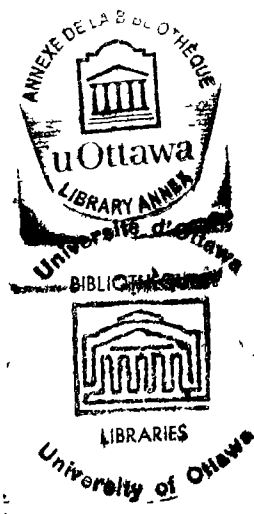


**THE LEGAL POSITION OF THE AGENCIES WHICH ADMINISTER
THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM**

by Robert Vincent McCarthy

**Thesis presented to the Faculty of Arts
of the University of Ottawa through the
School of Psychology and Education as
partial fulfillment of the requirements
for the degree of Doctor of Philosophy.**



Ottawa, Canada, 1955

UMI Number: DC53386

INFORMATION TO USERS

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleed-through, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.



UMI Microform DC53386
Copyright 2011 by ProQuest LLC
All rights reserved. This microform edition is protected against
unauthorized copying under Title 17, United States Code.

ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

ACKNOWLEDGMENT

This thesis was prepared under the guidance of the Director of the School of Psychology and Education, Reverend Father Raymond H. Shevenell, O.M.I.

To William J. O'Keefe, LL.D., Professor of Law at the Boston College Law School, the writer is indebted for many helpful suggestions, particularly those made when this study was in the planning stage.

Mr. Charles Edouard Gobeil, Q.C., Librarian of the Supreme Court of Canada, was most helpful in making the facilities of that library available to the writer.

Gratitude is here expressed for their interest and co-operation.

CURRICULUM STUDIORUM

The writer was born in Worcester, Massachusetts, on April 5, 1921, and received the degree of Bachelor of Arts from the College of the Holy Cross, Worcester, Massachusetts, in 1943, and the degree of Master of Arts in Education from Clark University, Worcester, Massachusetts, in 1948.

TABLE OF CONTENTS

Chapter	page
INTRODUCTION	
I.-THE ROLE OF GOVERNMENT IN EDUCATION	1
1. The Federal Government	1
2. The Constitution of the Commonwealth	6
3. The Legislature	7
4. The Courts and Education	15
II.-THE NATURE AND LEGAL STATUS OF THE SCHOOL COMMITTEE	46
1. The Evolution of the School Committee	47
2. The Nature and Legal Position of the School Committee and its Members	59
3. The Tort Liability of School Committee-men, School Committees and Municipalities	72
4. The Relationship Between the School Committee and the Municipality	85
III.-THE POWERS AND DUTIES OF THE SCHOOL COMMITTEE WITH REGARD TO POLICY MAKING	109
1. The School Committee has the right to make rules consistent with its purpose for being	113
2. The Committee has the power to make reasonable rules and regulations	118
3. Some of the Principal Powers delegated to the School Committee in the sphere of policy making	127
IV.-THE POWERS AND DUTIES OF THE SCHOOL COMMITTEE WITH REGARD TO TEACHERS, SUPERINTENDENTS OF SCHOOLS, AND OTHER PROFESSIONAL PERSONNEL	139
1. The School Committee has the right to contract with and fix the salaries of teachers, superintendents, principals and supervisors	140
2. The School Committee has the right to set the duties of teachers, superintendents, principals, and supervisors	152

TABLE OF CONTENTS

v

3. The School Committee has the right to dismiss Teachers, superintendents, principals and supervisors	155
4. Dismissal under the "Tenure Law".	159
V.-THE POWERS AND DUTIES OF THE SCHOOL COMMITTEE TO DETERMINE THE CONDITIONS UNDER WHICH A PUPIL MAY ATTEND THE PUBLIC SCHOOLS	
1. The right and duty of the School Committee to determine the conditions under which a child shall be admitted to the public schools	196
2. The School Committee has the right to determine the conditions under which a pupil shall be excluded from the public schools.	197
3. A pupil charged with misconduct has a right to be heard before he is excluded	213
SUMMARY AND CONCLUSIONS	227
BIBLIOGRAPHY	243
	252

Appendix

1. <u>GENERAL LAWS OF MASSACHUSETTS (TERCENTENARY EDITION)</u> : Pertinent Chapters Affecting Those Aspects of Public School Education Considered in this Thesis, with notation as to whether or not the section is treated therein.	255
2. <u>EXTRACTS FROM OPINION OF MR. JUSTICE REED DISSENTING FROM THE MAJORITY OPINION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF <i>Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, et al</i> 333 US 203</u>	261
3. <u>OPINION OF MR. JUSTICE JACKSON DISSENTING FROM THE MAJORITY OPINION OF THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF <i>Zorach et al v. Clausen et al, constituting the Board of Education of the City of New York et al.</i> 343 US 306</u>	269
4. <u>ABSTRACT OF The Legal Position of the Agencies which Administer the Massachusetts Public School System</u>	272

INTRODUCTION

In the three centuries that have elapsed since the General Court of the Massachusetts Bay Colony of New England enacted a law requiring every town of fifty or more householders to appoint a teacher "to teach such children as shall resorte to him to write and reade",¹ public school education has evolved from the "little red schoolhouse" to the multi-million dollar school plants that dot the State today, from the modest goal of teaching every child to "write and reade" to the multi-phasic curricula that are necessary to prepare the student of the present day to actualize his full potential and to assume his position in the community.

This growth has not been without direction. The Federal government, the State government, and the local school committee, created by the State Legislature for the purpose of conducting the affairs of the public schools at the community level, all have played a role.

It is the purpose of this thesis to study the legal position of these, the agencies which administer the Massachusetts Public School System.

¹ Nathaniel E. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England, Vol. 2, 1647-1649, Boston, William White, 1853, p. 203.

Although the financial outlay for the maintenance of the public schools represents a major portion of the total annual expenditure of every community in the Commonwealth, the citizenry-at-large, the teachers, the members of local school committees, and even the members of the State Legislature all too frequently lack a proper knowledge of the prerogatives and obligations of the agencies which administer the affairs of the public schools. If this thesis became a reference to provide these groups with a better understanding of the legal status of the Federal and State governments and the local school committee, as they operate the public school system of the Commonwealth, it would have served a purpose.

A complete analysis of the legal position of the local school committee, one of the agencies to be studied and the one whose role is necessarily emphasized, would, particularly when it is considered in conjunction with the educational roles of the Federal and State governments, involve a problem of such scope as to be almost prohibitive in view of the meticulousness of research required of the thesis writer. As a consequence, certain limitations are placed upon this study.

The public school discussed herein is the traditional twelve grades of the primary and secondary school. Vocational and trade schools, schools for the mentally

and physically handicapped, junior colleges, and the like, important as they are, are not considered in this study. Although much of what is said is applicable to Regional High Schools Districts and to Superintendency Unions, special laws applicable only to these types of schools are not included.

With regard to the school committee, only the principal or more important powers and duties of that body are discussed. That the reader may determine more easily what has been included and what omitted, Appendix 1 lists, with a descriptive title, each section of Chapters 71 and 76 of the General Laws of Massachusetts. (Tercentenary Edition); the chapters applicable to those phases of public school education considered herein, and notes whether or not the section is treated. Finally, the legal position of the school committee is studied only where intra-personal relationships with the community, the teacher, the parent and/or the pupil are involved. For example, the right of a school committee to negotiate a contract with a teacher is considered an intra-personal relationship and is discussed; whereas, the right of the committee, under certain conditions, to contract with a transit company for the transportation of pupils is not considered as an intra-personal relationship and is not discussed. The major topic excluded under this latter delimitation is the role

of the school committee in the financing of public school education. This matter is alluded to in Chapter II of this thesis, but only to make more clear the concept of the independent nature of the school committee. A thorough study of Public School Finance in the Commonwealth of Massachusetts would constitute a thesis in itself; in fact a thesis relating to that topic has been written.²

The study is organized into five chapters, the first of which examines the concept of government in education. The influence that the Federal government has exerted on the public schools of Massachusetts, through the Constitution of the United States and the interpretations which the Supreme Court of the United States have given to that organ; the plenary power which the Legislature of the Commonwealth exercises over its public school system and the methods by which it has exercised that power, including the creation of local committees of public officers known as school committees; and the place of the Supreme Court of Massachusetts in the scheme of public school education, are all discussed in this chapter.

Chapter Two treats of the nature and legal position of the school committee. The discussion is introduced by a short account of the evolution of the school

² Owen B. Kiernan, The Legal Position of the Massachusetts School Committee in Financing Education, Harvard University, unpublished Doctoral Dissertation, 1953 (153 p.).

committee from the earliest days of the Massachusetts Bay Colony, to the establishment of that body in its modern form in 1882. A study of the nature of the school committee as a public agency, whose members, as a board of public officers, act with the authority of the Commonwealth rather than by local sanction, is followed by an analysis of the tort liability of the school committee, school committeemen, and the municipality. This chapter is concluded by an analysis of the relationship which exists between the school committee and the municipality.

Chapters Three, Four, and Five treat of the powers and duties of the local school committee: Chapter Three with regard to the making of policy; Chapter Four as they concern the teachers, superintendents of schools, principals and supervisors whom the committee engages to operate the public schools under its general superintendence; and Chapter Five, as they affect the conditions under which pupils attend the public schools.

As the business of public education has become more complex, interest in its legal aspects has developed proportionately. An indication of this fact is gleaned from a survey of the publication Doctoral Dissertations.³ This one publication lists more than one hundred and fifty theses on school law during the period 1933-1953.

3 Doctoral Dissertations Accepted by American Universities, Vols. 1-20. New York, Wilson, 1934-54.

Strangely enough, however, in Massachusetts, which might be considered as the birthplace of the American public school, relatively little has been done. Two theses and a book comprise the apparent entire coverage afforded the topic through 1953. Public Education in Massachusetts Is a Function of the State and Not of Local Municipal Government.⁴ an unpublished Master's thesis, submitted to the Faculty of the Boston College School of Education, by Edward F. McGocey in 1948, is a brief but pointed discussion of a fundamental principle of Massachusetts school law. A 1953 Doctoral Dissertation, written at Harvard University by Owen B. Kiernan, deals with the Legal Position of Massachusetts School Committees in Financing Education.⁵ While not strictly pertinent to this thesis, Kiernan's work is of interest because it treats of one of the topics specifically excluded from this study.

By far the most important study to date is Teachers and Their Legal Rights,⁶ by William J. O'Keefe, A.B., LL.B., Litt.D., presently, professor of Law at the Boston College Law School, formerly, Interpreter of Educational Law for the Massachusetts Department of Education. Dr. O'Keefe

⁴ Edward F. McGocey, Public Education in Massachusetts Is a Function of the State and Not of Local Municipal Government, Boston College, unpublished Master's thesis, 1948. 46 p.

⁵ Owen B. Kiernan, op.cit.

⁶ William J. O'Keefe, Teachers and Their Legal Rights, Boston, published by the author, 1940, xvi-203 pp.

publications should be noted: The Evolution of the Massachusetts Public School System,⁷ by George Henry Martin, and A Rapid Survey of the Massachusetts Educational System,⁸ by Charles A. Harris.

Martin's work is the more comprehensive and widely known of the two. Prepared originally as four separate lectures, it was later prepared for publishing by the author. Inadequate documentation, coupled with a tendency on the part of the author to deviate from the role of historian to that of eulogizer leaves the reader somewhat confused as to what is history and what is the opinion of the author. None the less, it is the best available account of early education in Massachusetts. An examination of the content of Harris' Survey, along with frequent references of the author to the work of Martin discussed above, leads the reader to feel that it is based largely on that work. It restricts itself to history and is better documented in certain respects, but it adds little to the work of Martin.

Throughout this thesis, with few deviations, the method of reporting follows a regular pattern. A declarative statement concerning an attribute, power, or duty of the

7 George Henry Martin, The Evolution of the Massachusetts Public School System, New York, Appleton, 1894, xx-284 pp.

8 Charles A. Harris, A Rapid Survey of the Massachusetts Educational System, published by the author, 1910, 100 pp.

agency under consideration is made. Pertinent sections of the law and cases of litigation which substantiate or pose exceptions to the statement are then presented. Except where the conclusions to be drawn are deemed obvious to the reader, a brief statement of general conclusions terminates each section.

The "case method" of reporting instances of litigation is used throughout. The facts pertinent to the case are present first; the judicial decision follows. This method was chosen largely as a result of the personal experience and observation of the writer, who studied school law under this method, and who subsequently maintained a reading interest in the subject. Legal principles presented in this manner were found to be more readily understood and more permanently retained than were principles enunciated by other methods. This personal observation is strengthened by statements of Hamilton and Mort in the preface to their book, The Law and Public Education.⁹ These authors point out that teachers and other interested individuals, despite a lack of legal background, readily acquire and retain the principles of school law when the case study method is used. Except for a few instances where the decisions of other courts are cited for contrast, this entire thesis is based upon the decisions of the Supreme Court of the Commonwealth

⁹ Robert R. Hamilton and Paul R. Mort, The Law and Public Education. Chicago, The Foundation Press, 1941.

or upon rulings of the Supreme Court of the United States which affect all States of the Union.

The subject matter of this thesis is taken almost exclusively from primary sources. The Constitution of the United States; The Constitution of the Commonwealth of Massachusetts; The United States Reports, The Official Decisions of the Supreme Court of the United States; The Massachusetts Reports, the Official Decisions of the Supreme Court of the Commonwealth of Massachusetts; The Opinions of the Justices of the Supreme Court of Massachusetts; The National Reporter System, especially the Northeast Reporter; and the Annual Reports of the Massachusetts Board of Education, especially the Twenty-Fourth Annual Report, are all important sources of information.¹⁰

The basic source of the thesis, however, is the Tercentenary Edition (1932) of the General Laws of the Commonwealth of Massachusetts¹¹, the most recent codification of the law. The Annotated Laws of Massachusetts,¹² an unofficial but highly accurate, commercial compilation containing all amendments to the General Laws through 1964, is used in connection with the Tercentenary Edition. Prior codifications of the Law of the Commonwealth were consulted as the need arose.

10 For complete reference, see Bibliography, (p.252.)

11 Ibid.

12 Ibid.

Four further points of a technical nature should be called to the attention of the reader; all references to the General Laws of Massachusetts (Tercentenary Edition) should be understood to include all amendments through 1954; unless otherwise specified, all judicial decisions are those of the Supreme Court of Massachusetts; throughout the thesis the Legislative Branch of the State government is referred to by its common or popular title, "the Legislature", rather than by its official title, "The General Court"; in order that the reader may investigate further judicial decisions which interest him, the legal method of reference is used in referring to all court decisions, and statute citations. Thus "300 Massachusetts 222", refers to Volume 300 of the Massachusetts Reports, page 222; and "105 NE(2d) 404" means "Volume 105 of the Northeast Reporter, Second Series, page 404."

Finally, since this thesis purports only to establish the present legal position of the agencies which administer the Massachusetts public school system, no attempt is made to evaluate, justify or question any of the statutes or judicial decisions upon which that legal position depends.

CHAPTER I

THE ROLE OF GOVERNMENT IN EDUCATION

That an educated citizenry is essential to the processes of a democratic form of government has been recognized and accepted by the Federal government of the United States of America and by governments of the several states which constitute the Union from the time of their inception. Consequently, under the general authority which every government possesses inherently to provide for the welfare of its citizens, and in the case of the Federal government, under the specific authority of the "general welfare clause"¹ of the Constitution, the Federal and state governments have consistently championed education. Indeed, during the last century, the State governments have prescribed certain minimum educational requirements for their citizens.

It is with this governmental interest and the effect that it has had on education in the Commonwealth of Massachusetts that this chapter will treat.

1. The Federal Government

The position of esteem in which education is held by the Federal government of the United States of America

¹ The Constitution of the United States, Art. I, Section 8.

has been eloquently expressed in the preamble to a pre-constitutional Ordinance enacted by its legislative branch in 1787 and in the words of the highest tribunal of its judicial branch in 1954. In enacting the North-west Ordinance of 1787², the Congress of the United States declared: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged". Delivering the opinion of the Supreme Court of the United States in the case of Brown et al. v. The Board of Education of Topeka, Chief Justice Warren stated,

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.³

These two statements, made by different branches of the Federal government, one during the uneasy infancy of the newly-born republic, the other a scant few months

² Acts of the Congress of the United States, 1787, An Ordinance for the Territory of the United States Northwest of the River Ohio.

³ Brown et al. v. Board of Education of Topeka, (Kansas), 347 US 483.

ago, leave little doubt as to the vital interest which the Federal government takes and has always taken in the education of its young.

a) The Federal Constitution.- Aside, however, from this strong interest and from an attitude of encouragement to the individual states, the Federal government has actually played a very small role in the task of educating its young.

The Founding Fathers of the Republic, in framing the Federal Constitution, made no mention of education. Consequently, education became a function of the states. In order to understand this concept properly it is necessary to analyse the relationship which exists between the Federal government and the states.

With the Declaration of Independence in 1776, each of the thirteen colonies became essentially a sovereign state with all of the inherent rights and duties thereof. In 1777, the thirteen states banded together as the United States of America, under the lax control of the Articles of Confederation. In joining this Union, each of the states voluntarily yielded some of its sovereign rights to the United States. When, in 1787, the Constitutional Convention assembled in Philadelphia, it was to develop a constitution to replace the Articles of Confederation which had proven ineffective. In essence, then, the aim was the

achievement of a new instrument under which their Union might be preserved. The Federal government was formed when the several states delegated to it anew certain powers which they had inherently possessed.⁴

The government of the United States then is one of enumerated powers, and "the national Constitution ... (is) ... the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess".⁵

When this fundamental premise upon which the American republic is founded was challenged in the case of McCullough v. Maryland,⁶ that late and illustrious Chief Justice John Marshall said,

This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent, to have been required to be reinforced by all those arguments which its enlightened friends, while it was depending before the public found necessary to urge; that principle is now universally admitted.

4 James Bryce, M.P., The American Commonwealth, Philadelphia, Morris & Co., 1906, pp 154-156, and

Thomas M. Cooley, rev. by Walter Carrington, A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union, Eighth Edition, Vol.1, Boston. Little-Brown, 1927, pp 7-12.

5 Thomas M. Cooley, Ibid., p.11.

6 McCullough v. Maryland, 4 Wheaton 405.

b) The Tenth Amendment.- A second guarantee of the right of the individual state to educate its citizens is found in the Constitution itself. The Tenth Amendment states specifically, "The powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people".⁷

The Tenth Amendment adds nothing to the Constitution as it was originally ratified, but was included in order to make clear to the people of the time the fact that the Federal government possessed only those powers which were delegated to it, or could reasonably be inferred as concomitant to those delegated powers; and that the state governments possessed all powers not expressly forbidden to them.⁸

None the less, it may be interpreted as an affirmative exposition of the principle that education, since it is not delegated by the Constitution to the United States, is a function of the state and that the control of the state over education is plenary within the limits of the Federal constitution.

⁷ The Constitution of the United States, Article of Amendment X.

⁸ Edward S. Corwin, Constitution of the United States of America, Analysis and Interpretation, Washington, U.S., Government Printing Office, 1953, p.915.

2. The Constitution of the Commonwealth

The Constitution of the Commonwealth is the creature of the people of the Commonwealth and is the organ by virtue of which the Commonwealth exists as such. Drawn up by members of a special convention called for that purpose, it was presented to the voters in 1780 with the option to accept or reject. When they accepted it, it became the fundamental law of the Commonwealth. The executive, legislative, and judicial branches of the government are all creatures of the Constitution. The enactments of the legislative branch must be consistent with it, or they are unconstitutional. The actions of all elected or appointed officers must conform to it, or they are illegal. It is beyond the reach of the legislature and can be changed only by the power which created it, namely, the people, through the process of amendment.⁹

All specific reference to education in the original constitution was confined to Part II, Chapter V. Since the original ratification, two amendments have been added. Article of Amendment XVIII, ratified in 1855, prohibited the expenditure of public money to aid any school which is not wholly under public ownership. Article of Amendment XLVI, ratified in 1917, replaced Article of Amendment XVIII, deals with the same subject, and elaborates on it.

⁹ James Bryce, op.cit., pp 174-191.

Section one of Chapter V concerns Harvard University and is of little concern to this thesis. Section two, however, clearly, but loosely, lays the foundation upon which public school education in the Commonwealth has rested for one hundred and fifty years.

Entitled "The Encouragement of Literature, etc.", Section two reads as follows:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of the legislature and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.¹⁰

3. The Legislature

The above quoted section of the Constitution indicates the high esteem in which the people held education at the time of the original ratification, and enunciates

¹⁰ The Constitution of the Commonwealth of Massachusetts. Part II, Chapter 5, Section 2.

a philosophy which permeated education throughout the Commonwealth for more than a century. But, more important, when it charges the legislature to cherish, encourage, countenance, and inculcate wisdom, knowledge, and virtue in all future periods of the Commonwealth; it places the responsibility for the education of the citizens squarely upon the legislature.

Thus, the mandate to the legislature to supervise education is two-fold: that of the positive charge enumerated above, and that of the inherent charge which is natural to it; for, when the people ratified the Constitution they delegated all of their law-making powers to the legislature. Had they wished to do so they could have placed restrictions on the power of the legislature. Since they chose not to exercise this option prior to ratification, the power of the legislature over education in the Commonwealth, so long as it acts within the framework of the Federal and state constitutions is plenary.¹¹

a) The Attitude of the Legislature toward Education.- The legislature has always been conscious of its role in education and has recognized the importance of universal education to a democracy. The preamble to an Act of 1789 shows this attitude clearly:

¹¹ Thomas M. Cooley, op.cit., pp.1-6.

Whereas the Constitution of this Commonwealth, hath declared it to be the duty of the General Court to provide for the education of youth and whereas a general dispensation of knowledge and virtue is necessary to the prosperity of every state, and the very existence of a Commonwealth ...¹²

The second portion of this preamble emphasizes the principle that it is the duty of the legislature to enact laws which further the interests of the state and that the good which comes to individuals as an accompanying feature of the enactment is of secondary importance.

In matters pertaining to education, the courts have consistently ruled that this principle applies not only to the legislature but also to the agent which it has created for the purpose of accomplishing its mission to educate, the local school committee.

When a superintendent of schools who had displayed superior ability in the administration of the schools, but had been unable to maintain harmonious relations with the school committee was discharged and petitioned the court to reinstate him, the court ruled that regardless of his competency, and regardless of where the responsibility for the lack of co-operation might lie, a better school system could be obtained where there was a spirit of harmony and co-operation, between the superintendent

¹² Acts of Massachusetts, 1789, Chapter 19.

and the school committee. The court went on to declare that "... the committee in deciding whether a teacher or a superintendent shall be removed are bound to act for the best interests of the town and the welfare of its public schools".¹³

b) The Legislative Method of Exercising Control.-

Having the inherent authority to operate the schools of the Commonwealth as it saw fit, the legislature has delegated a large share of the responsibility for the actual operation and supervision of the schools to three subordinate agents: the town, the state department of education; and local school committees.

The town is required by statute to maintain schools,¹⁴ and to provide the school committee with the funds which it requests for their operation.¹⁵ Here the responsibility of the town ends. The state department of education functions largely as an administrative and supervisory body with little authority and limited discretion. The Commissioner of Education is authorized to supervise "all educational work supported in whole or in part by the government".¹⁶

¹³Toothaker v. School Committee of Rockland, 256 Massachusetts 592.

¹⁴General Laws of Massachusetts (Ter.Ed.), Chapter 71, Sections 1, 4.

¹⁵Ibid., Chapter 71, Section 34.

¹⁶Ibid., Chapter 69, Section 1.

Insofar, however, as the regular public schools are concerned, his duties involve the encouragement rather than coercion of local authorities towards better educational practices.¹⁷ The department is charged specifically with the collection and distribution of certain records, chiefly dealing with attendance,¹⁸ and with the general supervision of the manner in which all schools within the Commonwealth, private as well as public, comply with the law.

It is to the local school board, however, that the "general charge of all public schools"¹⁹ has been delegated. From the earliest times it has been the policy of the Commonwealth

... to establish a board elected directly by the people separate from other governing boards of the several municipalities and to place the control of public schools within the jurisdiction of that body unhampered as to details of administration and not subject to review by any other board or tribunal as to acts performed in good faith ...²⁰

The key words of this quotation taken from the decisions of the Supreme Court of the Commonwealth in the case of Leonard v. Springfield, "not subject to review by any other board or tribunal as to acts performed in good faith", are indicative of the scope of the powers possessed

¹⁷ General Laws of Massachusetts (Ter. Ed.), Chapter 69, Section 1.

¹⁸ Ibid., Chapter 72, Sections 1, 3, 4, 5, 6, and 8.

¹⁹ Ibid., Chapter 71, Section 37.

²⁰ Leonard v. Springfield, 241 Massachusetts 329.

by the school committee and of the broad latitude granted to it in the conduct of the education at the local level.

This apparent autonomy of the school committees, however, can be misleading. While it is true that the breadth of power granted to the local committees has been unusual, the legislature retains now, and during all periods has retained, complete authority over education in the Commonwealth.

The totality of this authority is probably best demonstrated by the fact that control of the schools was originally granted to the selectmen of the town,²¹ taken from them and given to district school committees,²² and returned again to the town school committees.²³

When a taxpayer, who felt that he was being unjustly taxed for the support of the schools²⁴ contested the legality of the latter move, the court declared:

This objection is not well taken. The laws in question were enacted in the legitimate exercise of that power by which the legislature may require the performances of certain public duties by different municipal or political agencies at its discretion. Before the enactment, school districts were indeed quasi-corporations with the power to hold property, to raise money by taxation for the support of schools, and with certain defined public duties. But they were public and political as distinguished from private corporations, and their rights and powers were held at the will of the legislature, to be modified or abolished as public welfare might require. The

²¹ Nathaniel B. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England, Vol. 3, 1644-1657, Boston, William White, 1834, p. 343-344.

²² Acts of Massachusetts, 1789, Chapter 19, Section 2

²³ Ibid., 1869, Chapters 110, 423.

²⁴ Lawson v. Spencer, 113 Massachusetts 40.

property held by them for public use was subject to such disposition in the formation of the objects for which it was held, as the supreme legislature might see fit to make.²⁵

Hence, while the legislature of the Commonwealth has seen fit to delegate broad powers to local school committees, it has not relinquished, indeed it cannot relinquish,²⁶ any of its inherent powers. What authority it has delegated, it can rescind, alter or reclaim.

Perhaps the most striking example of the power of the legislature is found in a recent decision of the court in the case of Gorman v. Peabody.²⁷ The legislature, in 1916, granted to the city of Peabody a new charter bearing a referendum provision.²⁸ Under the terms of the charter a petition of protest against any "measure" or part thereof passed by the city council or school committee, signed by a prescribed number of registered voters, and submitted within twenty days after the passage of such measure, rendered the measure inoperative. It was obligatory then on the council or committee to reconsider the challenged measure and "entirely annul, repeal, or rescind" it; or submit it to the qualified voters of the city, who must pass or reject it by a majority vote.

On October 2, 1941, the School Committee voted to increase the salary of each public school teacher then

25 Rawson v. Spencer, 113 Massachusetts 45.

26 Thomas M. Cooley, op.cit., pp 224-239.

27 Gorman v. Peabody, 312 Massachusetts 560.

28 Acts of Massachusetts, Special Statute, 1916, Chapter 300.

employed by the city two hundred dollars effective January 1, 1942. On October 18, under the authority of the Act to Incorporate the City of Peabody²⁹ a petition of protest, signed by the required number of registered voters was presented to the Committee. The said Committee, failed "contrary to the provisions of Special Statute 1916, Chapter 300" to annul, or repeal, or rescind the measure, and failed to request the city council to have "said vote or measure" submitted to a vote of the qualified voters of the city as required by the provisions of "said Chapter 300".

On November 19, the committee presented its budget to the mayor as required by General Laws, Chapter 44, Section 31A,³⁰ including the amount required to pay for the salary increases. The mayor refused to include this amount in his budget. Gorman and others, being ten or more taxable inhabitants of the City of Peabody, petitioned the court under authority of Chapter 71, Section 34,³¹ to compel the city to include in the budget the amount requested by the school committee.

In rendering its decision, the court said,³²

When the legislature in 1916 gave the legal voters of the City of Peabody the opportunity to decide whether they would accept or reject the proposed charter, it must be held to have been cognizant of the long line of decisions in this Commonwealth that had uniformly upheld the statutory

²⁹ Acts of Massachusetts, Special Statute 1916, Chapter 300.

³⁰ General Laws of Massachusetts (Ter.Ed.), Chapter 44, § 31A.

³¹ General Laws of Massachusetts (Ter.Ed.), Chapter 71, Section 34.

³² Gorman v. Peabody, supra, p.569.

powers of school committees, and when the provision for the proposed referendum was inserted in the proposed charter, it was for no idle purpose, nor was it a mere gesture. Provision was made for a protest against a "measure" or any part thereof, the word "measure" in connection with the school committee being defined as a resolution, order or vote. If, despite this referendum provision, the school committee, in the proper exercise of its statutory duties is supreme, then the referendum provisions would have little, if any, application. They derive their power in the first instance from the electorate, and, if the legislature, in its wisdom sees fit to provide a reasonable and proper check upon the exercise of their statutory duties, such provisions must be upheld.

This decision, limiting as it does, the scope of power of the local school committee in the face of three centuries of tradition,³³ gives a clear indication of the relationship between agent and master as applied to the local school committee and the power which created it, maintains it, and which by an act can limit or abolish it -- the legislature.

4. The Courts and Education

Although the management of education is exclusively a function of the legislative branch of the government of the Commonwealth, it must exercise its authority within the framework of the Federal and state constitutions. Consequently the Supreme Court of the United States and the Supreme Court of Massachusetts have exerted strong influence upon educational policy.

³³ Leonard v. Springfield, supra, pp.529-530.

a) The Supreme Court of the United States.— The Supreme Court of the United States has acted in educational matters only when the constitutional rights of an individual or corporation have been impaired. Even with this restriction the Supreme Court has been petitioned to rule upon the constitutionality of the enactments of the several legislatures and their agents on scores of occasions. While each decision has been concerned with a matter of considerable importance, and while each has helped to clarify the role of the various state legislatures with regard to the nature of the control which they exercise over education, an exhaustive study of these decisions would be beyond the scope of this thesis. Consequently, an effort has been made to classify these decisions into three major categories: decisions involving individual rights, the relationship between church and state, and the segregation of public school pupils by race. Problems involving the first category have generally been decided on the basis of the interpretation of the Fourteenth Amendment;³⁴ those involving church-state relationships on the interpretation of the First Amendment.³⁵ The third category, segregation, could logically be included

³⁴ The Constitution of the United States, Article of Amendment XIV.

³⁵ Ibid., Article of Amendment I.

in the first. Decisions here have involved the Fourteenth and the Fifth Amendments.³⁶ However, decisions in this area, particularly those of recent months, have such important implications to the future of public education in the United States that separate treatment seems justified.

From these major classifications, key decisions, which represent the present thinking of the court, have been selected for presentation here. Because of the impact which they have had on the public schools, not only of the Commonwealth, but of her sister states as well, the situations which brought these problems before the court, and especially the thinking of the courts are presented in as much detail as the limitations of this thesis will permit.

The rights of the individual. - The right of the parent to determine the type of education which he wishes his child to receive was enunciated clearly in a decision involving an Oregon statute in 1925.³⁷

In November, 1922, the legislature of the state of Oregon enacted The Compulsory Education Act³⁸ which was to become effective on September 1, 1926. The law required every parent, guardian, or other person having control or charge or custody of a child between the ages of eight and sixteen years to send him "to a public school for the

³⁶ The Constitution of the United States, Articles of Amendment XIV and V.

³⁷ Pierce, Governor of Oregon et al. v. Society of Sisters. 268 US 510.

³⁸ Oregon Laws, 1922, amendment to Section 5259.

period of time a public school shall be held during the current year"³⁹ in the district in which the child resided, unless he had completed the eighth grade.

The Society of the Sisters of the Holy Names of Jesus and Mary, and the Board of Trustees of the Hill Military Academy (a companion case which was decided in the same hearing)⁴⁰ each of whom had successfully conducted schools within the state over a long period of time, sought an injunction to the implementation of the act on the grounds that they were being deprived of liberty and property without due process of law as guaranteed by the Fourteenth Amendment.⁴¹

The injunction was granted and was later upheld by the Supreme Court of Oregon. The State appealed the case to the Supreme Court of the United States. In upholding the decision of the lower courts, the Supreme Court adjudged the Act of 1922 as "unreasonable" interference with the liberty of parents and guardians to direct the education of their offspring. The clear-cut statement which follows settled once and for all time the place of the parent in education.

³⁹ Pierce v. Society of Sisters, supra, p.534.

⁴⁰ Pierce, Governor of Oregon et al. v. The Board of Trustees of Hill Military Academy, 268 US 510.

⁴¹ The Constitution of the United States, Article of Amendment XIV.

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁴²

The right of the individual specifically to teach school and in general to follow the normal pursuits that are essential to happiness is well illustrated in Meyer v. the State of Nebraska.⁴³ The Nebraska legislature enacted a law⁴⁴ which prohibited any teacher in any private, denominational, parochial, or public school from teaching any subject to any pupil or group of pupils, in any language other than English; and forbade the teaching of any foreign language to any pupil prior to the time that he had completed the eighth grade.

Meyer was tried and convicted of teaching the subject "reading" in the German language to a ten-year-old boy who had not completed the eighth grade. When, upon appeal to the Supreme Court of Nebraska, his conviction was upheld, he appealed to the Supreme Court of the United States on the grounds that his right to teach was being jeopardized, and that consequently, he was being deprived

⁴² Pierce v. Society of Sisters, *supra*, p.535.

⁴³ Meyer v. State of Nebraska, 262 US 390.

⁴⁴ Nebraska. Laws of 1919, Chapter 249.

of his rights without "due process of law" as guaranteed by the Fourteenth Amendment.

In giving its decision, the court stated at the outset that the decision must rest on the answer to the question, "whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff ... by the Fourteenth Amendment".⁴⁵ The Fourteenth Amendment states in part that no state shall "deprive any person of life, liberty, or property without due process of law".⁴⁶ In giving its decision, the court included the following:

Liberty denotes not merely freedom from bodily restraint but also the right of the individual to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁴⁷

After classifying teaching as common, and indeed a commendable occupation in life, the court went on to say " ... his right ... to teach and the right of parents to engage him to instruct their children, we think are within the liberty of the amendment".⁴⁸ The court concluded its decision by

⁴⁵ Meyer v. State of Nebraska, supra, p.399.

⁴⁶ The Constitution of the United States, Article of Amendment XIV.

⁴⁷ Meyer v. State of Nebraska, supra, p.399.

⁴⁸ Ibid., p.400.

explaining, as it frequently does, the reasoning behind its decision:

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the constitution ... a desirable end cannot be promoted by prohibited means.⁴⁹

Although the Supreme Court of the United States is fallible and occasionally renders decisions which seem difficult to reconcile with other decisions, the general application of the principle found in the last sentence of the preceding paragraph has given to citizens of the United States a type of personal protection heretofore unknown in history.

The constitutional rights of the individual teacher as well as other public officers and state employees was the basis of a 1952 decision of the Supreme Court in the case of Wieman et al. v. Updergraff et al.⁵⁰

The legislature of the state of Oklahoma passed a statute⁵¹ in 1951 requiring all public officers and state employees to certify under oath that they were not then and

⁴⁹ Meyer v. Nebraska, *supra*, p.401

⁵⁰ Wieman et al. v. Updergraff et al., 344 US 183.

⁵¹ Oklahoma Statutes, 1951, Tit.51, Sections 37.1-37.8.

had not been for the five years immediately preceding, members of, or affiliated with, organizations listed by the United States Attorney-General or other authorized agencies of the Federal government, as communist front or subversive organizations.

When certain members of the staff of the Oklahoma Agricultural and Mechanical College refused to take the oath, action was pressed in the Oklahoma courts to halt their salaries. Defeated in the state Supreme Court, the professors appealed to the United States Supreme Court.

In over-ruling the state court, the Supreme Court pointed out that democratic government must defend itself from the threat of disloyalty but must do so "without infringing the freedoms that are ultimate values of all democratic living".⁵²

The statute in question was adjudged a violation of the "due process" clause of the Fourteenth Amendment, "by reason of an indiscriminate classification of people who had belonged to such organizations, knowingly, and those who had belonged unknowingly."⁵³

Church and state.- Several of the original thirteen states were founded by men who had left Europe in order to escape religious restrictions of one form or another. With

⁵² Wieman v. Updegraff, supra, p.188.

⁵³ Ibid., p.191.

this experience of their ancestors in mind, the framers of the Constitution took steps to prevent such situations from arising in the United States. This end was accomplished by the insertion of the First Amendment to the Constitution, which states in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;".⁵⁴

A number of interesting educational cases have reached the Supreme Court on the basis of alleged violations of the First Amendment.

Several state Supreme Courts, including that of Massachusetts,⁵⁵ had been asked to pass judgement on the policy of compelling students to salute the Flag of the United States. A 1942 decision of the United States Supreme Court in the case of West Virginia State Board of Education et al. v. Barnette et al.⁵⁶ settled the matter.

The Legislature of the State of West Virginia passed a law in 1941⁵⁷ which required that certain courses,

⁵⁴ The Constitution of the United States, Article of Amendment I.

⁵⁵ Nicholls v. Lynn, 297 Massachusetts 65; Commonwealth v. Johnson, 309 Massachusetts 65.

⁵⁶ West Virginia State Board of Education et al. v. Barnette et al., 319 US 624.

⁵⁷ West Virginia Code, 1941 Supplement, sec.1734.

which were intended to bring about a better understanding of the privileges and responsibilities attendant upon American citizenship, be taught in all of the schools of the state. A local board of education went a step further and made a rule requiring all pupils to participate in a pledge of allegiance to the flag. Failure to comply was classified as insubordination and resulted in expulsion. Since the state had a compulsory attendance law, the parents of pupils failing to attend under these circumstances were guilty of a misdemeanor and were liable to a fine and/or imprisonment.

The appellees were members of the religious sect known as Jehovah's Witnesses. Among their beliefs was included a liberal interpretation of Chapter twenty, verses four and five of the Book of Exodus, "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them".

They considered the flag as an "image" within the scope of this command and refused to salute it.

In deciding in favor of the appellees the court said,

"(The question is) ... whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our constitution ...⁵⁸

⁵⁸ W. Virginia v. Bernette et al., supra, p.629.

... If there is any fixed star in our constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, or other matters of opinion, or force citizens to confess by word or act their faith therein ...⁵⁹

... We think that the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our constitution to reserve from all official control.⁶⁰

As a result of this decision, although many states, including Massachusetts,⁶¹ still have statutes which require teachers, periodically, to lead their pupils in a pledge of allegiance to the flag, no pupil may be compelled to take part in the ceremony. To date no teacher has refused to comply with the statute. It is interesting to conjecture, in the light of this decision, what the opinion of the courts would be if such a situation were to arise.

The First Amendment has figured in three recent actions involving the extent to which co-operation between state schools and religious organizations is constitutional: Everson v. The State Board of Education,⁶² McCullum v. The Board of Education of Champaign County,⁶³ and Zorach et al. v. Clausen et. al.⁶⁴

⁵⁹ West Virginia v. Barnette, *supra.*, p.642.

⁶⁰ Ibid., p.642.

⁶¹ General Laws of Massachusetts (Ter.Ed.), Chapter 71, Section 69.

⁶² Everson v. The State Board of Education, 330 US 1.

⁶³ Illinois ex rel. McCollum v. Board of Education of School District No.71, Champaign County, Illinois, et al., 333 US 203.

⁶⁴ Zorach et al. v. Clausen et al., 343 US 306.

Everson v. The State Board of Education, involved a New Jersey Statute⁶⁵ which authorized local school districts to make rules and contracts for the transportation of pupils to and from school.

Under the authority of the said statute, the State Board of Education authorized the reimbursement to parents of money which they had spent for the transportation of their children to and from school on the regular commercial transportation system. A portion of this money was refunded to the parents of pupils who were attending parochial schools.

The appellant filed suit challenging the right of the State Board of Education to reimburse the parents of children attending parochial schools, on the grounds that the practice violated the Fourteenth Amendment by "authorizing the state to take the private property of some and to bestow it on others, to be used for their private purposes";⁶⁶ and the First Amendment by "forcing inhabitants against their will to help to support schools which taught the Catholic Faith".⁶⁷

Citing Cochran v. The Louisiana State Board of Education⁶⁸ as precedent, the court declared that legislation which facilitated the opportunity of a child to receive a secular education serves a public purpose and that the

⁶⁵ New Jersey Laws, 1941, chapter 191, p.581.

⁶⁶ Everson v. State Board of Education, *supra*, p.5.

⁶⁷ Ibid., p.6.

⁶⁸ Cochran v. Louisiana State Board of Education,

case at bar must be considered in such light.

The court denied the applicability of the Fourteenth Amendment to that situation by pointing out that, when changing local conditions led state authorities to feel that it was expedient to provide services for citizens which had not heretofore been provided, the Fourteenth Amendment was no bar to the exercise of their inherent power to so act. With regard to the alleged violation of the First Amendment the court said,

New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, the other language of the amendment commands that New Jersey cannot exclude Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians or members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.⁶⁹

... we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.⁷⁰

Having delivered its decision in essence, the court then undertook to analyze the contention of the plaintiff that the First Amendment commanded a complete cleavage of church and state. The suggested interpretation, they

⁶⁹ Everson v. State Board, supra, p.16.

⁷⁰ Ibid., p.17.

pointed out, when pressed to its ultimate conclusion, could deprive citizens in the pursuit of their religious activities of all public services. The policeman directing traffic that they might enter their churches for services, the firefighter protecting church property, the municipal street, water, and sanitation departments, and other state supported public service agencies would all act illegally when they contributed their services to a religious group.

Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it more difficult for them to operate. But such is obviously not the purpose of the First Amendment. That amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.⁷¹

The court actually settled this case on the principle that, the State of New Jersey had the inherent right to enact social welfare legislation; but that once it had enacted such legislation, it could not, without violating the Fourteenth Amendment, exclude any segment of its population from the benefits of such legislation by virtue of a religious distinction.

Having given its decision, without being forced to go into the essence of the First Amendment, the Court then undertook gratuitously to give at least a partial interpretation of the First Amendment. This was somewhat of a

⁷¹ Everson v. State Board, *supra*, p.18.

departure from customary procedure, which is to consider only a situation specifically before it, and to refuse ruling on a hypothetical situation.

This opinion, freely offered, in the eyes of at least one of the justices,⁷² came back to haunt the court five years later.

The decision handed down in 1947 in the case of McCullum v. School District No. 71⁷³ was one of the most controversial of modern times. The Board of Education of School District No. 71, in Champaign County, Illinois, adopted a program in 1940 by which clergymen of the Protestant, Catholic, and Jewish faiths entered the school buildings once each week for the purpose of instructing in the tenets of their respective religious faiths. Religion classes were of thirty minutes duration and were arranged to coincide with the study periods of the schools. Upon the written request of parent or guardian, pupils were released from their secular classes during that time to attend religious classes in the religion of their choice. Pupils whose parents did not choose to have them attend a religious class remained behind in the regular secular classes.

⁷² Everson v. State Board, *supra*, p.18.

⁷³ McCullum v. School District No. 71, dissenting opinion of Mr. Justice Reed,

The plaintiff, a Mrs. Vashti McCollum, brought action against the Board of Education on the grounds that this "joint public-school religious-group" program violated the First and Fourteenth Amendments to the United States Constitution. The Courts of Illinois upheld the Board of Education and the plaintiff appealed to the United States Supreme Court.

In delivering its decision the court asserted that the facts of the case showed "the use of tax-supported property for religious instruction and the close co-operation between the school authorities and the religious council in promoting religious education".⁷⁴ The decision went on to say that, under the circumstances, the compulsory attendance law of the State of Illinois was undoubtedly an aid to religious education, and that there was, beyond all question, "a utilization of the tax-established and tax-supported school system to aid religious groups to spread their faith".⁷⁵ The court then said that the program in question fell "squarely under the ban of the First Amendment".⁷⁶ The court explained its decision by citing Everson v. State Board of Education,

⁷⁴ McCollum v. School District No.71, 333 US 207.

⁷⁵ Ibid., p.210.

⁷⁶ Ibid.

Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect "a wall of separation between church and state".⁷⁷

Criticism of this decision stemmed chiefly from the interpretation of this Jeffersonian phrase, the "wall of separation" between church and state. The dissenting opinion of Mr. Justice Reed examines this interpretation and contrasts it with the spirit of the decision handed down in Everson v. The State Board of Education. In view of the controversy which this decision provoked portions of his dissenting opinion are being included in Appendix 2.⁷⁸

Four years later, Zorach et al. v. Clausen et al. posed another situation in which the court was forced to determine to what extent the church and the state might co-operate.

The Board of Education of the City of New York established a released time program for the religious education of public school children. Under the provisions of the program, pupils were, at the request of parents, released from the public schools one hour early one day a week to attend religious classes in the faith of their choice.

⁷⁷ McCullum v. School District No. 71, *supra*, p. 12., citing Everson v. State Board of Education, 330 US 15, 16.

⁷⁸ McCullum v. School District No. 71, opinion of Mr. Justice Reed, pp 238-256.

Zorach and others sought a review of the action on the grounds that the program violated the First Amendment to the Constitution of the United States by placing the weight and influence of the public schools behind a program of religious education. He further charged that public school teachers were directly involved in the program by virtue of the fact that they kept a check on the pupils released, and confirmed the attendance of said pupils at the religious schools. He maintained that the regular classes came to a virtual halt when the students left for the religious school. "The school", he said, "is a crutch on which the churches are leaning for support in their religious training; without the co-operation of the schools this 'released time' program, like the one in the McCollum case, would be futile and ineffective".⁸⁰

The court, in announcing its decision, declared that the program was unconstitutional only if the City of New York had prohibited "the free exercise of religion", or had made a law "respecting an establishment of religion" in violation of the letter or the spirit of the First Amendment.⁸¹

Commenting that religious classes were held outside of the school buildings, and that attendance or non-attendance at religious instructions was a matter of free

⁸⁰ Zorach et al. v. Clausen et al., 340 US 306.

⁸¹ Ibid., p.309.

choice on the part of parent and the pupil, the court said that it would take "obtuse reasoning to inject any issue of the 'free exercise' of religion into the ... case".⁸²

Moreover ... the court stated ... we do not see how New York by this type of "released time" program has made a law respecting an establishment of religion within the meaning of the First Amendment ... There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall (be) no concert, or union, or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render fire or police protection to religious groups. Policemen who helped parishioners into their places of worship would violate the constitution. Prayers in our legislative halls, the appeals to the Almighty in the message of the Chief Executive; the proclamation making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths -- these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies, would be flouting the First Amendment. A fortuitous atheist or agnostic could even object to the supplication with which the Court opens each session: "God love the United States and this Honorable Court".⁸³

⁸² Zorach et al. v. Clausen et al., p.309.

⁸³ Ibid., p.313.

Contrasting this decision with the decision in the McCollum case, the court in order to make its interpretation clear, said,

In the McCollum case the classrooms were used for religious instructions and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the McCollum case, but we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.⁸⁴

Mr. Justice Jackson dissented strongly against this decision. His analysis of the effect of the *Zorach* decision upon the principles laid down in the McCollum case is presented in Appendix 3.⁸⁵

The net result of these three decisions, *Leveron*, McCollum and *Zorach*, has been to make very clear the thinking of the court that the First Amendment prohibits all participation of the state in the affairs of a church or churches. Exactly what constitutes such participation is not as clear.

Racial Segregation.— In May, 1954, the Supreme Court of the United States handed down a series of decisions concerning the problem of segregation by race in the public schools, which are destined to cause basic changes

⁸⁴ *Zorach et al. v. Clausen et al.*, p.315.

⁸⁵ *Ibid.*, opinion of Mr. Justice Jackson, p.324.

in the educational policies of several states, principally those lying in the southern part of the nation.

Four of the cases, Brown et al. v. Board of Education of Topeka, (Kansas), Briggs et al. v. Elliot et al. (South Carolina), Davis et al. v. County School Board of Prince Edward County et al. (Virginia), and Gebhart et al. v. Belton et al. (Delaware)⁸⁶ reached the court on appeal by the plaintiffs that they were being deprived of equal protection of the laws guaranteed by the Fourteenth Amendment. In the first three cases deprivation was by reason of the refusal of public school authorities to admit negro students to the same schools which white children attended. In the fourth case, the Delaware case, negro students were being admitted to the public schools on an equal basis with the white pupils, but it was intimated that they were being so admitted only because the schools for negroes were inferior, and that as soon as they should be made equal to the "white" schools, negroes would be forced to attend them.

The states justified the policy of segregation on the basis of the "separate but equal facilities" doctrine enunciated by the Supreme Court in the case of Plessy v. Ferguson in 1896.

⁸⁶ Brown et al. v. Board of Education of Topeka, Briggs et al. v. Elliot et al., Davis et al. v. County School Board of Prince Edward County et al., Gebhart et al. v. Belton et al.; 347 US 483 (all included in one decision).

⁸⁷ Plessy v. Ferguson, 163 US 537.

In reaching its decision the court reviewed the history of the Fourteenth Amendment, tracing its letter and its spirit from the time of its adoption in 1868, through the Plessy v. Ferguson decision, with its "separate but equal facilities" conclusion, down to the present time. After pointing out the importance of education to the nation and the individual,⁸⁸ the court posed for itself this question: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority groups of equal educational opportunities?"⁸⁹ The question was answered by the simple statement "We believe that it does".⁹⁰

Citing as precedent Sipuel v. University of Oklahoma,⁹¹ Sweatt v. Painter,⁹² and McLaurin v. Oklahoma State Regents,⁹³ all recent cases in which it had been held that segregation of negroes at the graduate school level was inherently unequal, the court stated that the considerations which applied in these cases

... apply with equal force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts

⁸⁸ Brown v. Board of Education of Topeka, etc., supra, p.493 (quoted in part at page 2 of this thesis, comment of Mr. Chief Justice Warren).

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Sipuel v. University of Oklahoma, 332 US 631.

⁹² Sweatt v. Painter, 339 US 629.

⁹³ McLaurin v. Oklahoma, 339 US 637

and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the education and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."⁹⁴

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.⁹⁵

The foregoing clear-cut decision met the question of segregation in the public schools head-on. It ended a system of education which has prevailed in most of the southern states since the Civil War, and in so doing it

⁹⁴ Brown v. Board of Education of Topeka, *supra*, p. 494.

⁹⁵ Ibid., p. 495.

posed a serious problem of readjustment for these states. Realizing the difficulties which the states will encounter in effecting this reconversion, the Court has not as yet set a deadline date for the completion of said reconversion.

A companion case, Bolling et al. v. Sharpe et al.⁹⁶ was decided in the same judgement, but was given separate treatment. Arising in the District of Columbia, where the Fourteenth Amendment is inapplicable, this case was decided along much the same lines as its companions, excepting that both plea and decision were based on the "due process" clause of the Fifth Amendment.⁹⁷ Summarizing briefly its reasoning in the foregoing cases, the Court said, "In view of our decision that the Constitution prohibits the states from maintaining socially segregated schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."⁹⁸

b) The Supreme Court of Massachusetts. - The Supreme Court of Massachusetts, like the United States Supreme Court, has acted in educational matters only in cases where a personal right is involved, where there is improper usurpation of authority, or where there is dereliction of statutorily imposed duty.

⁹⁶ Bolling et al. v. Sharpe et al., 347 US 483.

⁹⁷ The Constitution of the United States, Article of Amendment V. (which places the same restriction on the Federal Government that the Fourteenth Amendment places on the state governments.)

⁹⁸ Bolling v. Sharpe, supra, p.500.

When the constitutionality of the statute⁹⁹ which compels the town to provide the financial support requested by the school committee for the schools was challenged, on the grounds that the nature of the statute gave to the courts functions of an administrative as well as a judicial nature; the court answered,

It (the statute) does not purport to transfer to the judiciary any question of expediency as to appropriations or to require the court to enter into consideration of municipal policy or the financial administration of a city or town. The Court, however, is required to determine whether the requirements of (the statute) have been met.¹⁰⁰

The Courts will not interfere in matters of policy. - On many occasions, the courts have been petitioned to overrule the decision of a school committee in situations involving matters of policy exclusively, but it has never done so.

The cases of Barnard v. Shelburne¹⁰¹ and Watson v. Cambridge¹⁰² both involving alleged unlawful exclusion from the public schools are examples of the application of this principle. In Barnard v. Shelburne the trial judge charged

⁹⁹ General Laws of Massachusetts (Ter. Ed.) Chapter 71, Section 34, as Amended by Acts of 1939, Chapter 294. (The 1939 amendment radically changed the penalty for failure on the part of the municipality to support the public schools, thus precipitating the above dispute.)

¹⁰⁰ Hayes v. Brockton, 313 Massachusetts 645.

¹⁰¹ Barnard v. Shelburne, 216 Massachusetts 19.

¹⁰² Watson v. Cambridge, 157 Massachusetts, 561.

the jury to answer two questions,¹⁰³ the first question being "Was the plaintiff excluded from the public schools of the town of Shelburne?". The second question was, "If the jury answer that he was excluded from the public schools, what was the ground for exclusion?". The jury answered to the first question, "He was"; and to the second, "His standing in school not being high enough, such facts however, in the minds of the jury not sustained by the evidence". When the decision was brought to the Supreme Court for review, the judges said

It would seem from the latter part of the answer of the jury to the second question that the trial proceeded upon the theory that the jury had power to pass upon the inquiry whether in fact the plaintiff was delinquent in his studies, and thus revise the conclusion of the school committee in this respect. But that was a matter plainly outside their province.¹⁰⁴

In Watson v. Cambridge¹⁰⁵ the court pointed out that, since the general supervision of the public schools was imposed upon the school committee by statute,¹⁰⁶ the question of whether the presence in a school of any individual was detrimental to the welfare of the school was one which the committee must answer; and that as long as they

¹⁰³ Barnard v. Shelburne, *supra*, p. 21.

¹⁰⁴ Barnard v. Shelburne, *supra*, p. 22.

¹⁰⁵ Watson v. Cambridge, *supra*.

¹⁰⁶ Acts of 1886, Chapter 236, Section 2, (Power lies now in General Laws of Massachusetts (Ter. Ed.), Chapter 71, Section 34.)

honestly attempted to discharge their statutory obligation, no "jury composed of men of no special fitness to decide educational questions should ... be permitted to say that their answer is wrong".¹⁰⁷

An unusual case in which the court was petitioned to change a method of classroom procedure was presented to the court as a tort action against the town of Wakefield for the alleged unlawful exclusion of a high school pupil. In Wulff v. Wakefield¹⁰⁸ the plaintiff was a member of a bookkeeping class. The clerical work of correcting assignments in the class was delegated by the teacher to a pupil who compared the written answers of the class with the answers in a "Key Book" and then marked them "right" or "wrong". When an answer of the plaintiff was marked "wrong" she worked on the problem for ten days and then submitted it again. Once again the answer was marked "wrong". After working for another ten days on the problem, she submitted the same answer to the teacher who said that it was "right". The parents of the plaintiff, explaining that their daughter had suffered much mental anguish and concern because of the error of the pupil corrector, requested first the principal, then the superintendent, and finally the school committee to direct that only the teacher would correct the work of their daughter. At the same time they

¹⁰⁷ Watson v. Cambridge, *supra*, p.563.

¹⁰⁸ Wulff v. Wakefield, 221 Massachusetts 427.

protested in general, the correcting procedure used in the class. When the two officials and the committee refused to grant his request, the father then requested the committee to excuse his daughter from attending the bookkeeping class. This request was also refused. Absenting herself from the class without authorization, the girl was threatened with suspension. Remaining obdurate, she was suspended. Her father then petitioned the court to reinstate his daughter, and to order that the method of correcting used in the bookkeeping class be changed. In ruling on the case, the court said,

The real and vital question is not whether the plaintiff is guilty of misconduct in refusing to attend her class, but whether a parent has the right to say a certain method of teaching any given course of study shall be pursued. The question answers itself. Were it otherwise, should several parents hold diverse opinions all must yield to one or confusion and failure follow. The determination of the procedure and the management and direction of pupils and studies in this Commonwealth rests in the wise discretion and sound judgement of teacher and school committee, whose action in these respects is not subject to the supervision of this court.¹⁰⁹

Although holding fast to the principle that the court had no function to interfere with the discretionary act of a school committee discharging its statutory obligation, the court, in this case, could not help commenting that the practice of pupil correction, although possibly unavoidable under the circumstances, was inadvisable and fraught with danger.¹¹⁰

¹⁰⁹ Wulff v. Wakefield, p.429.

¹¹⁰ Ibid., p.429.

The Trends Established by Key Decisions.— As the decisions of the Supreme Court of the United States have established principles which have guided the actions of the school systems of the several states, so too have certain key decisions of the Supreme Court of Massachusetts guided the legislature of the Commonwealth and its agents in the conduct of education in the Bay State.

Since the implications of these decisions will be developed fully in succeeding chapters, a detailed discussion of them at this point would seem to be inappropriate.

However, decisions in key cases have developed three clearly discernible trends in the educational practices of the state, and an enumeration of these trends would seem to be demanded here. The important trends are these:

1. Education is a function of the state and not of the local government.¹¹¹
2. The powers of local school committees have been very broadly defined.¹¹²

¹¹¹ Leonard v. Springfield, 241 Massachusetts 325; Decatur v. Peabody, 251 Massachusetts 82; School District v. Taylor, 83 Massachusetts 49; Witherington v. Eveleth, 24 Massachusetts 106; Jewell v. Abington, 84 Massachusetts 592; Wood v. Medfield, 123 Massachusetts 545; Rawson v. Spencer, 113 Massachusetts 40; Ring v. Woburn, 311 Massachusetts 679; Gorman v. Peabody, 312 Massachusetts 569.

¹¹² Cotter v. Chelsea, 329 Massachusetts 314; Averell v. Newburyport, 241 Massachusetts 333; Spilly v. Woburn, 94 Massachusetts (12 Allen) 127; Leonard v. Springfield, 241 Massachusetts 325; James v. Mayor of Fall River, 319 Massachusetts 74.

3. The right to education is not an unqualified right, but a right which imposes upon the beneficiary certain obligations.¹¹³

Summary

While the founding fathers of the American Republic saw fit, in their wisdom, to reserve to each respective state the right to educate its citizens, the Federal government has always evinced a healthy interest in the problems of education.

The people of the Commonwealth of Massachusetts through the state constitution designated the state legislature as its agent in the conduct of education. The legislature has from the earliest days of the Republic been aware of its responsibility in educational matters and has exercised the power, thus inherently granted to it by the Constitution, with vigor. It has delegated much of the responsibility for the conduct of the schools to various agents; notably, to the local school committee.

The Supreme Court of the United States has jealously guarded the constitutional rights of individuals and corporations; and through its decisions, notably those interpreting the First and Fourteenth Amendments to the

¹¹³ Russell v. Lynnfield, 115 Massachusetts 365; Mulff v. Wakefield, 221 Massachusetts 427; Carr v. The Inhabitants of Dighton, 229 Massachusetts 304; Sherman v. The Inhabitants of Charlestown, 62 Massachusetts (8 Cushing) 160; Spear v. Cummings, 40 Massachusetts (23 Pickering) 224.

Constitution of the United States. has defined the limits of power which may be exercised by the legislature of the Commonwealth, and the respective legislatures of her sister states.

The role of the Supreme Court of the Commonwealth of Massachusetts in helping to form the educational policies of the Commonwealth which has been intimated here will be developed more fully in succeeding chapters.

CHAPTER II

THE NATURE AND LEGAL STATUS OF THE SCHOOL COMMITTEE

It is the purpose of this chapter to establish the nature and the legal status of the school committee as it exists today. However, to understand fully the character of the committee as it is today, it is essential to know something of the various agencies from which it has evolved.

The school committee, which in its present form has existed for approximately seventy years, is the culmination of three centuries of growth. During this time various agencies managed the affairs of the public schools of the Commonwealth. Throughout all of this period there was some resemblance of the controlling bodies to the present school committee. At times this likeness was very marked; at other times it was scarcely recognizable.

The first portion of this chapter will attempt to survey the evolutionary process from which the contemporary school committee has emerged. The remainder of the chapter will concern itself with the legal nature and status of the present school committee and of the

men who constitute its membership. A special emphasis will be placed upon the relationship of the school committee to the municipality, a relationship which has been the source of much litigation during the past half century.

1. The Evolution of the School Committee

The Puritans who settled in Massachusetts Bay Colony were a relatively well educated group of people.¹ Consequently, from the earliest times, they were keenly aware of the need for an educated citizenry, if the new colony were to flourish.

Six years after the establishment of the colony in 1630, near what is now the city of Boston, they founded Harvard College.² It would be difficult to over-emphasize the role of this school in the development of the Commonwealth.

A sufficient indication of the esteem in which it was held by the founding fathers of the Commonwealth and their descendants may be drawn from the fact that Part II, Chapter V, Section I, of the Constitution of 1780³ is devoted exclusively to the preservation of the institution known as Harvard College.

¹ Albert Bushnell Hart, Editor, The Commonwealth History of Massachusetts, Vol. First, Colony of Massachusetts Bay, 1605-1689. New York, The States History Co., 1927-28, pp 21-22, 53-54, 337-339.

² Ibid., p. 284.

³ The Constitution of the Commonwealth of Massachusetts, Part II, Chapter V, Section I.

Harvard College, as such, is not pertinent to this thesis, which concerns itself with the public schools of the Commonwealth. However, it is a symbol, and indication, of the regard in which education has been held in the Commonwealth from the earliest days of the Colony.

Early Legislation.- An excellent example of this regard for learning is found in the first colony-wide educational legislation. The law of 1648 expressed in its preamble an alarm over the fact that many parents and masters were showing great neglect "in training up their children in learning, + labor + other imployments which may be proffitable to the common wealth".⁴ The said law placed upon "ye chosen men" (the selectmen) of every town the obligation of checking upon parents and masters to determine whether the parents were providing properly for the education of their children, "especially of their ability to read + understand the principles of religion + the capital lawes of their country".⁵ The selectmen in the enforcement of this law were empowered to levy fines upon negligent parents and in extreme cases to take the children from such parents and to turn them over to masters who would see to their education.

4 Nathaniel B. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England, Vol. 2 1642-1649, Boston, William White, 1853, p.6.

5 Ibid., p.7.

The original law of education then, in its essence, left the training of the young in the hands of the parents; but the enforcement of the law was delegated to the selectmen.

Five years later the Legislature, fearful that learning might be "buried in ye grave of our Fathers in ye churches",⁶ ordered that each town as it increased to include 50 householders should appoint a teacher "to teach such children as shall resorte to him to write and read".⁷ It further provided, that as each town increased to one hundred householders, it should "set up a gramer schoole, ye masr. thereof being able to instruct youth as far as they may be fitted for ye University,".⁸ This new law took education from the hands of the parents and placed it in the hands of the town. Although it did not indicate a specific agency to oversee the education of the young, by inference, it placed it in the hands of the selectmen of the town.

This inferential authority was made explicit in the law of 1654⁹ which delegated to the selectmen the authority to select teachers for the town schools.

6 Shurtleff, op.cit., p.7.

7 Ibid., p.203.

8 Ibid., p.204.

9 Nathaniel B. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England, Vol.3, 1644-1657, Boston, William White, 1854, pp.343-344.

Originally, then, the control of education had been placed in the hands of the parents, but from the earliest days the selectmen of the town had played an important role in the conduct of education.

The position of authority of the town selectmen in the affair of education remained the same for about fifty years.

This power was tempered considerably by an act of the legislature in 1701,¹⁰ which made the local minister together with the ministers of two neighboring towns, the agents from whom a prospective grammar school master must obtain a certificate of competency. This new act for all practical purposes established a coalition of ministers and selectmen to oversee the welfare of the public schools.

A Shifting Population.- From the time of the settlement of the Colony into the early years of the eighteenth century the population, primarily for security against Indian attacks, had tended to cluster in a compact group around the center of the town. Each town had been able to meet its educational obligations by maintaining a center-town school or schools.

10

Acts and Resolves of the Province of Massachusetts Bay, Provincial Laws, 1701-02, Chapter 10, Section 2.

As the frontier of the state moved westward and the danger from Indian attack ceased to be a factor, families moved further and further from the town proper.

This dispersion of the population meant that many pupils no longer had access to the town school. An effort to meet this new situation was the so-called "travelling school". The master would travel to schools located at different points within the township and would give instruction for a certain period of time in each. The length of the period was usually determined by the number of taxpayers whose children attended each school. Consequently school might "keep" in one district for six months and in another for six weeks. The defects of this plan were soon obvious. No one was satisfied, and the plan was quickly discontinued.¹¹

During the seventh decade of the century, parishes and precincts began to maintain schools. This was some improvement upon the central school, but since churches tended to be located in the more heavily populated areas, easy access to educational opportunities was still denied to many. This plan continued to be popular throughout the war years and remained in force until 1789. The ministers and precinct leaders were the chief overseers of these schools.¹²

¹¹ George Henry Martin, The Evolution of the Massachusetts Public School System. New York, Appleton, 1904, pp 74-78.

¹² Fourth Annual Report of the Secretary of the Board of Education, Boston, Dutton & Wentworth, 1841, p 17.

School Districts.- In 1789 the Legislature, dissatisfied with existing educational conditions, faced the problem of shifting population squarely by enacting a law which permitted the individual towns to set up and establish the limits of school districts within their boundaries.¹³

This law had far-reaching effects. With its enactment, the state established a new political subdivision, the school district. Where previously the town had constituted one political agency of the state, now, when it divided itself, under the authority of the statute, into school districts, each of the newly created districts became a political entity in itself.

As such they took on a quasi-corporate status which included the power to sue and to be sued; to buy, to sell, and to hold land; to negotiate contracts; and to perform those other corporate acts which were essential to the fulfillment of their statutory mandate.¹⁴

That the school district possessed inherent corporate powers was challenged in the case of the Inhabitants of the Fourth School District of Rumford v. Wood, in 1816.¹⁵

¹³ Acts of Massachusetts, 1789, chapter 19.

¹⁴ School District No. 1 of Stoneham v. Richardson, 40 Massachusetts, (23 Pickering) 62; First Parish of Medford v. Inhabitants of Medford, 38 Massachusetts (21 Pickering) 199; Baker v. Wood, 9 Massachusetts 419; Stoughton v. Atherton, 53 Massachusetts (12 Metcalf) 105; Lombard v. Trask, 50 Massachusetts (9 Metcalf) 557; Bailey v. Kilburn, 51 Massachusetts (10 Metcalf) 176; Hill v. The City of Boston, 122 Massachusetts 749.

¹⁵ Inhabitants of the Fourth School District of Rumford v. Wood, 13 Massachusetts, 192.

The defendant, Wood, refused to honor a contract under terms of which he had agreed to erect a schoolhouse on land which the district had leased from him. When the district brought suit against him, he based his defense on the allegation that the school district was not a corporation and consequently had no power to sue.

The court, in ruling for the plaintiffs, stated that school districts "may be considered under our institutions as quasi-corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage ... The same may be said of all the numerous corporations which have been from time to time created by various acts of the legislature; all of them enjoying the power which is expressly bestowed upon them; and perhaps in all instances where the Act is silent, possessing by necessary implication, the authority which is requisite to execute the purposes of their creation".¹⁶

This decision made explicit what had been the inherent, but untested, status of the district -- the status of a quasi-corporation with that power which is essential to all corporations, the power to sue and the liability to be sued.

From 1789 to 1826 the educational affairs of the school districts were carried on by committees elected

¹⁶ Inhabitants of the Fourth School Districts in Rumford v. Wood, 13 Massachusetts 199.

or appointed at town meeting for general educational supervision or for specific assignments.

It is important to remember at this point that the Act of 1789, which had authorized the formation of school districts was a permissive act. No city or town was obliged to district itself, and many, principally the larger cities and the more compact towns, did not do so. These communities continued to operate their schools under the coalition committees of ministers and selectmen established through the Act of 1701;¹⁷ or under the precinct-parish system of the 1770 period.

The School Committee.- Both of these systems were unwieldy. Consequently, in the early years of the nineteenth century several towns appointed special committees to supervise the schools. On June 20, 1826, the legislature passed an act giving these existing committees legal status¹⁸ and on March 10 of the following year, a law was enacted making it obligatory upon every town to choose "a board of school committee, which shall have the general charge and superintendence of all the public schools in town".¹⁹

¹⁷ Acts and Resolves of the Province of Massachusetts Bay, Provincial Laws of 1701-02, Chapter 10, Section 2.

¹⁸ Laws of Massachusetts, 1826, Chapter 143, Section 5.

¹⁹ Revised Statutes of Massachusetts, Chapter 23, Section 1.

The same chapter also provided that every town, which had divided itself into school districts, should elect, together with the town school committee, one man from each district to be designated as the prudential school committee for that district. The prudential committee was to

keep the school house of such district in good order, at the expense of the district, provide fuel and all other things necessary for the comfort of the scholars therein; select and contract with a school teacher for the district; and give such information and assistance to the school committee of the town as may be necessary to aid them in the discharge of the duties required of them.²⁰

These Laws, for the first time, vested the control of the public schools in the hands of men specifically chosen by the electorate for that task and unhampered by the weight of any other municipal duties.

For the cities and towns which had not adopted the district system, these acts represented a marked advance toward the solution of the problem of Public School Administration. For the school district towns, it placed education into the hands of people elected especially for that purpose, which was good; but, unfortunately, it divided the authority between the town committee and the prudential committee. This led to confusion.

²⁰ Revised Statutes of Massachusetts, Chapter 23, Section 25.

The new legislation, and statutes enacted in the immediately succeeding sessions of the legislature, encompassed many logical discrepancies. For example, the prudential committee could select a teacher,²¹ but the town committee could discharge him;²² the town committee had "general charge and superintendence of all the public schools in town",²³ but the prudential committee could select and supervise the operation of the school houses.²⁴

In actual practice the prudential committee played the greater role in managing the schools of the district.

One of the most interesting cases to arise from this confusion was the case of "The Inhabitants of the Ninth School District in Weymouth v. Loud et al."²⁵ This was a tort action brought against the defendants who were members of the town school committee for allegedly "breaking and entering" the school house of the district.

In July the voters of the district instructed their prudential committee to close the district school

Section 25. ²¹ Revised Statutes of Massachusetts, Chapter 23,

²² Acts of Massachusetts, 1844, Section 10.

Section 10. ²³ Revised Statutes of Massachusetts, Chapter 23,

²⁴ Ibid., section 25.

²⁵ Inhabitants of the Ninth School District in Weymouth v. Loud et al., 78 Massachusetts (12 Gray) 61.

for one day so that the teachers might attend a picnic of the Sons of Temperance, an organization of which they were members. During the previous March, the school committee of the town had passed a resolution to the effect that "no school shall be suspended during any school day without the permission of the Committee having charge of the same".²⁶

In compliance with the vote of his constituents, the prudential committee-man took the key from the teachers on the day prior to the picnic and locked the school; and, at the same time authorized the teachers to attend the picnic.

Since no request had been made of the town committee to suspend the school, Loud and others, constituting a majority of the town committee requested the key, that they might open the school to teachers and pupils for classes on the day of the proposed suspension. When the prudential committee-man refused to give them the key, they broke a window, forced entrance, and opened the school to such teachers and pupils as were present.

The tort action followed.

The court ruled for the defendants pointing out that the voters of the town had no authority to instruct the prudential committee to perform an act which was

²⁶ Inhabitants of the Ninth School District in Weymouth v. Loud et al., supra, p.62.

reserved by statute to the school committee and the prudential committee. The court went further and analyzed the powers of the prudential committee, as enumerated by section 25 of Chapter 23.²⁷ Finding no authorization to the prudential committee to suspend school, they adjudged that this power belonged to the town committee under their mandate to maintain "general charge" of the schools.²⁸

The sage of the school districts would constitute a thesis in itself. It suffices here to say that the experiment was not satisfactory. Educational opportunity and the burden of taxation were grossly unequal from district to district within the same township. On three occasions between 1826 and 1882 the legislature enacted and repealed legislation intended to discourage or discontinue the system.²⁹

The emergence of the modern school committee. - The law of 1882 abolished the school districts permanently and authorized the towns to

... forthwith take possession of all the school-houses, land, apparatus and other property owned and used by the several school districts therein, which said districts might lawfully convey ...³⁰

27 Revised Statutes of Massachusetts, Chapter 23, Section 25.

28 Ibid., Section 10.

29 Acts of Massachusetts, 1853, Chapter 153; repealed by Acts of Massachusetts, 1857, Chapter 254. Acts of Massachusetts, 1859, Chapter 252; repealed by General Statutes of Massachusetts (1859), Chapter 182. Acts of Massachusetts, 1869 Chapter 110, 423, rendered powerless by Acts of Massachusetts, 1870, Chapter 196.

30 General Laws of Massachusetts 1882, Chapter 219, Section 1.

and placed the general charge of the public schools in the hands of the town school committee.

This piece of legislation was followed by a second act in the same year which provided that "any city or town

... (should) ... have the same right to prosecute or defend any action, suit or proceeding commenced, or which may be commenced, by, or in the name of, or against any abolished school district which existed within such city or town, as though such action, suit or proceeding were brought by or against such city or town."³¹

The school committee which emerged from the legislation of 1882 had many of the characteristics of the town committee. However, it did not suffer the handicap of divided power which had been inflicted upon its predecessor. In the one committee, now, was found all of the powers, as regards the management of education, which had previously been divided between the town committee and the prudential committee. On the other hand the new school committee could exercise none of the quasi-corporate functions of the school district. It could not levy taxes; buy, hold, or convey land; sue or be sued; or negotiate contracts, except as authorized by statute.

2. The Nature and Legal Position of the School Committee and Its Members

The school committee which has regulated the affairs of the public schools from 1882 to the present

³¹ General Laws of Massachusetts, 1882, Chapter 1222, Section 1.

time, although chosen by the local electorate, is an agency of the state rather than of the local government. It possesses those powers which can be implied from granted powers.³² School committee members, since their duties are public in their nature and concern all citizens of the Commonwealth as well as their local constituents, are public officers.³³

A state agency. - The status of the school committee as a state agency has seldom been directly questioned. However, the implications of this status have frequently been a cause of litigation.

An early case which involved the principle that the school committee acts under authority of the state rather than the local government was the case of the Ninth School District of Weymouth v. Loud et al., discussed at page 56 of this thesis. Here the court clearly pointed out that the "direction of the affairs of a school

32 Flint v. McCabe, 299 Massachusetts 173, p.178; Leonard v. Springfield, 241 Massachusetts 325.

33 "Without attempting an exhaustive definition of what constitutes a public office, we think that it is one whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens irrespective of party, are interested, either as members of the entire body politic, or of some duly established division of it." Benjamin W. Pope, Legal Definitions, Vol.2, Chicago, Callaghan, 1920, p.1302, citing Attorney General v. Drohan, 169 Massachusetts 535; citing Brown v. Russell, 166 Massachusetts 14.

is not by law given to the district, but to the prudential committee and the school committee of the town"³⁴ who derive their authority not from the local electorate but from the legislature through statute.

The most emphatic utterance of the court defining the position of the committee as a state agency is found at page 296 of Morse v. Ashley:

... in the end their own (the school committee's) decision when reached is the decision of the Commonwealth, and it is to control.³⁵

Public Officers. - From the fact that the school committee is a state agency, exercising a portion of the sovereign power, it follows naturally that committee members are public officers.³⁶ In a case involving a suit against the City of Quincy for an alleged injury suffered on school property, the court emphasized that "the school committee is a board of public officers whose duties are prescribed by statute, and in the execution of its duties the members act not as agents of the municipality, but as public officers".³⁷

³⁴ Ninth School District, Weymouth v. Loud et al., 78 Massachusetts (12 Gray) 63.

³⁵ Morse v. Ashley, 193 Massachusetts, 396.

³⁶ B. W. Pope, Legal Definitions, *supra*, p.1302.

³⁷ Warburton v. City of Quincy, 309 Massachusetts 114.

This categorical classification of school committee members as public officers is illustrative of the consistent thinking of the court in a series of related decisions.³⁸

The Authority of Individual Committee Members.-

The courts of the several states have, almost without exception, held to the principle that school committee members are public officers who perform their statutorily imposed duties as a board. As individuals they have no authority.³⁹

The courts of the Commonwealth, however, have delivered contrary opinions in the two direct challenges to this principle which have been brought to them for adjudication.⁴⁰ In 1865 the City of Lowell appropriated a sum of five hundred dollars for the maintenance of an evening school. A local minister was appointed superintendent of the school. Encountering difficulty with a group of individuals who were not students at the

³⁸ McKenna v. Kimball, 145 Massachusetts 555; Hill v. City of Boston, 122 Massachusetts 344; Feitano v. City of Haverhill, 309 Massachusetts 118; Sweeney v. City of Boston, 309 Massachusetts 106.

³⁹ McBee v. School District No. 46, Clatsop County, 163 Oregon 121; State v. School District No. 29, Flathead County, 102 Montana 521; Davis v. School District No. 1, 81 Michigan 214.

⁴⁰ Huse v. City of Lowell, 92 Massachusetts (10 Allen) 149; and Russell v. Inhabitants of Lynnfield, 116 Massachusetts 365.

school, but who consistently congregated near the door of the schoolhouse disturbing the classes being held therein, he, with the permission of the mayor, who was a member of the school board, engaged one, Huse, to maintain order outside of the building while classes were being held. When Huse submitted a bill for his services, the city refused to honor it, contending that he was not engaged by the school committee as a whole and that, consequently, there was no valid contract for which it was liable. Huse brought action against the city for his wages.

The court, in delivering its opinion, said,

He (the night superintendent) deemed it necessary that the plaintiff should perform the service, and requested him to do so. He also applied to the Mayor, who was a member of the school committee, and the mayor designated the plaintiff as a proper person to employ and did employ him⁴¹... the plaintiff is entitled to recover for the service ... rendered.⁴²

A similar decision was handed down in the case of Russell v. the Inhabitants of Lynnfield,⁴³ a case involving a tort action for the alleged unlawful exclusion of the plaintiff from the public schools of the respondent town. One Jacob B. Hood, a member of the school committee had made a rule to the effect that any scholar upon being tardy a second time, should be sent from the school to

41 Huse v. Lowell, *supra*, p.150.

42 Ibid., p.148.

43 Russell v. The Inhabitants of Lynnfield, 116 Massachusetts 365.

his office. When the plaintiff was tardy for a second time, the teacher sent her from the school and ordered her to report to Mr. Hood. Disobeying the order, the girl went directly to her home instead. As a consequence of her disobedience, she was suspended until such time "as she will conform to the rules". The plaintiff sought to recover for "unlawful exclusion" contending that the rule under which she had been suspended had never been incorporated into the rules of the school committee, but was, rather, the ruling of one committee member and consequently invalid.

Investigation showed that the rule had never been formally voted by the whole committee. However, the members of the committee testified that, at a meeting held for another purpose, Hood had mentioned the new rule to them and each had given his approval.

In ruling for the defendants the court pointed out that the statutes gave general charge of the public schools to the school committee and required them to keep a record of their "votes, orders and proceedings".⁴⁴ "But this does not imply", said the court, "that all rules and orders required for the discipline and good conduct of the schools shall be matters of record with the committee,

⁴⁴ General Statutes of Massachusetts, Chapter 38, sections 16, 22.

or that every act in regard to the management of each school in these respects should be authorized or confirmed by formal vote. It would be practically impossible sufficiently to provide for such matters by a system of rules, however carefully prepared and promulgated. Such must necessarily be left to the individual members of the committee and to the teachers of the several schools."⁴⁵

The only modern case concerning the authority of individual committee men involved promises and assurances given by committee members rather than a strict contract and was resolved on that basis. In Downey v. Lowell⁴⁶ the plaintiff had served for eight years as principal of an elementary school in the city of Lowell. When, in June 1937, the school was closed for reasons of economy, she was transferred to another elementary school as a classroom teacher. Several members of the school committee promised her informally that she should have the next elementary school principalship to become available in the city. In 1938 two such vacancies occurred, and she was appointed to neither position. She petitioned the court for a writ of mandamus to require the school committee to restore her to the position of principal of a grammar school.

⁴⁵ Russell v. Lynnfield, *supra*, p.366.

⁴⁶ Downey v. The School Committee of Lowell, 305 Massachusetts 329.

In denying her petition the court said that since no law had been violated and no statute had made good faith essential to valid action, the disregard of "previous assurances given by ... (the committeemen) ... or their predecessors" did not entitle the petitioner to relief from the court.⁴⁷

Although this decision does not deal directly with a formal action of a committee member, it leads one to conjecture as to whether the courts of the Commonwealth, if faced with such an official action, would uphold decisions made almost a century ago or would follow the decisions of her sister states voiding the acts of individual school committee members.

The Majority May Do Legal Acts.- While the above question must remain unsettled until the courts are forced to rule on the matter, the principle is well established that a majority of the school committee may do legal acts when the minority is not present, providing that the minority is warned that a meeting is to be held.

A Quincy attorney was engaged by the Center School District of that city to prosecute a series of trespass cases.⁴⁸ Upon the completion of his assignment he presented the district with a bill for his services. The district, which had not wholly favored the prosecutions,

⁴⁷ Downey v. Lowell, supra, p.332.

⁴⁸ Kingsbury v. Center School District in Quincy, 53 Massachusetts (12 Metcalf) 99.

refused to honor his bill, on the grounds that he had been hired by two of the members of a three-man committee, and that the third man had been present at none of the meetings which led to his retention. The court ruled that the committee as a board of public officers had the authority to retain an attorney when their good judgment indicated that it was necessary, and that the abstention of the third committee member from the negotiations was no factor, since a majority of the committee might do legal acts, especially after a refusal of the minority to meet with them.⁴⁹ The district was directed to pay the bill.

Similarly, in the case of Toothaker v. Rockland,⁵⁰ a dismissed superintendent, who petitioned the court to reinstate him, based his plea in part upon the fact that, at a special meeting at which charges which led to his dismissal were drafted, only two committee members were present; and that the third member, although notified that a special meeting was to take place, was not informed that such charges were to be drawn. The court ruled that the absence of the third member did not affect the legality of the special meeting, since the two members present constituted a majority, and the third member had been warned, even though at the last hour and by telephone, that the meeting was to take place.

⁴⁹ Kingsbury v. Quincy, supra, p.105.

⁵⁰ Toothaker v. School Committee of Rockland, 256 Massachusetts 592.

Qualifications for Committee Membership.— Any citizen who is eligible to vote in the Commonwealth is qualified to hold public office.⁵¹ The basic requirements are that a candidate be able to read the Constitution of the Commonwealth in English and to sign his name; be twenty-one or more years of age; and be a resident of the Commonwealth for one year and of the community in which he plans to seek office for six months immediately preceding the election.⁵²

These are the requirements for election to any public office. Section 51 of Chapter 71 of the General Laws, however, places a specific restriction on school board membership:

No member of a school committee in any town shall be eligible to the position of teacher, or superintendent of public schools therein, or in any union school or superintendency union or district in which his town participates.⁵³

This law has a double effect. It prevents school committee members from appointing themselves to positions in the public schools; and, at the same time, it bars teachers and superintendents of schools from accepting election to the school committee.

Although the court has never had to deal with a clear-cut case in which a committee member has been

51 The Constitution of the Commonwealth of Massachusetts, Part I, article IX.

52 General Laws of Massachusetts (Ter.Ed.), Chapter 51, section 1.

53 Ibid., chapter 71, section 51.

appointed to the public school staff, or a teacher in good standing has been elected to the school committee, and then attempted to continue to teach in the public schools, two cases within the scope of the statute have arisen.

In Clifford v. The School Committee of Lynn,⁵⁴ the plaintiff had been a teacher in the public schools of that city for sixteen years prior to her dismissal in March of 1927. Alleging that she had been dismissed unlawfully, she petitioned the court for a writ of mandamus to require the school committee to reinstate her to the position of teacher in the public schools of Lynn.

After she had instituted proceedings, and before the case came up for a hearing, in December of 1930, the plaintiff sought and was elected to a position on the school committee of the City of Lynn. The justice dismissed her petition stating that regardless of the legality or lack of it, involved in the original dismissal, the plaintiff, by accepting election to the school committee had rendered herself ineligible to hold the position of teacher. She appealed to the Supreme Court. The Court upheld the ruling of the justice declaring that a judgement for the plaintiff would have to be predicated

⁵⁴ Clifford v. School Committee of the City of Lynn, 275 Massachusetts 258.

not only on an unlawful dismissal, but also on her eligibility to hold the office at the time that the case became ripe for judgement.⁵⁵

Whereas the statute specifically restricts a committee member from holding the position of superintendent of schools or teacher in the same system, a 1925 decision of the Supreme Court expanded the meaning of the statute to include any position under the supervision of the school committee.

In Barrett v. The City of Medford,⁵⁶ the plaintiff, a physician, was appointed to the position of Medical Inspector for the Public Schools of the City of Medford, on a temporary basis, in 1917. His appointment was made permanent in 1920, and he was placed under Civil Service protection. During this period of time and for several years prior to 1917, the plaintiff had been a member of the school committee of the City of Medford. The Mayor deleted from the budget of the school committee for the year 1923, the sum which was appropriated to pay the salary of the plaintiff, on the grounds that by virtue of his status as a member of the school committee he was holding illegally the position of Medical Inspector. The plaintiff continued to serve in his capacity of Medical Inspector without pay until August, 1924, at which time

⁵⁵ Clifford v. School Committee of the City of Lynn, 275 Massachusetts, p.260.

⁵⁶ Barrett v. City of Medford, 254 Massachusetts 384.

he presented the city with a bill for six hundred and sixty dollars for services rendered. When the bill was not honored, he brought suit. In rendering its decision, the court said,

... the duties which he (the plaintiff) is to perform as physician are incompatible with the supervisory duties which, as a member of the committee he should exercise over the incumbent of that office. Consistently he cannot be master and servant.⁵⁷

The court went on to point out that a potentially unwholesome situation was inherent in the situation. Under General Laws, Chapter 71, section 58, the superintendent of schools under the direction of the school committee has the duty to nominate for election all school employees and to make recommendations regarding their duties, salaries and dismissals.

... It is further to be observed that the superintendent of schools may hold his office by the deciding vote of the member whom he may subsequently nominate for school physician, with an accompanying recommendation of a stated salary for the incumbent of that office.⁵⁸

This decision broadens section 58 of Chapter 71 to the extent that no person may hold at the same time a position on the school committee, and the position of public school staff member, in the same community; nor may he be a committee member and, at the same time, an employee of any school system which is affiliated with the one which he helps to direct.

57 Barrett v. City of Medford, 254 Massachusetts 386.

58 Ibid., p.387.

This statute does not prevent any qualified person from being a committee member in one town and a public school employee in another town, where no union of the two school systems exists.

3. The Tort Liability of School Committeemen, School Committees, and Municipalities

In the law an action brought by one party against another for injuries received by the party of the first part due to a negligence of commission or omission on the part of the party of the second part, is known as tort action. Such negligence is classified under three headings: non-feasance, misfeasance, and malfeasance. These terms were defined by the Supreme Court of Massachusetts as follows:

non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all.⁵⁹

On numerous occasions the courts of the several states which form the American Union have been asked to rule on the liability to tort action of school committeemen, school districts, and municipalities. With few

59 Bell v. Josselyn, 69 Massachusetts (2 Gray) 309.

exceptions⁶⁰ they have ruled that in the performance of their public duty these agents are not liable for injuries resulting from the negligence or actions of their officers, agents, and employees.⁶¹

The Common Law.-- This status of non-liability stems from the ancient common law of England which preceded the parliamentary form of government. Under the common law rule the king was liable neither for his own tortious acts nor for those of his agents. The popular enunciation of this principle was found in the expression "the king can do no wrong". The reasoning behind this principle was that no court could have jurisdiction over the king without vitiating the legislative powers of the state.⁶²

60 In California and Washington, school districts are held liable by statute for negligence; Brown v. City of Oakland, 51 California Appellate 2d.150; Walter v. Everett School District No.24, 195 Washington 45. In New York the courts have held school districts liable for tortious acts: Kodetaky v. Board of Education of City of New York, 15 New York State 2d. 107.

61 Leviton v. Board of Education of City of Chicago, 374 Illinois 594; Bruggeman v. Independent School District No.4, Union Township, Mitchell County, 227 Iowa 661; Wallace v. Laurel County Board of Education 587 Kentucky 454; Whitfield v. East Baton Rouge Parish School Board, 23 So.2d 708 (Louisiana); Mellodon v. School District of Philadelphia, 328 Pennsylvania 457; Ward v. School District No.18 of Tillamook County, 157 Oregon 500.

62 Bernard C. Gavit, editor, Blackstone's Commentaries on the Law, Washington, Washington Law Book Company, 1941, pp 110-111, 625.

In the United States, although there is no king, the Federal and State governments, in view of their sovereign status have adapted this dictum to themselves. "The general rule, therefore, is that a state or any governmental agency cannot be sued without its consent."⁶³

The Courts of the Commonwealth.— The courts of the Commonwealth have frequently classified school committee members as a board of public officers who in the fulfillment of their statutory duties act "not as agents of the town but as public officers in the performance of public duties".⁶⁴ Consequently, for non-feasance, or the neglect of a duty which should be performed, committee members are not personally liable. For misfeasance, or improperly doing what they may lawfully do, committee members are not liable for the negligence of their agents.

As to acts of personal misfeasance there seems to be question. In Moynihan v. Todd the court said,

We are of the opinion that the principle which underlies the rule that public officers and other agencies of government are not liable for negligence in the performance of public duties goes no further than to relieve them from liability for non-feasance, and for the misfeasance of their servants and agents. For a personal act of misfeasance, we are of the opinion that a party should be held liable to one injured by it, as well when in the performance of a public duty as when otherwise engaged.⁶⁵

⁶³ Bernard C. Gavit, op.cit., p.625.

⁶⁴ Sweeney v. City of Boston, 309 Massachusetts, 106; Leonard v. City of Springfield 241 Massachusetts 325; Reitano v. City of Haverhill, 309 Massachusetts 118.

⁶⁵ Moynihan v. Todd, 188 Massachusetts 305.

Although this decision does not concern a school committee member, but rather a street commissioner, against whom a charge was brought for misfeasance resulting in personal injury, it seems quite probable that, in deciding a school committee issue, the court would be forced to consider this prior opinion.

In view of the above opinion it seems likely that a member of a school committee would be held liable for an act of malfeasance.

Since school committees, as such, have no corporate status, they may not be sued in tort action. Consequently, as a committee, they are never liable for tort, either personal or that of their agents.

Redress for torts alleged against the school committee must be sought from the municipality.⁶⁶

Municipalities have a dual nature. In the one capacity they are political subdivisions and agencies of the state. In the other, they are quasi-corporations, conducted as private corporations for the advantages of the citizens of the municipality rather than for the advantage of the state as a whole.

When a municipality acts in its governmental capacity, it is not liable for its torts nor for those of its agents. In its quasi-corporate status, it is liable.

⁶⁶ General Laws of Massachusetts, 1882, Chapter 1222, section 1.

This principle has been well expressed by the Supreme Court of Massachusetts.

In the absence of special statute imposing liability, a municipality is not liable for the negligent acts of officers or employees in the performance of strictly public functions imposed or permitted by the Legislature from which no special Corporate advantage, (or) pecuniary profit results.⁶⁷

On the other hand, the municipality is not exonerated from liability for

negligent acts of public officers or their employees in the performance of functions which are commercial in character and are undertaken for the city's profit or to protect or benefit corporate interests.⁶⁸

When in conformity to sections one and four of Chapter 71 of the General Laws, the municipality provides school buildings and grounds for the education of the citizens of the town, it is acting in a governmental capacity, and, consequently, it is not liable for tortious negligence, either on its own part, or on the part of its agents.

Although the instances in which the courts of the commonwealth have been required to decide whether committee-men or municipalities were liable in tort for their actions or their lack of action are not numerous, they are varied enough to illustrate the principles enunciated above.

The Liability of Committee Members.- In McKenna v. Kimball et al.,⁶⁹ the plaintiff brought action against

67 Orlando v. City of Boston, 295 Massachusetts 207.

68 Ibid., p.208.

69 McKenna v. Kimball et al., 145 Massachusetts 555.

the chairman and other members of the school committee of the town of Bradford for injuries received due to the alleged negligence of their agents. On the parcel of land which contained the high school of the town of Bradford was a tree which, because of its unsound condition, the committee considered a hazard to the pupils of the school. The committee voted to have the tree removed, and engaged one, Knight, to do the work. He in turn hired two other men to do the actual felling of the tree. The men used no retaining ropes, and failed to mark off the work area as one of potential danger. McKenna, a railroad employee, and two other men were working on property belonging to the railroad across the road from the school house. When the tree fell, without warning to the three workers, McKenna was struck by a limb and severely injured.

In deciding the case the court stated that it was the duty of the committee to use their judgement as to whether the tree should be removed; and that once they had decided that it was wise to remove it, they had full authority under Public Statutes, Chapter 44, Section 21⁷⁰ to do so. As public officers in the discharge of a duty imposed by statute, they were not liable for the negligence of their agents; and since there was no question

⁷⁰ Authority found now in General Laws of Massachusetts (Ter.Ed.) Chapter 71, section 37.

of personal negligence the action could not be maintained.

The court concluded its decision by saying that

The doctrine of respondent superior (the legal principle by virtue of which the master is held liable for the tortious negligence of his agent) is founded on the supposed benefit to the master of the act of the servant, and does not apply to a public officer employing agents in the discharge of a public duty.⁷¹

This last principle has been so consistently accepted that the case under discussion represents the last action in which an aggrieved party has attempted to hold a school committee member liable for the negligence of his agent.

The Liability of Municipalities.— The courts of the Commonwealth first considered the problem of municipal liability for tortious acts in the performance of statutorily imposed duty, in the case of Bigelow v. Randolph in 1860.⁷² The town of Randolph in compliance with Revised Statutes, Chapter 23, section 1, built and maintained a schoolhouse on a parcel of land which was considerably above the level of the road which fronted the lot. At the point of juncture was a "steep banking". Under authority of the selectmen of the town, workmen began to excavate the embankment for the dual purposes of securing gravel, with which to repair the roads of the town, and at the same time, of grading the approach from the road

⁷¹ McKenna v. Kimball, *supra*, p.557.

⁷² Bigelow v. Town of Randolph, 80 Massachusetts, (14 Gray) 541.

to the school house, which was located well to the rear of the lot.

During the excavation process, school was maintained. While the work was in progress, an eleven-year-old female pupil of the school was playing with companions near the edge of the embankment. When the bank caved, she fell seven or eight feet and was injured. Her father sought redress from the town on her behalf.

The first hearing established that the bank was unguarded and that the condition had existed for more than one year.

In giving its decision, the court cited Riddle v. The Proprietors of Locks and Canals,⁷³ a case which involved the injury of a woman due to the negligence of a draw-bridge attendant. At page 243 of that case the court had said

... a private action cannot be maintained against a town, or other quasi corporation, for a neglect of a corporate duty, unless such action be given by statute.

The court continued,

And so it has ever since been held by this and other courts. This rule, however, is of limited application. It is applied, in cases of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns, without their corporate consent, and exclusively for public purposes; and not to the neglect which a town incurs, when a special duty is imposed upon it, with its consent, express or implied, or a special authority is conferred on it at its request.⁷⁴

⁷³ Riddle v. The Proprietors of Locks and Canals, 7 Massachusetts 187.

⁷⁴ Bigelow v. Randolph, *supra*, p.542.

The court concluded that in the case at bar, the town of Randolph could be charged solely with neglect to provide the plaintiff with a safe place in which to attend school, and that such neglect constituted non-feasance in the performance of a statutory duty, for which it could not be held liable.

The court did indicate that ethical considerations would hold the town blameworthy for having knowledge of a dangerous situation and taking no steps against it, but pointed out that its decision had been based on the common law which admitted of no such distinction.

The principle of municipal non-liability for personal injury in the performance of a statutory duty imposed on all towns of the Commonwealth, without their consent, was re-iterated in Hill v. Boston.⁷⁵ The plaintiff, an eight-year-old boy, while exercising due care, fell over a second-floor railing of a building which was being used as a school house and was seriously injured. The fact that the railing was dangerously low, that the teachers of the school had repeatedly called the condition to the attention of the school committee, that the committee had promised to correct the situation, and had failed to do so, made the committee liable of nothing more than non-feasance for which the city was not liable.

Similarly, the City of Boston was held non-labile for an injury to a female student of a public school, who

⁷⁵ Hill v. City of Boston, 122 Massachusetts 484.

caught her heel between two lumps of ice and fell, while passing over a walk on the school lot which connected the school building and the sidewalk.⁷⁶ In this case the plaintiff based her suit on General Statutes, Chapter 43, sections 82 and 83, which provided that where a private way connected with a public way in such a manner that the public could not tell when they had left the public way and entered the private way, the city was bound to "close off such private way or caution the public against its use under penalty of being liable for defects therein, if they failed to do so".⁷⁷ She held that the school lot was not fenced off, and that the series of walks on the school property joined the public walk in such a way that it was difficult, if not impossible, to tell when a pedestrian had left one and entered another. The court ruled that "the open space in front of the school house ... (could not) ... in any just sense be called a way entering on and uniting with 'the public highway';"⁷⁸ that the injury had occurred not on the highway, but on the school house lot; and that the city could not be held liable even though it did allow a dangerous condition to exist there.

The court handed down a trio of interesting decisions in 1940 concerning the liability of the municipality for the actions of the school committee.

76 Sullivan v. City of Boston, 126 Massachusetts 540.

77 General Statutes of Massachusetts 1860, Chapter 43, section 83.

78 Sullivan v. Boston, *supra*, p 542.

In Reitano v. Haverhill,⁷⁹ the plaintiff, a public welfare aid recipient, worked a few hours each week for the city in exchange for the aid which he received. While working under the direction of one, Ferretti, an employee of the Department of Public Property of the City of Haverhill, at fixing a gate at the high school athletic stadium, he was injured. He brought suit against the city, alleging that it was through the negligence of Ferretti, its agent, that he was injured.

In judging the case, the court pointed out that the statutory obligation or duty to keep the stadium in repair fell not upon the city, but rather, upon the school committee.

The work upon which the plaintiff was assisting when injured ... (was work) ... over which as a matter of law the city had no power of control ...⁸⁰

Although the work, upon which the plaintiff was engaged at the time of his injury, was being done by the Department of Public Property, it was being done "with the consent of" and "in the right of" the school committee

upon the members of which alone the duty of maintenance was imposed by statute ... It follows that the defendant is not liable for the torts of Ferretti committed while engaged in the discharge of this public duty, imposed upon the members of the committee as public officers.⁸¹

⁷⁹ Reitano v. City of Haverhill, 309 Massachusetts 118.

⁸⁰ Ibid., p.122

⁸¹ Ibid., p.123.

The case of Sweeney v. Boston⁸² was settled by a similar decision. One, Sullivan, had rented the building known as The Teachers' College and Girls' Latin School Building from the school committee of the city of Boston, for the purpose of holding a "beano" party on the night of June 21, 1937. The plaintiff, an elderly woman, after entering the vestibule of the building stopped to take her ticket of admission from her handbag. While she searched for her ticket, she took a few steps to her right to avoid the crowd which was entering the building. In so doing, she fell down an unlighted and unguarded stairway and was injured. She sought redress from the city alleging negligence on the part of the authorities in failing to light and/or guard the stairway. The court said that although the title to the building was by statute in the hands of the city, the actual maintenance was, conversely by statute, in the hands of the school committee; that the school committee as a board of public officers could not be held liable for negligence; and that the city, since it could not direct or control the actions of public officers carrying out a mandate of the legislature, could not reasonably be held liable for the negligence of such officers.

A plaintiff, who, while approaching a schoolhouse to attend a meeting of an organization which had hired

82 Sweeney v. City of Boston, 309 Massachusetts 106.

the building for the night, was injured by falling on an allegedly defective walk located on the school property, based her plea for compensation on the charges that:

- (1) the school committee had exercised an option when it rented the building; and
- (2) that, in charging a rental fee that was greater than that which was required to cover the expenses of keeping the building open, it assumed the capacity of a quasi-corporation acting for profit.⁸³

The Superior Court judge decided in favor of the plaintiff and awarded her damages in the amount of twelve hundred dollars. The Supreme Court heard the case on appeal from the defendant, the City of Quincy.

In reversing the decision of the Superior Court judge, the Supreme Court pointed out that he had misinterpreted section 71 of Chapter 71 of the General Laws⁸⁴ which requires that, under certain circumstances, the school committee "shall" allow individuals and associations to use school buildings. Indicating that in the case at bar these conditions had been present, the court answered charge one by saying:

The underlying purpose of said section 71 is declared to be "promoting the usefulness of public school property". In effect, said section 71 requires the school committee, consistently and without interference with the use of the premises ... to turn over buildings erected under peremptory statutory requirements as public school buildings to individuals and associations⁸⁵... When the

111. ⁸³ Warburton v. City of Quincy, 309 Massachusetts

⁸⁴ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 71.

⁸⁵ Warburton v. Quincy, supra, p.115.

committee has determined that the requested use is for the interest of the community ... (the elements of the statute become effective) ... and discretion to allow that use is at an end.⁸⁶

Concerning the second charge of the plaintiff, the court refused to rule upon what constituted a proper rental fee. The charge was meaningless, it pointed out, by virtue of the fact that the committee, as a board of public officers, had in spirit and in letter, carried out the mandate of the legislature and consequently could under no circumstances be held liable for negligence.

As the foregoing cases illustrate, the courts of the Commonwealth will not hold individual committeemen or municipalities liable to an injured party in cases involving non-feasance or misfeasance on the part of agents, regardless of how unjust that may seem to be to the injured party.

4. The Relationship Between the School Committee and the Municipality

The relationship that exists between school committees and municipalities within the Commonwealth of Massachusetts is based upon four fundamental concepts: the school committee is independent of the municipality;⁸⁷ the

⁸⁶ Warburton v. Quiney, *supra*, p.117.

⁸⁷ Leonard v. Springfield, 241 Massachusetts 325; Morse v. Ashley, 193 Massachusetts 294; Casey v. City of Everett, 330 Massachusetts 220.

municipality must provide schools in sufficient number to provide for the needs of the children of the town;⁸⁸ the municipality must provide annually the amount of money required to operate the schools in accordance with the law;⁸⁹ and, the school committee has general control of the public schools.⁹⁰

Although the limits of the authority and the obligations of town and committee would seem to be manifest from a study of the laws and of the legal decisions which have interpreted them, this relationship has been a major source of legal action over the past four decades. This litigation has been the result of ignorance of the law, misunderstanding of the law, or some special circumstance which has led one of the litigants, usually the town, to believe that the law was not applicable to the question under dispute. The majority of the cases fall into the latter category.

The school committee is independent of the municipality.-- The principle that the school committee is independent of the municipality and not answerable to the same for its actions is well illustrated in the case of Morse v. Ashley.⁹¹ There had been maintained in the town of Acushnet an ungraded school called The Bisbie School. The school committee, feeling that the smallness

⁸⁸ General Laws of Massachusetts (Ter.Ed.) Chapter 71, section 1.

⁸⁹ Ibid., chapter 71, section 34.

⁹⁰ Ibid., Chapter 71, section 37.

⁹¹ Morse v. Ashley, 193 Massachusetts 294.

of numbers and diversity of grade levels of the pupils attending the Bisbie School made its continued operation inadvisable and unnecessary, ordered it closed. The pupils of the Bisbie School were sent to Long Plain School, a larger, graded, and better equipped school where the committee felt that their interests would be better served. Subsequently, the town voted to reopen the Bisbie School. When the school committee refused to comply with the vote, the town sought a writ of mandamus directing the committee to reopen the school. When the petition was denied in the Superior Court, appeal was made to the Supreme Court.

In giving its judgement, the court pointed out that, in effect, the vote to reopen the Bisbie School was a vote to return to the said school the pupils who had formerly been in attendance there. This vote, the court opined, if valid, would give to the town the right to assign pupils from one school to another. The court went on to say,

... R.L.C.42, section 27, provides that the school committee "shall have general charge and superintendence of all of the public schools". In the performance of this duty the committee act not as the agents of the town but as public officers intrusted with certain powers and charged with corresponding duties ... the duty of assigning the pupils to the various schools is a part of the superintendence under this provision of the statute ... While they may and should take into careful consideration any wish of the inhabitants of the town, whether expressed in a formal vote or otherwise, still in the end their own decision when reached is the decision of the

Commonwealth, and it is to control ... It is manifest that by the vote under consideration the town undertook to direct the committee in a matter over which the committee under the statute had full control. It follows that the vote is inoperative and is in no way binding upon the committee.⁹²

This case is not only a good illustration of the principle that the committee is independent of local control but is also an example of a misunderstanding of the law on the part of one of the litigants. The law and the decisions interpreting the law are so clear on this point that it is difficult to understand how the dispute ever reached the courts.

The obligation of the town to appropriate the funds requested by the school committee.— A second type of problem has arisen in the area of committee-municipality relationship over the fact that the law imposes upon the town the obligation of providing and supporting the public schools and confers upon the school committee the authority to manage them.

The concept of a separate board of specially elected officers controlling the affairs of the schools dates back at least to the organization of the school committee in 1826,⁹³ and implicitly is found in the legislation of 1789⁹⁴ which authorized the school district. The notion of town responsibility for the establishment of and the

⁹² Morse v. Ashley, supra, pp 296-297.

⁹³ Laws of Massachusetts, 1826, Chapter 143, section 5.

⁹⁴ Acts of Massachusetts, 1789, Chapter 19.

financing of the public schools is of even more ancient origin, dating back to 1647.⁹⁵ The towns have recognized their obligation under the law for three centuries, and it is more than a century since any town has attempted to evade completely its obligation. Throughout the years, however, there have been differences of opinion as to the amount of support necessary in order to comply with the law. The answer to this question is found in The General Laws of the Commonwealth, and in the judicial decisions that have interpreted them.

The pertinent laws, as they stand in the present code, are Sections 1, 4, 34, and 37 of Chapter 71.⁹⁶ Section 1 provides that "Every town shall maintain, for at least one hundred and sixty days in each school year ... a sufficient number of schools for the instruction of all children who may legally attend a public school therein". The statute then outlines the courses that must be taught in the public schools and concludes with the statement: "Such other subjects as the school committee considers expedient may be taught in the public schools".⁹⁷ Section 4 specifies that "every town containing ... five hundred families or householders, shall ... maintain a high school ... One or more courses of study, at least four years in length, shall be maintained in such high

95 Nathaniel B. Shurtleff, Records of Massachusetts Bay, *supra*, Vol.III, p.203.

96 General Laws of Massachusetts (Ter.Ed.), Chapter 71.

97 Ibid. Chapter 71, section 1.

school, and it shall be kept open for the benefit of all of the inhabitants of the town for at least one hundred and eighty days, exclusive of vacations, in each school year ...⁹⁸

Section 34 imposes upon every city and town the obligation of annually providing "an amount of money sufficient for the support of the public schools as required by this chapter". This section further provides that

... Upon petition to the superior court, sitting in equity, against a city or town, brought by ten or more taxable inhabitants thereof, or by the mayor of a city, or by the attorney-general, alleging that the amount necessary in such city or town for the support of public schools as aforesaid has not been included in the annual budget appropriations for said year, said court may determine the amount of the deficiency, if any, and may order such city ... or such town ... to provide a sum of money equal to such deficiency, together with a sum equal to twenty-five per cent thereof.⁹⁹

Section 37 gives to the school committee "general charge of all the public schools ...".¹⁰⁰

An analysis of these laws shows that sections one and four obligate the town to provide schools, and, at the same time, leave the school program to the discretion of the school committee. Section 37 gives to the committee a general charge of the schools. Section 34 is an express

⁹⁸ General Laws, supra, Chapter 71, section 4.

⁹⁹ Ibid., section 34.

¹⁰⁰ Ibid., section 37.

mandate to the town to provide "an amount of money sufficient for the support of the public schools", and a penalty is attached to a failure to comply with this law. Since the town is to pay the penalty for failure to provide sufficient support, certainly some agency other than the town must determine what amount of support is sufficient. Since the school committee has "general charge" of the schools, the right to determine the program to be offered, and is the only other agency designated by statute to concern itself with the schools, manifestly, it is the school committee that determines the amount of money necessary to run the schools. The answer, then to the question "How much money must a town appropriate in order to comply with the law?" is simply "that amount which the school committee deems necessary for the adequate operation of the schools".

A thorough study of the law as found in Chapter 71 wherein specific functions are given to the school committee, such as the power to contract with teachers,¹⁰¹ and superintendents of schools,¹⁰² the duty to provide textbooks,¹⁰³ the duty to maintain the schoolhouses,¹⁰⁴ and

101 General Laws of Massachusetts, (Ter. Ed.), Chapter 71, section 38.

102 Ibid., section 59.

103 Ibid., section 48.

104 Ibid., section 68.

to employ physicians, nurses,¹⁰⁵ clerks,¹⁰⁶ and custodians;¹⁰⁷ and like powers, all of which imply the expenditure of funds; leaves no doubt that the legislature intended to leave the determination of school expenditures to the school committee.

In the case of O'Brien v. the City of Pittsfield¹⁰⁸ the court makes clear the relative positions of the school committee and the municipality in matters pertaining to the support of the schools.

In June, 1941, the teachers' subcommittee of the School Committee of Pittsfield recommended to the full committee that the salaries of the teachers be increased by two hundred dollars. In November, 1941, the full committee accepted the recommendation of the subcommittee and submitted to the mayor, in compliance with Chapter 44, section 31, an itemized budget including the amount necessary for the raises. The original recommendation had included the reservation "provided money for this increase is made available".¹⁰⁹ The mayor failed to include the amount necessary for the increase in his budget. When

105 General Laws, supra, section 53.

106 Ibid., section 59 (by implication).

107 Ibid., section 68 (by implication).

108 O'Brien v. City of Pittsfield, 316 Massachusetts
283.

109 Ibid., p.283.

one, O'Brien, and others being ten taxable residents of the City of Pittsfield, sought a writ of mandamus to compel the city to provide in the budget for the salary increases, the city contended that the words "provided money for this increase is made available" made the proposed increase optional with the mayor. The city further alleged that the budget had been handed personally to the mayor by the superintendent of schools with the words, "They (the committee) have added two hundred dollars to the teachers' salaries if the money is made available by you".¹¹⁰ The Superior Court Judge ruled for the city. On appeal, the Supreme Court declared that the authority to determine the salaries of teachers was one delegated by statute to the school committee and was vested "solely and absolutely in the school committee".¹¹¹ "That power is one which the school committee could not delegate lawfully to any of their subordinates or to the mayor or other city official, but is one for the committee alone to exercise, ... any attempt to delegate that power would have been void".¹¹² The court went on to say that by including the appropriation for the increases in the

¹¹⁰ O'Brien v. Pittsfield, *supra*.

¹¹¹ Ibid., (citing Hays v. Brockton, 313 Massachusetts 641, at p. 644,) p. 285.

¹¹² Ibid., p. 286.

budget the committee had implicitly voted the increase and that said increase was "unconditional, definite and binding upon the city".¹¹³ The city was ordered to provide the amount of the deficit plus the penalty of twenty-five per cent provided by Chapter 71, section 34 of the General Laws.

In what is perhaps the most exhaustive of the decisions in the area of town-committee relationships, Ring v. Woburn,¹¹⁴ the court interpreted further Chapter 71, section 34, by defining explicitly what types of appropriations were legal.

This case involved four separate petitions, each of which was brought under authority of Chapter 71, section 34, alleging that during the years 1938 to 1941, inclusive, the city had failed to appropriate the full amount estimated by the school committee to operate the public schools. As a result of the deficiency, the teachers had not been paid in full during any of these years. The respondents, although admitting the deficiencies, held that if an amount sufficient to meet the minimum standards of Chapter 71 had been appropriated, there had been a compliance with the law.

The case reached the Supreme Court on appeal from the respondents against whom the Superior Court judge had

113 O'Brien v. Pittsfield, supra, p.286.

114 Ring v. City of Woburn, 311 Massachusetts 680.

ruled. After reiterating the principles that it was the intent of the legislature to "intrust the care and operation of the public schools" to the school committee and that the municipality "must provide the money that is necessary for the support of the public schools", the court said that it was of the opinion that "section 34 relates to support that is mandatory, as distinguished from that which is permissive".¹¹⁵ It then proceeded to analyze the budget of the school committee in the light of this distinction. The following budget items were classified as mandatory, and, consequently, obligatory upon the town:

- (a) salaries of the superintendent of schools and of teachers under contract;¹¹⁶
- (b) text-books and supplies for instruction in subjects required by Chapter 71, sections 1 and 4, and subjects which the committee deems it advisable to teach;¹¹⁷
- (c) the salaries of janitors and custodians of buildings;¹¹⁸
- (d) telephone,¹¹⁹ fuel, lights, power, water and other supplies for the operation of the school plant;¹²⁰
- (e) repairs;¹²¹
- (f) health equipment and salaries of school physicians and nurses;¹²²
- (g) expenses connected with graduation exercises;¹²³
- (h) the salary of the attendance officer;¹²⁴
- (i) the clerical assistance in the administrative department;¹²⁵ and
- (j) library, supplies, books and the salary of a librarian.^{126, 127}

¹¹⁵ Ring v. Woburn, *supra*, p. 685.

¹¹⁶ General Laws of Massachusetts, Chapter 71, sec. 34.

¹¹⁷ Ibid., section 48.

¹¹⁸ Ibid., section 68

¹¹⁹ Ibid., section 68

¹²⁰ Ibid., section 48

¹²¹ Ibid., section 68

¹²² Ibid., secs. 53, 54, 55, 57.

¹²³ Ibid., sections 37, 48.

¹²⁴ Ibid., sec. 10 (Ch. 77)

¹²⁵ Ibid., section 59 (Ch. 71)

¹²⁶ Ibid., section 48

¹²⁷ Ibid., section 34

The transportation of pupils to and from school was held to be a "permissive" duty rather than one required by Chapter 71. Consequently, it was ruled that the city was not liable to provide the funds for that item.¹²⁸

This comprehensive analysis of municipal obligation in regard to school committee budgets dispelled any remaining doubt as to the type of support required by the law. It has been cited in almost every case of school litigation which has arisen since it was handed down in 1942.

The Municipal Finance Act of 1913,¹²⁹ which was intended to control the expenditures of municipalities, introduced a new element into the school committee—municipality relationship. There seemed to be a conflict between the traditional right of the school committee to determine the amount of the appropriation necessary to operate the schools and the provisions of the new law.

This apparent conflict reached the courts for settlement in 1925 in the case of Decatur v. Peabody.¹³⁰

¹²⁸ Ring v. Woburn, *supra*, p.689. (The school committee is permitted to provide transportation for pupils, at the discretion of the municipality, under authority of Chapter 40, section 4 of the General Laws, (Ter.Ed.)).

¹²⁹ Acts of Massachusetts, 1913, Chapter 719.

¹³⁰ Decatur v. City of Peabody, 251 Massachusetts 82.

The school committee of the City of Peabody voted a salary increase for the teachers of the city schools. In compliance with section 32 of Chapter 44¹³¹ they submitted an itemized budget including the appropriation estimated as necessary to meet the increase, to the mayor. He deleted this item from the budget which he presented to the City Council, citing as his authority to do so, section 32 of the Municipal Finance Act. When the City Council approved his budget, the administration and teachers of the city sought a writ of mandamus to compel the city auditor, the mayor, and others to perform the acts necessary to include the deleted amount in the payroll.

The court ruled that the authority to determine the salaries of the teachers of the City of Peabody lay with the school committee and not with the mayor. With regard to the Municipal Finance Act, the court stated that the seeming conflict resolved itself when the tradition of each statute was examined.

The purpose of the ... (Municipal Finance Act) ... was to set rigid barriers against expenditures in excess of appropriations, to confine borrowing of money and the issuance of municipal bonds within strict limits and to put all cities upon a sound financial basis as far as is possible by legislation.¹³²

¹³¹ General Laws of Massachusetts (Ter. Ed.), Chapter 44, section 32. (The Municipal Finance Act of 1913 is included in the General Laws under this section).

¹³² Decatur v. Peabody, *supra*, p. 86.

The court continued,

It is clear that the design of Section 34 was to make the observance of certain requirements of General Laws, Chapter 71, imperative upon municipalities and not subject even to the limitations of the provisions of law as to the budget. This compulsion imposed by the General Court is peremptory and unequivocal. ... with reference to the public schools there is both the power in the school committee and the express legislative mandate to the municipality to "raise by taxation" the necessary money.¹³³

The judgement of the court was concluded by the statement:

It follows from the provisions of Section 34 touching the public schools, that it is the duty of those framing the budget under General Laws Chapter 44, section 32, to conform to G.L. Chapter 71, section 38, and to provide for the salaries of teachers in the public schools as voted by the school committee.¹³⁴

The clarity and explicitness of the Court's decision in Decatur v. Peabody dispelled any seeming conflict between the powers of the municipality under the Municipal Finance Act and the traditional right of the school committee to determine school expenditures. It has not since been forced to rule directly on the matter. On a number of occasions, however, it has been requested to judge quite similar cases, where factors other than the direct Chapter 44-Chapter 71 relationship were involved.

On December 5, 1941, the school committee of the City of Brookton submitted to the incumbent mayor an estimated budget for the year 1942.¹³⁵ His successor

¹³³ Decatur v. Peabody, *supra*, p.88.

¹³⁴ Ibid., p.89.

¹³⁵ Hayes v. Brookton, 313 Massachusetts 641.

assumed office on January 5, 1942, and presented to the city council a budget calling for thirty-three thousand dollars less than the amount requested by the school committee. The school committee budget had included an appropriation to provide for certain salary adjustments, principally, the raising of all male instructors in the vocational schools to the salary level of the male high school teachers. The amount of the deficiency was approximately equal to the amount necessary to meet this salary increase and to expand certain other features of the vocational school program. In defending its position, the city questioned the constitutionality of section 34, Chapter 71, declaring that it gave to the court functions other than judicial; disputed the right of the city to so adjust the salaries of the male vocational school teachers; and pointed out that the school committee budget had been submitted on December 5 rather than on November 1 as required by law.¹³⁶ The court ruled that the section is constitutional since the only function of the court is to determine that the requirements of the statute are being met;¹³⁷ that section 37 of Chapter 71 gives the school committee "general charge and superintendence of all the public schools" including vocational schools, hence the school committee had every right to adjust the salaries

¹³⁶ General Laws of Massachusetts (Ter. Ed.), Chapter 44, section 32.

¹³⁷ Ibid., Chapter 71, section 34.

of the vocational school instructors; and that the submission of the budget on December 5, 1941, rather than on November 1, was a technicality and no factor, since the new mayor had not taken office until January 5, 1942, and would have been unable to act upon the budget before that time.

The right of a school committee to give a "bonus" to its employees was challenged in the case of The Attorney-General of the Commonwealth of Massachusetts v. the City of Woburn.¹³⁸ In submitting its budget for the year 1944, the school committee recommended that a "bonus" be paid to all employees of the school department for the year 1944, in the amount of two hundred dollars for full time employees and one hundred dollars for part time employees. In the budget the item was headed "Increase (Temporary)". The city challenged the right of the school committee to grant such a "bonus". The Superior Court judge ruled for the city stating that a "bonus" is a gift and it was not within the power of the committee to grant "bonuses" out of public funds.¹³⁹ The case reached the Supreme Court on appeal from the Attorney-General of the Commonwealth. In reversing the decision of the lower court the Supreme Court said, "Bonus is a word of flexible meaning. It is true that it is sometimes used in the sense

¹³⁸ The Attorney-General of the Commonwealth of Massachusetts v. The City of Woburn, 317 Massachusetts 464.

¹³⁹ Attorney-General of Massachusetts v. Woburn, supra., p.466.

of a gift or gratuity, but it is also true that it is commonly used to denote an increase in salary or wages in contracts of employment.¹⁴⁰ ... Whatever may have been the purpose of the committee in using the word 'bonus', ... we think that the only proper inference that can be drawn from the testimony ... is that the committee intended to grant, but only for the year 1944, an increase in the compensation of the employees of the school department.¹⁴¹

In Gotter v. The City of Chelsea¹⁴² the school committee of the city of Chelsea voted that all married teachers who were "the sole support of his own wife, her own husband or his or her own children under eighteen years of age be granted a dependency allowance of three hundred dollars per annum".¹⁴³ The city refused to appropriate the money required for the dependency allowance on the grounds that it was illegal by virtue of the fact that it violated the spirit of section 40 of Chapter 71.¹⁴⁴ This latter section provides in part that "... women teachers employed in the same grades and doing the same type of work with the same preparation and training as men teachers shall be paid at the same rate as men teachers".

The court ruled that Chapter 71, section 40, does not prevent the school committee from making "legal, logical and reasonable differentiations among employees" but

¹⁴⁰ Attorney-General v. Woburn, p.467.

¹⁴¹ Ibid., p.468.

¹⁴² Gotter v. City of Chelsea, 329 Massachusetts 314.

¹⁴³ Ibid., p.314.

¹⁴⁴ General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 40.

prevents only the making of such distinctions when they are made on the basis of sex. In the case at bar, sixty-five men and five women were to receive the allowance, hence, sex was not the determining factor. The court went on to say that "school committees have general charge of public schools and undoubtedly have full power to make reasonable and proper contracts with teachers and to fix salaries".¹⁴⁵ The court concluded that if the school committee felt that recognition of extra burden on the part of some teachers would help to provide better schools for the city of Chelsea, the granting of the additional allowance was legal.

The general principle that the school committee alone has the right to determine appropriations and in so doing is not bound by the wishes of the municipality was reiterated in Watt v. Chelmsford.¹⁴⁶ The town at its annual meeting in 1947 refused to appropriate a sum amounting to \$13,591 to provide for salary increases voted by the school committee. The judge of the Superior Court ordered the town to make up the deficiency together with the penalty of 25% thereof provided for in Section 34 of Chapter 71. The respondent appealed to the Supreme Court on the grounds that Section 34 applied to cities but not to towns and that the vote of the town as a whole

¹⁴⁵ Cotter v. Chelsea, *supra*, p.317, citing Attorney-General v. Ware, 328 Massachusetts 18; Watt v. Chelmsford, 323 Massachusetts 697.

¹⁴⁶ Watt v. Chelmsford, 323 Massachusetts 697.

voided the previous vote of the school committee. In support of the second argument Gorman v. Peabody¹⁴⁷ was cited. The court rejected the first argument by pointing out that it had never differentiated between city and town and at page 682 of King v. Woburn¹⁴⁸ had used the terminology "the duty that is imposed upon every city and town". With regard to the respondents' second point, the court ruled that by statute "the school committee of a city or town has the absolute right to fix the salaries of teachers".¹⁴⁹ Gorman v. Peabody was ruled no true precedent because the decision in that case had been predicated on a special provision in the charter of the City of Peabody. The charter of the town of Chelmsford contained no such provision.

A 1953 Supreme Court decision concerned the deletion of slightly more than one hundred thousand dollars from the estimated budget of the school committee by the mayor of the city of Everett.¹⁵⁰ The city based its case on chapter 49 of its own special charter¹⁵¹ which provided that the recommendations of the school committee be submitted to the mayor and that he then "recommend such appropriations as he shall deem necessary".

Because it reveals so unmistakably the present thinking of the court, it seems appropriate to quote at

¹⁴⁷ Gorman v. Peabody, 312 Massachusetts 560, (Discussed at page 13 of this thesis).

¹⁴⁸ King v. Woburn, 311 Massachusetts 680.

¹⁴⁹ Watt v. Chelmsford, 323 Massachusetts 700.

¹⁵⁰ Casey et al. v. City of Everett, 330 Massachusetts 220

¹⁵¹ Special Statute 1202 Chapter 355

some length the decision rendered:

The petitioners plea is based upon Chapter 71, section 34, whose tradition extends back to 1647. The policy of the Commonwealth in broad terms may be stated as a determination by the Legislature that the maintenance of public schools is of paramount importance. The Legislature has given ... (to the school committee) ... substantially final authority to decide upon the needs of school systems in their charge. The special provision cited by the correspondent, although, admittedly in this particular charter it is stated specifically, is no different in spirit from the general tenor of General Laws Chapter 44. Nor is it essentially different from section 32 of the same chapter, giving to the mayor a control over the budgets of other department heads.¹⁵²

... It is well settled that despite the importance and the broad sweep of General Laws (Ter. Ed.) Chapter 44, which regulates municipal finance, section 32 does not deprive the school committee of the final authority to determine the financial needs of the public schools.

Beyond the point stressed by the respondent, nothing in the city's charter supports the contention that section 49 thereof was intended to deprive the public schools of the city of Everett of the protection of General Laws, chapter 71 or to permit the mayor or the city council to ignore the basic standards there set out for the maintenance of public school systems throughout the Commonwealth... We are accordingly of the opinion that the bare reiteration in section 49 of the respondents' charter of a power which is probably contained in section 32 (of chapter 44) does not have the effect of cutting down the traditional and well established power of the school committee. Therefore, the petitioners are within their rights in invoking chapter 71, section 34.¹⁵³

When the respondents cited Gorman v. Peabody¹⁵⁴ as precedent for their stand, the court pointed out that the

¹⁵² Casey v. Everett, *supra*, pp 222-223.

¹⁵³ Ibid., p.324.

¹⁵⁴ Gorman v. Peabody, 312 Massachusetts 560.
(Discussed at p.13 of this thesis)

charter of the City of Peabody was a charter providing for absolute home rule and containing a provision for referendum. The decision of a mayor in the case at bar, the court declared, could hardly be classed with a decision of a majority of the voters.

The Legislature retains control.— While a long line of decisions in addition to those enumerated above iterate and emphasize the right of the school committee to determine appropriations for school purposes and obligate the municipality to meet those appropriations, the case of Souza v. Fall River¹⁵⁵ serves to emphasize the source of these powers and duties -- the Legislature.

Under authority of Statute 1939, Chapter 444, the city, with the approval of the Emergency Finance Board, was permitted to borrow money to meet an emergency. Section 2 of said chapter 444 provided that

... no appropriation voted for any purpose shall be valid without the approval of the said board during any period while any loan incurred under authority of this act is outstanding, and the maximum amount which may be expended in each year or any portion thereof during said period, for any and all municipal purposes, shall be fixed by said board, any provision of the general laws to the contrary notwithstanding ...

In November, 1944, while a portion of the said loan was still outstanding, the school committee submitted a budget which provided a salary increase of ten per cent for the teachers of the public schools. The mayor refused

¹⁵⁵ Souza v. City of Fall River, 320 Massachusetts 541.

to include the amount necessary to provide for the proposed increase in his budget. He submitted his budget to the Emergency Finance Board which approved it. When Souza and other taxable residents challenged the mayor's budget on the strength of Chapter 71, section 34, the court ruled:

During the time when it applied the statute provided no substitute "for the approval of the Emergency Finance Board. Such approval" was necessary to valid appropriations ... such approval was never obtained ... if the petitioners were to prevail, it would mean that the holders of the bonds and notes issued under St.1939, c.444, would be deprived of the intended statutory protection, and a paramount requirement of the act would be defeated.¹⁵⁶

In ruling against the petitioners the court did nothing to jeopardize the dominant position of the local school committee. It merely re-emphasized the principle that all powers of the school committee are contingent upon the will of the legislature, which may for any reason, whatsoever, change, limit or abolish them.

In concluding a discussion of the relationship which exists between the school committee and the municipality, it should be pointed out that, while a duly elected school committee possesses broad grants of statutory power and is not to be controlled by the town, the committee, in the first instance, is chosen by the local electorate. Consequently, the people of the town do maintain a type of control over the school committee -- the control that expresses itself at the ballot box.

¹⁵⁶ ~~Souza v. Fall River~~, supra, p.545.

Summary

The local school committees, which govern the affairs of the public school system of the Commonwealth of Massachusetts, at the present time, are the product of three centuries of evolution.

They are administrative agencies, without corporate status, and exercise only that authority which is given to them by statute or which can be inferred from the powers delegated by statute. School committee members are public officers. Although chosen in the first instance by the local electorate, they owe their authority to the Legislature of the Commonwealth, and their decisions are the decisions of the Commonwealth.

School committees, having no corporate status, are not liable in tort to aggrieved parties for acts of negligence. All such actions must be brought against the municipality. Municipalities have a dual nature. On the one hand, they are political sub-divisions of the state, on the other they are quasi-corporations, conducted as private corporations for the benefit of the municipality rather than the Commonwealth. In the former role, they are not liable for non-feasance, nor for the misfeasance of their agents; in the latter role, they are liable. School committee men as public officers have the same status as the municipality in its governmental role. Court

decisions have indicated that public officers may be held liable for personal acts of misfeasance.

Much of the litigation in recent years has hinged upon the relationship that exists between the school committee and the municipality. By statute, the school committee directs the affairs of the public schools, and the municipality supports them. The courts have consistently ruled that it is the obligation of the municipality to appropriate that amount of money which the school committee deems necessary to operate the public schools properly. Seeming conflict between the laws relative to public finance, and those concerning the public schools, has been dispelled by the courts, which have, in effect, set the public schools apart from certain of the restrictive measures of the finance laws.

Having established the nature and legal position of the school committee and its members, this thesis will concern itself, in the next chapter, with the specific powers and duties which they exercise and which are imposed upon them.

CHAPTER III

THE POWERS AND DUTIES OF THE SCHOOL COMMITTEE WITH REGARD TO POLICY MAKING

The nature and legal position of the school committee having been determined in Chapter II, it will be the purpose of the remaining three chapters of this thesis to observe how that nature and that legal status manifest themselves as the committee exercises its principal powers and fulfills its principal duties.

Something of the scope of the power, which the legislature has delegated to the school committee, has already been indicated in the foregoing chapters. It is the purpose of the present chapter to examine the powers and duties of the school committee as they affect the making of policy.

By Statute 143 of 1826,¹ now embodied in the General Laws of the Commonwealth as Section 37 of Chapter 71, the school committee is cloaked with a sweeping and comprehensive authority to manage the affairs of the public

¹ Acts of Massachusetts, 1826, Chapter 143,
section 1.

schools. The courts, for their part, have placed the broadest possible construction upon this authority.²

The Broad extent of the power, which the school committee possesses for the management of the schools in general, was well stated by the court in the case of Leonard v. Springfield:³

"The establishment of schools for the education, to some extent at least, of all of the children of the whole people, is not the result of any recent enactment: it is not the growth of our constitutional government, or the provincial government which preceded it, but extends back two hundred years, to the early settlement of the colony. Indeed, the establishment of popular schools is understood to have been one of the objects for which powers were conferred on certain associations of persons living together in townships, enabling them to regulate and manage certain prudential concerns in which they had an interest."⁴

The policy of the Commonwealth from early times has been to establish a board elected directly by the people separate from other governing boards of the several municipalities and to place the control of the public schools within the jurisdiction of that body, unhampered as to details of administration and not subject to review by any other board or tribunal as to acts performed in good faith ...⁵

² Hammond v. Hyde Park, 195 Massachusetts 29; Roberts v. Boston, 59 Massachusetts (5 Cushing) 198; Barnard v. Shelburne, 216 Massachusetts 19; Spofford v. Carleton, 238 Massachusetts 528; O'Brien v. Pittsfield, 316 Massachusetts 283.

³ Leonard v. City of Springfield, 241 Massachusetts 325.

⁴ Ibid., citing Cushing v. the Inhabitants of Newburyport, 51 Massachusetts (10 Metcalf) 508.

⁵ Leonard v. Springfield, supra, p. 329

The school committee is an independent body, entrusted by law with broad powers, important duties and large discretion ...⁶

The school committee may make all reasonable rules and regulations for the government, discipline and management of the schools under their charge. This includes a determination, within the bounds set by the statutes, of the subjects to be taught and the nature of the schools to be maintained, and the exercise of discrimination, insight and wisdom in the election of teachers and in the general supervision of the school system, with all the incidental powers essential to the discharge of their main functions.⁷

The wording of this decision, placing, as it does, emphasis on "broad powers", "important duties", "large discretions", and sweeping "incidental powers", and demanding from the committee the exercise of "discrimination, insight and wisdom" in the performance of its duties, leaves little doubt as to the extent of the power held by the school committee under Chapter 71, section 37.

The type of control which the committee exercises is well exemplified in the case of McDevitt v. School Committee of Malden.⁸ On December 17, 1935, the school committee of the city of Malden elected McDevitt, a teacher on tenure at the discretion of the committee in the public schools of that city, to the position of principal of the Lincoln Junior High School and Lincoln Elementary

⁶ Leonard v. Springfield, supra, p.329.

⁷ Ibid., p.330.

⁸ McDevitt v. School Committee of Malden, 298 Massachusetts 213.

School. His new duties were to commence on January 10, 1936. On January 6, 1936, a new committee was elected. They instructed the superintendent to disregard the previous vote and to notify McDevitt that he was to continue in his position of teacher. They alleged that the appointment had been made without the recommendation of the Superintendent of Schools and, consequently, was illegal by virtue of section 59 of Chapter 71.⁹ McDevitt petitioned the court for a writ of mandamus to compel the school committee to permit him to assume the position of principal of the Lincoln School. He alleged that the decision of the committee was based on an erroneous interpretation of chapter 71, section 59.

In deciding the case the court said,

The school committee had general charge of the public schools ... The general managerial powers of the committee continued to exist after December 17. These powers included the power to change by a majority vote the duties of teachers on tenure at discretion and to assign them to new duties, or to continue them in their existing duties, or to return them to duties formerly performed.¹⁰

The court then concluded that the second vote did nothing more than to continue the petitioner in the position which he had held prior to December 17, and that "It was within the power of the committee to do this".¹¹ With

⁹ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 59.

¹⁰ McDevitt v. Malden, *supra*, p.214.

¹¹ Ibid., p.214.

regard to the alleged misinterpretation of Chapter 71, section 59, the court pointed out that the alleged misinterpretation of the law played a minor part in the decision to continue the petitioner in the position of teacher. The underlying reason appeared to be the feeling that he was not qualified to hold the position and that he had been elected in the first instance without due consideration.

This sweeping comprehensive power, as it affects the power of the school committee to establish policy, will be considered, for the purposes of this study, under three classifications: the power of the school committee to make rules consistent with its purpose for being; the power of the school committee to make reasonable rules and regulations; and some of the principal powers delegated to the school committee in the sphere of policy making.

1. The School Committee Has the Right to Make Rules Consistent with Its Purpose for Being

It has been ruled that the school committee has the power to make rules and regulations which are consistent with its purpose for being.¹² The purpose for the existence of the public school system of the Commonwealth is the education of its citizens. While education has never been specifically defined as such by the legislature

¹² Inhabitants of the Fourth School District in Rumford v. Wood, 13 Massachusetts 192.

or the courts, a study of Part II, Chapter V, Section II of the Constitution of the Commonwealth, reveals that the Legislature is charged with the spiritual, intellectual, moral, physical, social, cultural, and economic development of its young citizens. Consequently, rules affecting any of these areas have been held as consistent with the purpose of public schools.

Perhaps the most striking example of this principle is found in the case of Sherman v. Charlestown.¹³ The plaintiff, a female pupil under sixteen years of age, had been excluded from the public schools of the City of Charlestown for alleged character defects. Under authority of Statute 1845, Chapter 214,¹⁴ she sought redress from the city for alleged unlawful exclusion.

In the hearing before the lower court, the defendants gave notice that, if forced to, they were prepared to prove that "the plaintiff's character in regard to chastity was such, that she ought not to be allowed to remain in the public schools, and that for that reason she was excluded".¹⁵ In a subsequent charge contained in a bill of particulars which they filed with the court, the committee stated that they would show "that during the year 1845 ... the plaintiff was at unseasonable hours of the night with one John B. Nicholson Etc., - specifying a

¹³ Sherman v. The Inhabitants of Charlestown, 62 Massachusetts 160.

¹⁴ Acts of Massachusetts, 1845, Chapter 214.

¹⁵ Sherman v. Charlestown, *supra*, p.162.

continued course of open and notorious familiarities and actual illicit intercourse, and that for hire and reward"¹⁶

The plaintiff objected that these charges, if proved, would not be grounds for lawful exclusion, since the alleged illicit acts had occurred outside of the school, and that while good moral character was a requisite prescribed by statute for teachers it was not demanded of pupils.

The lower court judge sustained the objection and ruled for the plaintiff. The defendant appealed to the Supreme Court.

In reaching its decision the court pointed out¹⁷ that it would be strange if in the legislation establishing the public schools, no power had been vested anywhere to protect them from the noxious influence of anyone whose presence would be "injurious to the whole, and subversive of the purposes manifestly contemplated by their establishment". Under the existing system of public schools, children of both sexes and of "various ages, capacities and susceptibilities" are brought together both in the schools and in their outside amusements in such a way as "to exert a powerful influence on each other". The argument that, while good character is by statute a requisite for teachers

¹⁶ Sherman v. Charlestown, *supra*, p.162.

¹⁷ This paragraph and the two which follow it represent a transposed paraphrase of the court decision contained in pages 163 to 168 of Sherman v. Charlestown.

in the schools, it is not demanded of students, cannot be maintained. The very existence of the schools presupposes that the characters of its pupils are in a plastic state and not yet formed. If the formation of character "is the manifest intention and purpose of the schools, then it is necessary, in the unreserved intercourse of pupils of the same school, as well without as within its precincts, to preserve the pure minded, ingenuous and unsuspecting children of both sexes, from the contaminating influence of those of depraved sentiments and vicious propensities and habits as from those infected with contagious disease".

The court is of the opinion "that the schools have not been left by the law without reasonable protection in this respect"; but that a power has been vested in the school committee "to exclude a pupil ... for good and sufficient cause; and that the notorious immoral propensities, practices and habits of any one claiming admission as a pupil if proved to the satisfaction of the committee, do constitute a good and sufficient cause for such exclusion".

This decision established the principle that, since character development is one of the purposes for the existence of the schools, the committee, so that pupils as a whole may not be hampered in achieving that purpose, may demand certain standards of any individual seeking admission to the public schools.

That the school committee may make rules consistent with its purpose for being is illustrated again, and from an entirely different point of view in the case of Averill v. Newburyport.¹⁸

The School Committee of the City of Newburyport had a rule which permitted teachers who were absent because of personal illness, death in the immediate family, or other cause which the superintendent of schools considered good and sufficient to be paid in full. The plaintiff was absent from his work under these conditions during the month of January, 1919. The city deducted from his salary an amount in proportion to the number of days he was absent, contending that it was not within the power of the school committee to make such a "gift" of public funds to any individual.

The court stated that such payment could not be considered as a gift, and that the authority of the school committee to make all "reasonable rules and regulations for the government and management of the schools under their charge" was not open to question. The "general grant of authority," the supreme tribunal said, "to have charge of the public schools and to fix the salaries of teachers includes the subsidiary power to decide within reasonable limits whether, in order to promote efficiency

¹⁸ Averill v. The City of Newburyport, 241 Massachusetts 333.

and insure constancy of excellent service on the part of teachers, temporary absences without loss of pay be afforded them ...¹⁹ In ruling that the committee was within its right in making such a rule, the court said that such payment should be considered not as a gift but as an "incentive to superior work".²⁰

Similarly, when in Cotter v. Chelsea²¹ the City of Chelsea challenged the right of the school committee to vote extra pay to teachers with certain types of dependents, the court ruled that, if the "committee could reasonably believe that it would be for the good of the school system to pay more for teachers having dependents", the committee was within its rights and the vote was valid.²²

2. The Committee Has the Power to Make Reasonable Rules and Regulations

The courts have ruled consistently that in addition to rules made in the furtherance of the very purposes for which the public schools exist, the school committee may also make such rules and regulations as are reasonable and make for more effective discipline, government, and management of the schools. This authority, like the

¹⁹ Averill v. Newburyport, supra, pp 334-335.

²⁰ Ibid., p.335.

²¹ Cotter v. City of Chelsea, 314 Massachusetts 314

²² Ibid., p.318.

authority described above, stems from the general management clause, contained in section 37 of Chapter 71 of the General Laws, and from the broad construction which the courts have placed upon that clause. While this principle has been established in scores of cases, many of which are discussed under different headings in other sections of this thesis, three cases have been chosen for development here; because they not only establish the right of the school committee to make reasonable rules, but also are at the policy making level, have universal rather than local application, and have had lasting rather than temporary results.

Among the more controversial rules adopted by school committees in the exercise of this authority was the policy of excluding married females as teachers in the public schools. This practice was adopted by many school committees of the Commonwealth during the period between the two World Wars and was especially prevalent during the depression of the nineteen-thirties. Two outstanding cases developed during this period, Sheldon v. Hopedale²³ and Rinaldo v. Dreyer.²⁴ The second of these has been chosen for discussion here, because the teacher involved had acquired a full tenure status and there was no reason for her dismissal other than the fact that she married.

²³ Sheldon v. Hopedale, 276 Massachusetts 15.

²⁴ Rinaldo v. Dreyer et al., 264 Massachusetts 167.

The school committee of the city of Revere, in 1927, had passed a rule to the effect that the contract of every female elected to the position of teacher in the public schools of that city should include the stipulation that the marriage of the teacher would terminate the contract. In 1930 the rule was changed to read, "the marriage of a woman teacher ... shall operate as an automatic resignation of said teacher, and this regulation shall apply to teachers on tenure".²⁵ The plaintiff, Rinaldo, married in 1935 and was dropped from the teaching staff of the City of Revere. She petitioned the court for a writ of mandamus to compel the school committee to restore her to her position, on the grounds that by statute a teacher on tenure could be dismissed only for "inefficiency, incapacity, conduct unbecoming a teacher, insubordination, or other good cause".²⁶ She contended that marriage could not be included under "other good cause" because this phrase must be construed in the light of the specific inefficiencies preceding it in the statute.

25 Rinaldo v. Dreyer, *supra*, p.167.

26 Acts of Massachusetts, 1934, Chapter 123, now contained in General Laws of Massachusetts, (Ter.Ed.) Chapter 71, section 42.

In ruling for the school committee, the court said,

"Good cause" for dismissal ... is by no means limited to some form of inefficiency or of misconduct on the part of the person dismissed. ... Such matters are amply covered by the words which precede "good cause"... Good cause includes any ground which is put forward by the committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee's task of building up and maintaining an efficient school system... If the cause assigned is at least fairly debatable and is asserted honestly, and not as a subterfuge, that is enough.²⁷

The court then pointed out that there was much reason for questioning the assumption that married female teachers were less valuable to a school system than were unmarried female teachers but that "the committee have 'general charge' of the public schools in Revere ... It is for them and not for the court to determine matters of policy".²⁸

Although the dismissal of a female teacher because of a change in her marital status was prohibited by a 1953 amendment to section 42 of Chapter 71,²⁹ and, consequently, the specific school committee rule under discussion is no longer tenable; the case has been presented here to show the latitude that is permitted school committees in making rules and regulations for the government

27 Rinaldo v. Drayer, supra, p.169.

28 Ibid., p.169.

29 Acts of Massachusetts, 1953, chapter 244.

and management of the schools. The case is important also because of the definition of "good cause" as applied to Chapter 71, section 42.³⁰ This definition has been the measuring device against which all subsequent actions of a similar nature have been compared.

The right of the school committee to make reasonable rules which were intended to further the discipline of the schools was upheld in the case of Spiller v. the Inhabitants of Woburn,³¹ in 1865. The school committee had passed a rule that the schools of the town should be opened each morning with a prayer and the reading of a passage from the Bible, and, that during the prayer, the pupils should bow their heads. Because of some opposition to the rule, allegedly occasioned largely by one, Spiller, the rule was modified to the extent that any child might be excused from the bowing of the head whose parent requested such exemption. Spiller refused to request such exemption for his daughter and, at the same time, directed her not to obey the rule. After persistent refusal to conform, the plaintiff, a 13-year-old girl, was excluded from the school. Contending that her dismissal was because of her religious opinions and a violation of General Statutes, Chapter 41, section 9,³²

³⁰ General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 42.

³¹ Spiller v. The Town of Woburn, 94 Massachusetts 127.

³² General Statutes of Massachusetts, Chapter 41, section 9.

the plaintiff, through her father, sought redress from the town for unlawful exclusion.

In judging the case the court said,

The power of a school committee of a town to pass all reasonable rules and regulations for the government, discipline and management of the public schools under their charge and superintendency is clear and unquestionable. . . . Equally clear is it that the committee of the town of Woburn did not exceed their authority in passing an order that the Bible should be read and prayer offered at the opening of the schools on the morning of each day. No more appropriate method could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by the statutes of the commonwealth, and which teachers are especially enjoined to carry into effect, is "to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for truth".³³

The plaintiff's contention that her dismissal was based on religious grounds was dismissed by the court. She was not, the court pointed out, asked to take part in a religious exercise. She was asked to bow her head as a means of lessening the temptation to communicate with other pupils during the prayer. The court stated further that any question of the plaintiff's conscience being compromised through acquiescence to the rule was removed when her parent was granted the right to request exemption.

³³ Miller v. Woburn, supra, pp 128-129, citing in the concluding clause the General Statutes of Massachusetts, Chapter 38, section 10, now contained in General Laws of Massachusetts. (Ter. Ed.), Chapter 71, section 30.

The Statute of 1826, Chapter 143,³⁴ which established the school committee included, in section 7, a provision that a passage be read from the Bible at the start of each school day. This same provision is found in Chapter 71, section 31, of the present code.³⁵ In view of the recent decisions, reported in Chapter I of this thesis,³⁶ it might be conjectured as to how the Miller decision, with regard to the bowing of the head, and the reading of the Bible, as prescribed by the present code, would fare if brought to the Supreme Court of the United States, as a violation of the First Amendment to the Federal Constitution. Since neither has been challenged to date, only conjecture is possible. At the present time both are lawful and the latter is prescribed by statute in the Commonwealth of Massachusetts.

The general power to make reasonable rules and regulations which has its source in section 37 of Chapter 71 is sometimes made more specific by supporting statutes. Section 47 of Chapter 71 gives to the school committee the authority to "supervise and control all athletic and other organizations composed of public school pupils and bearing the school name or organized in connection therewith".³⁷ The court has interpreted the clause "or organized

34 Acts of Massachusetts 1826, Chapter 143, section 7.

35 General Laws of Massachusetts (Ter.Ed.) Chapter 71, section 37.

36 Everson v. The State Board of Education, 330 US 1; Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, et al., 333 US 203; Zorach et al. v. Clausen et al., 343 US 306.

37 General Laws. supra, Chapter 71. section 47.

in connection therewith", as giving the school committee control over fraternities, sororities, or any other secret organization of which public school students are members.

In Antell v. Stokes,³⁸ the School Committee of the City of Haverhill passed a resolution to the effect that, as of May 15, 1933, no student of the Haverhill High School might become a member of any secret organization composed "wholly or in part of high school pupils", unless such organization was approved by the superintendent of schools and Principal of Haverhill High School; and that the officers of secret organizations of which high school pupils were members should file certain information with the Principal of the Haverhill High School. The penalty for failure to comply with the rule was exclusion from the school.

Every student of the high school was asked to sign a pledge agreeing to observe the rule. All complied. Eight female students, of whom the plaintiff was one, failed to abide by the regulation and were excluded from the school.

Contending that the school committee invaded the sphere of the family when it attempted to regulate the out-of-school activities of the pupils of the Haverhill

³⁸ Antell et al. v. Stokes et al., 287 Massachusetts 103.

High School, and that they exceeded the power conferred by Chapter 71, section 47, when they excluded the plaintiffs, the students involved petitioned the court to compel the school committee to reinstate them. In ruling for the defendants the court pointed out that "by section 37 it is provided that the school committee shall have general charge of the public schools", and that "the jealous care of the General Court has always clothed municipal officers with adequate authority to encourage the highest practicable efficiency of the system of public education ... in the absence of other limitations, includes the power to determine within reason what pupils shall be received and what pupils shall be rejected".³⁹

With regard to the contention that the authority given to the school committee under section 47⁴⁰ to control the activities of students did not include the power to exclude students the court said,

The penalty of expulsion from school for violation of the rules does not exceed the power conferred by Section 47. The power to make rules would be vain without the capacity to annex reasonable penalties for their violation. Rules adopted by the constituted authorities for the governance of the public schools must be presumed to be based upon mature deliberation and for the welfare of the community. A pupil who persistently violates such rules ... may be excluded from the school by the school committee acting in good faith. No personal right stands superior to the public welfare in this particular. 41

39 Antell v. Stokes, supra, p.104.

40 General Laws of Massachusetts (Ter.Ed.) Chapter 71, section 47.

41 Antell v. Stokes, supra, pp 107-108.

Concerning the charge that the rights of the family were infringed by the rule under discussion, the court pointed out that "formal associations of pupils in connection with a public school possess possibilities of harm to the reputation of the school and to the studious habits and personal character of the members".⁴² These factors, the court stated, concern intimately "the general welfare in connection with the public school", and might properly be regulated "by rules adopted pursuant to legislative sanction".⁴³

The cases reported above are illustrative of the thinking of the courts of the Commonwealth, which have consistently ruled that any reasonable rule or regulation intended to further the discipline, government, or management of the public schools, and enacted in good faith, by a properly constituted school committee, is valid.⁴⁴

3. Some of the Principal Powers Delegated to the School Committee in the Sphere of Policy Making.

In addition to the authority to make rules consistent with the very purpose of the public schools and rules which are intended to further the discipline, government,

42 Antell v. Stokes, supra, p.107.

43 Ibid.

44 Hodgkins v. Rockport, 105 Massachusetts 475; Roberts v. Boston, 59 Massachusetts (5 Cushing) 192.

and management of the public schools, the Legislature has delegated to the local school committee certain specific powers which to a large extent enables it to determine the extent, quality, and type of education to be offered in the public schools.

May determine the length of the school year. -- Section 37 of Chapter 71⁴⁵ gives to the local school committee the right to determine, subject to the provisions of Sections 1 and 4 of the same chapter, "the number of weeks and the hours during which (the) schools shall be in session ...". Section 1 stipulates that the elementary schools must be maintained for at least one hundred and sixty days in each year⁴⁶, and section 4 requires that the secondary schools be operated for at least one hundred and eighty days in each year, exclusive of vacations⁴⁷. The school committee may determine whether the schools shall be maintained beyond the prescribed period, and if so, the exact number of additional days; the dates for the commencement and termination of the school year; the number of hours in the school day; and the time and length of vacation periods, subject only to the laws of the Commonwealth regarding certain legal holidays.

45 General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 37.

46 Ibid., section 1.

47 Ibid., section 4.

This authority, delegated to the school committee in the original legislation establishing that body,⁴⁸ has been seriously questioned on only one occasion. In the aforementioned case of the Inhabitants of the Ninth School District of Weymouth v. Loud et al.⁴⁹ a century ago, when the exclusive right of the school committee to determine when the schools might legally be closed was questioned, the court said, "the fixing of the times for vacations, or for occasional suspension, of the schools, and for closing of the school houses for a day or more," is the exclusive prerogative of the school committee.⁵⁰

May designate the subjects to be taught.-- Within the limits established by statute the school committee may designate those subjects which are to be taught in the schools under its superintendence. Section 1 of Chapter 71 provides that instruction must be given in "orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, the history and constitution of the United States, the duties of citizenship, physiology and Hygiene, good behaviour, indoor and outdoor games,

48 Acts of 1826, chapter 143.

49 Inhabitants of the Ninth School District of Weymouth v. Loud et al., 78 Massachusetts 61.

50 Ibid., p. 63.

and athletic exercise", in all of the elementary schools of the Commonwealth.⁵¹ Section 2 of the same chapter requires that Civics, United States History, and certain related subjects be taught in all elementary and secondary schools.⁵² Military drill and gymnastics are required under provision of section 3.⁵³ The teaching of modern foreign languages, under certain conditions, is prescribed by sections 13, 13A, 13B, 13C and 13E.⁵⁴ By authority of section 1, "such other subjects as the school committee may deem expedient may be taught in the public schools".⁵⁵ Section 4 provides that "one or more courses of study, at least four years in length, shall be maintained in ... (each) ... high school."⁵⁶ It is the right of the school committee to determine the course to be offered, whether or not more than one course should be offered, and, if more than one, which courses they shall be.

The right of the school committee to determine the type of instruction has never been questioned. However, in the exhaustive Ring v. Woburn decision⁵⁷ the court

⁵¹ General Laws of Massachusetts (Ter.Ed.) Chapter 71, section 1.

⁵² Ibid., section 4

⁵³ Ibid., section 3

⁵⁴ Ibid., sections 13 (Commercial Spanish), 13A (Italian), 13B (Modern Languages in General), 13C (Polish), 13E (Lithuanian).

⁵⁵ Ibid., section 1

⁵⁶ Ibid., section 4

⁵⁷ Ring v. The City of Woburn, 311 Massachusetts 679.

emphasized the right of the committee to so determine the subjects to be taught when it said at page 686, "The mandate of this section requiring that instruction shall be given in the high school in such subjects as the school committee considers expedient ... is equally compelling with the mandate requiring the maintenance of that school".

The local school committee, then, once the minimum requirements prescribed by statute have been met, largely determines the type of instruction to be offered in the schools under its control.

May select, purchase, and change textbooks and other instructional materials.-- Section 7 of Chapter 143 of the Acts of Massachusetts, 1826, the act which originated the modern school committee, delegated to the committee the right to select and purchase textbooks for use in the schools. This right is found in the present code in section 48 of Chapter 71 of the General Laws, which provides, in part, that the school committee "shall, at the expense of the town, purchase textbooks and other school supplies, and ... shall loan them to the pupils free of charge."⁵⁸ Section 50 of the same chapter permits the school committee, under certain prescribed conditions, to change textbooks.⁵⁹

⁵⁸ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 48.

⁵⁹ Ibid., section 50.

The latter right has never been questioned. The authority to purchase textbooks, however, has been challenged.

The traditional interpretation of section 48 is found in the case of Hartwell et al. v. Littleton,⁶⁰ and is re-emphasized in Ring v. Woburn.⁶¹ A 1949 decision, however, places certain restrictions upon the school committee in the matter of purchasing materials, in towns which have established general purchasing departments.

In Hartwell v. Littleton, the School Committee of the Town of Littleton, in compliance with the Act of 1826,⁶² has purchased books for the use of the pupils during the school year 1829-1830, in the amount of thirty-four dollars and eleven cents. The members of the committee paid for the books from their own private funds. When they submitted a bill to the town treasurer for the value of the books, he refused to honor it, contending that the committee might purchase books under the statute only on the credit of the town and not by making themselves the creditors of the town. An examination of the facts in the lower court disclosed that the books were suitable; and required for use in the school; that they had been billed to the town at wholesale prices; and that no profit had accrued to the committee or to any member thereof.

⁶⁰ Hartwell et al. v. Town of Littleton, 30 Massachusetts (13 Pickering) 229.

⁶¹ Ring v. Woburn, *supra*, p. 679.

⁶² Acts of Massachusetts, 1826, Chapter 143, section 7.

The Supreme Court of the Commonwealth ruled that the expression "procure at the expense of the town" was comprehensive enough to include either purchase on the credit of the town, or purchase by the committee with reimbursement from the municipal treasury.

Obviously, the above described method of purchasing textbooks, or any other school supplies would be impractical in this day of high priced education. Nevertheless, the case is important in that it demonstrates the latitude of the authority allowed the school committee in the matter of selecting and procuring necessary school supplies. With the exception of a brief span from 1873 to 1885⁶³ when the city council and/or the town meeting could control the expenditure of the school committee in the matter of textbook purchase, and subject, since 1913, to the provisions of The Municipal Finance Act,⁶⁴ which requires the school committee to determine its needs prior to the formulation of the municipal budget, this decision was essentially representative of the thinking of the court from 1830 to 1950.

The absolute right of the school committee to select and purchase textbooks was reaffirmed by the court in 1942. When the right of the school committee to determine the amount of money necessary to purchase textbooks

⁶³ See Acts of Massachusetts, 1873, chapter 106, section 1, and Public Statutes of Massachusetts, chapter 44, section 40.

⁶⁴ General Laws of Massachusetts (Ter. Ed.), Chapter 44, section 32.

and school supplies for the public schools of the City of Woburn was under question, along with the right to determine the appropriations necessary to operate properly other phases of the public school program, the court said,

Section 48 of the said Chapter 71 provides that the school committee shall, at the expense of the town, purchase textbooks, and other supplies. This is a mandatory provision, and the finding (of the lower court) was warranted that they (the school committee estimates) were proper and represented books and supplies that were necessary. We are of the opinion that these items are required by said Chapter 71.⁶⁵

This traditional interpretation was to some extent limited by a 1949 decision of the court,⁶⁶ to the effect that, where a town has set up a purchasing department under the permissive authority granted in section 103 of Chapter 41 of the General Laws,⁶⁷ the school committee must operate through the said purchasing department.

In 1947, the City of Gloucester established a purchasing department under the authority granted in the said section 103, which states in part that the purchasing agent "shall purchase all supplies for the city ... and for every department thereof, except in case of emergency..."

⁶⁵ Ring v. Woburn, *supra*, p.686.

⁶⁶ School Committee of Gloucester v. The City of Gloucester, 324 Massachusetts 209.

⁶⁷ General Laws of Massachusetts, Chapter 41, section 103.

In 1948 the city council enacted an ordinance requiring the school committee to determine what textbooks and supplies would be needed for the school year and to submit a list to the purchasing agent that he might purchase them. The school committee challenged the legality of the ordinance on the grounds that its wording, "the purchasing agent shall procure the article he considers best in quality, all other things being equal", deprived it of its discretion and its traditional right under section 48 of Chapter 71; and that there was no guarantee in the ordinance that those requests would receive prompt attention. In deciding for the city the court pointed out that in enacting the legislation which provided for the purchasing department, the Legislature must be presumed to have been cognizant of the traditional rights of the school committee under section 48; and that, since it did not specifically exclude school committees from the provisions of the Act, it would be unthinkable for the courts to hold that an agency which expended such a large percentage of the municipal funds as did the school committee should be set aside from other city departments in the methods by which it would purchase its supplies.

With regard to the specific charge that the school committee was deprived of its discretion the court said, "If the article to be purchased is peculiar to the field

of education, the school committee's determination as to quality as disclosed in its requisition will be conclusive upon the purchasing department. In the important subject of textbooks no question could arise".⁶⁸ To the charge that the ordinance made no provision for the "expeditious honoring of requisitions", the court answered, "It must be presumed that the purchasing department will comply with the ordinance".⁶⁹ This decision makes it clear that there can be no doubt as to the right of the school committee to select textbooks and other school supplies. It does, however, limit the traditional freedom of the committee, as expressed in Hartwell v. Littleton,⁷⁰ and King v. Woburn⁷¹ with regard to methods of purchase, in those communities which have established purchasing departments.

SUMMARY

The school committees of the Commonwealth have a sweeping and comprehensive authority to manage the affairs of the public schools.

This authority has its origin in statute, principally in section 37 of Chapter 71 of the General Laws,

68 School Committee of Gloucester v. City of Gloucester, supra, p.220.

69 Ibid., p.220.

70 Hartwell v. Littleton, supra, p.228.

71 King v. Woburn, supra, p.679.

which has always been given the broadest of constructions by the courts.

In addition to the general powers of management found in section 37, the school committees have certain specific prerogatives in the sphere of policy making.

The courts have ruled that the school committee has the right to make rules which are consistent with the purposes for which it exists. This purpose is implicit in the State Constitution as the spiritual, intellectual, moral, physical, social, cultural, and economic development of the youth of the Commonwealth. Consequently, the committee may make rules concerning any of these areas.

The committee has the power, also, to make rules and regulations which are reasonable and which are intended to improve the discipline, management, or government of the schools. The courts have enunciated this principle in a number of cases where rules of the committee have affected the status or the activities of teachers as well as pupils.

Finally, the school committee is granted by statute the right to establish certain policies, which to a considerable degree determine the extent, quality, and type of education to be offered in the schools under their superintendence. In the realm of policy making the chief powers granted by statute are: the right to decide "the number of weeks and the hours during which (the) schools shall be in

session", and the number and type or types of course to be offered at the high school level; the right to designate the subjects, over and above the statutorily required subjects, to be taught; and the right to select, purchase, except under special conditions, and change the text books and other supplies to be used in the schools.

The powers and duties of the school committee in relation to its professional employees will be treated in the following chapter.

CHAPTER IV

THE POWERS AND DUTIES OF THE SCHOOL COMMITTEE WITH REGARD TO TEACHERS, SUPERINTENDENTS OF SCHOOLS, AND OTHER PROFESSIONAL PERSONNEL

The preceding chapter treated of the powers and duties of the school committee with regard to the making of policy. The present chapter continues the theme of its predecessor, the power and duties of the school committee, but analyzes these prerogatives and obligations in the light of the relationship which exists between the school committee and the teachers, superintendents of schools, principals, and supervisors under its superintendence.

Within the limits prescribed by statute, the school committee has the right to contract with, fix the salaries of, determine the qualifications of, set the duties of, and dismiss the professional personnel which it engages to operate the public schools. Much of this authority is found in specific statutes. All of it has its ultimate origin in the mandate of the legislature to the school committee to take "general charge" of the public schools. While the school committee exercises great power over the teachers, superintendents, principals and supervisors under its jurisdiction, it is in

this area, concerning, as it does, human relationships, personalities, and repeated opportunities for preferment, that a prudent legislature has seen fit to place, by statute, the most restrictive of the limitations by which it constrains the general authority of the school committee.

A study of the authority and obligations of the school committee as it deals with its professional personnel divides itself logically into three sections: the authority of the committee to select and engage persons to conduct the schools under its supervision; the right to determine the duties of these individuals, once they are engaged; and the right to dismiss them when occasion demands. It is on this plan that the present chapter proceeds.

1. The School Committee Has the Right to Contract with and Fix the Salaries of Teachers, Superintendents, Principals and Supervisors.

In this discussion of the right of the school committee to contract with and determine the salaries of teachers, superintendents of schools, principals and supervisors, although we deal with three separate classes; the teacher, the superintendent of schools, and the principal and the supervisor; the term "teacher" is frequently used in the generic sense to cover all three classes. Although the appointment and determination of the salary of teachers and superintendents are prescribed by different

statutes, in all important essentials what applies to one applies to all.

The power to contract with and set the salary of teachers of the public schools is delegated to the school committee by section 38 of Chapter 71, which states that the school committee

shall elect and contract with the teachers of the public schools, shall require full and satisfactory evidence of their moral character, and shall ascertain their qualifications for teaching and their capacity for the government of the schools.¹

Section 59 of the same chapter empowers the school committee to "employ a superintendent of schools and fix his salary".²

The exclusiveness of this power is emphasized by the court in Decatur v. Peabody.

The power to contract with teachers in the public schools and to fix their salaries, for many years has been conferred by the statutes and has received definite construction. That construction has been that the power is vested absolutely in the school committee. The obvious reason was that suitability of teachers must depend to a large degree upon the amount of compensation which can be offered, and that since the general charge and superintendence of schools is vested in the school committee, it cannot be held to a strict performance of its duties without corresponding authority. Moreover, the power to contract with teachers imports the power to agree upon compensation.

1 General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 38.

2 Ibid., chapter 71, section 59.

... The requirement that the school committee shall "contract with the teachers of the public schools", with the necessary implication of fixing salaries, is as definite as that requiring high schools, evening schools, free text books, and the minimum number of days of instruction.³

In a similar manner the court said, at page 268 of Callahan v. Woburn,⁴

The power to contract with teachers in the public schools and to fix their salaries is vested in the school committee by G.L.(Ter.Ed.) Ch.71, sec.38, and it is plain from the provision of G.L.(Ter.Ed.) Ch.71, sec.59, that the power over the superintendent of schools is the same as over the salaries of teachers.

In O'Brien v. Pittsfield the court went even further when it stated that not only was the power to contract with and set the salaries of public school teachers vested exclusively in the school committee but that the power was one "that the school committee could not delegate lawfully to any of their subordinates or to the mayor or other city officials."⁵

The right of the school committee to determine the salaries of teachers has been questioned on many occasions. The courts, however, have consistently rejected these

3 Desatur v. City of Peabody, 251 Massachusetts 88.

4 Callahan v. City of Woburn, 306 Massachusetts 268.

5 O'Brien v. The City of Pittsfield, 316 Massachusetts 283.

challenges. At page 75 of James v. The Mayor of Fall River et al.,⁶ the court said, "the fixing of salaries of school teachers is not within the control of the city council, but is exclusively within the control of the school committee". The principle expressed in these words is nothing more than a recent reiteration⁷ of a judicial interpretation that is as old as the school committee itself.

Because the above quotation is so typical of the court decisions, it does not seem necessary to discuss further the many challenges that have been levelled at the exclusive right of the school committee to contract with and determine the salaries of teachers. Moreover, the cases discussed at pages 92 to 104⁸ of this thesis, under the heading "The Obligation of the Town to appropriate the Funds Requested by the School Committee", are among the foremost cases involving this concept. These key decisions, without exception, uphold the principle enunciated above.

6 James v. The Mayor of Fall River et al. 319 Massachusetts 75.

7 Ibid., decision handed down January 11, 1946.

8 O'Brien v. Pittsfield, supra; King v. City of Woburn, 311 Massachusetts 680; Decatur v. Peabody, supra; Hayes v. City of Brockton, 313 Massachusetts 641; Attorney-General of the Commonwealth of Massachusetts v. City of Woburn, 317 Massachusetts 464; Cotter v. City of Chelsea, 329 Massachusetts 314; Watt v. Town of Chelmsford, 323 Massachusetts 697; Casey v. City of Everett, 330 Massachusetts 220.

In addition to delegating the authority to "select and contract with teachers", section 38 of Chapter 71 provides that in electing individuals to the position of teacher in the public schools, the school committee "shall require full and satisfactory evidence of their moral character, and shall ascertain their qualifications for teaching and their capacity for the government of the schools".⁹ The interpretation of this portion of section 38 was a prominent factor in the case of School District No. 10 in Uxbridge v. Mowry et al.,¹⁰ one of the two cases in which the exclusive right of the school committee to select teachers was seriously questioned.

The prudential committees of the various school districts in Uxbridge had been authorized to select teachers for their respective districts. By statute, however, all teachers were obliged to secure certificates from the central town school committee before commencing their duties.¹¹ When the teacher selected by the plaintiff applied for a certificate, the town committee found her to be of good moral character, possessed of sufficient "literary qualifications", and "in general", of the capacity to govern; but refused to grant her a certificate.

⁹ General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 38.

¹⁰ School District No. 10 in Uxbridge v. Mowry et al., 91 Massachusetts (9 Allen) 94.

¹¹ General Statutes of Massachusetts, Chapter 38, section 24.

The reason advanced was that the said teacher had taught in that neighborhood before and had encountered some difficulties.

Consequently, the committee deemed it unwise for her to attempt to teach in that particular school. The prudential committee refused to engage another teacher. After waiting two months, the town committee, under authority of the General Statutes, Chapter 39, section 12 (which granted to the town committee the authority to conduct a school in any school district which neglected or refused "to establish a school and employ a teacher for the same"),¹² appointed and installed a teacher, taking possession of the school house against the wishes of the prudential committee. The school district sought redress from the chairman and other members of the town committee in a tort action for alleged unlawful entry of the district school.

The contention of the plaintiff was that the defendants had no right under Chapter 39¹³ because the district "had employed a teacher, who was found upon examination to possess a good moral character, and the requisite literary qualifications and general capacity to govern, and that it was the duty of the general committee

¹² General Statutes of Massachusetts, Chapter 39, section 12.

¹³ Ibid.

to give the requisite certificate; and that they could not take advantage of their wrongful refusal of the certificate in order to select a teacher, when that duty was intrusted by vote of the town to the prudential committee".¹⁴

In deciding for the defendants the court stated that the "language of the statute does not confine them (the committee) to an examination of the 'literary qualifications' of the teacher, but the more comprehensive phrase is used, 'qualifications for teaching'. Upon these in their widest sense", the court said, "the judgment of the committee is to be exercised; and their decision is conclusive".¹⁵ The court went on to point out that a prospective teacher might be a person of undoubted moral character, scholarship, and capacity to govern and at the same time possess some characteristic such as, lack of skill in teaching, physical unattractiveness, or political or religious bias; all factors which the committee would have to consider before granting a certificate. In concluding its decision the court declared,

The Legislature intended to confide to the school committee the determination of the fitness of the teacher for his position and his work. This construction of the language of the statute is strengthened by the provision which authorizes the committee to dismiss a teacher whenever they think proper.

¹⁴ School District No. 10 in Uxbridge v. Cowry, supra, p. 96.

¹⁵ Ibid.

It cannot be supposed, then, that they would be required by law to give their approval to a person contrary to their own convictions of his general fitness, and whom they would feel bound and have the right to dismiss at once.¹⁶

Although this case could not occur in the Commonwealth at the present time, because the school districts no longer exist, it has been selected for discussion here, because it is the only case in which the right of the school committee to select and appoint teachers has been directly questioned; because of the clarity with which it particularizes the factors which a school committee should consider in appointing a teacher; and, finally, because it has been cited as precedent by the courts in discussing factors which a school committee may consider in dismissing a teacher.

Russell v. Gannon¹⁷ is a somewhat similar case in that it involves an instance where a superintendent of schools refused to recognize an assistant superintendent, who, against his recommendation, had been appointed by the school committee.

In 1931 the school committee of the City of Pittsfield created the office of Assistant Superintendent of Schools and elected the petitioner, a teacher in the Pittsfield High School, to the newly made position.

¹⁶ Uxbridge v. Mowry, *supra*, p.97.

¹⁷ Russell v. Gannon, 281 Massachusetts 398.

Subsequently, the committee requested the superintendent to recommend someone for the position. He recommended a person other than the petitioner. The school committee rejected the candidate recommended by the superintendent and once again elected Russell.¹⁸ Gannon, the superintendent, refused to recognize him as his assistant. The case reached the court when the latter (Russell) sought a writ of mandamus to compel the superintendent to recognize him as assistant superintendent of schools.

In deciding in favor of the petitioner, the court said,

If it be assumed, but without so deciding, that in electing an assistant superintendent of schools, the advice of the superintendent must first be sought, that was done in the case at bar, and there is nothing in the law which requires the school committee to adopt the recommendation of the superintendent. Naturally (sic) his advice will be given consideration, but the ultimate responsibility and the finality as to choice rest with the school committee. It may act on its own judgement as to what is required by the public welfare, and contrary to advice from any source, even from the superintendent of schools. It is still the master and not the servant.¹⁹

The unmistakable wording of this decision makes it plain that the right of the school committee to select its professional personnel is unrestricted in so far as recommendation or regulation from other agencies or individuals are concerned.

¹⁸ The court report is silent as to the purpose of the second election. It may be conjectured that, since Chapter 71, section 59 states that the "superintendent ... shall recommend teachers..." the committee had some doubt as to the validity of the original election.

¹⁹ Russell v. Gannon, *supra*, p.401.

On the other hand, the school committee, in the exercise of the rights discussed above, namely, the right to select, contract with, and set the salary of teachers, is restricted by certain confining statutes. Section 40 of Chapter 71²⁰ specifies the minimum salary which may be paid to any teacher as twenty-three hundred dollars in towns of less than two and one half million dollars valuation, and as twenty-five hundred dollars in all other towns. The same section provides that "women teachers employed in the same grades and doing the same type of work, with the same preparation and training, as men teachers shall be paid at the same rate as men teachers". Section 38G establishes certain minimum qualifications which a prospective teaching candidate must possess.²¹ Section 39 forbids any school committee or officer from requiring of an applicant for the position of public school teacher information concerning his religious creed or his political affiliations.²²

The "minimum salary" and "certification" laws have never been questioned; nor have the courts been requested to pass judgement on a case where an applicant for a teaching position has been queried concerning his

²⁰ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 40.

²¹ Ibid., section 38G.

²² Ibid., section 39.

religious or political convictions. In Murphy v. The School Committee of Lawrence,²³ however, the judiciary was asked to interpret the "equal pay" clause of section 40.

The plaintiff, Murphy, a female, was Supervisor of Arithmetic for grades four, five, and six of the Lawrence Public School Department. One, Durgin, a male, was Supervisor of Manual Training for grades six, seven, and eight. The plaintiff contended that since both were supervisors, their salaries should be equal by virtue of Chapter 71, section 40.²⁴ Since they were not, she petitioned the court to compel the School Committee of the City of Lawrence to increase her salary to the point where it would be equal to that of Durgin.

In giving its decision the court said,

... although both the plaintiff and Durgin are called supervisors, the type of work performed by them differs substantially in that the plaintiff supervises the teaching of arithmetic to both girls and boys, while Durgin supervises the teaching of woodworking to boys only and in addition performs other duties, not similar to any performed by the plaintiff, in ordering and distributing supplies and in keeping the time of other teachers. Supervision is the only common element in the work of the two teachers, and it is obvious that supervision of the work in manual training must differ substantially from the supervising of the teaching of arithmetic.²⁵

²³ Murphy v. School Committee of Lawrence, 321 Massachusetts 478.

²⁴ General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 40.

²⁵ Murphy v. Lawrence, supra, p.479.

The court went on to point out that whereas the training of the plaintiff had consisted primarily of academic training, as a result of which she had earned both the bachelor's and master's degrees; Durgin's training had consisted of an apprenticeship, followed by extensive experience as a journeyman carpenter, and a short normal school course in the teaching of manual training.

Pointing out that the statute provides equal pay for male and female teachers when they do "the same type of work", "in the same grades", with "the same preparation and training", the court ruled that the two positions were equal in none of these respects and dismissed the petition.

The court expanded its interpretation of this statute when the City of Chelsea, in the aforementioned case of Cotter v. Chelsea,²⁶ alleged that the granting of a dependency allowance to all married teachers "who are the sole support of his own wife, her own husband, or his or her own children under eighteen" violated the spirit, if not the letter, of section 40. Rejecting this allegation, the court said, "Chapter 71, section 40, does not mean that the committee can not make legal, logical, and reasonable differentiations among employees, but only that the differentiation cannot be made on the basis of sex."²⁷ Since sixty-five men and five women profited from the dependency allowance, the court ruled that sex could not have been the determining factor.

²⁶ Cotter v. Chelsea, 328 Massachusetts 314.
²⁷ Id. at 318

Section 40, then, while it prescribed the actions of the school committee under certain conditions is, on the one hand, subject to a literal scrutiny by the court to determine if those conditions do, in fact, exist; and on the other hand, is found to be no barrier to the school committee in making reasonable distinctions between teachers, unless that distinction be based on sex alone.

Just as the school committee possesses the exclusive right to engage and determine the compensation of a teacher, so too, it exercises a very large measure of control over the teacher once he has been engaged.

2. The School Committee Has the Right to Set the Duties of Teachers, Superintendents, Principals, and Supervisors.

The school committee has the exclusive right to set the duties of the teachers, superintendents of schools, principals and supervisors, who under its general superintendence conduct the affairs of the public schools. This authority has its source in the mandate of the Legislature to take "general charge" of the public schools, found in section 37 of Chapter 71.²⁸ Perhaps the best description of the scope of this power is found in McDevitt v. The School Committee of Malden, at page 214, where it is stated that the general powers of the school committee "included the power to change by a majority vote the duties

²⁸ General Laws of Massachusetts (Ter. Ed.) Chapter 71, section 37.

of teachers on tenure at discretion, and to assign them to new duties, or to continue them in existing duties, or to return them to duties formerly performed...²⁹

These words of the court leave little doubt as to the extent of the power exercised by the school committee with respect to the determination of the duties which its employees shall perform.

In the case of a teacher, whether he be serving on tenure at the discretion of the committee, or on a yearly contract prior to the attainment of tenure status, the power of the committee to determine his duties is unquestioned. With regard to superintendents, principals, and supervisors, however, the committee is restricted: by statute in the instance of those serving on tenure,³⁰ by the laws of contract in the case of those who have not achieved tenure status.

A principal or supervisor serving the committee on tenure may be transferred to another school or department within the school system³¹ but by virtue of Chapter 71, section 42A³² He may not be reduced in rank or salary. A person who contracted to serve for a period of time as a principal or supervisor, could probably, depending upon

29 McDevitt v. School Committee of Malden, 298 Massachusetts 214.

30 General Laws of Massachusetts (Ter. Ed.) Chapter 71, sections 41, 42, 42A.

31 Boody v. Town of Barnstable, 276 Massachusetts 138.

32 General Laws, supra, section 42A.

the terms of the contract, be transferred to other schools or departments, but could not, during the period covered by the agreement, be reduced in rank without a breaching of the contract.

No case has reached the court in which the exclusive right of the school committee to determine the duties of a teacher has been contested. However, the principle involved is well illustrated in Demers v. The School Committee of Worcester.³³ The plaintiff had served for three years as Director (Supervisor) of Industrial Arts in the Worcester School Department. The school committee failed in June, 1950 to appoint him to the position for a fourth year, which appointment would have given him tenure status under section 42A of Chapter 71.³⁴ The plaintiff sought a writ of mandamus to compel the school committee to appoint him to the post of director, contending that he had been among the assistant superintendents, supervisors and directors who had received a letter from the superintendent of schools "reminding them of the need of their services 'the last week in August to assist in completing plans for the reopening of schools on September 6', and stating that the superintendent expected to 'find (him) ready for work on and after Tuesday, August 29';"³⁵ and that he had, in

³³ Demers v. School Committee of Worcester, 329 Massachusetts 370

³⁴ General Laws of Massachusetts (Ter. Ed.) Chapter 71, section 42A.

³⁵ Demers v. Worcester, *supra*, p.372.

compliance with the superintendent's directive, reported for duty as the Director of Industrial Arts on August 29, and had served as such until September 8, two days after the opening of school, on which date the school committee voted to deny him appointment to tenure; and that as a consequence of his service, he had, as a matter of fact, served more than three years and was protected by the tenure status afforded to supervisors under section 49A.

The court denied his petition stating that the power to determine the duties of a teacher lay solely with the school committee, and that the "superintendent of schools had no authority to direct him to continue his work after his term of employment had expired".³⁶

The Demers case is a clear-cut example of the principle that the power to determine the duties of public school employees delegated to the school committee under section 37 of Chapter 71,³⁷ is a power which is vested exclusively in the school committee.

3. The School Committee Has the Right to Dismiss Teachers, Superintendents, Principals and Supervisors

Logically, the school committee, which has the right to select, contract with, set the salaries of, and determine

³⁶ Demers v. Worcester, supra, p.373.

³⁷ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 37.

the duties of the individuals whom it engages to operate the public schools under its jurisdiction, should also have the right to terminate the employment of those individuals. A study of the General Laws of the Commonwealth and of pertinent judicial decisions reveals that the school committee does, in fact, have the authority to dismise the teachers, superintendents, principals and supervisors it has engaged, whenever the honest judgement of the committee deems such dismissal necessary or beneficial to the welfare of the public schools under its direction.

The right of the school committee to dismiss teachers had its origin in section 5 of Chapter 143 of the Statutes of 1826,³⁸ which gave to the newly created school committee "general charge" over the public schools. The power implicitly encompassed in the "general charge" mandate was made explicit by Statute 1844, Chapter 32, which authorized the school committee "to dismise from employment any teacher ... whenever the said school committee may think proper".³⁹ This explicit authority of the school committee to dismiss teachers when the good of the schools required has been present, in some form, in the Code of the Commonwealth from 1844 to the present time.⁴⁰

38 Acts of Massachusetts 1826, Chapter 143, section 5.

39 Acts of Massachusetts 1844, chapter 32.

40 For a good review of the legislation affecting the dismissal of public school teachers, see Sheldon v. The School Committee of Hopedale, 276 Massachusetts 230.

The courts, for their part, have always given the broadest possible interpretation to the statutes. This is well exemplified in the Knowles v. Boston⁴¹ decision in 1855. The plaintiff, who for several years had taught in the public schools of the City of Boston, was dismissed thirteen days after the opening of the schools in September, 1855. Her dismissal was occasioned, not by any inefficiency on her part, but because the school committee decided to close the school in which she taught. She, like other teachers in the City of Boston, was employed on a yearly basis and was paid quarterly on the first days of September, December, March, and June. When, on December 1, 1855, the respondents paid her for the thirteen days that she had worked, and no more, the plaintiff alleged that she was employed on a yearly contract, that she had been dismissed through no fault of her own, that she had been available for further service; and brought suit for her salary through December 1.

In handing down a decision for the respondents, the court pointed out that while she was employed on an annual basis and paid quarterly, her continued employment and reimbursement were contingent upon the ability to perform and the performance of the duties for which she was engaged. When she failed to perform the duties, even

⁴¹ Knowles v. The City of Boston, 78 Massachusetts (12 Gray) 339.

through no fault of her own, her right to compensation ended.

To the specific argument that the statute under which the plaintiff was dismissed⁴² was not intended to authorize a school committee to dismiss a teacher unless some fault or neglect was committed by her in the performance of her duties, the court said, "this is altogether too narrow an interpretation of this statute. The power is conferred in the most general terms, and is to be exercised whenever in the judgement of those to whom it is committed the public good for any cause requires it, of this they are the exclusive judges."⁴³

Almost a century later, when a dismissed teacher sought the aid of the courts in an effort to regain her position, on the strength of an argument, which, if upheld by the courts, would give to a review board of the Teachers' Retirement Association the right to determine whether or not a teacher had been properly dismissed, the court denied the petition.⁴⁴ Such an interpretation of the law, the court pointed out, would be completely out of harmony with the traditional legislative intent and judicial decisions concerning the position of the school committees of the commonwealth. "By long established legislative policies",

42 Statute 1854, Chapter 448, section 86.

43 Knowles v. Boston, *supra*, p.340.

44 Davis v. the School Committee of Somerville, 307 Massachusetts 354.

the court said, "school committees are given general management of the public schools including the election and dismissal of teachers ... They have administrative control of school systems, and they are responsible for the proper functioning of the schools..."

"Manifestly, one of the most important duties involved in the management of a school system is the choosing and keeping of proper and competent teachers. The success of a school system depends largely on the character and ability of the teachers. Unless a school committee has authority to employ and discharge teachers, it would be difficult to perform properly its duties of managing a school system. The statutory power of a school committee has always been freely construed."⁴⁵

The decisions discussed above, spanning, as they do, nearly a century of judicial thought, are representative of the consistent judgement of the courts to the effect that a school committee has the authority to dismiss a teacher, whenever it deems the dismissal to be required by the common good.

4. Dismissal Under the Tenure Law

Although it has endowed the local school committee with a very broad power in the matter of dismissing its

⁴⁵ Davis v. Somerville, supra, 362.

agents, the Legislature, to provide teachers with some sense of security to the end that they might more efficiently perform their duties, has seen fit to restrict the manner in which this power may be exercised.

The so-called Tenure Law, passed originally in 1914⁴⁶ and embodied now in the Code as section 41 of Chapter 71, provides that

Every school committee, in electing a teacher or superintendent, who has served in its public schools for the three previous consecutive school years, other than a union or district superintendent and the superintendent of schools in the city of Boston, shall employ him to serve at its discretion; but any school committee may elect a teacher who has served in its schools for not less than one school year to serve at such discretion. A teacher or superintendent not serving at discretion shall be notified in writing on or before April fifteenth whenever such person is not to be employed for the following school year. Unless said notice is given as herein provided, a teacher or superintendent not serving at discretion shall be deemed to be appointed for the following school year.⁴⁷

Section 42, Chapter 71, which outlines the conditions under which "tenure teachers" may be dismissed, reads as follows:

The school committee may dismiss any teacher, but no teacher and no superintendent, other than a union or district superintendent and the superintendent of schools in the city of Boston, shall be dismissed unless by a two-thirds vote of the whole committee. In every such town a teacher or superintendent employed at discretion under the preceding section shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause, nor unless at least

46 Acts of Massachusetts, 1914, Chapter 714.

47 General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 41.

thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. The change of marital status of a female teacher or superintendent shall not be considered cause for dismissal under this section. Neither this nor the preceding section shall affect the right of a committee to suspend a teacher or superintendent for unbecoming conduct, or to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable. In case a decrease in the number of pupils in the schools of a town renders advisable the dismissal of one or more teachers, a teacher who is serving at the discretion of a school committee under section forty-one shall not be dismissed if there is a teacher not serving at discretion whose position the teacher serving at discretion is qualified to fill. No teacher or superintendent who has been lawfully dismissed shall receive compensation for services rendered thereafter, or for any period of lawful suspension followed by dismissal.⁴⁸

Despite the fact that the tenure laws have been in existence for a relatively brief forty years, the courts have been called upon to construe practically every phase of them. Judicial decisions with regard to the dismissal of tenure teachers group themselves

⁴⁸ General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 42.

into two categories: decisions in which the courts have been forced to rule when, in fact, tenure is acquired; and decisions involving the conditions under which tenure teachers may be dismissed.

a) The Acquisition of Tenure.— Tenure status is normally acquired when a teacher is elected to further service after having served for three consecutive years, on a full time basis, as a regularly appointed teacher in a public school system of the Commonwealth. Cases have arisen, however, where not all of these conditions are clearly fulfilled: it is in these instances that the courts have been asked to rule whether or not a teacher had acquired a tenure status.

Part-time Teachers.— In Frye v. The School Committee of Leicester⁴⁹ the plaintiff had been elected to serve as a "part-time" teacher in the Leicester High School in September, 1933. Her duties as a "part-time" teacher consisted of teaching three periods and supervising a study hall each day. She did additional teaching as assigned. In March, 1934, she was appointed a regular teacher and held that position until June, 1937, when she was dismissed. She petitioned the court to compel the school committee to restore her to her position contending that she had acquired tenure status and

⁴⁹ Frye v. The School Committee of Leicester, 300 Massachusetts 537.

consequently the protection of Chapter 71, section 41, when she was elected to serve for the school year 1936-1937, after serving a probationary period of three years from September 1933 to June 1936. The respondents countered that the school year 1933-34 could not be counted for tenure purposes, since she had been a part-time teacher from September to March; and that her election in June 1936 had been to serve for the school year 1936-1937 rather than to serve at the "discretion" of the school committee in a tenure status.

The court said of the respondents' first argument,

The statute recognizes no separate classification of "part-time" teachers. The sole test mentioned in the statute is service "for the three previous consecutive school years". We are not here called upon to consider what might be the bearing of long or repeated absences from work or of employment of a merely casual nature, as the findings show continuous employment of a substantial character under the direction of the superintendent and of the committee for the entire period ...⁵⁰

Pointing out that the teacher had, as a matter of fact, been a regular member of the high school faculty for "three consecutive school years prior to her election in May, 1936", the court ruled that she had qualified "to serve at discretion under the statute",⁵¹ and that the committee should have so classified her.

⁵⁰ Frye v. Leicester, supra, p.540.

⁵¹ Ibid., p.538.

To the allegation of the respondents that the petitioner's appointment in May, 1936, to serve for the school year 1936-1937 rather than at the "discretion" of the committee prevented her from acquiring a tenure status, the court replied,

This construction assumes that tenure at discretion cannot begin until there has been a formal election which must take place after the complete expiration of the three consecutive school years. The literal wording of the statute has some tendency to support this view. But a strictly literal construction of a statute is not necessarily to be adopted if the result of adopting it will be to thwart or hamper the accomplishment of the obvious purpose of the act and if another interpretation which will not have such effect is possible...⁵²

The decision of the court in this case would seem to indicate that tenure can be acquired through part time service, as long as that service is continuous, regular, and of three years' duration; and provided also that the teacher is elected to further service beyond the three year probationary period.

The court stated in Frye v. Leicester that it was not being asked to consider the effects upon a teacher's claim to tenure of "long or repeated absences or of employment of a merely casual nature". Seven years later, in the case of Nester v. The School Committee of Fall River⁵³ it was asked to rule on that very point.

⁵² Frye v. Leicester, supra, p.538.

⁵³ Nester v. The School Committee of Fall River, 318 Massachusetts 538.

Four female teachers, the Misses Nester, Murther, Driscoll, and a Mrs. Aldermann had served as substitute teachers in the public schools of the City of Fall River during the school years 1940-1941 to 1943-1944 inclusive. In August, 1944, they were dismissed. They sought a writ of mandamus to compel the respondents to restore them to their positions contending that through three consecutive years of service as substitute teachers they had acquired the status of tenure teachers as set forth in Chapter 71, section 41, and that, as a consequence, their dismissal, without compliance with the provisions of Chapter 71, section 42, was illegal.

In ruling for the school committee the court said,

We assume ... that a substitute teacher who has been continuously employed for the three year probationary period specified in section 41 acquires the status of tenure at discretion therein provided when elected to serve for the fourth year. But we are of the opinion that the phrase "served ... for the three previous consecutive school years" in section 41 signifies a continuity of service for that period and is not satisfied by intermittent and irregular service as a substitute. To hold otherwise might very well lead to the result that a substitute teacher who had served for a brief period or even for a few days in each of three consecutive years would acquire tenure upon election by a school committee for the fourth year. We cannot believe that the Legislature intended that tenure would be acquired in this manner.⁵⁴

The court went on to point out that the first three petitioners had served for little more than one half

⁵⁴ Nester et al. v. Fall River, supra, pp 541-542.

of the one hundred and eighty-day school year during 1941-1942, the first of the three years upon which they based their claim to tenure status. This, in the opinion of the court, did not represent the continuous service required by the statute. The fourth plaintiff, Mrs. Aldermann had served for 182 and 178 days respectively during the school years 1940-1941 and 1941-1942. She had continued to serve regularly through June, 1943, but had submitted a resignation, which had been accepted, in May, 1943. Although she applied for reinstatement in August, 1943, and had served regularly until her dismissal, the court ruled that she was not protected by the tenure law, by virtue of the fact that her resignation, almost a month before the close of the school year in 1943, had interrupted the probationary period prescribed by the statute. She had, in effect, commenced a new term of probation in September, 1943.

A third decision on the acquisition of tenure rights was handed down in 1953. In Kelley v. The School Committee of Watertown⁵⁵ the court ruled that a sub-master of a high school, who was demoted to the position of teacher in a Junior high school before he had completed more than three years in the former position, could not add ten years of service as a sub-master of a junior high

⁵⁵ Kelley v. The School Committee of Watertown, 330 Massachusetts 150.

school to his high school service in order to obtain tenure. A ruling for the plaintiff, the court pointed out, would destroy the purpose of the probationary period prescribed by the statute.

The above decisions would indicate that, in addition to the customary method, tenure status may be acquired through election to a fourth year of service after three consecutive years of continuous part time service, or, under like conditions, through service as a substitute teacher. The court has not defined "continuous service" in the case of substitute teachers. It may be assumed, however, that the term is construed as service similar to that rendered by the petitioner Aldermann, in Nester v. Fall River,⁵⁶ who would have acquired tenure status save for her untimely resignation in 1943. The Kelley case⁵⁷ makes it clear that each time a teacher acquires a different status he begins a new period of probation.

b) The Conditions of Dismissal.— The second group of decisions to be considered in a study of dismissal under the tenure law are those concerning the various provisions of section 42, of Chapter 71,⁵⁸ compliance with which is necessary to a legal dismissal.

⁵⁶ Nester v. Fall River, *supra*.

⁵⁷ Kelley v. Watertown, *supra*.

⁵⁸ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 42.

Dismissal by a two-thirds vote.— Section 42 provides that the school committee may dismiss any teacher but that no teacher "shall be dismissed unless by a two-thirds vote of the whole committee". Despite the apparent clarity of this provision, the court has been forced to interpret it on two occasions.

In Perkins v. the School Committee of Quincy,⁵⁹ the petitioner, a teacher serving on tenure at the discretion of the school committee was notified that the committee planned to vote to dismiss her from the teaching force of the public schools of Quincy. She requested a specification of charges and a hearing as provided in Chapter 71, section 42. On November 20, 1940, a hearing was held before five of the seven members of the school committee, at which evidence was presented by both parties to the controversy. On December 10, 1940, the whole committee, with six of the members voting "aye", and the seventh "present", voted to dismiss the petitioner.⁶⁰ Two of the "aye" votes were cast by the two members who were absent from the hearing of November 20.

The dismissed teacher petitioned the court for a writ of mandamus to compel the committee to restore her to her position, alleging that the two committee members who were not present at the hearing were not eligible to

⁵⁹ Perkins v. School Committee of Quincy, 315 Massachusetts 47.

⁶⁰ Ibid., p.49.

vote on the matter and that discounting their votes there was no two-thirds vote as required by the statute. The respondents countered by saying that, while the two members were not present, they had heard a complete transcript of the hearing.

The judge of the lower court ruled that "as a matter of law ... (the absent members) ... were not qualified to vote on the ... dismissal, and, ... since their votes (could) not be counted, there was not a two-thirds vote of the committee as required by law".⁶¹ The petitioner was granted the requested writ. The Supreme Court upheld the ruling. They added,

A two-thirds vote of the whole committee to dismiss a teacher is, in substance, a vote that the charge or charges against that teacher have been substantiated by evidence introduced at the hearing ... The statute necessarily implies not only that a hearing "before the school committee" of the nature described in the statute, if a hearing is requested by the teacher, shall be a condition precedent to the dismissal, but also that the participation in such a hearing of a member of the school committee who votes shall be a condition precedent to such a vote.⁶²

The court concluded its decision by stating that in so far as the absent committee members were concerned the teacher had not had the type of hearing which the statute contemplated.

61 Perkins v. Quinoy, *supra*, p.50.

62 Ibid., p.52.

Further construction of the statutory provision of a two-thirds vote for dismissal is found in the case of Moran v. The School Committee of Littleton.⁶³ Moran had been dismissed from his position as principal of the Littleton High School on charges preferred by the school committee after a hearing before that body. He sought the help of the courts in regaining his position, protesting that the school committee of Littleton consisted of three members, and that, during the hearing which led to his dismissal, two of the three committee members had been sworn as witnesses and had offered testimony that was detrimental to him; and that they had then resumed their judicial role and had voted his dismissal on the strength of the testimony heard. Once they had offered testimony, he contended, the two committeemen were no longer suitable judges of his fitness to hold his position.

The court prefaced its decision by saying that the authority of the school committee to control the affairs of the public schools under their jurisdiction was unquestioned. "The responsibility", said the court, "for the removal of a teacher who is incompetent or whose retention would be detrimental to the best interests of the public school system rests exclusively with the committee,

⁶³ Moran v. The School Committee of Littleton, 317 Massachusetts 591.

although the exercise of the power to remove a teacher has for many years been regulated by statute, more especially with reference to teachers who like the petitioner are employed to serve at the discretion of the committee".⁶⁴ "The statutory provisions", the court pointed out, did not "limit the power conferred upon the committee but (restricted) the manner of its exercise".⁶⁵ An analysis of the statutes, the bench indicated, revealed that the Legislature had made no provision for the replacement of a school committee member who, for any reason, could not sit with the committee. Since, in the case at bar, a vote of two-thirds of the whole committee was required to effect the legal dismissal of the petitioner, the disqualification of the two members of the board who had testified would leave the committee powerless to act in a matter of grave importance to the school system under its charge. Reasoning that such a condition could never have been the intent of the Legislature, the court ruled that the hearing had been conducted in compliance with the statute and that the dismissal was valid.

Although both of the cases discussed above concern teachers serving on tenure at the discretion of the committee, the principles enunciated would apply equally to

64 Moran v. Littleton, supra, p.592.

65 Ibid.

non-tenure teachers, since the opening sentence of section 42 makes no differentiation between them.⁶⁶

Valid reasons for dismissal.— Section 42 specifies the causes for which a teacher serving on tenure at the discretion of the committee may be dismissed as "inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause".⁶⁷ These are essentially the same reasons for the valid dismissal of a tenure teacher that are to be found in the statutes of any of the states that have established tenure laws. It is the judicial construction that has been given to the phrase "other good cause" that has endowed the school committees of the Commonwealth with a power that is entrusted to few of the school committees of her sister states. As was stated in the aforementioned case of Rinaldo v. Dreyer⁶⁸ the court has defined "good cause" as including

... any ground which is put forward by the committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee's task of building up and maintaining an efficient school system ... If the cause assigned is at least fairly debatable and is asserted honestly, and not as a subterfuge, that is enough.⁶⁹

Moreover, where the courts of the majority of her sister states have ruled that the phrase "other good cause"

⁶⁶ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 42.

⁶⁷ Ibid.

⁶⁸ Rinaldo v. Dreyer et al., 294 Massachusetts 167.

⁶⁹ Ibid., p.169.

means causes denoting some inefficiency or misconduct on the part of the teacher and in keeping with the specifically enumerated charges, the courts of the Commonwealth have held that "good cause for dismissal ... is by no means limited to some form of inefficiency or of misconduct on the part of the person to be dismissed". "Such matters", the court declared, "are amply covered by the words which precede 'good cause'."⁷⁰

The sweeping scope of this statutory interpretation gives to the school committees of the Commonwealth the power to dismiss a teacher, even though he have a tenure status, whenever it can advance in good faith any legitimate reason for judging that the schools under its superintendence will function more efficiently without the services of the said teacher.

The broad power of dismissal granted to the school committee can be made more meaningful through an analysis of the conditions surrounding the dismissal of superintendents of schools in the cases of Toothaker v. Rockland⁷¹ and Freeman v. Bourne,⁷² and of a master at the Boston Latin School in the case of Faxon v. The School Committee of Boston.⁷³

⁷⁰ Rinaldo v. Dreyer, *supra*, p.169; contrast with: City of Knoxville v. Haywood, 133 S.W.(2d) 465 (Tennessee); State ex rel. Penney v. Rapides Parish School District, 180 (2d) 334 (Louisiana); School District of Wildwood v. State Board of Education, 185 ATL (2d) 664 (New Jersey).

⁷¹ Toothaker v. Rockland, 256 Massachusetts 534.

⁷² Freeman v. Inhabitants of Bourne, 170 Massachusetts 289.

⁷³ Faxon v. School Committee of Boston, 100 N.E. (2d) 772 (Massachusetts).

In Toothaker v. Rockland⁷⁴ Toothaker was dismissed from the position of Superintendent of Schools for the Town of Rockland because: (1) It was the opinion of the school committee that the lack of co-operation between the superintendent and the committee was detrimental to the best interests of the Rockland schools; and, (2) The school committee believed that it could maintain a higher standard in the schools and "one more satisfactory to the town" with another superintendent. He petitioned the court for a writ of mandamus to compel the committee to restore him to his position, alleging that his dismissal was brought about through bad faith on the part of the committee.

An auditor, appointed by the court to determine the facts in the case, reported that: one of the three members of the Rockland school committee had favored the retention of the petitioner; another had for some time been hostile to the dismissed superintendent; and the third had been elected to the committee at a time when it was allegedly well known that he was opposed to the superintendent and to his policies. Further investigation showed that, prior to his dismissal, Toothaker had made uncomplimentary remarks about the two committee members who opposed him, which had been published in a daily newspaper, the Boston Post. He was alleged to have characterized one of the committee men as a "truck driver" and the other as a "barnstorming actor"

74 Toothaker v. Rockland, supra, 584.

who when "stranded" in Rockland had secured a "job as a bookkeeper".⁷⁵ He did not deny the remarks, but he protested that he did not know that they were to be published. The auditor concluded his report by saying that he found no good cause for dismissal and that the public schools of Rockland had flourished under the leadership of the petitioner.

Despite the auditor's report, a single justice of the Supreme Court ruled that he was not "satisfied that the reasons set out in the notice ... were a mere subterfuge, a camouflage for personal hostility, ill will and political animosity".⁷⁶ Moreover, he indicated, that if the case were to be considered from a discretionary, rather than a strictly legal point of view, it would not seem wise for the courts to help maintain in office a superintendent whose further usefulness to the community was as doubtful as was that of the petitioner, in view of the evidence offered at the trial; "even though", stated the justice, "his ability and willingness to render good service to the schools of Rockland are as great as, from the evidence, I believe them to be, and although his dismissal is so likely to be a cause of regret to the committee and the town".⁷⁷

⁷⁵ Toothaker v. Rockland, supra, p. 587.

⁷⁶ Ibid., p. 590.

⁷⁷ Ibid., p. 590.

In upholding the decision of the single justice to dismiss the petition, the Supreme Court, as a body, pointed out that regardless of where the blame for the controversy might be, the interests of the public schools of Fockland could be better served where a spirit of co-operation existed between the superintendent of schools and the school committee.

Thus, no matter how efficiently a school department seems to be functioning, a charge put forward in good faith by a school committee, that in their honest judgment, a lack of co-operation between school committee and superintendent of schools is acting as a detriment to the operating efficiency of the schools under their superintendence, is sufficient reason for the dismissal of the said superintendent.

The right of a school committee to dismiss a teacher whose moral reputation has been seriously impaired is made clear in the case of Freeman v. Bourne.⁷⁸

On August 12, 1893, one Delbert G. Donnacher was elected superintendent of schools by the joint committee of the Sandwich-Bourne-Mashpee school union. He accepted the election and commenced his duties. The following month, Donnacher was indicted in a Superior Court in the State of Maine on a charge of adultery. He pleaded "not

⁷⁸ Freeman v. Bourne, *supra*, p.290.

guilty" to the charge but was convicted. Exceptions which he filed during the trial were granted by a court of appeal and a second trial was ordered. The second trial ended with a disagreement of the jury, and a third trial had the same result. Finally in 1896 a nolle prosequi was entered by the prosecutor. In October, 1893, the accused had been dismissed by a vote of nine to nothing by the joint committee of the school union. The case reached the courts when the town school committee of Bourne challenged the right of the joint committee to dismiss Donnacher under the circumstances existing and refused to contribute to the salary of his successor, Freeman.

The court upheld the right of the joint committee to dismiss the superintendent saying

There can be no doubt that the existence of the indictment alone would at least put him under just suspicion of having committed the offense therein charged. The joint committee did not act upon mere rumors more or less current in the community. Schools will suffer if those who conduct them are open to general and well grounded suspicion of this kind. It needs no extended argument to show that not merely a good character, but good reputation, is essential to the greatest usefulness in a position such as that of superintendent of schools ... Where a superintendent of schools is under indictment for adultery, it is competent for the ... committee to declare that he has become unsuitable and unfit to continue in that position, without assuming for themselves to determine the question of his guilt or innocence. They are not bound to form a judgement on that matter.⁷⁹

Although Donnacher was dismissed prior to the enactment of the present tenure law, the results in all likelihood

⁷⁹ Freeman v. Bourne, supra, p.294.

would have been the same had the law been in existence at the time of his dismissal. A teacher in his position at the present time could, under the terms of section 42,⁸⁰ demand a hearing. After the required hearing, however, a school committee could still dismiss such a teacher on the grounds that in its honest judgement, the teacher, by reason of impaired reputation, was no longer a suitable person to perform the duties of the high office for which he was engaged.

This principle is clearly illustrated in a 1954 decision of the Supreme Court in the case of Faxon v. The School Committee of Boston.⁸¹ In that instance, the petitioner, a master at the Boston Latin School, was serving on tenure at the discretion of the committee and enjoyed all the protection that was to be found in sections 41 and 42 of Chapter 71.⁸² When called before an investigating subcommittee of the United States Senate, he exercised the right guaranteed to every citizen by the Fifth Amendment to the Constitution of the United States⁸³ and refused, on the grounds that his answers might incriminate him, to answer such questions as: was he a member of the Communist Party? Had he ever been a member of the Communist Party? Had he tried to recruit students of the

⁸⁰ General Laws of Massachusetts (Ter. Ed.) Chapter 71, section 42.

⁸¹ Faxon v. Boston, supra.

⁸² General Laws, supra, sections 41, 42.

⁸³ Constitution of the United States, Article of Amendment No. V.

Boston public schools into the Communist Party or the Young Communists League? Had he ever attempted to induce a fellow teacher to join the Communist Party? and other questions of a similar nature. After due notice and full compliance with the provisions of section 42⁸⁴ the School Committee of the City of Boston dismissed him from his position of Master at the Latin School for "conduct unbecoming a teacher". He petitioned the court to compel the committee to restore him to his position contending that no valid reason existed for his dismissal and that to dismiss him for exercising a constitutional right was to place that right in jeopardy.

In denying his petition the court said, "... it is not too much to say that in this Commonwealth from time immemorial school committees have had general charge and control over the public schools, including the power to dismiss teachers and fix their compensation.⁸⁵ The dismissal of teachers is, however, restricted by sections 41 and 42 of Chapter 71. Permissible grounds for dismissal are "inefficiency, incapacity, conduct unbecoming a teacher, insubordination or other good cause". This has been held to include any ground "which is not arbitrary, irrational, unreasonable, or irrelevant to the task of building up and maintaining an efficient school system". The dismissal of a teacher for pleading possible self

⁸⁴ General Laws of Massachusetts (Ter. Ed.) Chapter 71, section 42.

⁸⁵ Faxon v. Boston, supra, p. 773.

incrimination when asked whether he is a member of the Communist Party or has ever exerted efforts on behalf of the Communist Party does not fall into any of these latter classifications. Although no guilt can be attributed to him in the eyes of the law, public opinion can not be controlled by the courts. If members of the community have reason to suspect the loyalty of the petitioner, that is ample reason for the school committee to vote his dismissal.⁸⁶ The court disposed of the allegation that the dismissal infringed the constitutional rights of the petitioner with the pithy but conclusive declaration that "he may have a constitutional right not to incriminate himself, but he has no constitutional right to be a public school teacher".⁸⁷

The latitude allowed a school committee in the dismissal of a teacher is brought more sharply into focus when we note that the dismissal of Toothaker was upheld, despite the fact that the schools of Rockland had flourished under his guidance, and that there was some question of political animosity being involved; that Donnacher was dismissed, not because he was an adulterer, but because he had been indicted by a court of another state on the charge of adultery; and that Faxon was dismissed, not because of membership in or affiliations with the Communist Party, but because the

⁸⁶ This paragraph is a paraphrase of the key points of the court's decision. Faxon v. Boston, supra, pp.773-776.

⁸⁷ Faxon v. Boston, supra, p.775.

school committee felt that his refusal to deny such membership or affiliation would lead many people to think that such membership or affiliation was a fact, and that, as a consequence, his value to the Public School Department of the City of Boston would be greatly impaired.

Dismissal in "Bad Faith".— Although the courts have been consistent in ruling that in the dismissal of teachers, as well as in all other matters affecting the operation of the public schools, a decision of the school committee made in compliance with the statutes and in good faith is final and "is not subject to review by any other board or tribunal",⁸⁸ they have been ever ready to come to the aid of an aggrieved party, where the evidence has indicated that a statute has been violated or that a school committee has acted in bad faith.

The case of Pollard v. The School Committee of Revere⁸⁹ demonstrates this point. The petitioner was demoted from the position of assistant principal of the Revere High School to the position of teacher when the school committee voted to abolish his position for reasons of economy. He contended that the desire to demote him as a reprisal for his political opinions rather than to practice economy was the true purpose of the abolition of the position of assistant principal, and that,

⁸⁸ Carr v. Dighton, 229 Massachusetts 304; Wulff v. Wakefield, 221 Massachusetts 427; Averell v. Newburyport, 241 Massachusetts 333.

⁸⁹ Pollard v. School Committee of Revere, 249 Massachusetts 526.

consequently, his demotion was accomplished in violation of section 39 of Chapter 71.⁹⁰

After an investigation of the facts by an auditor, the court said,

A full perusal of the record clearly shows that at least Murray and Feilly, two of the members voting for the changes, were in the case of Pollard⁹¹ actuated by ill feelings of political resentment and ill will, more or less openly expressed and exhibited... The votes of these respondents were not cast upon the merits of the question, whether the position held by Pollard should be abolished in the interests of the public welfare, but were cast as a convenient and effective means of displacing him from his position because of his political views, which do not appear at any time to have been improperly expressed.⁹²

The court went on to point out that since the full school committee consisted of seven members, and that two members had voted against the dismissal, the vote would lack the necessary two-thirds required by the statute if the votes of Murray and Feilly were discounted. "We do not consider", concluded the tribunal, "that we are required to allow such a board to nullify the plain and salutary provisions of this statute by simply covering their unlawful act with a legal name. There is a real and fundamental difference between the laudable abolition of an unnecessary position' and the elimination of a faithful teacher, 'and the latter action can neither be concealed nor protected by a pretense that it was the exercise of the former right'.⁹³

⁹⁰ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 39.

⁹¹ This case and a companion, Sweeney v. Revere, were decided by the court at the same time.

⁹² Pollard v. Revere, supra, p.530.

⁹³ Ibid.

This decision is particularly pertinent in discussing the conditions under which a school committee may dismiss, because it was tried with a companion case, Sweeney v. The School Committee of Revere.⁹⁴ Sweeney, who was demoted from the position of principal of a junior high school to teacher, based his petition on the same arguments as Pollard. In his case, however, the auditor reported that "he was not satisfied" that political ill-will was the motivating force behind the petitioner's demotion. Consequently, the court ruled for the school committee.

Thus, the courts are reluctant to attribute bad faith to a school committee in any of its acts, but where the evidence is clear that a committee has so acted, the courts will defend the statutory rights of the offended party.

The Notice and the Recommendation of the Superintendent.— In Duffey v. The School Committee of Hopkinton,⁹⁵ the court construed those provisions of section 42 which concern the notice, and the recommendation of the superintendent of schools, each a prerequisite to a valid dismissal.

The petitioner, dismissed for "conduct unbecoming a teacher and insubordination" after six years of service in the public schools of Hopkinton, contended that the law

⁹⁴ Sweeney v. The School Committee of Revere, 249 Massachusetts 526.

⁹⁵ Duffey v. The School Committee of Hopkinton, 236 Massachusetts 5.

required that she be notified of the proposed dismissal vote "at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote ... (was) ... to be taken";⁹⁶ and that, since the Thanksgiving Vacation had fallen within the thirty day period, she had not been notified in accordance with the provisions of the statute. Moreover, she asserted, that the school committee had dismissed her without first obtaining the recommendation of the superintendent of schools.

The court dismissed her first argument by ruling that the "Thanksgiving recess, including Thursday and Friday of Thanksgiving Week, was not a 'vacation' period within the meaning of those words of the statute".⁹⁷

With regard to the second point the court reasoned that, while the school committee need not be bound by the statutorily required recommendation of the superintendent, his advice could be of benefit in protecting both the teacher and the community. Since in the case at bar, "no recommendation by the superintendent of schools was made as to the proposed dismissal of the petitioner; ... the school committee acted beyond their power in attempting to discharge the petitioner from the service".⁹⁸ The committee was ordered to restore Miss Duffey to her position.

⁹⁶ General Laws of Massachusetts (Ter.Ed.) Chapter 71, section 42

⁹⁷ Duffey v. Hopkinton, supra, p.7.

⁹⁸ Ibid., p.9.

Thus the "notice of dismissal" provision of the statute is interpreted by the courts as being interrupted by vacations of considerable length such as the summer or Christmas vacations, but not by recess of a few days such as that customarily granted at Thanksgiving time. The provision requiring the recommendation of the superintendent prior to dismissal is mandatory. While the committee is free to accept or reject the recommendation once it is given, it must have the opinion before a valid dismissal can be made.

The Hearing. — Finally, the courts have been asked to construe that provision of section 42 which guarantees to a teacher the right to a hearing before the school committee, at which the charges upon which the proposed dismissal is premised must be substantiated.

Perhaps the clearest interpretation of this provision is found in the decision of the court in the case of Graves v. The School Committee of Wellesley.⁹⁹ Graves, who had served as Superintendent of Schools of the Town of Wellesley from 1914 to 1935, was asked to resign by the school committee in 1935; he refused. In February, 1936, he was again asked to resign, and on this occasion was informed that his successor had already been chosen; again, he refused. In March, 1936, he was notified that

⁹⁹ Graves v. The School Committee of Wellesley, 299 Massachusetts 80.

the committee would vote in April to dismiss him. When he requested a "written statement of charges in order that he might defend himself", he was supplied with a lengthy list of charges, all of a general nature, which in their substance imputed to him a lack of competency in supervising the school system and the inability or the unwillingness to co-operate fully with the townspeople, town officials and the school committee. The committee refused the request of the petitioner for a statement of more detailed charges, but the chairman indicated that, among other things, certain technical deficiencies which a Survey Commission had allegedly uncovered in the Wellesley public school system had existed for a considerable period of time, without effort on the part of the superintendent to correct them.

At the hearing, which was held in four sessions extending from April 13 to April 26, the committee called no witnesses and introduced no evidence to substantiate its charges. All of the evidence that was introduced was favorable to the petitioner. He submitted "much evidence of a documentary nature and exhibit, in the form of reports and other literature",¹⁰⁰ all of which the committee refused to read. On April 27, 1936, he was dismissed. Contending that he had been given no true "hearing" in the

100 Graves v. Wellesley, supra, p.84.

statutory meaning of the term, Graves sought a writ of mandamus to compel the school committee to restore him to his position.

The court pointed out that the "hearing" contemplated by the statute was a hearing in the nature of a "judicial investigation".¹⁰¹ Since the committee had chosen his successor before dismissing the incumbent, the court reasoned that no real judicial investigation had taken place.

Of the conduct of the hearing, the court said,

The respondents called no witnesses and introduced no evidence. The witnesses called by the petitioner may have been disbelieved, but it is alleged that their testimony was wholly favorable to the petitioner. Disbelief of their testimony is not the equivalent of evidence in support of the charges made by the respondents. While the decision whether proper charges have been substantiated rests with the school committee, an affirmative decision can be rendered only when the truth of the charges has been supported by evidence adequate in law to warrant that conclusion.¹⁰²

The court concluded that there had been no "judicial investigation" and no true "hearing" as required by the law and ordered the petitioner restored to his position.

The statute upon which this case hinged was enacted in 1934.¹⁰³ Prior to that time a hearing was prescribed, but it was not necessary that charges be "substantiated".

101 Graves v. Wellesley, *supra*, p.85.

102 Ibid., pp 86-87.

103 Acts of Massachusetts, 1934, Chapter 123.

Since 1934 a teacher may not be dismissed unless the "truth of the charges has been supported by evidence adequate in law to warrant" a finding that the charges have been substantiated.¹⁰⁴ While this restricts the conditions under which a school committee may dismiss a teacher, it in no wise deprives the school committee of the right to determine when preferred charges have been substantiated, nor does it limit the right of the school committee to determine "good cause" for dismissal.

c) Demotion and Salary Reduction.— In any discussion of the right of the school committee to dismiss teachers in the Commonwealth of Massachusetts, two closely related topics must be mentioned, namely, the demotion of superintendents, principals, and supervisors; and the reduction of a teacher's salary.

The courts have ruled that, since the law recognizes a difference between the classes of teacher and superintendent of schools, the demotion of a superintendent to the position of teacher is in fact a dismissal from the former position.

The point is made clear in the case of McCartin v. the School Committee of Lowell,¹⁰⁵ On May 5, 1944, the petitioner, who was serving at the discretion of the committee under the protection of Chapter 71, section 42,¹⁰⁶

¹⁰⁴ Graves v. Wellesley, supra, pp 85 and 87.

¹⁰⁵ McCartin v. The School Committee of Lowell, 322 Massachusetts 624.

¹⁰⁶ General Laws, supra, Chapter 71, sections 41, 42.

was demoted from the position of superintendent of schools, with a salary of \$7000 per year, to the position of teacher in the high school with a salary of \$2900 per year. The change in status was brought about without notice to the petitioner or a hearing.

He sought a writ of mandamus to compel the committee to restore him to his former position. On February 8, 1945, the school committee of Lowell voted to restore him to the position of superintendent. He then amended his petition to seek the aid of the court in recovering the salary he had lost during his period of non-service. The judge of the lower court denied the petition on the grounds that a writ of mandamus was not an appropriate remedy for the recovery of salary, and ruled further, that the dismissal of May 5 had been valid and that the petitioner's tenure in office dated from February 8, 1945.

The Supreme Court upheld his decision concerning the inapplicability of mandamus to the recovery of salary, but reversed him on the ruling concerning the validity of the petitioner's dismissal. "In our opinion", said the court, "the purported demotion of McCartin, the superintendent of schools, to the rank of teacher, was a dismissal, and was invalid. The statutes contrast the words 'teacher' and 'superintendent' (G.L.(Ter.Ed.) Chapter 71, sections 41, 42 and 43) and a transfer of a person from

one category to the other dismisses him from the position from which he is transferred, even though he is given a different position within the school department."¹⁰⁷ The court went on to rule that the petitioner's tenure in office was not interrupted by the attempted dismissal of May, 1944, and that he was entitled to his salary at the rate of \$7000 per year from that date to the date of the final decree.

A superintendent of schools, then, may not be demoted to a lesser position in a school system, without first being dismissed from the position of superintendent; and that dismissal must be accomplished in full compliance with the provisions of section 42 of Chapter 71.¹⁰⁸

Section 42A¹⁰⁹ affords to principals, supervisors, and other professional employees, who perform the duties of principals and supervisors under other titles, approximately the same type of protection in office that section 42 gives to superintendents. As is indicated in a corollary to this chapter, section 42A is a relatively recent enactment. To date the courts have not been asked to consider a case of demotion where the demotee was actually protected by the provisions of this statute.

Under the provisions of Chapter 71, section 43, the salary of "no teacher employed ... to serve at discretion

¹⁰⁷ McCartin v. Lowell, *supra*, p.265.

¹⁰⁸ General Laws of Massachusetts (Ter. Ed.) Chapter 71, section 42.

¹⁰⁹ Ibid., section 42A.

shall be reduced without his consent except by a general salary revision affecting equally all teachers of the same salary grade in the town".¹¹⁰ The statute provides further that the "salary of no superintendent so employed shall be reduced without his consent until at least one year after the committee has so voted." The most prominent constructions given to this statute have involved situations where principals have been demoted to the position of teacher.¹¹¹ Since the recently enacted section 42A now restricts the right of the committee to so demote principals, these decisions become meaningless; and a discussion of them has no place in this thesis.

A Corollary.— Subsequent discussions of the dismissal of tenure teachers in the Commonwealth of Massachusetts will undoubtedly include a discussion of the status of principals, supervisors, and professional employees performing the duties of principals and supervisors, under different titles. Prior to the enactment of Statute 1945, Chapter 330, now included in the General Laws as section 42A,¹¹² individuals holding these positions were considered as teachers with special duties. The 1945 amendment

¹¹⁰ General Laws, supra, section 43.

¹¹¹ Sullivan v. School Committee of Lowell, 322 Massachusetts 624 (a companion case to McCartin v. Lowell); Sweeney v. Revere (249 Massachusetts 526; Downey v. the School Committee of Lowell, 305 Massachusetts 300).

¹¹² General Laws, supra, section 42A.

established them as a special class, and gave to them approximately the same type of tenure protection that section 42 affords to teachers and superintendents of schools.

At the present time only two cases in which individuals have sought the protection of this statute have reached the courts, Demers v. The School Committee of Worcester,¹¹³ and Kelley v. The School Committee of Watertown.¹¹⁴ Both of these cases have been mentioned in the discussion of other phases of this chapter, and it has been noted that in neither case was the petitioner entitled to the protection of section 42A.

Consequently, in the absence of pertinent judicial interpretation, an attempted discussion of the dismissal of this class of teacher would, at this time, be based on hypothesis and conjecture and would be inconsistent with the general purposes of this thesis.

Summary

The school committees of the Commonwealth have the exclusive right to contract with, fix the salaries of, set the duties of and dismiss the teachers, superintendents of schools, principals and supervisors whom it has engaged to operate the public schools under its jurisdiction.

¹¹³ Demers v. The School Committee of Worcester, 329 Massachusetts 370.

¹¹⁴ Kelley v. The School Committee of Watertown, 330 Massachusetts 150.

The authority to contract with and fix the salaries of its professional personnel is vested in the committee specifically by section 38 of Chapter 71, and in general by section 37 of the same chapter. This right, which is exclusive and may not legally be delegated to any other individual or agency, carries with it the implicit right to select personnel. In this selection, the courts have ruled, the committee may exercise its judgement as to the "qualifications for teaching" of a prospective candidate. The authority of the committee to contract with, determine the salaries of, and select teachers, while exclusive, is restricted, in certain respects, by statute. A prospective teacher may not be employed unless he possesses certain qualifications as required by Chapter 71, section 38G. Section 40 of the same chapter establishes the minimum salary that may be paid to any teacher in the Commonwealth, and provides further that no salary differentiation may be based on sex alone. No candidate may be asked about his political or religious affiliations without violation of section 39 of Chapter 71.

The mandate of section 37, to take "general charge" of the public schools, empowers the school committee to set the duties of teachers. In the case of classroom teachers this power is unlimited, except by the law of contract. The duties of superintendents, principals and supervisors, however, may be changed only in strict compliance with the

restrictions found in sections 41, 42 and 42A of Chapter 71.

The school committee possesses, and since the earliest days of its establishment has possessed, the authority to dismiss teachers whenever in its judgement the dismissal is in the best interests of the schools under its charge. In the last half century, certain laws, known popularly as "The Tenure Law", have restricted the manner in which the committee may exercise its right to dismiss a teacher.

At the present time "tenure" is ordinarily acquired through election to further service after the satisfactory completion of a probationary period as prescribed in section 41 of Chapter 71.

Section 42 of the same chapter designates the conditions under which a teacher who has acquired a tenure status may be legally dismissed. Such a dismissal, the statute provides, may be accomplished by a two-thirds vote of the whole committee, for "inefficiency, incapacity, conduct unbecoming a teacher or superintendent," "insubordination", or "for other good cause". The phrase "other good cause" has been broadly construed by the courts. The statute further provides that a teacher be notified that the committee plans to vote his dismissal, that the superintendent of schools be asked to make a recommendation on

the proposed dismissal, and that the teacher, if he so desires, be granted a hearing in the nature of a judicial investigation, at which the charges upon which his proposed dismissal is predicated shall be substantiated.

This chapter is the second of three dealing with the powers and duties of the school committee. It has analysed the position of the school committee in relation to the professional personnel which it has engaged to operate the public schools under its superintendence. Its predecessor dealt with the rights and duties of the school committee in the sphere of policy making. Its successor, the fifth and last chapter of this thesis, will treat of the Powers and Duties of the School Committee in establishing the conditions under which scholars shall attend the public schools.

CHAPTER V

THE POWERS AND DUTIES OF THE SCHOOL COMMITTEE TO DETERMINE THE CONDITIONS UNDER WHICH A PUPIL MAY ATTEND THE PUBLIC SCHOOLS

The educational policy of the Commonwealth of Massachusetts is based upon three premises, namely: that all children between the ages of seven and sixteen years, inclusive, must attend school;¹ that the decision as to what type of school the child shall attend rests with the parent;² and that any child may attend the public schools of the town in which he resides.³ The third premise, however, does not afford an unqualified right, but rather, a right which is subject to the laws of the Commonwealth, and to such reasonable rules and regulations as the local school committee may establish.⁴

It is with this authority and duty of the school committee to determine the conditions under which a child may attend the public schools that this, the fifth and

1 General Laws of Massachusetts (Ter. Ed.), Chapter 76, section 1.

2 Ibid.; see also Pierce, Governor of Oregon et al. v. Society of Sisters, 268 US 510.

3 General Laws, supra, section 5.

4 Ibid.,

final chapter of this thesis; and the third to treat of the power and duties of the school committee, shall concern itself.

The general right of the school committee to make reasonable rules and regulations for the public schools under its supervision has been established at pages 117 to 128 of this thesis. In the present chapter this general authority is treated more specifically as it is applied to the statutes which prescribe the conditions of public school attendance.

A study of the authority and the obligations of the local school committees of the Commonwealth to determine the conditions under which a scholar may attend the public schools can be classified under two general headings: the right and the duty of the school committee to determine the conditions under which a child shall be admitted to the public schools; and the right and duty of the committee to determine the conditions under which a child shall be excluded from the public schools.

1. The Right and Duty of the School Committee to Determine the Conditions under which a Child Shall be Admitted to the Public Schools.

In determining the conditions under which a child may enter the public schools, a school committee must ordinarily consider three factors: the age, the place of

residence, and the health of the prospective scholar. In each of these categories the legislature has established certain statutory standards to which all communities of the Commonwealth must conform. Although these standards are comprehensive and determine to a very large extent the conditions under which pupils are to be admitted to the public schools, they represent only a minimum standard which all municipalities must meet. Beyond these minimum statutory requirements the school committee is free to exercise its judgement in determining which children may be admitted.

Age of Entry.— The school committee has the authority to regulate the age at which a scholar shall be admitted to the public schools. Section 1 of Chapter 76 of the General Laws, the section which regulates school attendance in the Commonwealth, provides that

... every child between seven and sixteen ... shall ... attend a public day school in said town, or some other day school approved by the school committee, during the entire time the public schools are in session, unless the child attends school in another town, during the entire time the same is in session...⁵

This Act sets the minimum which the law requires in the matter of school attendance, and, read in conjunction with Chapter 72, section 2,⁶ it obligates the committee to see to it that all children within these age groups are, in fact, attending school under these conditions, but it is

⁵ General Laws of Massachusetts (Ter. Ed.), Chapter 76, section 1.

⁶ Id., Chapter 72, section 2.

designed to compel the education of children, and not to fix a legal age.⁷ The matter of determining at what age, below seven, a child may enter the public schools is left to the determination of the local school committee. That the school committee has this authority was settled by the courts in Alvord v. The Inhabitants of Chester⁸ in 1900 and has not been challenged since.

In that case a female child, five years and ten months of age, was denied admission to the public schools of Chester in April, 1900, several months after the beginning of the school term. The school committee of that town had a rule that any child under seven years of age, who desired admission to the school, must enter the class "at the beginning of the fall term or within three or four weeks thereafter; and that pupils desiring to enter at any other time were excluded unless found qualified to enter the classes then in session in the said school".⁹

The excluded child, through her father, sought redress from the town for unlawful exclusion, contending that the rule was unlawful and that she, being of school age had the right to attend the school.

In deciding for the defendants, the court said,

7 Needham v. Wellesley, 139 Massachusetts 372.

8 Alvord v. The Inhabitants of Chester, 180 Massachusetts 20.

9 Ibid., p.20.

This was a reasonable rule. Children under seven years of age, although allowed to attend the public schools, are not required to attend ... Grading is a permitted if not an essential feature of the public school system. The introduction, late in the school year, of a very young scholar not qualified to enter the existing classes, would tend to impair the efficiency of the school, and so to prevent the other scholars from obtaining such advancement in learning and in training as would enable them to proceed with their education in due course.¹⁰

The interpretation found in Alvord v. Chester is still valid. While children over seven years of age must attend school, and while most communities of the Commonwealth permit children to attend at younger ages, those who enter below seven years of age must do so in conformity to the reasonable regulations of the school committee.

Place of Residence.— The second factor to be considered in permitting a child to enter the public schools is his place of residence. In this respect prospective students may be considered as falling into one of four classifications: those who wish to enter a school of the town in which their parents or guardian legally reside; those who reside temporarily in another town for the purpose of attending a school therein; those who may live in a town which is not required by law to maintain a high school; and those who attend the public school of another town with the consent of, and at the expense of, the school committee of the town of residence.

¹⁰ Alvord v. Chester, *supra*, p.21.

Under the provisions of Chapter 76, section 5,

Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following sections,¹¹ and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to the other school matters as the school committee shall from time to time prescribe...¹²

The great majority of the public school pupils of the Commonwealth are admitted to the schools under the provisions of this section.

In the case of pupils who temporarily reside in a town other than the town of legal residence of parent or guardian, "for the special purpose of there attending school", section 6 of Chapter 76 provides that such attendance is permissible but is contingent upon the payment of tuition by the parent or guardian to the town in which the pupil attends school.¹³

Pupils who reside in towns which are not required by law to maintain a public high school comprise a third category. Such pupils, under the provisions of Chapter 70, section 6, may, after obtaining the permission of the school committee of the town of residence, attend the high school of another town, so long as such high school has been approved for that purpose by the State Department of Education. In such a case the town of residence is liable

¹¹ General Laws of Massachusetts (Ter. Ed.), Chapter 76, sections 6, 7, and 12.

¹² Ibid., section 5.

¹³ Ibid., section 6.

for the tuition of the said student. While this section permits the local school committee to decide whether or not a permit for attendance at another high school should be granted, this discretion is largely nullified through a further provision of the section which establishes the State Department of Education as a board of review in all cases where permission to attend a high school is refused. A decision of the review board over-ruling the local school committee makes the town liable for the payment of tuition.¹⁴

By virtue of the permissive legislation of Chapter 76, section 6, "Any child, with the consent of the school committee of the town where he resides, may attend, at the expense of said town, the public schools of another town, upon such terms as may be fixed by the two committees".¹⁵

All children of school age, who attend the public schools, do so under the provisions of one of these sections; and a study of the statutes makes it plain that, in the matter of ascertaining that all children of the Commonwealth shall have the opportunity to be educated, the Legislature has to a very large extent prescribed the actions of the local school committees. Beyond the

¹⁴ General Laws, supra, Chapter 71, section 6.

¹⁵ Ibid., Chapter 76, section 12.

authority, found in section 6 of Chapter 71,¹⁶ to deny a pupil the right to attend high school in another town, and the right of a school committee of a town which maintains a high school to determine whether or not it shall accept into its schools non-resident pupils,¹⁷ very little is left to the discretion of the committee.

Indeed, so specific have the statutes become in the last half century, that the courts have not been asked to construe their meaning since 1899. Prior to that time the courts were requested to resolve a number of disputes involving the right of the school committee to determine the conditions under which a child should attend the public schools.¹⁸

Of these decisions, one has retained its meaning through the half century of statutory revision and changing environmental factors that have rendered the others meaningless.

In Hurlburt v. The Inhabitants of Boxford¹⁹ the court ruled that a town which is not required by law to maintain a high school need not pay the tuition of the

16 General Laws, Chapter 71, section 6.

17 Ibid., Chapter 71, section 37.

18 City of Haverhill v. Gale, 103 Massachusetts 104; Hillard v. The Inhabitants of Egremont, 164 Massachusetts 430; Fiske v. The Inhabitants of Huntington, 179 Massachusetts 572; Inhabitants of Wrentham v. Fales, 185 Massachusetts 539.

19 Hurlburt v. Boxford, 171 Massachusetts 501.

child of a resident to a high school in another town, if equal facilities can be afforded the child, at no cost to the parent, within the town.

In that case, the plaintiff by virtue of Statute 1894, Chapter 436²⁰ sought to recover a sum of money paid to the City of Danvers as tuition in return for instruction given to his daughter in the high school of that city. The school committee of the town of Boxford had refused to grant the pupil permission to attend the Danvers High School on the grounds that there was in the Town of Boxford a private school of corresponding grade, known as the Barker Free School, which was maintained exclusively from a fund created by the will of one Jonathan T. Barker, and which was open to the children of the residents of Boxford free of charge. The Barker School, the committee said offered curriculum and instruction equal to that of schools prescribed by law. The plaintiff contended that the school was not maintained by the town, and had never been approved by the State Board of Education, and that consequently the town must reimburse him for his expense in sending his daughter to the Danvers High School, a school which was maintained in accordance with statute,²¹ and was approved by the State Board.

20 Acts of Massachusetts. 1894, Chapter 436.

21 Public Statutes of Massachusetts, Chapter 44, section 2. Now embodied in General Laws of Massachusetts, (Ter.Ed.), Chapter 71, section 55.

The judge of the lower court upheld the position of the plaintiff and the defendant town appealed to the Supreme Court.

In reversing the decision of the lower court, the Supreme Court said, "While this school is not maintained by the town there is nothing in the Act which requires that it be so maintained. Nor is there anything in the Act which requires the school to be maintained by the State Board of Education".²² After pointing out that such academies were to be found in many Massachusetts communities, and that the Legislature must have been aware of this when framing the statute, the court concluded its decision by declaring that there is "no reason why a town which is not obliged by law to maintain a high school, and which has a school of equal grade within its borders, should be obliged to pay for the tuition of a child of one of its inhabitants in another town, because the parent of the child prefers one school to the other".²³

Although the number of towns which would be affected by this decision is much smaller today than it was when the decision was handed down, there is no reason to believe that the principle enunciated is less valid.

Health Factors in Admission.— The third factor to be considered by the school committee in the admission of

22 Hurlburt v. Hoxford, supra, p.502.

23 Ibid.,

a child to the public schools is the health of the prospective pupil. In this instance only two statutes are relevant. Section 55 of Chapter 71²⁴ provides that no child infected with a dangerous disease, or who is a member of a household where dangerous disease is present, may attend the public schools. Chapter 76, section 15, stipulates that "an unvaccinated child shall not be admitted to a public school" unless he present a certificate from a practising physician to the effect that the said physician has personally examined the child and is of the opinion that vaccination at that time would be detrimental to his health.²⁵ The courts have never been asked to consider a situation where a child, either personally infected with a dangerous disease, or from a home where dangerous disease is present, has sought admission to the public schools. The right of the school committee to make reasonable regulations relative to the "vaccination law" has been upheld by the courts.

In Hammond v. Hyde Park,²⁶ the court ruled that a school committee may exclude an unvaccinated child from the public schools during a smallpox epidemic. At a time when the disease of smallpox was prevalent in the town of Hyde Park, the school committee passed a rule "to exclude

²⁴ General Laws, supra, Chapter 71, section 55.

²⁵ Ibid., Chapter 76, section 15. For conditions of exemption, see General Laws of Massachusetts (Ter.Ed.), Chapter 111, section 183.

²⁶ Hammond v. Inhabitants of Hyde Park, 105 Massachusetts 29.

all unvaccinated children and also all children who do not present a certificate of revaccination as required by the board of health, until such times as this committee may become satisfied that the imminent danger from contagion of smallpox in our town has ceased".²⁷

After refusal to comply with the rule, the plaintiffs, of whom Hammond was one, were suspended from the public school. Contending that the law specifically stated that unvaccinated children should not be admitted to the public schools, unless they presented a certificate from a practicing physician certifying that, in his opinion, the health of the pupil would be jeopardized by vaccination at that time, and asserting that they had presented such certificates; the plaintiffs sought redress from the town for unlawful exclusion. The judge of the lower court instructed the jury to decide in favor of the plaintiffs and then referred the case to the Supreme Court for a determination.

In reversing the finding of the lower court, the Supreme Court said,

The question on this instruction is whether the statute which absolutely forbids the admission of an unvaccinated child to a public school at any time, without a certificate from a physician, is an implied enactment that, with a certificate, such a child shall be permitted to attend at all times, even when smallpox is raging in the neighborhood. We see nothing to indicate such an intention on the part of the Legislature. This is a prohibition

²⁷ Hammond v. Hyde Park, *supra*, p. 29.

of attendance at any time except upon a condition. There is an implication that, with the certificate, such a child properly may be permitted to attend when there is no particular reason to apprehend danger; but it was not intended to take away from the school committee the power to make proper regulations for the protection of all the pupils; if the prevalence of smallpox seems to require special precautions. The ruling of the court was wrong.²⁸

The same line of reasoning is found in Spofford v. Carleton et al.²⁹ In that case, the unvaccinated children of the plaintiff were admitted to the public schools of Haverhill on November 12, 1919, after presenting the required certificate. On October 13, 1920, the children were excluded from school after the refusal of the petitioner to either have his children vaccinated or to comply with a rule of the school committee, which stipulated that, "Every pupil in attendance at the public school, or who may hereafter be in attendance at such school, who has been given a certificate by a physician noting that such pupil is not a fit subject for vaccination, shall be required to renew such certificate once in two months..."³⁰ At a subsequent hearing the school committee refused the plea of the petitioner to readmit his children to the school. He then sought a writ of mandamus to compel the School Committee of the City of Haverhill to so reinstate them, pointing out that the certificate required by the statute had been

28 Hammond v. Hyde Park, *supra*, p.31.

29 Spofford v. Carleton et al., 238 Massachusetts
528.

30 Ibid., p.530.

presented and accepted; and that in the absence of danger of a smallpox epidemic, the committee rule under which his children were excluded was unreasonable.

The case was first heard by a single justice of the Supreme Court, who without decision referred it to the full court for adjudication. In deciding for the respondents, the court said,

The intention of the legislature is clear that the exemption is not to cover absolutely the entire period of the child's attendance, but the certificate is limited to the period when his physical condition is such that in the opinion of the certifying physician he is an unfit subject for vaccination. The respondents as the school committee of the city are given "general charge and superintendence of all the public schools ..." R.L. Ch.42, sec.27; G.L. Ch.71, sec.37. It is sufficiently broad to promote and secure not only the best interests of the pupils, but the general welfare of the community in the management of the schools.³¹

The court went on to point out that the right of an unvaccinated child to attend school was a conditional right, based upon an exemption. "This exemption", said the court, "ceases when the physical condition of the child has become such that his health will not be endangered or impaired by vaccination. If to determine this further medical examination is necessary, it is wholly within the supervision of the parent or guardian, upon whom rests the burden of compliance with the law. The regulation (of the school committee) is not so unreasonable or arbitrary as to be invalid ..."³²

³¹ Spofford v. Carleton, *supra*, p.531.

³² Ibid. p.532.

The above cases make it clear that the conditional admission of a pupil to the public schools without vaccination is subject to the reasonable rules and regulations of the local school committee.

On two other occasions the courts have been asked to rule on the question of the vaccination of school children. In the case of the Commonwealth v. Green,³³ the defendant was charged with failing to send his children to school as the law required, and was convicted. He admitted his failure to send the children to school, but stated in defence of his action that the schools would not admit the children unless they were vaccinated, and that his religious beliefs and conscientious scruples prevented him from subjecting them to vaccination. He should not, he contended, be held liable for the violation of a law, with which compliance was impossible unless he were to violate his conscience.

The court ruled for the Commonwealth, stating that

... the requirement for vaccination has been held to be constitutional, the defendant's views cannot affect the validity of the statute nor entitle him to be excepted from its provisions. By statute, vaccination is made a condition precedent to the right of a child to attend a public school. The defendant's sole defence to the complaint... seems to be that because of his religious belief and conscientious scruples concerning vaccination he should not be held to have incurred the penalty of the statute for failing to send his children to school. But he cannot thus avoid this penalty even if their failure to attend was based upon this ground alone. It was his own act which kept the children ... ineligible for school attendance.³⁴

33 Commonwealth v. Green, 260 Massachusetts 585.
 34 Id., p. 585.

Thus "the statutory obligation to cause children to attend school involves an obligation to put them into condition to attend, and cannot be escaped by neglect to qualify them for attendance".³⁵

The constitutionality of Chapter 76, section 15,³⁶ was questioned in the case of The Commonwealth v. Childs.³⁷ in 1938. The situation was similar to that found in Spofford v. Carleton.³⁸ The School Committee of Quincy had a rule which required that a certificate accepted in lieu of vaccination be renewed every two months. When the defendant refused to comply with the rule or have his children vaccinated, they were excluded from the Quincy schools. He was subsequently prosecuted for failing to send his children to school. The defendant alleged that "the words 'vaccinated' and 'unvaccinated' do not convey the idea of inoculation against smallpox as distinguished from other diseases;" and that, as a consequence, the statute was too vague for enforcement and, therefore, unconstitutional.³⁹

The court rejected this argument and ruled for the Commonwealth, saying,

The word "vaccination" was originally used to describe the method, discovered by Jenner, late in the eighteenth century, of inoculating with cow pox for the purpose of procuring immunity from smallpox. In

³⁵ Commonwealth v. Green, *supra*, p.587.

³⁶ General Laws of Massachusetts (Ter.Ed.), Chapter 76, section 15.

³⁷ Commonwealth v. Childs, 299 Massachusetts 767.

³⁸ Spofford v. Carleton, *supra*.

³⁹ Commonwealth v. Childs, *supra*.

the second volume of the General Laws of Massachusetts ... the earliest statute enacted on March 8, 1810, for compulsory inoculation "with the cow pox" ... is indexed under the word "vaccination". St.1855, ch.414, required that all children should be vaccinated before attaining the age of two years and before being admitted to the public schools. In our statutes, and even in common speech, the word "vaccinated", without explanation or qualification, meant in 1855, and still means, inoculation against smallpox. The language is not vague, but clear. The case presents no other substantial constitutional question.⁴⁰

An analysis of the cases discussed above makes clear the thinking of the courts on the meaning of Chapter 71, section 15, as it prescribes vaccination as a prerequisite to the lawful admission of a pupil to the public schools: the law is constitutional; vaccination is essential to legal admission; under certain conditions exemption may be granted from the general rule; the continued attendance of a child admitted conditionally is contingent upon compliance with the reasonable rules and regulations of the local school committee; the statute was enacted, and the rules of the local school committees are presumed to have been enacted, in the furtherance of the common weal; the right of no individual takes precedence over the common weal; even where conscience prevents compliance with the statute, a parent who refuses to comply, is liable to prosecution for failing to send his children to school as required by Chapter 76, section 2.⁴¹

40 Commonwealth v. Childs, supra, p.368.

41 General Laws of Massachusetts, (Ter. 7d.), Chapter 76, section 2.

Although the conditions under which a child shall be admitted to the public schools are largely prescribed by statute, the local school committee is allowed to exercise its discretion in certain phases of the matter. In a similar manner, the committee is permitted to exercise its discretion in determining the conditions under which a child may remain in the public schools.

2. The School Committee Has the Right to Determine the Conditions under which a Pupil Shall be Excluded from the Public Schools.

Section 37 of Chapter 71 confers upon the local school committee the right to exclude pupils from the public schools when it charges that body to take "general charge of all the public schools" and to "make regulations as to attendance therein..."⁴²

In the words of the Supreme Court of the Commonwealth,

They (the words of the statute) confer an ample power. For the promotion of the interests of the pupils and of all the people they have been broadly construed by the courts for nearly a century. In the absence of other limitation, they include the power to determine within reason what pupils shall be received and what pupils shall be rejected.⁴³

In general it may be said that the school committee may exclude a pupil whenever it decides, in good faith,

⁴² General Laws, supra, Chapter 71, section 37.

⁴³ Antell v. Stokes, 287 Massachusetts 106.

that the best interests of the schools under its supervision would be served by such an exclusion.

In specific instances, the courts of the Commonwealth have ruled that a pupil may be excluded for character deficiencies, lack of sufficient mental capacity to profit from school, misconduct, and failure to observe a reasonable regulation of the school committee, even though no misconduct be involved.

Exclusion for Character Deficiencies.— The most notable case in which a pupil was excluded for deficiencies of character is Sherman v. Charlestown,⁴⁴ which is discussed in detail at pages 114 to 116 of this thesis. In that instance the court upheld the right of the school committee to exclude a female scholar who, it was alleged, was guilty of notoriously immoral conduct. The exclusion was justified, ruled the court, because the presence of such a child in the school was detrimental to the very purposes for which the school existed, since "the whole tone and tenor of the laws demonstrate, that it was the intention of the Legislature to make the public schools a system of moral training, as well as seminaries of learning".⁴⁵ The judicial disposition of the claims of the plaintiff in Sherman v. Charlestown was so forceful that the

⁴⁴ Sherman v. Charlestown, 62 Massachusetts (8 Cushing) 160.

⁴⁵ Ibid., p.167.

right of a school committee to exclude a pupil for immorality has never since been challenged.

Exclusion for Lack of Sufficient Mental Capacity to Warrant Attendance at School.— The right of a school committee to exclude a pupil who is so lacking in mental capacity that he is unable to profit from attendance at school and whose very presence is a detriment to the school is well illustrated in the case of Watson v. The City of Cambridge.⁴⁶ The plaintiff was excluded from the public schools of Cambridge in 1885 "because he was too weak-minded to derive profit from instruction". Subsequently he was readmitted for a trial period of two weeks. At the end of that time, he was again excluded. School committee records included statements from teachers who had observed him and doctors who had examined him to the effect that he was "so weak in mind as not to derive any marked benefit from instruction, and further that he ... (was) ... troublesome to other children, making uncouth noises, pinching others, etc. He ... (was) also found unable to take the ordinary decent physical care of himself."⁴⁷ The plaintiff sought redress for unlawful exclusion.

⁴⁶ Watson v. The City of Cambridge, 157 Massachusetts 561.

⁴⁷ Ibid., p.561.

The court upheld the right of the school committee to determine when the presence of an individual was detrimental to the welfare of a school, and pointed out that the decision of the school committee was conclusive and not subject to revision by the court.

A child in similar circumstances today could, if he were merely mentally retarded, be assigned to special classes such as are provided by Chapter 71, section 46.⁴⁸ If he were feeble minded he could be accommodated in special institutions provided by the Commonwealth. If, however, his parents chose not to commit him to a special institution, and because of his inability "to take the ordinary decent physical care of himself", he was considered not a fit subject for special classes, he would be as much a detriment to the public schools today, as was Watson in 1885. As such, he could undoubtedly be excluded by the school committee.

Exclusion for Misconduct.— The school committee may exclude a pupil for misconduct. This principle is well exemplified in Hodgkins v. The Inhabitants of Rockport.⁴⁹ In that case the plaintiff, after repeated warnings concerning his conduct, was excluded from the public schools of Rockport. His acts of misconduct were not of

⁴⁸ General Laws of Massachusetts (Ter.Ed.), Chapter 71, section 46.

⁴⁹ Hodgkins v. The Inhabitants of Rockport, 105 Massachusetts 475.

a "gross or mutinous" nature but rather consisted of "acts of neglect, carelessness of posture in his seat and in recitation, tricks of playfulness, and inattention to study and the regulations of the school" in such things as "whispering, laughing, acts of playfulness and rudeness to other children, inattention to study, and conduct tending to cause confusion and distract the attention of other scholars from their study and recitation".⁵⁰

The boy was actually sent from the school by two members of the school committee, who thereafter, on that same day, reported the matter to the full committee. The latter voted unanimously to exclude him. He sought redress from the town for unlawful exclusion questioning the right of the two committeemen to send him from the school. The court ruled for the defendant town declaring,

The school committee has "general charge and superintendence of all the public schools in town". This general power, by necessary implication, includes the power to make all reasonable rules and regulations for the discipline, government, and management of the schools, and also the power to exclude a child from school for sufficient cause ... And when a scholar is guilty of misconduct which injuriously affects the discipline and management of the schools, we think the law vests in the school committee the power of determining whether the welfare of the school requires his exclusion. They are required by law to visit the schools frequently, for the purpose of inquiring "into the regulation and discipline of the schools, and the habits and proficiency of the scholars therein" ... and they are thus in a situation to judge, better

⁵⁰ Hodgkins v. Rockport, supra, p.475.

than any other tribunal, what effect such misconduct has upon the usefulness of the school and the welfare of the other scholars; and if they exercise this power in good faith, their decision is not subject to revision by the court.⁵¹

To the charge that there were irregularities in the manner of his exclusion the court pointed out that "much of the power of committee, as to the preservation of order and the maintenance of discipline" must necessarily be delegated to individual committeemen and to the teachers of the schools. "We have no doubt", said the court, "that they may send a scholar out of school, if the exigencies of the case require it, subject to the future action of the committee".⁵²

Thus, misconduct need not be of a "gross or mutinous" nature to warrant exclusion. If it is persistent and detrimental to the best interests of the school, that is sufficient.

Exclusion for Refusal to Observe a Reasonable Regulation.— The courts have ruled that a child may be excluded from the schools for refusing to observe a lawful and reasonable regulation of the school committee. This principle is well exemplified in Spiller v. The Inhabitants of Woburn,⁵³ Antell v. Stokes et al.,⁵⁴ and

⁵¹ Hodgkins v. Rockport, *supra*, pp 475-476.

⁵² Ibid., p.476.

⁵³ Spiller v. The Inhabitants of Woburn, 94 Massachusetts 127.

⁵⁴ Antell v. Stokes, 287 Massachusetts 105.

Wulff v. The Town of Wakefield,⁵⁵ all of which have been treated in detail in connection with other phases of this thesis. In Spiller v. Woburn⁵⁶ the court ruled that a regulation of the school committee that each school day should begin with a prayer and the reading of a passage from the Bible and that during the prayer each pupil should bow his head, was lawful and reasonable. A child who persistently refused to bow her head, the court said, could be lawfully excluded from the school. In Antell v. Stokes,⁵⁷ the participation of high school students in certain activities of secret societies, after such participation had been proscribed by the school committee, was judged sufficient reason for exclusion. In Wulff v. Wakefield,⁵⁸ the court ruled that the persistent refusal of a pupil to attend a class in "bookkeeping", because she disagreed with the manner in which certain phases of the class were conducted, was sufficient reason to warrant her exclusion.

In these, and in other situations,⁵⁹ the court has pointed out that the school committee has the right to make any regulation which is lawful and reasonable and which has as its purpose the improvement of the discipline,

55 Wulff v. Town of Wakefield, 221 Massachusetts 427.

56 Spiller v. Woburn, *supra*.

57 Antell v. Stokes, *supra*.

58 Wulff v. Wakefield, *supra*.

59 Brofford v. Carleton, 278 Massachusetts 528; Einaldo v. Dwyer, 294 Massachusetts 167; Sheldon v. School Committee of Hopedale, 276 Massachusetts 15; Averill v. The City of Newburyport, 271 Massachusetts 333.

government or management of the public schools; and that the authority to make a regulation necessarily implies the authority to enforce it.

It seems appropriate at this point to take note of the rather obvious fact that of the seven decisions discussed above, only Wulff v. Wakefield (1915), and Antell v. Stokes (1934), have been delivered in the twentieth century. In view of the radical changes that have taken place in social and educational theory since the end of World War I, the value of these decisions as precedent for a modern court might very well be questioned. In this respect, two relatively recent decisions, which otherwise would not be mentioned in this thesis, become of value. Nichols v. The Mayor and School Committee of Lynn (1937)⁶⁰ and The Commonwealth v. Johnson (1941)⁶¹ both involved situations where pupils were excluded from the public schools because they refused to pledge allegiance to the Flag of the United States as required by Chapter 71, section 69 of the General Laws.⁶² In view of the 1942 decision of the United States Supreme Court in West Virginia State Board of Education v. Barnette,⁶³ neither of these exclusions could be legally accomplished today, and consequently, neither case as such is pertinent to this

⁶⁰ Nichols v. The Mayor and School Committee of Lynn, 297 Massachusetts 65.

⁶¹ Commonwealth v. Johnson et al., 309 Massachusetts 476.

⁶² General Laws of Massachusetts (Ter. Ed.), Chapter 71, section 69.

⁶³ West Virginia State Board of Education v. Barnette et al., 319 US 624.

thesis. They become important, however, in that the Supreme Court of the Commonwealth, in Nichols v. Lynn, reiterated the right of a school committee to exclude a pupil under conditions such as those found in Sherman v. Charlestown, Watson v. Cambridge, Hodgkins v. Rockport, Antell v. Stokes, Spiller v. Woburn, and Wulff v. Wakefield. In Commonwealth v. Johnson, the right of the school committee to exclude the plaintiff in Sherman v. Charlestown is upheld. The same Johnson brought an action against the Town of Deerfield in the First Federal District Court of the United States.⁶⁴ That case, more nearly parallels Nichols v. Lynn⁶⁵ than does Commonwealth v. Johnson.⁶⁶ because it dealt with the actual exclusion, whereas in Commonwealth v. Johnson the Supreme Court of Massachusetts was asked to decide whether the defendant could be committed to a training school as an "habitual school offender" as provided in section 5 of Chapter 77.⁶⁷ In that case the Federal Court cited Sherman v. Charlestown, Watson v. Cambridge, Hodgkins v. Rockport, and Antell v. Stokes as examples of the power of the school committees of the Commonwealth to exclude pupils.

⁶⁴ Johnson et al. v. Town of Deerfield, 25 Federal Supplement 918.

⁶⁵ Nichols v. Lynn, *supra*.

⁶⁶ Commonwealth v. Johnson, 309 Massachusetts 476.

⁶⁷ General Laws of Massachusetts (Ter. Ed.), Chapter 77, section 5.

Thus the principles enunciated in the foregoing cases have all been reiterated by the courts at least as recently as 1937.

The Right to Exclude a Pupil from a Particular School or to Demote Him for Failure to Meet Scholastic Standards.— In any discussion of the conditions under which local school committees may, and have, excluded children from the public schools, a closely related topic, the right of the committee to demote a pupil must be considered. The only instance in which the courts have been called upon to rule concerning the authority of a school committee to demote a pupil was Barnard v. The Inhabitants of Shelburne.⁶⁸

In that case, the plaintiff, who entered the Shelburne High School in September, 1910, was, from the first, unable to keep up with his class. The school authorities notified his father to that effect and suggested that the plaintiff transfer to the ninth grade at another town school and return to the high school for the tenth grade the following year. When the father refused to consent, to the proposed transfer, the school committee formalized by vote a policy that had long been in use on an informal basis at the high school, to the effect that any student

⁶⁸ Barnard v. The Inhabitants of Shelburne, 216 Massachusetts 19.

whose average dropped below sixty per cent in two or more subjects should be demoted one grade, and, if such deficiency occurred in the first year, he should be dropped from the rolls of the school. The father alleged unlawful exclusion and sought to recover damages. Through an erroneous ruling on the part of the trial judge a jury was given the opportunity to review the decision of the school committee. The case reached the Supreme Court on exception from the latter.⁶⁹

That body pointed out the error of the trial judge, saying,

The care and management of schools vested in the school committee, includes the establishment and maintenance of standards for promotion of pupils from one grade to another and for their continuance as members of any particular class. So long as the school committee act in good faith their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal. It is obvious that the efficiency of instruction depends in no small degree upon this feature of our school system.⁷⁰

The court struck to the heart of the matter when it said,

... when the real ground for exclusion from a particular school or grade is failure to maintain a proper standard of scholarship and there is opportunity afforded to the pupil to attend another school adapted to his ability and accomplishments, there is no illegal exclusion from school within the meaning of the statute.⁷¹

69 See page 40 et seq. this thesis.

70 Barnard v. Shelburne, supra, p.21.

71 Ibid., p.22.

Although the term "exclusion" is used throughout this discussion, the plaintiff had at all times the option of attending another town school. The parent, through his refusal to consent to a demotion, forced the committee to formally exclude the boy from the high school, but it was clear that it was only from the Shelburne High School and not from the public schools of the Town of Shelburne that he was excluded. Approval of the judicial decision in Barnard v. Shelburne is found in the 1941 decision in Commonwealth v. Johnson.⁷²

Exclusion in "Bad Faith".— The underlying premise of all valid exclusions from the public schools of the Commonwealth is that the school committee is acting in good faith. The courts are slow to attribute "bad faith" to such a board of public officers, but where a school committee obviously acts in "bad faith" or where, through negligence in the manner in which it brings about an exclusion, a committee leaves itself liable to a charge of "bad faith", the courts will uphold the rights of an offended party. A good example of this principle is found in Carr v. the Inhabitants of Dighton.⁷³

That case involved three tort actions for unlawful exclusion brought by children of the Carr family. The case was tried before a jury in the lower court, and each

⁷² Commonwealth v. Johnson, 300 Massachusetts 176.

⁷³ Carr v. The Inhabitants of Dighton, 202 Massachusetts 305.

of the plaintiffs was awarded one hundred dollars in damages. The defendant town appealed the case to the Supreme Court.

The facts in the case were these. On December 2, 1908, the plaintiffs along with two siblings, were excluded from the public school. When the father asked for a written statement of the reasons for their exclusion, the Superintendent of Schools replied by letter, that they had been excluded because the medical inspector had stated that they had "head lice", that the situation must be corrected, and that the children must return to school as soon as possible. They returned to school on January 5, 1909, and the next day were sent home again. The superintendent notified the father that "they have been examined today by the school physician and not found to be in a proper condition to attend school".⁷⁴ On January 9, the father asked for a hearing before the school committee alleging "bad faith on the part of the doctor and unfairness to the superintendent and teacher". The school committee refused to grant the requested hearing. The children did not again return to school. In 1914 they brought their suit.

In the trial before the lower court the statement of another doctor, deceased at the time of the trial, to the effect that the children were free of head lice, was admitted as evidence.

⁷⁴ Carr v. Dighton, supra, p.306.

The Supreme Court pointed out that the plaintiffs had not been entitled to hearing by statute, because there was no implication of misconduct being a factor in the exclusion.⁷⁵ The court then refused to upset the ruling of the lower court, saying,

On all the evidence in the present case ... including the failure to give the plaintiffs an opportunity to be heard, we think that it was a question of fact for the jury whether the committee acted in good faith ... on the school physician's testimony, the plaintiffs were not excluded for eczema, which was said to amount to a contagious disease, but were suffering from head lice. There was testimony on the other hand that they were free from these pests. In addition to this denial of the underlying fact, their father, in demanding a hearing specifically alleged that the physician, on whom the committee relied for their action was "animated by anything but good faith and honest motives"; charged the superintendent with failure to afford him the promised protection, and referred to the "revengefulness" of teachers. In addition, it appears that five Carr children were sent home from school, although only three were examined; one of the committee was alleged to have admitted "there had been a misunderstanding" and that ordinarily a hearing was given when requested. The weight of the evidence submitted is not for us to determine. The only question before us is, whether there was any evidence for the consideration of the jury that the exclusion was unlawful; and it is enough to say that there was such evidence.⁷⁶

This decision is of particular value to a study of the powers and duties of a school committee, because it serves to keep the power of that body in proper perspective. When a school committee acts in "good faith" on any

⁷⁵ Now embodied in General Laws of Massachusetts, (Ter.Ed.), Chapter 76, section 17.

⁷⁶ Carr v. Dighton, *supra*, p.307.

matter directly affecting the discipline, government, or management of the public schools, its decision is not subject to the review of any other tribunal. However, when there is any reason to suspect it has acted in "bad faith", as was suspected in this case, its decision becomes very much subject to a review by the courts.

Although the power of the school committee to exclude pupils is a broad power, it may be used to permanently exclude a child for misconduct only after the fulfillment of certain conditions.

3. A Pupil Charged with Misconduct Has a Right to be Heard Before He is Excluded.

Section 17 of Chapter 76 provides that

A school committee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him and his parent or guardian an opportunity to be heard.⁷⁷

Section 16 of the same chapter provides that any child who is unlawfully excluded from the public schools "may recover from the town in tort".⁷⁸ This section of the law ostensibly contemplates that a child shall have a hearing at which he will be able to present arguments in his defense before he is permanently excluded from the public schools for alleged misconduct. Unfortunately, however, in the only instance in which the court was asked to determine the

⁷⁷ General Laws of Massachusetts. (Ter. Ed.), Chapter 76, section 17.

⁷⁸ Ibid., Chapter 76, section 16.

exact nature of the hearing provided herein, Morrison v. Lawrence.⁷⁹ the interpretation is not made clear.

The plaintiff, in that case, was suspended from the Lawrence High School for allegedly inciting other pupils to write letters to the local newspaper criticizing the principal of the school. He requested a hearing before the school committee, and the request was granted. At the hearing the principal read a list of charges which he alleged were substantiated by information which was given to him by other boys at the school. He named the boys. The counsel for the principal then read an endorsement of the principal, which had been prefaced by the sub-master of the school and signed by all of the teachers. No further evidence to support the charges was produced.

When the counsel for the plaintiff called one of the boys whom the principal had named for cross examination, the chairman of the school committee, with the compliance of the other members, ruled that no student of the school would be forced to give testimony. He did say, however, that any student who volunteered to testify would be permitted to do so. There were no volunteers. On the strength of this hearing Morrison was excluded.

He brought a tort action against the City of Lawrence alleging that without the testimony of the boys he

⁷⁹ Morrison v. City of Lawrence, 181 Massachusetts 127.

could present no defense and that, consequently, he had had no true "hearing" within the meaning of the statute. The jury ruled in his favor and awarded him \$471.10 for expenses which he had incurred in acquiring an education similar to that of which he had been deprived by his unlawful exclusion from the public school, and for the suffering and disgrace he had undergone. The defendant city appealed to the Supreme Court.

That court, while stating that the testimony of the boys should have been heard, said "but it has not been contended that the committee were acting otherwise than in good faith. Doubtless they believed that a compulsory examination of the pupils in regard to matters which they probably considered confidential, would be detrimental to the interests of the schools".⁸⁰ The court said further that it can not be expected that a "hearing in regard to the exclusion of a pupil from a school must be conducted with all the formalities of a court trial, or that a material mistake, innocently made by a school committee in conducting a hearing, will make his exclusion unlawful."⁸¹

Pointing out that a school committee has "general charge and superintendence of all the public schools, and as public officers, so far as the performance of their duties involves the exercise of judgement and discretion,

131. ⁸⁰ Morrison v. City of Lawrence, 181 Massachusetts

⁸¹ Ibid., p.132.

they are accountable to no higher authority",⁸² the court ruled that a hearing had been held and that the statute had been complied with. A new trial was ordered.

In the second trial the plaintiff was prevented from testifying as to the nature of a conversation which he alleged took place in his presence when the principal took him to the office of the superintendent of schools. This restriction when coupled with the original prohibition of student testimony rendered the plaintiff incapable of presenting his side of the case. The judge then instructed the jury that the only question which they might settle was whether the committee had acted in "good faith" in the exclusion. The jury ruled that it had not so acted. The Supreme Court on appeal, upheld this ruling.⁸³

Thus the case was finally settled, but on the basis of "bad faith" on the part of the committee, rather than with a clear-cut interpretation of the term "hearing" as used in the statute. It is interesting to conjecture how a present day court would rule on a similar problem; particularly when one considers the recent rulings of the court in Perkins v. The School Committee of Quincy,⁸⁴ and Graves v. The School Committee of Walleale,⁸⁵ especially the latter, to the effect that the hearing required by statute

⁸² Morrison v. Lawrence, *supra*, p.131.

⁸³ Ibid., 186 Massachusetts 457.

⁸⁴ Perkins v. School Committee of Quincy, 315 Massachusetts 47.

⁸⁵ Graves v. School Committee of Walleale, 299 Massachusetts 80.

before a teacher may be legally dismissed must be a hearing in the nature of a "judicial investigation". While the exact meaning of the term "hearing" must be left to the interpretation of some future court, the bench has made it most clear that a school committee may not deny a hearing to a pupil on the grounds that he is merely "suspended", when essentially he is excluded.

In Bishop v. The Inhabitants of Rowley,⁸⁶ the plaintiff along with other pupils of the school was present on the school grounds before the beginning of the morning session. A boy, other than the plaintiff, threw a handful of gravel at one of the windows of the school. The plaintiff's teacher came out of the school building and requested that he disclose the name of the offender. He refused. The teacher alleged that the manner of his refusal was "disrespectful and impudent" and sent him from the school until such time as he should receive the permission of the school committee to return. The school committee of Rowley had a rule to the effect that any child sent from the school for disobedience or misbehaviour could return only with the permission of the committee or of a committee member. The boy would not request of the committee readmission to the schools. The committee, for its part, would not allow him to return until he requested permission and promised "to do his best at school".

⁸⁶ Bishop v. The Inhabitants of Rowley, 165 Massachusetts 460.

When the father requested a hearing before the committee that the alleged misconduct of his son might be elaborated upon, that body refused the request. The plaintiff then sought to recover in tort from the town for unlawful exclusion from the public schools. The lower court ruled for the defendants and the plaintiff appealed.

In reversing the decision of the lower court, the Supreme Court pointed out that the boy was suspended until he requested permission to return and promised "to do his best in school". To so request and so promise, the court reasoned, would be an admission of guilt. Therefore the boy was actually excluded unless he admitted the truth of the teacher's charges. Furthermore, the court pointed out, the father had asked for a hearing to determine the facts in the case, and the committee had refused his request. "If a school committee", said the court, "acts in good faith in determining the facts in a particular case, its decision cannot be reviewed by the courts. But the power of exclusion is not a merely arbitrary power, to be exercised without ascertaining the facts ... In the present case the facts were in dispute, and a hearing was asked for on the question of fact, and it was refused. Under the circumstances, the permanent exclusion of the plaintiff from school was unlawful."⁸⁷

⁸⁷ Bishop v. Rowley, *supra*, pp 461-462.

The court concluded its decision by pointing out that the fact that the lower court had found that the boy actually was disrespectful to his teacher had no bearing on the case. The committee was wrong in assuming his guilt without giving him a chance to be heard.

A similar finding was made by the court in Jones v. The City of Fitchburg.⁸⁸ At the grammar school which the plaintiff attended, a course in civil government was conducted in such a manner that students carried on the duties of the various functionaries of the city government. While the plaintiff was acting as a policeman, misunderstandings between her and the principal arose concerning her honesty. Although he resolved the misunderstanding in her favor, she requested that she be permitted to abandon her role of policeman. He refused her request, and when she failed to comply with his direction to continue in her role, she was suspended.

Her father requested the school committee to present him with written charges showing why his daughter had been excluded. The committee responded by letter, informing him that his daughter had been "suspended" for refusing to obey the orders of the principal, and that she might return to school "upon condition that she submit to the direction of the principal of the school".

⁸⁸ Jones v. City of Fitchburg, 211 Massachusetts 66.

As it ruled for the plaintiff, the Supreme Court reasoned that the committee, since it had transmitted the letter to the parent, was well aware that the plaintiff was actually excluded rather than suspended from the schools, at least until such time as she was ready to admit that her conduct was unjustified. The committee could have called a hearing, the court pointed out, and having heard the evidence on both sides, could then have expelled or reinstated the child, as the facts warranted. When they chose to act without a hearing, they left the city exposed to a tort action, because "the severance of the plaintiff from school, even if characterized in the vote as a suspension, operated and was intended to operate for an indefinite period, and in effect amounted to a permanent exclusion, which could not be justified unless preceded by the required hearing".⁸⁹

If, then, a "suspension" is intended to operate indefinitely, it is in effect an exclusion, and cannot be legally accomplished unless preceded by a hearing.

Although a pupil excluded for misconduct has a statutory right to a hearing before the school committee and the right to recover in tort if excluded without a hearing, he can expect no assistance from the courts if he chooses to by-pass the committee and appeal directly to the courts.

⁸⁹ Jones v. Fitchburg, supra, p.65.

In Davis v. The City of Boston,⁹⁰ the plaintiff was excluded under conditions much the same as those found in Bishop v. Rowley⁹¹ and Jones v. Fitchburg.⁹² The School Committee of Boston had a rule at that time that a pupil might not be subjected to corporal punishment unless he said that he was "willing" to accept it. The plaintiff refused to accept corporal punishment for alleged disobedience and impertinence to his teacher, and was sent from the school until such time as he expressed willingness to be so punished. The boy remained obstinate in refusing to state that he was "willing" to be punished. After repeated negotiations between the plaintiff's father and the school principal had failed to bring about his readmittance, the father formally requested the principal to furnish him a written statement of the charges under which the boy had been excluded from the school. The principal complied with his request stating: (1) that the boy was not "excluded" from the school; and (2) that he would be reinstated whenever he should "willingly" undergo punishment for his impertinence. He pointed out also that, if the parent disagreed with his methods of discipline, it would be proper for him to appeal to the school committee. The

103. ⁹⁰ Davis v. The City of Boston, 133 Massachusetts

⁹¹ Bishop v. Rowley, *supra*.

⁹² Jones v. Fitchburg, *supra*.

father did not appeal to the school committee, but, instead, brought suit against the City of Boston for the unlawful exclusion of his son from the school.

In upholding the decision of the lower court, which had ruled for the defendant, the Supreme Court said,

A teacher has no authority to exclude a child from school, unless he acts under order of the school committee, of which there was no evidence in this case. The laws vest in the school committee the charge and superintendence of the schools. They alone have the right to exclude any child from school.

If a teacher sends a child home from school, there is no hardship in requiring the parent to appeal to the committee. Unless the teacher is acting under some order of the committee, this is the only way of ascertaining whether the proper authority, for whose actions the city or town is made responsible, have excluded the child. On the other hand, to hold that, whenever a teacher sends a child home as punishment, the parent may treat it as an expulsion, and sue the city or the town, would lead to vexatious litigation and impair the discipline and the usefulness of the schools. ... The plaintiff in this case has failed to show an expulsion from school for which the city is liable under the statute.⁹³

This decision makes it clear that a true exclusion from the schools can be brought about only by the school committee.

The foregoing exposition has been an account of the conditions under which a school committee may exclude a child from the public schools, and of the procedures it must follow if that exclusion is to be legal. The statutes and the judicial decisions which have construed them have

⁹³ Davis v. Boston, supra, p.106.

been set forth. Thus the legal position of the school committee has been described. However, an account of exclusion practices in the Commonwealth would seem to be incomplete unless some mention were made of the consequences of exclusion.

The Consequences of Exclusion.— The consequences of exclusion must be considered under two aspects; the exclusion of a pupil between seven and sixteen years, the ages prescribed by law as the period of required attendance, and the exclusion of a pupil beyond those age limits. In the latter case, the pupil is denied the benefit of further training at the public expense and there the matter ends. In the former situation, however, the parent is faced with the necessity of providing the child with an education equal to that afforded by the public school, at his own expense.⁹⁴ Ordinarily this is done through the attendance of the child at a private school. If the parent chooses some other means of complying with the statute, if for example, he provides the child with a private tutor, it is incumbent upon the parents to show that the child is being instructed in the subjects that the law requires.⁹⁵ If the parent fails to provide for the training of his excluded child, he becomes liable to fine under the conditions outlined in Chapter 76, section 2.⁹⁶

⁹⁴ General Laws of Massachusetts (Ter.Ed.) Chapter 76, sections 1 and 2.

⁹⁵ Roberts v. City of Boston, 59 Massachusetts (5 Cushing) 198.

⁹⁶ General Laws, supra, Chapter 76, section 2.

The child himself, depending upon the conditions of his exclusion, may become subject to Chapter 75, section 5, which provides that

A child under sixteen persistently violating reasonable regulations of the school he attends, or otherwise persistently misbehaving therein, so as to render himself a fit subject for exclusion therefrom, shall be deemed an habitual school offender, and, unless placed on probation as provided in section seven, may, on complaint of a supervisor of attendance, be committed, until he reaches his sixteenth birthday, to the county training school, if any, maintained within the county wherein he resides, or, if there is no such school, to the custody of the youth service board, or to a county training school.⁹⁷

In Commonwealth v. Johnson⁹⁸ the court attempts to point out which excluded children should be liable to the provisions of Chapter 75, section 5, and which should not. Essentially, the court bases its distinction on the concept of misconduct. A child excluded by reason of misconduct may be liable to prosecution under the said section; a child excluded for reasons other than misconduct may not be classed as an habitual offender.

Under no circumstances, however, may the parent avoid his obligation to educate his child as provided by Chapter 76, section 2, nor avoid the fine therein described if he fails to do so.

The serious consequences of an exclusion from the public schools is very likely a factor in the caution and infrequency with which the local school committees exercise their power. That we find only three instances in

⁹⁷ General Laws, supra, Chapter 76, section 2.

⁹⁸ Commonwealth v. Johnson, 200 Massachusetts 476.

which the courts have been requested to rule on the legality of an exclusion since 1918⁸⁹ bears testimony to the fact that when a school committee finally decides to exclude a pupil, the justification is so great that there is little point in disputing the case before the courts.

Summary

Although it is one of the fundamental premises of public school education in the Commonwealth of Massachusetts that every child has a right to attend the public schools of the town in which he resides, the right is not an unqualified right, but one subject to the laws of the Commonwealth and to such reasonable rules and regulations as the local school committee may establish.

The right and duty of the local school committee to determine the conditions under which a pupil may attend the public schools is here studied under two major headings, namely: the right to determine the conditions under which a child may be admitted to the public schools; and the right to determine the conditions under which a child may be excluded from the public schools.

The conditions under which children shall be admitted to the public schools are largely regulated by statute. Except in the matter of determining health standards,

⁸⁹ Commonwealth v. Johnson, supra, (1941); Antell v. Stokes, 287 Massachusetts 105 (1934); Nichols v. Mayor and School Committee of Lynn, 297 Massachusetts 65 (1937).

little discretion is allowed to the local school committee. In that area, the statute provides that no child shall be admitted to public schools unless he first be vaccinated. Under certain conditions an exception to this general rule is permitted. The school committee is empowered to determine the circumstances under which all conditionally admitted pupils shall remain in the schools.

In the matter of excluding pupils from the schools, a greater amount of discretion is permitted the committee. The right of the local committee to exclude pupils from the public schools is found in section 37 of Chapter 71, which charges the committee to take "general charge" of the public schools and to "make regulations as to attendance therein". In general, it may be said that the school committee may exclude a pupil whenever it decides, in good faith, that the best interests of the schools under its supervision would be served by such an exclusion.

In specific instances the courts have ruled that a pupil may be excluded for immorality, lack of sufficient mental capacity to warrant attendance at school, misconduct, and for failure to comply with reasonable regulations of the school committee. Moreover, the courts have held that the school committee may demote a pupil who is unable to meet the scholastic standard set for a particular school or grade by the committee.

All valid exclusions presume "good faith" on the part of the school committee. The courts have consistently refused to review decisions of the committee made in good faith. However, where there is reason to believe that "bad faith" has played a part in an exclusion, the courts are quick to come to the aid of the offended party.

By statute a pupil is entitled to a hearing before the school committee prior to exclusion for misconduct. Although the exact nature of the hearing contemplated by the statute has not been made clear by the court; that body has made it quite clear that the law may not be contravened by labelling an exclusion as a suspension. When a suspension is for an indefinite period, it is in effect an exclusion; and may not legally be accomplished without the required hearing. The courts have ruled further that only a school committee may exclude. The parent of a child sent from school by a school official may not seek redress through the courts for unlawful exclusion, without first appealing to the school committee.

The parent of a child excluded from the public schools must find other means of educating his child if he is to comply with the provisions of section 2 of Chapter 76 of the General Laws. Failing to do so he is liable to the penalty described therein.

Depending upon the conditions of his exclusion, the child may become subject to chapter 75, section 5, "The Habitual Offender Law", and to the penalties established therein.

The dearth of exclusion cases to reach the courts in the past four decades bears witness to the caution and discretion with which the local school committees of the Commonwealth have exercised their power to exclude.

SUMMARY AND CONCLUSIONS

The three centuries of expansion that have marked the evolution of the Massachusetts Public School System have taken place under the supervision of three agencies, The Federal Government, the State Government, and the local school committee. It has been the purpose of this thesis to determine the legal position from which these agencies operate.

Since the several states that formed the American Union did not, when framing the Federal Constitution, delegate any portion of their authority in educational matters to the Federal Government, the control of education was reserved to the States.

Consequently, the Federal government, at least as far as the traditional twelve grades of the primary and secondary school are concerned, has taken no active part in the management of the Massachusetts Public School System. Nevertheless, it has exerted a very powerful influence on the manner in which the schools have been conducted. Through the Supreme Court of the United States it has restrained the Commonwealth, as well as her sister states, from adopting any educational policy which would

jeopardize the rights guaranteed to the individual by the Constitution of the United States.

The people of the Commonwealth of Massachusetts when they created the Constitution by virtue of which the Commonwealth, as such, exists, delegated the control of public school education to the State Legislature. The power of that body in educational matters, so long as it operates within the framework of the Federal Constitution and the Constitution of the Commonwealth, is plenary and subject to no control save that of the people, who in the exercise of their right to amend the Constitution, could place limitations on the control of the legislature.

The Legislature has carried out its constitutional mandate to provide for the education of the citizens of the Commonwealth in two ways: directly, through statutory enactments; and indirectly, through a delegation of portions of its authority to three agencies which it has created, the municipality, the State Department of Education, and the local school committee. The last of these has been endowed with an extraordinary power and has been charged with much of the responsibility for conducting the public schools at the local level.

The judicial branch of the State government, through the decisions of the Supreme Court of Massachusetts, which have interpreted the Constitution of the Commonwealth, and the enactments of the Legislature, has also played a part in the development of the public school system.

The local school committee, although chosen by the local electorate, is an agency of the State. It has no corporate status and exercises only those powers granted to it by statute and those which may be inferred from granted powers. Committee members are public officers whose authority stems from the State and whose decisions are those of the Commonwealth.

While the courts of her sister states have held that school committee members are public officers who perform their statutory duties as a board and have no authority as individuals, the courts of the Commonwealth have ruled that committeemen may exercise a limited amount of authority as individuals. Since the Massachusetts interpretations were given more than three-quarters of a century ago, however, it is questionable whether the courts of the present day, if presented with the same type of problems, would uphold the interpretations of their predecessors.

Since school committees have no corporate status, they are not liable in tort to aggrieved parties for acts of negligence. All such actions must be brought against the municipalities. Municipalities have a dual nature. On the one hand, they are political sub-divisions of the state, on the other, they are quasi-corporations, conducted as private corporations for the benefit of the

municipality rather than the Commonwealth. In the former role, they are not liable for non-feasance, nor for the misfeasance of their agents; in the latter role, they are liable. School committeemen, as public officers, have much the same status as the municipality in its governmental role. Although the courts have not been asked to rule directly on the personal misfeasance of a school committeeman, the courts have held other public officers liable for torts of that type. These precedents would certainly be considered by the courts if it were asked to adjudge an act of personal misfeasance on the part of a school committee member.

As a board of public officers, a school committee is completely independent of the municipality in which it is geographically located, and under ordinary conditions the municipality may exercise no control over the actions of the committee. The most notable efforts of the municipalities to compromise this general rule have been in the nature of attempts to restrict the right of the school committee to fix teachers' salaries. The courts have consistently ruled that the exclusive right to regulate teachers' salaries lies with the school committee.

In this study the powers and duties of the local school committee have been considered under three broad headings; the power and duties of the school committee with regard to the making of policy; the powers and duties of

the school committee as they pertain to the teachers, superintendents of schools, principals and supervisors whom it has engaged to conduct the public schools under its general supervision; and the powers and duties of the school committee as they affect the conditions under which pupils attend the public schools.

As regards the making of policy, the courts have repeatedly ruled that the mandate of the Legislature to the school committee to take "general charge" of the public schools embodied in Chapter 71, section 37, of the General Laws of Massachusetts, Tercentenary Edition, is a broad and comprehensive type of power. Specifically, the courts have ruled that the school committee may establish any policy which is consistent with the purposes for which the schools exist, and any reasonable rule or regulation which is intended to improve the government, management, or discipline of the schools under their charge. Moreover, the Legislature has reserved to the school committee by statute certain specific prerogatives in the matter of policy making, such as, the right to determine the number of days, if any, that the school shall remain in session beyond the statutory minimum; the right to determine the time and length of vacations; the right to select textbooks for use in the schools, and the like.

Although the minimum requirements which a teaching candidate must possess and the minimum salary which he may

be paid are prescribed, and distinctions among candidates or teachers on the basis of sex, politics, or religion, are forbidden by law; school committees are allowed a considerable discretion in their relations with the professional personnel, which they engage to operate the public schools. The courts have ruled that committees may engage and fix the salaries of teachers, have the exclusive right to determine the duties which they shall perform, and may dismiss them whenever, in the honest judgement of the committee, the welfare of the public schools will be best served by the dismissal. The committee is allowed a wide discretion in determining what constitutes a good cause for dismissal. All valid dismissals, however, must be made in "good faith" and in conformity with the provisions of the so-called "Tenure Law". The latter does not limit the power of the school committee to dismiss a teacher; it merely restricts the manner in which the power may be exercised.

Although it is one of the fundamental premises of public school education in the Commonwealth of Massachusetts that every child has the right to attend the public schools of the town in which he resides, the right is not an unqualified right, but one subject to the laws of the Commonwealth and to such reasonable rules and regulations as the school committee may establish. The authority of

the school committee to determine the conditions under which a child shall attend the public schools may be considered under two aspects; namely, the power to determine the conditions under which a child may be admitted to the public schools; and the power to determine the conditions under which a child may be excluded from the public schools.

The conditions of admission are largely prescribed by statute, the principal discretion permitted the committee being the authority to determine the standards of health to be met by aspirant scholars. The important litigation in this area has centered upon the matter of vaccination. With regard to this problem the courts have held that no child may be legally admitted to the schools unless he be vaccinated. Under certain conditions exceptions are made. The local school committee has full power to determine the conditions under which conditionally admitted pupils shall remain in the public schools.

The school committee is allowed a greater amount of discretion in excluding pupils from the schools. In general, the courts have ruled that the power to take "general charge" of the public schools and to "make regulations as to attendance therein", contained in section 37 of Chapter 71, empowers the school committee to exclude a pupil whenever it decides, in good faith, that the best interests of the schools will be served by the exclusion. Some of the specific reasons for which the courts have held

that school committees may validly exclude pupils have been immorality, mental incapacity, misconduct and insubordination. While the power of a committee to exclude a pupil is a broad power, it is restricted by statute when the cause for exclusion is misconduct. A pupil so charged must, if he so requests, be granted a hearing before the school committee. Failure of the committee to grant his request makes any subsequent exclusion unlawful, and leaves the municipality liable to action in tort.

In conclusion, the legal position of the agencies which administer the Massachusetts Public School system may be stated as follows: the Federal government has the inherent right to prevent the Commonwealth of Massachusetts, as well as her sister states, from adopting educational policies which would jeopardize the rights guaranteed the individual by the Constitution of the United States. Through her Supreme Judicial Branch she has exercised this right. The Legislative branch of the government of the Commonwealth possesses, through constitutional grant, a plenary control over all phases of public school education carried on within her boundaries. The school committee created by the Legislature to administer the affairs of the public schools at the local level, is an agency of the state, to whom sweeping and comprehensive powers have been delegated. The continued exercise of this power,

however, is contingent upon the will of the Legislature, which at any time may restrict, alter, or abolish any or all powers of the school committee or the committee itself.

BIBLIOGRAPHY

COOLEY, Thomas M., The General Principles of Constitutional Law in the United States of America, 3rd edition, revised by Andrew C. McLaughlin, Boston, Little-Brown, 1898, li-423 pp.

Of value to this thesis for discussion of the origin and nature of the respective powers of the Federal and State governments.

-----, A Treatise on Constitutional Limitations. The Legislative Power of the States of the American Union, Vol.1, 8th edition, revised by Walter Carrington, Boston, Little-Brown, 1927, cciii-730 p.

Treats of the legislative powers of the several state governments. Of value to this writer in establishing right of state government to regulate education.

CORWIN, Edward S., editor, The Constitution of the United States of America. Analysis and Interpretation, Washington, U.S. Government Printing Office, 1953, xxxiv-1361 pp.

A thorough analysis of the Constitution of the United States carried on at the instigation of the United States Senate. This writer found the analysis of the Tenth Amendment of particular value.

GAFF, Bernard C., Blackstone's Commentaries on the Law, Washington, Washington Law Book Co., 1941, xx-1040 pp.

A modern revision of the work Sir William Blackstone covering the fundamental principles of Anglo-Saxon jurisprudence. The section treating of the common law and tort liability was of value to this writer.

MASSACHUSETTS, ACTS OF, 1777 to 1954.

The annual enactments of the General Court, Consulted as needed for background to the present law.

MASSACHUSETTS, THE ANNOTATED LAWS OF, Rochester, Lawyers Co-op. Publishing Co., 1953, with pocket supplements through 1954.

An unofficial, but highly accurate, version of the General Laws of Massachusetts, Tercentenary Edition, with all amendments to the same through 1954. Contains also references to pertinent judicial decisions.

MASSACHUSETTS. The Commonwealth of: Annual Reports of the Board of Education, together with the Annual Reports of the Secretary of the Board, 1837 to 1953.

These reports give a picture of the condition of the public schools of Massachusetts on a statewide basis. The Twenty-fourth Annual Report, Boston, White, 1861, p.111-127, contains a discussion of the school district which was of particular value to this writer.

MASSACHUSETTS. The Constitution of the Commonwealth of: General Laws of Massachusetts, 1921 edition, Vol.I, Boston, Wright and Potter, 1921, p lix-cxii.
Basic material for this thesis.

MASSACHUSETTS. The General Laws of the Commonwealth of. (Tercentenary Edition), Boston, Wright and Potter, 1932, 2 volumes, with index.
Basic material for this thesis.

MASSACHUSETTS REPORTS, The Decisions of the Supreme Judicial Court of Massachusetts. Vols.1-330, 1804-1953.
Basic material for this thesis.

MASSACHUSETTS BAY. Acts of the Province of. 1692 to 1776.
Enactments of the General Court. Consulted as needed for historical background in this thesis.

SHURTLEFF, Nathaniel B., editor, The Records of the Governor and Company of Massachusetts Bay in New England, published in Vol.1, 1628-1641; Vol.2, 1642-1649; Vol.3, 1644-1657; Vol.4, part 1, 1650-1660; Vol.4, part 2, 1661-1674; Vol.5, 1674-1686; Boston, William White, 1853-54.

Compiled and printed by order of the Legislature to perpetuate the content of the original handwritten records, which were almost illegible and were decaying. Volumes II and III were particularly valuable to this writer in his study of early educational legislation.

THE National Reporter System, St.Paul, West Pub.Co., The National Reporter System divides the United States into seven basic areas: Atlantic, Northeastern, Northwestern, Pacific, Southern, Southeastern, and Southwestern, and publishes a Reporter for each area. The decisions of either the State Supreme

Court and/or the Court of Appeals for each of the states are reported. A "key number" allows the reader studying a case in one state to determine the findings of the courts in other states in similar situations. The system also includes the Supreme Court Reporter, the Federal Supplement and the New York Supplement. Used in this thesis in those instances where it seemed desirable to cite the findings of other courts for comparative purposes.

THE NORTHEASTERN REPORTER, Ibid., Contains the decisions of the Supreme Court of Massachusetts from 1885 to the present. Used here to report 1954 decision not as yet available in Massachusetts Reports.

UNITED STATES OF AMERICA, The Constitution of. Library of Congress edition, Washington, U.S. Government Printing Office, 1950.

Basic material for this thesis.

UNITED STATES REPORTS, Cases Adjudged in the Supreme Court of the United States, Washington, Government Printing Office, 1781-June, 1955.

Basic material for this thesis.

APPENDIX 1

GENERAL LAWS OF MASSACHUSETTS (TERCENTENARY EDITION):
PERTINENT CHAPTERS AFFECTING THOSE ASPECTS OF PUBLIC
SCHOOL EDUCATION CONSIDERED IN THIS THESIS, WITH NOTA-
TION AS TO WHETHER OR NOT THE SECTION IS TREATED THEREIN.

Chapter 71

Section	Descriptive Title	
1	Maintenance of Public Schools. Subjects of instruction.	COVERED
2	Teaching of American History, Civics, etc.	COVERED
3	Teaching of military drill, gymnastics, etc. permitted	COVERED
4	Maintenance of high schools	COVERED
6	Payment of tuition for pupils in towns not required to maintain high schools	COVERED
7A	Reimbursement of towns for expenses incurred for transportation of pupils	NOT COVERED
10	Reimbursement to small towns for tuition of physically disabled pupils	NOT COVERED
11	High school defined for purposes of state reimbursement	NOT COVERED
12	Certification of teachers in towns receiving certain types of state aid	NOT COVERED
13 to 13E	Teaching of foreign languages; teaching of driver education	COVERED
14 to 16I	Regional school districts	NOT COVERED
17	Teaching of manual training and household arts	NOT COVERED

Section	Descriptive Title	
18 to 20	Evening schools	NOT COVERED
21 to 26	Continuation schools	NOT COVERED
26A 26F	Extended school services for certain children of certain employed mothers	NOT COVERED
27	Free lectures	NOT COVERED
28	Vacation schools	NOT COVERED
29	Female assistants in certain schools	NOT COVERED
30	Duties of teachers (covered implicitly)	COVERED
30A	Teacher's Oath Law	NOT COVERED
31	Reading of Bible	COVERED
32	Observance of Memorial Day	NOT COVERED
33	Regulation of vivisection and dissec- tion	NOT COVERED
34	Remedy in case a town fails to provide money for the support of the public schools	COVERED
34A to 34C	Concerning transcripts and diplomas	NOT COVERED
35	Commencement of term of school com- mittees in certain cities	NOT COVERED
36	Records of school committee	COVERED
37	Duties of school committee	COVERED
38	Election of Teachers	COVERED
38A to 38F	Concerns director of occupational guidance and placement	NOT COVERED

Section	Descriptive Title	
38G	Teacher certification	COVERED
39	Inquiry as to religion or politics of teacher candidate	COVERED
40	Minimum salary - Equal pay	COVERED
41	Tenure of certain teachers and superintendents	COVERED
42	Dismissal of tenure teachers	COVERED
42A	Demotion of principals and supervisors	COVERED
42B	Tenure teachers in regional school districts	NOT COVERED
43	Reduction of teacher salaries	COVERED
44	Teacher's right of suffrage not to be restricted	NOT COVERED
45	Concerning commercial teacher employment agencies	NOT COVERED
46	Instruction of certain mentally retarded children	COVERED
46A	Instruction of certain physically handicapped children	NOT COVERED
47	Control of committee over athletic teams and extra-curricular activities	COVERED
48	School committee to provide textbooks	COVERED
48A	Equipment for pupils directing traffic	NOT COVERED
49	Purchase of textbooks by pupils	NOT COVERED
50	School committee may change textbooks	COVERED
51	Exhibition of school work at exhibitions	NOT COVERED

Section	Descriptive Title	
52	Committeemen may not be teachers in same school system, etc.	COVERED
53	School physicians and nurses	COVERED
53A 53B	Physicians and nurses in superintendency unions	NOT COVERED
54	Physical examinations of teachers, pupils, janitors, etc, under certain conditions	NOT COVERED
55	Pupils infected or exposed to contagious disease	COVERED
55B	Teachers, janitors, etc. suffering from tuberculosis	NOT COVERED
56	Parent to be notified when child is found to be suffering from disease, etc.	NOT COVERED
57	Examination for defective sight	NOT COVERED
59	Election of and duties of superintendents of schools	COVERED
59A	Superintendents of schools in certain small towns, state reimbursement	NOT COVERED
60 to 66	Superintendency Unions	NOT COVERED
67	Superintendent of schools may not take fee for obtaining position for teacher candidate	NOT COVERED
68	Committee to maintain school property	COVERED
69	Display of Flag - "Pledge of Allegiance"	COVERED
70	Location of schoolhouses	NOT COVERED
71	Public use of school property	COVERED
72	School lunch program	NOT COVERED

Section	Descriptive Title	
73	Closing of school for teachers' meetings (covered implicitly)	COVERED
74	Management of school funds by certain corporations	NOT COVERED
75 to 79	Junior colleges	NOT COVERED

Chapter 76

Section	Descriptive Title	
1	School Attendance Regulations	COVERED
2	Duties of parents as regards school attendance	COVERED
2A	Attendance of deaf children	NOT COVERED
3	Certain illiterate minors to attend evening school	NOT COVERED
4	Penalty for inducing minors to absent themselves from school	NOT COVERED
5	Child may attend schools of town of residence, under certain conditions	COVERED
6	Attendance in place other than residence of parent or guardian	COVERED
7	Tuition of certain public charges	NOT COVERED
8	Transportation of certain public charges	NOT COVERED
9	Tuition, where town does not maintain a high school	COVERED
10	Payments of accounts where child attends school under sections 7, 8, and 9	NOT COVERED
11	Tuition of inmates of certain institutions	NOT COVERED

Section	Descriptive Title	
12	Attendance outside of town of residence	COVERED
13	Transfer cards	NOT COVERED
14	Transportation of children living on islands	NOT COVERED
15	Vaccination	COVERED
16	Exclusion from school	COVERED
17	Pupils not to be excluded for misconduct without hearing	COVERED

APPENDIX 2

EXTRACTS FROM OPINION OF MR. JUSTICE REED DISSENTING FROM THE MAJORITY OPINION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, et al. 333 US 203

Extract #1*

The phrase "an establishment of religion" may have been intended by Congress to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience". Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion, as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion. A reading of the general statements of eminent statesmen of former days,

* McCollum v. Illinois, 333 US, pages 244-247.

(NOTE: Contrary to the usual practice, footnote references to these extracts will follow the text, in view of their length. Numbers used are those in the text of the original opinion)

referred to in the opinions in this case and in Everson v. Board of Education, supra, will show that circumstances such as those in this case were far from the minds of the authors. The words and spirit of those statements may be wholeheartedly accepted without in the least impugning the judgment of the State of Illinois.⁸

Mr. Jefferson, as one of the founders of the University of Virginia, a school which from its establishment in 1819 has been wholly governed, managed and controlled by the State of Virginia,⁹ was faced with the same problem, that is before this Court today; the question of the constitutional limitation upon religious education in public schools. In his annual report as Rector, to the President and Directors of the Literary Fund, dated October 7, 1822, approved by the Visitors of the University of whom Mr. Madison was one,¹⁰ Mr. Jefferson set forth his views at some length.¹¹ These suggestions of Mr. Jefferson were adopted and Ch. II, (section) 1, of the Regulations of the University of October 4, 1824, provided that:

Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.

Thus, the "wall of separation between church and State" that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

8 For example, Mr. Jefferson's striking phrase as to the "wall of separation between church and State" appears in a letter acknowledging "the affectionate sentiments of esteem and approbation" included in a testimonial to himself. In its context it reads as follows:

"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof' thus building a wall of separation between church and State". The Writings of Thomas Jefferson, (Washington ed., 1861) 113.

9 Acts of the Assembly of 1818-1819 (1819) 15; Phillips v. The Rector and Visitors of the University of Virginia. 97 Va.472, 474-75, 34 S.E. 66,67.

10 The Writings of Thomas Jefferson (Memorial edition, 1904) 408-409.

11 Id. pp 414-417:

"It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent

to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences ... A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instructions in the other branches of science... It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations, as proposed in the same report of the commissioners, or in the lecturing room of such professor... Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy; and could this jealousy be now alarmed, in the opinion of the legislature, by what is here suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express."

Mr. Jefferson commented upon the report on November 2, 1822, in a letter to Dr. Thomas Cooper, as follows:

"And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality".

12 Ford, The Works of Thomas Jefferson (Federal edition 1905), 272.

Extract #2*

Cases running into the scores have been in the state courts of last resort that involved religion and the schools. Except where the exercises with religious significance partook of the ceremonial practice of sects or groups, their constitutionality has been generally upheld. Illinois itself promptly struck down as violative of its own constitution required exercises partaking of a religious ceremony. People ex rel. Ring v. Board of Education, 245 Illinois 334, 92 N.E. 251. In that case compulsory religious exercises -- a reading from the King James Bible, the Lord's Prayer and the singing of hymns -- were forbidden as "worship services". In this case, the Supreme Court of Illinois pointed out that in the Ring case, the activities in the school were ceremonial and compulsory; in this, voluntary and educational. 396 Ill.14, 20-21, 71 N.E. 2d 161, 164.

The practices of the federal government offer many examples of this kind of "aid" by the state to religion. The Congress of the United States has a chaplain for each

*McCullum v. Illinois, 333 US, pages 252-256.

House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days. They conduct the public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion. Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools. The schools of the District of Columbia have opening exercises which "include a reading from the Bible without note or comments, and the Lord's Prayer".

In the United States Naval Academy and the United States Military Academy, schools wholly supported and completely controlled by the federal government, there are a number of religious activities. Chaplains are attached to both schools. Attendance at church services on Sunday is compulsory at both the Military and Naval Academies. At West Point the Protestant services are held in the Cadet Chapel, the Catholic in the Catholic Chapel, and the Jewish in the Old Cadet Chapel; at Annapolis only Protestant services are held on the reservation, midshipmen of other religious persuasions attend the churches of the city of Annapolis. These facts indicate that both schools since

their earliest beginnings have maintained and enforced a pattern of participation in formal worship.

With the general statements in the opinions concerning the constitutional requirement that the nation and the states, by virtue of the First and Fourteenth Amendments, may "make no law respecting an establishment of religion" I am in agreement. But, in the light of the meaning given to those words by the precedents, customs, and practices which I have detailed above, I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes; churches are unconstitutionally aided. Whatever may be the wisdom of the arrangement as to the use of the school buildings made with the Champaign Council of Religious Education, it is clear to me that past practice shows such cooperation between the schools and a non-ecclesiastical body is not forbidden by the First Amendment. When actual church services have always been permitted on government property, the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion. For a non-sectarian organization to give the type of instruction here offered cannot be said to violate our rule as to the establishment of religion by the state. The prohibition of enactments respecting the establishment of religion do not bar every

friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment -- free speech, free press -- are absolutes. If abuses occur, such as the use of the instruction hour for sectarian purposes, I have no doubt, in view of the Ring case, that Illinois will promptly correct them. If they are of a kind that tend to the establishment of a church or interfere with the free exercise of religion, this Court is open for a review of any erroneous decision. This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population. A definite violation of legislative limits must be established. The Constitution should not be stretched to forbid national customs in the way the courts act to reach arrangements to avoid federal taxation. Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance, where, for me, the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introduction to the study of its text. The judgment should be affirmed.

APPENDIX 3

OPINION OF MR. JUSTICE JACKSON, DISSENTING FROM THE MAJORITY OPINION OF THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF Zorach et al. v. Clausen et al., constituting the Board of Education of the City of New York et al. 343 US 306.

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages: first, that the State compel each student to yield a large part of his time for public secular education; and second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes. No one suggests that the Constitution would permit the State directly to require this "released" time to be spent "under the control of a duly constituted religious body". This program accomplishes that forbidden result by indirection. If public education were taking so much of the pupils' time as to injure the public or the students' welfare by encroaching upon their religious opportunity, simply shortening everyone's school day would facilitate voluntary and optional attendance at Church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to the Church. Hence, they must be deprived of freedom for this period, with Church attendance put to them as one of the two permissible ways of using it.

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officers who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is as unconstitutional in my view, when exerted by indirection, as when exercised forthrightly.

As one whose children, as a matter of free choice, have been sent to privately supported Church schools, I may challenge the Court's suggestion that opposition to this plan can only be anti-religious, atheistic, or agnostic. My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.

The day that this country ceases to be free for irreligion it will cease to be free for religion -- except for the sect that can win political power. The same epithetical jurisprudence used by the Court today to beat down those who oppose pressuring children into some

religion can devise as good epithets tomorrow against those who object to pressuring them into a favored religion. And, after all, if we concede to the State power and wisdom to single out "duly constituted religious" bodies as exclusive alternatives for compulsory secular instruction, it would be logical to also uphold the power and wisdom to chose the true faith among those "duly constituted". We start down a rough road when we begin to mix compulsory public education with compulsory godliness.

A number of Justices just short of a majority of the majority that promulgates today's passionate dialectics joined in answering them in Illinois ex rel. McCollum v. Board of Education, 333 US 203. The distinction attempted between that case and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity. A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and undertones as to make clear that the McCollum case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

ABSTRACT OF
THE LEGAL POSITION OF THE AGENCIES WHICH ADMINISTER
THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM

The Massachusetts Public School System is conducted under the administration of the Federal government, the Government of the Commonwealth, and the local school committee. This thesis studies the legal position from which these agencies function.

It is limited in scope to the extent that in the study of the powers and duties of the school committee only intra-personal relationships, that is, the relationships which exist between the committee and the community, its professional employees, and/or parents and pupils are considered.

Conclusions are reached through an analysis of basic sources, primarily the Constitution of the United States and of the Commonwealth of Massachusetts, the General Laws of Massachusetts, as amended through 1954, and the judicial interpretations given to the Constitutions of the United States and of Massachusetts, and the Massachusetts statutes through 1954.

The study is presented in five chapters, the first of which deals with the legal positions of the various branches of the Federal and State governments. After it

is established through a study of the pertinent sections of the Federal and State Constitutions, that the State and specifically the State Legislature, has plenary control of the public schools of the Commonwealth, the methods by which the Legislature has exercised that control, and most especially the delegation of sweeping powers to local school committees, created specifically for conducting the affairs of the public schools at the community level, are discussed. An emphasis is placed in this chapter upon the power of the Federal government through its Supreme Judicial Branch to restrict the right of the Commonwealth, and of her sister states as well, to adopt educational policies which contravene the rights guaranteed to each citizen by the Constitution of the United States.

Chapter Two, which treats of the nature and legal status of the school committee, is introduced by a brief survey of the agencies which have administered the affairs of the public schools of the Commonwealth from 1642 to 1882, when the school committee in its present form was established. The school committee is determined to be an agency of the state without corporate status, independent of the municipality in which it is geographically located, and is possessed of those powers granted to it by statute and those implicit in granted powers. School committee members are found to be public officers whose decisions, when made in conformity with the Constitution and the statutes, are the decisions of the

Commonwealth and are subject to review by no other board or authority. Decisions of the Supreme Court of the Commonwealth are cited to show that school committee members and municipalities, which are liable for the tortious acts of school committees, will not be held liable for negligence in the performance of a public duty, when the negligence involves non-feasance, or mis-feasance on the part of an agent.

Chapters Three, Four, and Five are devoted to a discussion of the powers and duties of the school committee: Chapter Three with regard to the making of policy; Chapter Four as they affect the relationship of the committee with the professional personnel engaged by it to operate the public schools; and Chapter Five as they concern the conditions under which pupils may attend the public schools.

In Chapter Three, the power of the school committee to establish any policy consistent with the purpose for which the schools exist, and to make all reasonable rules and regulations intended to further the discipline, management, or Government of the schools is discussed.

The power of the school committee to contract with, fix the salaries of, determine the qualifications of, set the duties of, and dismiss the teachers, superintendents of schools, supervisors, and principals whom it has engaged to operate the public schools under its general charge is established in Chapter Four. The various sections of the

"tenure law" and the constructions given them by the courts are discussed at length. It is concluded that the tenure law does not limit the power of a school committee to dismiss a teacher: it merely limits the manner in which that authority may be exercised.

The power of the school committee to admit and exclude pupils from the public schools is treated in the fifth and final chapter. From a study of the statutes it is shown that the conditions under which pupils are to be admitted to the schools are largely prescribed by statute. Relatively little is left to the discretion of the school committee. In the matter of exclusion, it is shown that a school committee may exclude a pupil whenever it determines in "good faith" that such exclusion will best serve the interests of the school. Exclusions, however, must be made in conformity with the statutes, or the municipality becomes liable in tort to the offended student.

In summary, this study of the legal position of the agencies administering the public school system in the Commonwealth of Massachusetts establishes that the right of the Federal Government to prevent the several states of the Union, including the Commonwealth, from adopting educational policies which would jeopardize the rights guaranteed to the individual by the Constitution of the United States, is an inherent right found in that organ; that the plenary power of the state legislature over the public

school is derived from the Constitution of the Commonwealth; and that the local school committee exercises its authority at the will of the Legislature, which can not only alter, restrict or nullify, at any time, the sweeping powers of the committee, but could abolish the committee itself.