of going to press a decision has not been handed down.

_Lamson v. Secretary of the Commonwealth_ is of interest for more than the points actually decided. The case called for construction of Articles 21 and 22 of the Amendments to the State Constitution, as modified by Article 71. These provide for a decennial census, beginning in 1935, and for legislative reapportionment of representative districts and of senatorial and councillor districts at the first regular session after the return of the enumeration of voters in the census. After the 1955 census, the legislature did not act upon reapportionment until 1960, and then reapportioned only the senatorial and councillor districts. On petitions for mandamus to prevent the preparation of election ballots on the basis of the reapportioned districts, the Supreme Judicial Court held that the power to reapportion remained in the legislature, even though it had not been exercised at the constitutionally appointed time, and that reapportionment of senatorial and councillor districts was effective, although not accompanied by reapportionment of representative districts.

While the decision settled some controversial issues of great practical importance, the case carries implications of perhaps greater significance. First, although the Court has traditionally proclaimed that it is not bound, in litigated cases, by advisory opinions that its justices have rendered, there has been no case decided contra a ruling in an advisory opinion. On each of the major points in the _Lamson_ case there appear in advisory opinions strong dicta that the Court refused to follow. While the Court pointed out that the advisory opinions in question were not directed to the precise issues involved in _Lamson_, the brushing aside of these rather categorical statements is an indication that the doctrine of judicial reconsideration of advisory opinions is more than pious protestation. Secondly, the Court strongly intimated that if the legislature persists in its failure to obey the constitutional mandate to reapportion in its first session after the return of the decennial census, the judiciary may undertake the reapportionment of election districts. Such a drastic remedy for unequal apportion-

---

ments had been disapproved by the Supreme Court of the United States, but some state courts have approved it, and the Supreme Court has agreed to take a case in which it may reconsider its earlier decision.

Singleton v. Treasurer and Receiver General clarified a point having an important bearing upon public finance. The Constitution provides, with respect to state borrowing, that except when money is borrowed for war or defense purposes or "in anticipation of receipts from taxes or other sources" the borrowing authority must be by two-thirds vote in each house of the legislature. When the Mount Greylock Tramway Authority was created, its project was directed to be financed through revenue bonds, payable solely from proceeds of tramway tolls. A 1959 amendment, however, provided that interest on tramway bonds would be guaranteed by the Commonwealth, and the Treasurer of the Commonwealth was authorized to borrow "in anticipation of appropriations" sums equal to deficiencies of toll revenues in the amounts necessary to meet annual bond interest obligations. Since the statute did not have a two-thirds vote in each house, the Court held the borrowing authorization defective. The authorized borrowing was not "in anticipation of receipts" but was, rather, as the Court put it, "to create receipts." The Court distinguished this from other public bond guarantees of the Commonwealth, in which state borrowing, even without two-thirds vote authorization, is lawful because it is in anticipation of "receipts" from deficiency assessments upon cities and towns within the area included within the bonded public works project.

Stone v. City of Springfield was a second attempt to make a broadside attack upon the validity of the entire 1958 assessment of the real property in the city of Springfield. An action to recover taxes paid under protest tendered the issue whether the assessing practices were

18 A second attack upon the state guarantee of the Mt. Greylock bond interest sought to have the guarantee provision subjected to referendum. The attack was unsuccessful because the referendum petition was defective. Newman v. Secretary of the Commonwealth, 339 Mass. 749, 162 N.E.2d 291 (1959).
20 In Carr v. Assessors of Springfield, 359 Mass. 89, 157 N.E.2d 880 (1959), a suit to enjoin the 1958 assessments was dismissed as moot.
21 G.L., c. 60, §98.
such as to violate the equality\textsuperscript{22} and the proportional-and-reasonable\textsuperscript{23} provisions of the State Constitution and the equal protection clause of the Federal Constitution.\textsuperscript{24} The Court, however, did not reach the merits, holding that the declaration alleged conclusions rather than the facts necessary to set forth a cause of action.

\textsuperscript{22} Mass. Const., Declaration of Rights, Art. X.
\textsuperscript{23} Id., Part 2, c. I, §1, Art. IV.
\textsuperscript{24} U.S. Const., Amend. XIV.