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STATE NORMAL SCHOOL,
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A TREATISE

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LAW OF PUBLIC SCHOOLS

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ÇOUNCIL BLUFFS, IOWA

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PREFACE.

ALMOST every court in the land has to do with questions growing out of our public-school system. Our educational interests are becoming of greater magnitude and importance each year.

Questions respecting school taxation, contracts, employment of teachers, authority of teachers, rules and regulations, rights of pupils, powers of officers, liabilities of teachers and directors, use of school property, etc., arise constantly.

Normal schools, teachers, and school officers—who are annually called upon to assume duties new to them—have all felt the need of a work which should embody in small compass what may be called the common law of public schools, and which would be a companion book to the statutory school laws as published in the several States by State authority.

The statutory school law is easy of access, but the judicial decisions are scattered through a large number of reports, and are out of the reach of teachers and officers.

It has been the object of the writer to make a book useful to the busy law practitioner and also to teachers and officers.

An acquaintance with the law of this subject would tend in no small degree to avert much unseemly litigation, which in the infancy of our public-school system was caused more by the unsettled state of the law than by a fondness for contention.

Teachers, especially, are often called upon to act with vigor and promptness in matters requiring not only tact and judgment, but also a knowledge of what has actually been decided by the courts of law, and this knowledge is often demanded when there is neither time nor opportunity to take professional advice.

The writer has limited himself to the treatment of what has actually been decided, and what is believed to be the law.

If any are disappointed in not finding mentioned in these pages subjects and cases which have been ably discussed in teachers' meetings, institutes, and conventions, and by State Superintendents, the writer has only this to say to them, that such discussions, though valuable and interesting, are outside of the design of this book, and he has purposely avoided them in order to present this as a distinct work on the actual

law of the subject, based upon decisions of courts which are precedents in those and other legal tribunals.

It often becomes important to teachers and officers to know how their interests would fare if an action should be instituted in a court of law.

The questions treated of are of a general character, and are as likely to arise in one State as in another. Those that are of a purely local character have been avoided as far as possible.

JULY, 1880.

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LAW OF PUBLIC SCHOOLS.

CHAPTER I.

TAXATION FOR PUBLIC SCHOOLS.

1. Brief History of the Subject.—2. The Power to Tax for School Purposes.

1. Brief History of the Subject.

The thought that man as man, without reference to any special practical end, should be educated seems to have occurred first to the Greeks, but it was not until the Reformation that men began to hold the opinion that *every man's* intellect should be so trained as to be able to read and inquire and think for itself.

During what are called the dark centuries a state of deplorable ignorance prevailed all over Europe. It is refreshing to find in the history of this dark middle age two monarchs who strove to give to their subjects the inestimable privilege of

lifting themselves out of the depths of ignorance in which they were immersed. At the accession of Charlemagne to the throne of France no means of education existed in his dominions. This monarch, who, it is said, was himself incapable of writing, invited men of letters from abroad to come and reside at his court and instruct himself and his family. He also established schools in various cities of his empire.[1]

In the ninth century Alfred the Great, of England, made similar efforts, but they died with him, his successors being too much occupied with warfare to continue the educational work thus initiated.[2]

Down to the time of the transitional movement in Europe from the mediæval ages to the modern world, there is little of interest to the cause of popular education to record.

The influence of the Reformation upon education was made manifest early in the seventeenth century. In 1616 the Scotch Parliament adopted measures for settling and supporting a public school in each parish at the expense of the heritors or landed proprietors. This legislation was repealed at the restoration of Charles II., but was re-enacted by the Scottish Parliament in 1696.[3]

[1] Hallam's "Middle Ages," chap ix , parts 1 and 2.

[2] Hume's "History of England," vol. i. chap. ii.

[3] II. Kent's Comm , *196.

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Lord Macaulay says: "By this memorable law it was, in the Scotch phrase, statuted and ordained that every parish in the realm should provide a commodious school-house and should pay a moderate stipend to a schoolmaster. The effect could not be immediately felt. But, before one generation had passed away, it began to be evident that the common people of Scotland were superior in intelligence to the common people of any other country in Europe. To whatever land the Scotchman might wander, to whatever calling he might betake himself, in America or in India, in trade or in war, the advantage which he derived from his early training raised him above his competitors. If he was taken into a warehouse as a porter, he soon became foreman. If he enlisted in the army he soon became a sergeant. Scotland, meanwhile, in spite of the barrenness of her soil and the severity of her climate, made such progress in agriculture, in manufactures, in commerce, in letters, in science, in all that constitutes civilization, as the Old World has never seen equalled, and as even the New World has scarcely seen surpassed.

This wonderful change is to be attributed, not indeed solely, but principally, to the national system of education." [1]

[1] Macaulay's "History of England," vol. v. chap. xxii.

Since then every great power of the civilized world has adopted some system of public schools.[1]

What little objection has been made to taxation for universal education, in this country, has come from Wealth, which says it cannot properly be taxed for the education of the people. We must not forget that without law the ownership of that wealth could not exist.

Jeremy Bentham says: "The idea of property consists in an established expectation, in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion can only be the work of the law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which *guarantees* it to me. Property and law are born together, and *die* together. Before laws were made there was no property; take away laws and property ceases."[2]

The words, "I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it

[1] In Turkey, whose influence as a nation is declining, public instruction has ceased. Her school-houses have been abandoned and are in ruins. Rept. of U. S. Com. of Education, 1876–7, p. 193

[2] "Principles of the Civil Code," chap. viii. "Of Property."

to me," come home with significant meaning in this day of Socialism and of clashing between Capital and Labor, which now so often occurs in the monarchies of the Old World, and even in our own land. The law *guarantees* the right of property, but instantaneous with the creation of the right of property must exist the paramount claim of the government to such portion of it as may be necessary fully to effectuate that guaranty. The law must be upheld and respected, or else all rights of ownership are in jeopardy and industry paralyzed.

To maintain the law, education of the people is more potent than standing armies.

Lord Brougham, in the House of Commons, said: "There have been periods when the country heard with dismay that the soldier was abroad. That is not the case now. Let the soldier be abroad: in the present age he can do nothing. There is another person abroad—a less important person in the eyes of some, an insignificant person, whose labors have tended to produce this state of things. The schoolmaster is abroad! And I trust more to him, armed with his primer, than I do the soldier in full military array, for upholding and extending the liberties of his country."[1]

[1] Speech, January 29, 1828.

"It is intelligence," said Daniel Webster, "which has reared the majestic columns of our national glory, and this alone can prevent them from crumbling into ashes."

State education, being so important to national existence, is therefore a very appropriate object of taxation.

2. Power to Tax for School Purposes.

The State is the source of authority. "Every municipal corporation and every political division of the State must be able to show due authority from the State to make the demand."[1]

The taxing power can be lawfully exercised only in behalf of a public purpose.

Boards of school directors are civil corporations, and the Legislature may confer upon them the power to tax for school purposes.[2]

The words "public schools" are synonymous with "common schools," and mean the schools created by law and maintained at the public expense, and which are open and common to the children of all the inhabitants alike.[3]

Taxation for public schools is for a public use

[1] "Cooley on Taxation," p. 474.

[2] State v. Bremond, 38 Texas, 116.

[3] Jenkins v. Andover, 103 Mass., 94–98; Poeple v. Board of

and purpose, and public education is a fit and appropriate object of taxation.[1]

Such taxes may be constitutionally imposed, and one receiving his full share of benefits from the school system cannot complain that the legislative power is in that respect unwarranted.[2]

There can be no taxation in aid of a private educational institution operated for individual profit.[3]

That a school building was larger than was immediately needed, and that the vote specified among other uses of a part of the building that of holding school society meetings and lectures therein, does not vitiate the tax, nor authorize a court to enjoin the same.[4]

A vote by a school district to raise a given sum to remove and repair a school-house is within the

Education, 13 Barb. (N. Y.), 400 ; Webster's Dictionary, Common—*common schools*, and Abbott's Law Dictionary, title "Common Schools."

[1] Opinion of the Judges, 68 Me., 582 ; Williams *v.* School District, 33 Vt., 271.

[2] Marshall *v.* Donovan, 10 Bush. (Ky.), 681 ; 6 Cowen (N. Y.), 543 ; 56 Pa. St., 359 ; 22 Grattan (Va.), 857.

[3] Curtis' Adm'r's *v.* Whipple, 24 Wisc., 350 ; Philadelphia Association, etc., *v.* Wood, 39 Pa. St., 73.

[4] Sheldon *v.* Centre School District, 25 Conn., 224 ; Greenbanks *v.* Boutwell, 43 Vt., 207.

authority granted by statute to raise money "for erecting and repairing school-houses."[1]

Where the law provides, as it does in some of the States, that the electors of a school district, at an annual meeting, must vote a precise and definite sum as a tax on the inhabitants of the district for building a school-house, they cannot delegate to the officers of the district any discretion as to the aggregate amount of tax to be raised.[2]

In Michigan the policy of the law of that State upon the subject of education, from its organization until after the adoption of the present constitution, was reviewed by the Supreme Court of that State, and the court came to the conclusion that there is nothing in the constitution or laws of that State restricting its school districts in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if the voters of the district consent to bear the expense, nor is there anything to prevent instruction in the classics and modern languages in these schools.[3]

In the same case, the question of whether there

[1] Bump *v.* Smith, 11 N. H., 48.

[2] Robinson *v.* Dodge, 18 Johnson, 351 ; Trumbull *v.* White, 5 Hill, 46.

[3] Stuart *v.* School District, etc., 30 Mich., 69.

exists any authority to make high schools free by taxation, levied on the people at large, was fairly and fully raised, and the argument urged that, while there may be no constitutional provision expressly prohibiting such taxation, the general course of legislation in the State and the general understanding of the people have been such as to require the courts to regard instruction in the classics and in living modern languages, in these "high schools," as in the nature, not of practical and therefore necessary instruction for the people at large, but rather as accomplishments for the few, to be sought after in the main by those most able to pay for them, and to be paid for by those who seek them, and not by general tax, and that therefore the courts ought to declare such taxation incompetent. After hearing full argument, the court decided that such taxation was proper and lawful.[1] In considering the applicability of the decision above referred to, it must be borne in mind that there is nothing in the State Constitution, or in the history of education in Michigan, different, so far as the principle therein settled is regarded, from the constitutional provisions and educational histories of many of the other States of the Union.[2]

[1] Stuart *v.* School District, etc., 30 Mich., 69.

[2] A very convenient compilation of the history of public

There are many other decisions in which the power to vote and grant money by taxation for the support of grammar schools, high schools, and normal schools, has been liberally construed by the courts in aid of such institutions.[1] Indeed it seems practically to have been adopted as a rule by the courts that the law shall be liberally construed in aid of such objects.

In an early Massachusetts case it was decided that money raised for the support of a female high school, for the purpose of teaching bookkeeping, algebra, geometry, history, rhetoric, mental, moral, and natural philosophy, botany, the Latin and French languages, and other higher branches, was lawfully raised by taxation.[2]

As early as 1636 provision was made in Massachusetts for a public school, which two years later,

education in the various States is contained in the Report of the U. S. Commissioner of Education for 1876–7.

[1] Richards *v.* Raymond, Sup. Court of Ill., Nov. 10, 1879, Chicago Legal News, vol. xii., No. 11, Whole No. 580; Merrick and others, *v.* Inhabitants of Amherst and others, 12 Allen, 500; Cushing *v.* Inhabitants of Newburyport, 10 Metcalf (Mass.), 508; Briggs *et al.* *v.* Johnson County, Mo., 4 Dillon C. C. R., 148; Commonwealth *v.* Dedham, 16 Mass., 141; Commonwealth *v.* Sheffield, 11 Cush. (Mass.), 178; and see Jenkins *v.* Andover, 103 Mass., 94.

[2] Cushing *v.* Inhabitants of Newburyport, 10 Metcalf (Mass.), 508.

receiving a bequest from John Harvard, was called HARVARD COLLEGE.[1]

"To the end that learning may not be buried in the graves of our forefathers," in 1647 it was ordered in all the Puritan colonies "that every township, after the Lord hath increased them to the number of fifty householders, shall appoint one to teach all children to read and write; and where any town shall increase to the number of one hundred families, they shall set up a grammar school; the masters thereof being able to instruct the youth so far as they may be *fitted for the university*."[2]

The great historian of the United States says: "In these measures, especially in the laws establishing common schools, lies the secret of the success and character of New England. Every child, as it was born into the world, was lifted from the earth by the genius of the country, and in the statutes of the land received as its birthright, a pledge of the public care for its morals and its mind."

In 1817 the town of Dedham was indicted for failure to maintain a public high school.[3]

[1] Bancroft's "History of the United States," vol. i. chap. x.

[2] Id.

[3] Commonwealth *v.* Dedham, 16 Mass., 141. See also Com. *v.* Sheffield, 11 Cushing (Mass.), 178.

High schools thus originated almost with the settling of the colonies, and are now maintained in the various States and Territories, and no question has been made as to the power to tax for their support, except in the cases previously cited, in which that power was upheld.

It may be said that in the case of Ruleson *v.* Post, the Supreme Court of Illinois held the contrary so far as that State is concerned, but an examination of that case will disclose that the writer of the opinion was not called upon to decide the question, and it cannot be considered as more than the private view of the writer of the opinion.[1] It should be said, to the credit of that State, that it is one of the foremost in secondary education, and its many high schools are cheerfully supported by taxation.

A power that is thus coeval with our government, which originated with it, and has been constantly exercised ever since, cannot now be doubted.

Most undoubtedly, the legislature of a State has power to tax for the support of public high schools, and this power may be delegated to school districts as civil corporations.

In the course of an opinion recently delivered in the Federal Circuit Court for the Eighth Circuit, it

[1] Ruleson *v.* Post, 79 Illinois, 567.

was said by the court : "It has long been a recognized fact that the order and well-being of any community largely depended upon its moral and intellectual culture ; and nearly all nations making any pretensions to civilization have in some way or other recognized this. The encouragement usually was in keeping with the prevailing form of government and social organization. As these became modified, so as to distribute burdens and benefits more equally, educational interest came in for a share of its favors. Not, however, until intelligence had demonstrated its physical power, beyond cavil and dispute, did education obtain the universal recognition it deserves.

Organizing armies and schools, improving implements of war and the school-master, became equally of national concern.

At the birth of our government education had not obtained national recognition ; for beyond 'the promotion of science and arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' no attempt is made in the Constitution of the United States to draw education within national cognizance—thus indirectly delegating it to the States.

In them it found more or less favor, until to-

day there is not a State in the Union which fails to recognize its importance."[1]

In the same case it was held that the fact that free schools and a State university are expressly mentioned in a State constitution, and normal schools are not, does not amount to a constitutional prohibition against the establishment of the latter.[2]

[1] Briggs *et al. v.* Johnson County, etc., 4 Dill, C.C.R., 148.

[2] Id.

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CHAPTER II.

EXEMPTION FROM TAXATION OF PROPERTY USED FOR EDUCATIONAL PURPOSES.

1. Rules of Construction.—2. Whether Property must be actually used for Educational Purposes.—3. Residences of Professors, etc.—4. Property of Private Schools and of Private Persons.

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1. Rules of Construction.

The property belonging to the State or other civil divisions, employed for the purpose of public education, is, like all other public property, exempt from taxation. And property devoted to educational purposes, generally, is expressly exempted from taxation by legislative enactment in the various States.

The statutes of some of the States are, however, much more liberal than those of others, and questions frequently arise as to the extent of the exemption and the construction to be given thereto.

It is said that "taxation is the rule and exemp-

tion the exception, and that statutes providing for exemption should be strictly construed, so that no property shall be exempt excepting that which is clearly and fairly within the express terms of the law."[1]

The right of exemption cannot be implied, but must be given in language which will not admit of doubt.

Exemptions are so repugnant to the law that they will be construed with strictness.[2]

Statutory exemptions will be construed as a di-

[1] Per Rothrock, J., in Trustees of Griswold Coll. *v.* The State of Iowa, 46 Iowa, 275–278.

[2] Trustees of Griswold Coll. *v.* The State of Iowa, 46 Iowa, 278; Wash. University *v.* Rouse, 42 Mo., 308; Hannibal, etc., *v.* Shacklett, 30 Mo., 550; Wyman *v.* St. Louis, 17 Mo., 335; Pacific R.R. Co. *v.* Cass. County, 53 Mo., 17; Indianapolis *v.* McLean, 8 Ind., 328; Methodist Church *v.* Ellis, 38 Ind., 3; Hart *v.* Plum, 14 Cal., 351; Kendrick *v.* Farquhar, 8 Ohio, 189; Armstrong *v.* Treasurer of Athens County, 10 Ohio, 235; Cincinnati Coll. *v.* The State, 19 Ohio, 110; Probasco *v.* Moundville, 11 W. Va., 501; Crawford *v.* Burrel, 53 Pa. St., 219, 220; Platt *v.* Rice, 10 Watts, 352; Armand *v.* Dumas, 28 La. Ann., 403; State *v.* Ross, 24 N. J. L. (4 Zabr.), 497; State *v.* Parker, 32 N. J., 426; Chegaray *v.* Mayor, etc., 13 N. Y. (3 Kern.), 220; Chegaray *v.* Jenkins, 3 Sandf., 409; People *v.* Roper, 35 N. Y., 629; Seymour *v.* Hartford, 21 Conn., 481; State *v.* Wilson, Peningt., 300; Bank of Republic *v.* Hamilton, 21 Ill., 53; Vail *v.* Beach, 10 Kan., 214; St. Mary's Coll. *v.* Crowl, 10 Kan., 442; Miami *v.* Brackenridge, 12 Kan., 114.

rection not to assess, rather than as a contract creating vested rights.[1]

When an exemption is prescribed as part of a charter granted by the State to a corporation, such exemption becomes part of the contract, and is protected by the Constitution of the United States.[2] This is well settled.

2. Whether Property must be actually used for Educational Purposes.

Whether, in order to be exempt, the property must be actually used for educational purposes, depends upon the wording of the particular statute creating the exemption, but the judicial constructions which have been put upon such statutes as have been called in question are valuable aids in discovering the meaning of analogous laws.

In order to be exempt from taxation it is generally necessary that the property be actually used for educational purposes.[3]

[1] Probasco *v.* Moundville, 11 W.. Va., 501.

[2] The Delaware, 18 Wall., 225 ; "Blackwell on Tax Titles," *407 ; "Cooley on Taxation," p. 55 ; Cooley's "Constitutional Limitations," pp. 280, 127.

[3] Washburn *v.* Commissioners, 8 Kan., 344 ; Cincinnati Coll. *v.* State, 19 Ohio, 110 ; State *v.* Elizabeth, 4 Dutch., 103 ; Detroit, etc., *v.* Mayor, 3 Mich., 172 ; State *v.* Ross, 4 Zabr., 497 ; Pace *v.* Jefferson County, 20 Ill., 644 ; Nazareth *v.* Commonwealth, 14 B. Mon. 266.

But it was decided by the Supreme Court of the United States that an exemption of all property "necessary for school purposes" includes property not in actual use by the school, but which is rented and the income applied to the support of the school.[1]

And under a statute of Massachusetts exempting from taxation "the personal property of literary and scientific institutions incorporated within the Commonwealth, and the real estate belonging to such institutions occupied by them or their officers for the purposes for which they were incorporated," it was held that a farm used for pasture and tillage grounds, the products of which were used for the support of a boarding-house for students attending an academy, was exempt.[2]

A certain building was at first intended for a dwelling-house, but the plan was altered soon after the foundation was laid, and the owner, under an agreement with another, finished it for use as a seminary, and it was so used, under a statute exempting every building *erected for the use* of a college, etc.; it was held that this building was exempt.[3]

[1] The Northwestern University *v.* The People, Sup. Court of U. S., reported in Am. L. Reg., vol. xviii., No. 6, p. 366.

[2] Wesleyan Academy *v.* Wilbraham, 99 Mass., 599.

[3] Chegaray *v.* Mayor, etc., 2 Duer (N.Y.), 521.

3. Residences of Professors, etc.

It has sometimes been made a question whether the residences of college officers and professors are included in an exemption of property devoted to educational purposes.

In New Jersey it is held that the exemption clause in the Tax Act of that State of 1851, exempting "all colleges, academies, or seminaries of learning," extends to the houses and lots provided by the College of New Jersey for the residences of its president, professors, and steward, such residences being *in part pay* for their official services.[1]

Under the Iowa statute exempting from taxation "all public libraries, grounds, and buildings of literary, scientific, benevolent, agricultural, and religious institutions and societies devoted solely to the appropriate objects of these institutions, not exceeding six hundred and forty acres, and not leased or otherwise used with a view to pecuniary profit,"[2] it was held that all property, including the residences of professors upon the grounds of literary institutions and the dwellings of clergymen owned by religious societies and used exclusively for such dwellings, without pecuniary profit to the owners, is exempt from taxation, provided such

[1] State *v.* Ross, 24 N. J. L. (4 Zabr.), 497.

[2] Code of 1873, Sec. 797.

property is proper and appropriate to effectuate the objects of such institutions.[1]

The president and fellows of Harvard College built a dwelling-house on land of the corporation within the college yard, and leased the same to one of their professors, to be occupied by him as a residence for himself and family at an annual rent. Held, that this was not an occupation of the real estate of the college by one of its officers, within the exemption from taxation provided by Massachusetts Revised Statutes, Ch. 7, § 5, cl. 2; but it was expressly stated that this would be otherwise if the building had been built for one of the professors or officers of the college, and had been occupied by him, with the permission of the college, and without having any estate therein, or paying any rent therefor.[2]

But in Ohio it was said the mere occupancy of a house by a college professor is not an occupation for literary purposes, within the meaning of certain acts of 1831 and 1834, although it is situated on land of the college. Under said acts the building must be occupied for literary purposes.[3]

[1] Trustees of Griswold College *v.* The State of Iowa, 46 Iowa, 275.

[2] Pierce *v.* Cambridge, 2 Cushing (Mass.), 611.

[3] Kendrick *v.* Farquhar, 8 Ohio, 189. And see Vail *v.* Beach, 10 Kan., 214; St. Peter's Church *v.* Board of Com's, 12 Minn., 395.

4. Property of Private Schools and of Private Persons.

These exemptions are not generally intended to include private schools operated for individual profit, nor property used for the support of such private institutions.[1]

A building used in part for school purposes and in part for other purposes is not exempt, because there can be no separate assessment for the part not used for school purposes.[2]

A private boarding-school is not such a "school" or "seminary of learning" as is exempt from taxation by 1 New York Revised Statutes, 388, § 4.[3]

A building owned by the College of New Jersey, but used as a grammar school, at an annual rent, and which prepares students for the college, is not such a part of the college as to be exempt from taxation.[4]

A grammar school kept by a person at his own risk, on his own account, is not exempt under the New Jersey Tax Act of 1851.[5]

[1] State *v.* Ross, 4 Zabr., 497; Indianapolis *v.* McLean, 8 Ind., 328; Pace *v.* Jefferson County, 20 Ill., 644; Chegaray *v.* Mayor, 13 N.Y. (3 Kern.), 220; Chegaray *v.* Jenkins, 3 Sandf., 409.

[2] Wyman *v.* St. Louis, 17 Mo., 335.

[3] Chegaray *v.* Mayor, etc., 13 N. Y. (3 Kern.), 220; Chegaray *v.* Jenkins, 3 Sandf., 409.

[4] State *v.* Ross, 24 N. J. L. (4 Zabr.), 497.

[5] Id.

And in Illinois it has been decided that to constitute a school-house a "public school-house," and to exempt it as such from taxation, it must be property under the immediate control of the school district.[1]

But in Indiana, under an act of 1861, it was held that buildings erected, kept, and appropriated for the use of a literary and scientific institution, and in which a corps of teachers has been engaged in instructing pupils in ancient and modern languages, in the various sciences, and in all branches usually taught in colleges, are exempt, even though the institution is conducted on private account, and the earnings go to the individual proprietor.[2]

In Louisiana it is decided that a building is not exempt because used for a school, unless its owner keeps the school.

If its owner rents the building, and thus derives an income from it, the building is taxable, notwithstanding it is used for a school.[3]

In Michigan, under a statute exempting from taxation certain real estate belonging to library and benevolent institutions, it was said that the words

[1] Pace *v.* Jefferson County, 20 Ill., 644.

[2] Indianapolis *v.* Sturtevant, 24 Ind., 391.

[3] Armand *v.* Dumas, 28 La. Ann., 403 ; New Orleans *v.* St. Patrick's Hall Association, 28 La. Ann., 512 ; New Orleans *v.* Lafayette Ins. Co., 28 La. Ann., 756.

"belonging to" do not necessarily imply ownership, unless upon the most severe technical construction, for property belongs to its possessor so long as he has the exclusive right to its possession.[1]

[1] Sisters of Charity *v.* Detroit, 9 Mich., 94.

CHAPTER III.

CONDEMNATION OF SITES FOR SCHOOL-HOUSES.

THERE is usually a statutory provision for the condemnation of property necessary for school purposes, and where such is not the case the general principles of the law of eminent domain would warrant the condemnation of property for that purpose.[1] Ground may be condemned for the erection of a school-house.[2] And for a school-yard. Schools are a public necessity, and the exercise of eminent domain is as justifiable as that of taxation for the same purpose.[3]

School districts, as *quasi* corporations empowered by law to hold property for school purposes, have the ability to acquire real property, necessary for such purposes, by purchase. They may take by gift, grant, or devise in the corporate name and

[1] "Mills on Eminent Domain," Sec. 17; Peckham *v.* School District, 7 R.I., 545; Appointment of Viewers, Wyoming Com. Pleas, 4 Leg. Gazette, 410; Long *v.* Fuller, 68 Pa,. 170.

[2] Township Board *v.* Hackman, 48 Mo., 243.

[3] Williams *v.* School District, 33 Vt., 271.

capacity. And where the owner is willing that his property may be taken for school purposes upon a fair valuation, ground for the erection of school buildings may be acquired by agreement with such owner, and a contract of that kind be enforced as any other contract for the sale of real property. It is well, however, to bear in mind that, while this is true of the corporation, yet this gives the officers of such school corporation no right or power to make such contract without the direction of the corporation, for this might lead to great abuses.

School districts are *quasi* corporations of very limited powers, and act through the medium of officers, or agents whose powers and duties are confined to special purposes, and no inference can be drawn from the general nature of their powers.[1]

Where property is acquired by deed, great care should be exercised that the grantee be named by the proper corporate name.

A grant to "the people of" a county, or to "the inhabitants of the C. and L. Union School District," there being no corporation of that name, is void, or if it has any effect, must vest the title in the individual inhabitants.[2]

[1] Harris *v.* School District, 8 Foster (N.H.), 58.

[2] Foster *v.* Lane, 30 N.H. (10 Fost.), 305; Jackson *v.* Cory, 8 Johns., 385; Hornbeck *v.* Westbrook, 9 Johns., 73.

CHAPTER IV.

ELECTIONS.

1. Time and Place.—2. Conduct of the Election and Irregularities therein.—3. Sufficiency of the Election.—4. Imperfect Ballots.

It is by means of elections that the will of the electors, in the choice of officers to manage the affairs of the district, is expressed.

These elections are governed by constitutional and statutory enactments. The numerous litigated cases respecting elections have given rise to a common law upon the subject, part of which is borrowed from the common law of England. The succeeding pages of this chapter are designed to point out, very briefly, the general principles governing such questions as are most likely to arise upon school elections.[1]

[1] The general subject has been treated of very fully and ably by Hon. Geo. W. McCrary, now U. S. Circuit Judge of Eighth Circuit, in his recent work on the "American Law of Elections," and incidentally, but thoroughly, by Judge Cooley in

1. Time and Place.

Time and place are of the substance of every election, and the election must be held at the time and place established by law.[1]

Where a notice of an election for a school district specifies several purposes in such a way as that no doubt is left as to its meaning, it will be sufficient, although there may be an omission in it of a copulative conjunction.[2]

Where a statute requires polls to be kept open from nine o'clock A.M. to four o'clock P.M., an election called for one o'clock P.M. is void.[3]

A meeting of the electors of a sub-district for choice of a sub-director convened at twenty minutes before four o'clock and adjourned at ten minutes past four; shortly afterward, and while the president and secretary were still in their places, and all who composed the meeting were present, two qualified electors came in and tendered their votes. Held, that they should have been received and counted.[4]

his work on "Constitutional Limitations," to both of which the reader is referred for a complete treatment of the entire law of elections.

[1] Dickey *v.* Hurlburt, 5 Cal., 343.

[2] Merritt *v.* Farris, 22 Ill., 303.

[3] District Township of Hesper *v.* Independent District, etc., 34 Iowa, 306. [4] The State, etc., *v.* Woolem, 39 Iowa, 380.

Although the law directs that the polls shall be closed at a designated hour, and this question is at issue, unless it be made to appear that votes were cast after that hour which change the result, the irregularity will not be fatal.[1]

So, too, votes should not be rejected merely because the judges closed the polls an hour before the time prescribed, if there is no evidence that any voter offered to vote after the polls were closed, or was prevented from voting by reason of such closing of the polls.[2]

2. Conduct of the Election, and the Irregularities therein.

Any mere irregularity in conducting an election which does not deprive any voter of his franchise, or allow an illegal vote, or change the final result, will not vitiate the election.[3]

An election is not invalidated by the fact that

[1] Piatt *v.* The People, 29 Ill., 54. See Locust Ward Election, 4 Pa. Law Journal, 341, and McCrary's "Am. Law of Elections," Secs. 114–141.

[2] Cleland *v.* Porter, 74 Ill., 76.

[3] Whipley *v.* McKune, 12 Cal., 352; Sprague *v.* Norway, 31 Cal., 173; Keller *v.* Chapman, 34 Cal., 635; Piatt *v.* People, 29 Ill., 54; Augustin *v.* Eggleston, 12 La. Ann., 841; Lanier *v.* Gallatas, 13 La. Ann., 175; State *v.* Mason, 14 La. Ann., 505; People *v.* Cook, 8 N.Y., 67; McKinney *v.* O'Connor, 26 Texas, 5.

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Los Angeles, Cal.

illegal votes were included, when the number of such illegal votes is not enough to change the majority;[1] but when the admission of an improper vote changes the result of an election the election is void.[2]

The will of the majority is to be respected even though it be irregularly expressed.[3]

3. Sufficiency of the Election.

A majority of all the votes cast is not requisite to the choice of an officer, except when made so by express statutory enactment.

Where there is no positive statute to the contrary, a plurality of the votes cast will suffice to elect.[4]

That the candidate who stood highest on the list in ineligible does not give the election to the next highest. In such a case there is no choice, and the election is invalid.[5]

[1] Judkins *v.* Hill, 50 N. H., 140; Third School District, etc., *v.* Gibbs, 2 Cush. (Mass.), 39; Sudbury *v.* Stearns, 21 Pick. (Mass.), 148.

[2] State *v.* The Judges, etc., 13 Ala., 805.

[3] Juker *v.* Commonwealth, 20 Pa. St., 493.

[4] "Cooley on Constitutional Limitations," 619.

[5] Saunders *v.* Haynes, 13 Cal., 145; Opinion of the Judges, 38 Me., 597; Sublett *v.* Bedwell, 47 Miss., 266; State *v.* Boal, 46 Mo., 528; People *v.* Clute, 50 N.Y., 451; Commonwealth *v.* Cluley, 56 Pa. St., 270; State *v.* Giles, 1 Chandler (Wis.),

The ballots cast at an election are better evidence than the tally list, made from them, of the number of votes.[1]

4. Imperfect Ballots.

In an election for school directors all tickets voted which have more names for the offices than there are vacancies to be filled must be rejected.[2]

A single piece of paper cast as a ballot and containing the name of a candidate more than once, should be counted as one vote, and not rejected as illegally thrown.[3]

If a voter has written upon his ballot the name of a particular person in connection with the title of office, and omits to strike out the name printed on it in connection with the same office, the writing will prevail over the printing, and evidence to the contrary is not admissible to explain it.[4]

A ballot indorsed for "trustees of *public* schools," instead of for "trustees of *common* schools," was

112; State *v.* Smith, 14 Wis., 497. *Contra*, Carson *v.* McPhetridge, 15 Ind., 327; Gulick *v.* New, 14 Ind., 93.

[1] State *v.* The Judges, etc., 13 Ala., 805; People *v.* Holden, 28 Cal., 123.

[2] Contested Election, 6 Phila. (Pa.), 437. And see also People *v.* Cicott, 16 Mich., 283; Carpenter *v.* Ely, 4 Wis., 420.

[3] People *v.* Holden, 28 Cal., 123.

[4] McCrary's "Am. Law of Elections," Secs. 408, 409.

held sufficient.[1] So, where a statute provided for the election of "police magistrates," votes thrown for "police justices" were held to be good.[2]

It seems that a mere defect in the naming of a candidate will not render the ballot illegal, if the intent of the voter can fairly be gathered from it, as where J. W. J. was a candidate for election in a district where there was no J. J., it was held that votes cast for J. J. were presumably intended for J. W. J., and should have been counted for him.[3]

If the sound is the same, errors of orthography will not authorize the rejection of the ballot.[4]

Technical nicety should not be allowed to prevail over the intention of the voter fairly gathered from the ballot and facts of general notoriety.

Where one Joseph Talkington was a candidate for constable, it was held that votes cast for "Talkington" for that office should be counted for Joseph.[5] But where the word "Pence" was writ-

[1] People *v.* McManus, 34 Barb., 620.

[2] People *v.* Matteson, 17 Ill., 167.

[3] People *v.* Kennedy, 37 Mich., 67.

[4] People *v.* Mayworm, 5 Mich., 146.

[5] Talkington *v.* Turner, 71 Ill., 234. And see Attorney-General *v.* Ely, 4 Wis., 430; People *v.* Ferguson, 8 Cowen, 102; People *v.* Seaman, 5 Denio, 409; People *v.* Cook, 8 N. Y. (4 Seld.) 67; People *v.* Cicott, 16 Mich., 283; People *v.* Pease, 27 N. Y., 64.

ten on a ticket for sheriff, and one Spence was a candidate, the vote was rejected.[1]

Where, in a ballot a name placed above another by a slip partly obliterates it, it will be sufficient if it shows the intent.[2]

[1] State *v.* The Judges, etc., 13 Ala., 805.

[2] People *v.* Cicott, 16 Mich., 283.

CHAPTER V.

SCHOOL OFFICERS.

1. United States Commissioner of Education.—2. State Superintendent of Public Instruction.—3. County Superintendent.—4. Directors, Trustees, etc.: *A. Their Powers and Duties; B. Their Contracts; C. Their Liability for Negligence.*—5. Treasurer.—6. Vacancies by Operation of Law.

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1. United States Commissioner of Education.

By Act of March 2, 1867, Congress established a department, since known as the Bureau of Education, "for the purposes of collecting such statistics and facts as shall show the condition and progress of education in the several States and Territories, and of diffusing such information respecting the organization and management of school systems and methods of teaching as shall aid the people of the United States in the establishment and maintenance of efficient school systems, and otherwise promote the cause of education throughout the country." It was established as an inde-

pendent bureau, but was subsequently attached to the Department of the Interior by Act of July 20, 1868.

The head of this bureau is called the Commissioner of Education, and it is his duty to present annually to Congress a report embodying the results of his investigations and labors, together with a statement of such facts and recommendations as will, in his judgment, subserve the purpose for which the office is established.[1]

In the Centennial message of the President an amendment to the Constitution was suggested which should make public education a subject of national cognizance. As the matter now stands, public instruction in this country is left entirely to the States, each of which frames and regulates its own system by appropriate constitutional provisions and legislation.

Although in the different States the details vary, yet the management of the schools is in the hands of officers chosen by the people, and whose duties are everywhere much the same. The National Government has been very liberal in the donation of lands, and of the proceeds arising from the sale thereof, yet the schools have been supported mainly by voluntary taxation, voted by the people, and this taxation and the apportionment of interest on

[1] Rev. Stat. U. S., Secs. 516, 517, and 518.

the permanent funds have necessitated the employment of officers essentially the same in nearly all the States and Territories.

It is the object of this chapter to present the decisions upon questions of official duties and liabilities which are common to all the States.

2. State Superintendent of Public Instruction.

The State Superintendent of Schools, or Superintendent of Public Instruction, is the highest officer in the common school system.

This office exists under some title in every one of the States and Territories, and in those States in which attempts have been made to abolish it, the movement has proved disastrous to the school interests, and the office has been restored.

It is generally the duty of the State Superintendent to supervise all of the public schools in his State, to call upon the officers under him for reports upon matters concerning which they are by law required to gather information, to ascertain the number of children residing in each district and the number attending school, the amount paid for salaries, the number of school-houses and the amount expended in building school-houses, and to report this information, together with such

other information as he may acquire concerning the operation of the common school system. He also tries and determines appeals from inferior officers upon questions of school law, and performs duties pertaining to the distribution of the State school funds.

He ought also to recommend such changes in the law or such additional legislation as he may deem beneficial to the system of public education.[1] The duties of this officer and the law governing his actions are usually made explicit by statute.

3. County Superintendent.

In most of the States there is in each county an officer known by the title of County Superinten-

[1] The Bureau of Education was established by Congress because of the numerous inquiries by foreign educators and others for statistics and information concerning public education in the United States. The reports of that bureau are now exchanged and sent to the various foreign nations, and their fulness and accuracy depend much on the readiness with which State superintendents co-operate with the bureau. If the State superintendent's reports are not full his State will be imperfectly represented. This is a matter demanding likewise the especial attention of the city supeintendents. Secondary or high-school education has heretofore been very poorly represented in the reports of the bureau, and it is doubtless owing to a lack of authentic information from city superintendents, or from them through the medium of the State superintendents.

dent, or some similar title, who serves as the organ of communication between the State Superintendent and the township or district authorities. His duties vary in the different States, but it is usually his duty to gather statistics as to the number of youth of school age in the county, and in each school district therein, and the number taught, and such other information as is necessary to exhibit the true condition of the schools under his charge. This is embodied in a report to the State Superintendent. It is also generally his duty to examine applicants for teachers' certificates, and to grant certificates to such as possess the necessary qualifications, and to exercise such supervision of the schools in his county as will advance the public interests in the matter of education.

In some of the States, particularly the New England States, there is no such county officer, but the reports from the towns are made directly to the State Superintendent.

The County Superintendent is not entitled to an injunction to restrain one from teaching on the ground that he is teaching without a certificate of qualifications.[1]

Where the statute vests a discretionary power in a County Superintendent in granting licenses to teach, the judgment of the court will not be sub-

[1] Perkins *v.* Wolf *et al.*, 17 Iowa, 228.

stituted for that of the officer, and *mandamus* will not lie to compel him to issue a license, but where he wholly fails to act on an application he may be compelled by *mandamus* to take action thereon.[1]

It is a general principle lying at the base of the law of *mandamus* that the courts will not interfere with nor attempt to control the judgment or discretion of any officer whose official duties call for the exercise of some degree of judgment or discretion. Where such an officer wholly refuses to act *mandamus* will lie to compel action, but not to control such action, nor to substitute the discretion or judgment of the court for that of the officer.[2]

An officer whose duties are judicial or *quasi*-judicial is not liable for errors of judgment or discretion in the discharge of those duties unless he acts from corrupt or malicious motives.

In an action on the case against the Superintendent of Schools of a county for illegally revoking a teacher's certificate, the plaintiff, in order to show malice, is not compelled to prove personal hatred or ill-will; but if the defendant acted rash-

[1] Bailey *v.* Ewart, Sup. Court of Iowa, October 23, 1879. Reported, "Northwestern Reporter," vol. ii. N. S. No. 11, p. 1009.

[2] High's "Extraordinary Legal Remedies," Secs. 24, 34, 42.

ly, wickedly, and wantonly in revoking the certificate, the jury may infer malice.[1]

4. Directors, Trustees, etc.

A. Their Powers and Duties. A board of school directors, though a corporation, is possessed of certain specially defined powers, and can exercise no others, except such as result from fair implication.[2]

In Iowa it is held that the duties of school directors respecting the discharge of teachers, imposed by Section 1734 of the Code of 1873, are of a judicial character.[3]

The officers charged with the control and management of the schools have a right to dismiss a teacher employed in said schools upon breach of the contract, either by reason of failure to teach or because of incompetency,[4] and such officers are not liable in damages if they honestly err in the discharge of this duty.[5]

[1] Love *v.* Moore, 45 Ill., 12.

[2] Peers *v.* Board of Education, 72 Ill., 508.

[3] Smith *v.* The District Township of Knox, 42 Ia., 522.

[4] Crawfordsville *v.* Hays, 42 Ind., 200.

[5] Donahoe *v.* Richards, 38 Me., 164; Burton *v.* Fulton, 49 Pa. St., 151; Morrison *v.* McFarland, 51 Ind., 206; Bays *v.* The State, 6 Neb., 167. But see *contra*, McCutchen *v.* Windsor, 55 Mo., 149, where the court held that a statute making it

If they act wantonly and maliciously, it gives a cause of action against them personally,[1] but malice and injury must be affirmatively shown to have been the impelling motives, even though no reason was assigned for the removal of the teacher.[2]

A letter from an inhabitant of a school district to the school committee, complaining of a school teacher, is privileged, if written with an honest purpose and for the public good.[3]

Where a suit is instituted in the individual names of school directors in reference to a matter in which they are only interested in their corporate capacity, it is proper to amend the title of the cause by striking out the individual names of the

"the duty of the directors to manage and control its local interests and affairs," and giving them "power to hire legally qualified teachers," gives the directors no authority to dismiss a teacher, unless for good and sufficient cause shown, which, in his action against them for discharging him would be wholly a question for the jury.

[1] Clinton School District's Appeal, 56 Pa. St., 315.

[2] Burton *v.* Fulton, 49 Pa. St., 151.

[3] "Townshend on Slander and Libel," 385 and 399; Bodwell *v.* Osgood, 3 Pick., 379. It is actionable to call a schoolmistress a dirty slut, or to charge her with being insane, or to charge, by writing, a school-teacher with making a false report to the school visitors, and with general untruthfulness or with a want of chastity. "Starkie on Slander," * 126; "Townshend on Slander and Libel," 272.

directors, and substituting their corporate name. The individual names, in such case, are regarded as surplusage.[1]

A suit or defence for a district must be conducted in its corporate capacity by its proper officers. An individual member of a school district has no right to appear and be heard in defence of an action against the district.[2]

A verbal contract of a school board employing an attorney is valid although never entered on the minutes.[3]

In Iowa the president of a school district township has no authority to employ counsel at the expense of the district, unless in a suit brought by or against the district, and an appeal to the county or State Superintendent to contest the correctness of an order of the board is not such a suit.[4]

The board has no right to make acceptances of orders or bills of exchange so as to bind the district,[5] unless expressly authorized by statute.

Where a board of education is, by statute,

[1] Shoudy *v.* School Directors, 32 Ill., 290.

[2] Lane *v.* School District, 10 Metc. (Mass.), 462.

[3] Page *v.* Township Board, etc., 59 Mo., 264.

[4] Templin & Sons *v.* District Township of Fremont, 36 Iowa, 411.

[5] Peers *v.* Board of Education, 72 Ill., 508.

made a body corporate, individual members acting separately, although a majority, cannot contract a debt thereof, or direct the issuance of an order to pay it.[1]

School officers are not liable to an assignee of a school order for constructive fraud in issuing an order they had no power to issue.[2]

In Kentucky, school trustees failing to raise and collect the school funds as required by law are personally liable to the teacher for a failure to pay him his salary as agreed.[3]

Power to establish and keep up a system of graded schools implies authority to appoint a superintendent thereof.[4]

A member of a school board or school committee has a right to order from the school-room a boy who addresses him, in the presence of other pupils, in a profane and insulting manner, and where the pupil refuses to go he may be ejected, no more force being used than may be necessary. In such a case the pupil cannot recover as for a wrongful expulsion.[5]

[1] Ohio *v.* Treasurer of Liberty Township, 22 Ohio St., 144.

[2] Boardman *v.* Hayne *et al.*, 29 Iowa, 339.

[3] Ferguson *v.* True and Walker, 3 Bush (Ky.), 255.

[4] Spring *v.* Wright, 63 Ill., 90; Stuart *v.* School District, etc., 30 Mich., 69.

[5] Peck *v.* Smith, 41 Conn., 442.

B. Their Contracts. A member of a district school board cannot make a contract with the board of which he is a member, for the building of a school-house. Such contract is void upon grounds of public policy.[1]

The board of directors of a district township has no authority to purchase lightning-rods for school-houses, nor to give the obligation of the district township therefor.[2]

School charts, exhibiting and illustrating matters to be taught to pupils, are not necessary appendages to a school-house.[3]

In Iowa the board of directors have no power to make contracts for the purchase of maps, charts, and other school apparatus, without being previously authorized by a vote of the electors.[4]

The directors have no power to make an express contract of the character specified, unless thereto authorized. They could not so act as to raise an

[1] Pickett *v.* School District, 25 Wis., 551 ; Hewitt *v.* Board of Education, etc., Sup. Court of Illinois, 1880. "Northwestern Reporter," Illinois Supplement, vol. i., No. 6, p. 462.

[2] Monticello Bank *v.* District Township, etc., Sup. Court of Iowa, June 10th, 1879 ; Wolf *v.* Independent School District, etc., Sup. Court of Iowa, June 13th, 1879.

[3] Gibson *v.* School District, etc., 36 Mich., 404.

[4] Taylor *v.* District Township of Otter Creek, 26 Iowa, 281 ; Manning *v.* District Township of Van Buren, 28 Iowa, 332 ; Taylor *v.* Township of Wayne, 25 Iowa, 447.

implied contract, or ratify the express one by the acceptance and acquiescence in the use, by the schools in the sub-districts, of the apparatus purchased.[1]

That such maps, charts, and apparatus were by the board distributed among the several sub-districts, and used in the schools thereof with the knowledge of the directors and electors, and that no steps were taken by the electors to repudiate the contract, does not amount to a ratification of it. Nothing short of an express ratification of the electors in their corporate capacity would suffice.[2]

An independent district may provide for the teaching of music in its schools, and the board has power to purchase by verbal contract a musical instrument to be paid for out of any unappropriated funds of the district.[3]

There is a marked difference between the rights of an assignee of a school order and those of an assignee of a promissory note or bill of exchange. The assignee of a school order must at his peril ascertain what defences may exist against its collection.[4]

[1] Taylor *v.* Township of Wayne, 25 Iowa, 447.

[2] Id.

[3] Bellmeyer *v.* Independent District of Marshalltown, 44 Iowa, 564.

[4] Newell *v.* School Directors, 68 Ill., 514 ; School District

An action may be maintained against a school district on an order drawn by the proper officer thereof. The creditor of a corporation is not restricted to *mandamus* as his sole remedy.[1]

Where a person acts in his official capacity, which is disclosed in the contract itself, he is not personally liable on the contract, although he has failed to affix to his signature his official title.[2]

C. Their Liability for Negligence. No private action for neglect of corporate duty, unless given by statute, lies against any *quasi* corporation as such.

In the absence of a statute creating such liability a board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a public school, from its negligence in the discharge of its official duty in the erection and maintenance of a public school building under its charge, nor for an injury sustained by a scholar attending a public school from a dangerous excavation in the school-

v. Stough, 4 Neb., 357 ; Boardman *v.* Hayne *et al.*, 29 Iowa, 339 ; Bellmeyer *v.* Independent District, etc., 44 Iowa, 564 ; Sheffield School Township *v.* Andress, 56 Ind., 157.

[1] Cross *v.* The District Township, etc., 14 Iowa, 28.

[2] Baker *et al.* *v.* Chambles, 4 G. Gr., 428 ; Lyon *v.* Adamson *et al.*, 7 Iowa, 509 ; Harvey *v.* Irvin *et al.*, 11 Iowa, 82. See, however, Bayliss *v.* Pearson, 15 Iowa, 279.

house yard, owing to the negligence of such school board.[1]

But in Bassett *v.* Fish *et al.*, 19 N. Y. Supreme Court (12 Hun), 209, it was held that the trustees of the Union Free Schools, having the duty imposed on them by statute of keeping schools in repair, and being supplied with the necessary means, they are personally and individually liable to any person for special damages sustained by reason of omission or negligence on their part. This was reversed in the Court of Appeals, on the ground that the trustees of a Union Free School district is a corporation complete, and not a *quasi* corporation, and that the individual trustees are not liable, the negligence being the negligence of the corporation, for which it alone is liable.[2]

5. Treasurer.

The liability of the treasurer of a school district is absolute for all funds which come into his hands in his official capacity, and in case of loss cannot be varied or diminished by reason of the cause or manner of the loss.[3]

[1] Finch *v.* The Board of Education, 30 Ohio St., 37; Bigelow *v.* Randolph, 14 Gray, 541; II. Kent's Comm., * 274.

[2] Bassett *v.* Fish, 75 N.Y. (Court of Appeals), 303.

[3] The District Township of Bluff Creek *v.* Hardinbrook, 40

Where the loss occurs through the failure of a bank, the treasurer is liable on his bond, although he was not guilty of want of prudence or care in failing to ascertain its financial condition.[1]

Where the treasurer deposited money of the district with his banker to his own individual credit, which money was intended to meet certain bonds of the district then about to fall due at, and which were payable at the same bank, and the treasurer so informed the banker, and directed him verbally so to apply it, when the bonds should be presented, and while the matter was in this condition the bank failed, resulting in the loss of the money, it was held that the banker was the agent of the treasurer and not of the district, and that the money was recoverable by the district in an action on the treasurer's bond.[2] The treasurer is liable absolutely for all money of the district coming into his hands, which he has not

Iowa, 130; District Township of Taylor *v.* Morton, 37 Iowa, 550; District Township of Union *v.* Smith, 39 Iowa, 9; Lindsey *v.* Marshall, 20 Miss. (12 Smed. & M.), 587; Ward *v.* School District No. 15, Colfax County, Sup. Court of Nebraska, March 18th, 1880, "Northwestern Reporter," vol. iv. (N. S.), No. 13, p. 547.

[1] The State *v.* Powell, 67 Mo., 395.

[2] Ward *v.* School District No. 15, etc., Sup. Court of Nebraska, March 18th, 1880, "Northwestern Reporter," vol. iv. (N. S.), No. 13, p. 547 (1001).

lawfully disbursed, and the school district has no power to release him from liability for money lost or misapplied by him.[1]

And where he resigns and absconds and fails to pay over the money in his hands, as such treasurer, to his successor, no demand therefor is necessary to maintain suit upon his official bond.[2]

If a school treasurer releases a mortgage given to secure a debt due the school fund of his township, without an order of the board, he will be liable upon his official bond for any loss sustained in consequence thereof.[3]

6. Vacancies by Operation of Law.

The acceptance by a school officer of another office incompatible with the school office renders such school office vacant.[4]

The duties of teacher and school trustee are incompatible, and the appointment of a trustee as teacher, and the acceptance thereof, renders the office of school trustee vacant.[5]

[1] Ward *v.* School District No. 15, etc., Sup. Court of Nebraska, March 18th, 1880, "Northwestern Reporter," vol. iv. (N. S.), No. 13, p. 547 (1001).

[2] Jenks *v.* School District, 18 Kan., 356.

[3] Board of Trustees *v.* Misenheimer, 78 Ill., 22.

[4] Ferguson *v.* True and Walker, 3 Bush (Ky.), 255; Cotton *v.* Phillips, 56 N. H., 220.

[5] Ferguson *v.* True and Walker, 3 Bush (Ky.), 255.

The offices of prudential committee and auditor of a school district are incompatible, and one who is elected to both offices at the same meeting and accepts, the latter thereby declines the former.[1]

[1] Cotton *v.* Phillips, 56 N. H., 220.

CHAPTER VI.

USE OF SCHOOL PROPERTY.

In general the school property is to be used only for the purposes of secular education, yet in many of the States school-houses are temporarily and occasionally used for other purposes, and such temporary use has been held lawful.

A school-house may be used for township purposes.[1] And the district electors may, at a meeting for that purpose, lawfully direct the use of a school-house for a private school, for the time being merely, but can confer no right of possession, for any definite time, upon any one. A lease, by trustees, of a public school-house for the purpose of having a private or select school taught therein for a term of weeks, is in violation of their trust, and such use may be restrained at the suit of a resident taxpayer of the district.[2]

In Iowa the district township electors have the legal power to direct the school-houses therein to be used for the purpose of Sabbath-schools, re-

[1] Trustees, etc., *v.* Osborne, 9 Ind., 458.

[2] Chapin *v.* Hill, 24 Vt., 528; Weir *v.* Day, Sup. Court of Ohio, 1879, "Central Law Journal," vol. ix., p. 398.

ligious worship, etc., and such use is held not to be in conflict with Section 3, Article 1, of the Constitution of Iowa, which provides that no law shall be passed respecting the establishment of religion, nor shall any person be compelled to pay tithes, taxes, or other rates for building or repairing places of worship.[1]

In the same case it was held that if the directors refuse to allow such use, *mandamus* will lie.

The power to permit the school-houses in a district to be used for the purpose of religious worship and Sabbath-schools is conferred upon the electors of the district legally assembled by a statute authorizing them "to direct the sale *or other disposition* to be made of any school-house . . . that may belong to the district.[2]

In Illinois it has been decided that the temporary use of a school-house for religious purposes is not forbidden by the Constitution of that State. An incidental use of a school-house for religious purposes, not interfering with school purposes, is not in any reasonable sense inconsistent with the faithful application of the property to school purposes. Religion and religious worship are not so placed under the ban of the Constitution of that

[1] Davis *v.* Boget *et al.*, Sup. Court of Iowa, December, Term, 1878, "West. Jurist," vol. xiii., No. 3. 50 Ia. 11.

[2] Townshend *v.* Hagan *et al.*, 35 Iowa, 194.

State that they may not be allowed to become the recipient of any incidental benefit whatever from the public bodies or authorities of the State.[1]

In Connecticut, however, it was held that the school property could not be used for religious purposes against the objection of any single taxpayer in the district, even though he may have voted to allow such use. And an injunction will be granted the taxpayer because he has no other remedy.[2] The force of that decision is greatly abated by the fact that two of the five judges ably dissented from the majority opinion.

The trustees of a school district may, subject to the control of the district meeting, lawfully permit the district school-house to be used out of ordinary school hours for the purpose of private instruction in vocal music of the district scholars and of others residing in the district, and it is no objection to such use that the teacher is compensated by private subscription, or otherwise.[3]

[1] Nichols *v.* The School Directors, etc., Sup. Court of Illinois, November 10th, 1879, "Chicago Legal News," vol. xii., No. 11, Whole No. 580.

[2] Schofield *v.* Eighth School District, 27 Conn., 499. Subsequently it was enacted that any district may, by a two thirds vote, allow the school-house or school-houses to be used for any other purpose than school, when not in use for school purposes. Laws of Connecticut (1872), Rev. of 1875, tit. 2, c. 5, sec. 29.

[3] Appeal of Barnes, 6 R. I., 591.

In Missouri[1] and Wisconsin[2] the law may be regarded as settled that the board of directors of a school district cannot authorize the use of a school-house for any other than school purposes.

In some of the States it is expressly provided by statute that the trustees may permit the school-house or school-houses of the district to be used for literary, religious, or township purposes, when not in use for school purposes.

The authority to permit the school-house or school-houses of the district to be used for other than school purposes is expressly conferred upon the trustees by statute in Kansas, New Jersey, and West Virginia.[3]

In Maryland no school-house can lawfully be used for any other than public school purposes and district school meetings, unless by consent of the Board of County School Commissioners, or a majority of them.[4]

[1] Dorton *v.* Hearn, 67 Mo., 301.

[2] School District No. 8 *v.* Arnold, 21 Wis., 657. And see Spencer *v.* Joint School District, etc., 15 Kan., 259—since changed by statute.

[3] "Compiled Laws of Kansas," chap. xcii., art. 4, sec. 43; "Rev. of Statutes of New Jersey," p. 1077, sec. 39, subdiv. 12; "Rev. Statutes of West Virginia" (1879), chap. clxxiv., sec. 15, p. 999 (Kelley's).

[4] "Rev. Code of Maryland" (1878), art. 27, sec. 29.

In Connecticut it is provided that any school district or town may, by a vote of two thirds of those present at any legal meeting, allow its school-house or houses, when not in use for school purposes, to be used for any other purpose.[1]

In Maine a school district has power, at any legal meeting called for the purpose, to allow the school-house to be used for meetings of religious worship, lectures, and other similar purposes.[2]

Where such use of school property is unlawful, an injunction will be granted at the suit of a tax-payer who shows that the school-house has been built partly out of taxes that he has paid, that he has children attending school in said school-house, and that by the misuse complained of, the books of his children are torn, soiled, carried away, lost and misplaced, their copy-books written on or thrown to the floor, their slates and pens broken, etc.[3]

An injunction will not lie to restrain the erection of a school-house or its use as a school near one's dwelling-house, on the ground of the school being a nuisance, even if the property is thereby depreciated in value.[4]

[1] "General Statutes of Connecticut, Rev. of 1875, title ii. chap. v., sec. 29.

[2] "Rev. Statutes of Maine," chap. xi., tit. ii., sec. 24.

[3] Spencer *v.* Joint School District, 15 Kan., 259; Schofield *v.* Eighth School District, 27 Conn., 499.

[4] Harrison *v.* Good, 11 L. R. (Eq. Cas.), 388.

STATE NORMAL SCHOOL,
Los Angeles, Cal.

CHAPTER VII.

SCHOOL DISTRICT MEETINGS.

WHERE a meeting of a school district is held for a special purpose, all that is necessary in the form of the notice is that it should be so expressed as that the inhabitants of the district may fairly understand the purpose for which they are convened.[1]

It has been held that where the warning of a school society meeting stated the object of the meeting to be "to take into consideration the expediency of raising money for the use of schooling for the year ensuing," such a warning was sufficient to authorize the laying of a tax for the purpose specified.[2]

The meeting should be opened in a reasonable time after the hour specified in the notice; and what is reasonable time depends, in some measure, upon the circumstances of each particular case; but a delay of one hour and five minutes is not, of itself, an unreasonable delay, there being no law

[1] School District *v.* Blakeslee, 13 Conn., 227; Weeks *v.* Batchelder, 41 Vt., 317; Moore *v.* Beattie, 33 Vt., 219.

[2] Bartlett *v.* Kinsley, 15 Conn., 327.

necessarily requiring the meeting to be opened within that time.[1] Of course, where the statute requires the meeting to be opened at a particular time, it must be followed. But an irregularity in this respect which does not affect the action of the meeting, nor deprive any elector of his voice in the deliberations of the meeting, would not, it is believed, render the acts of the meeting illegal.

In New Jersey it was held that a special meeting of the legal voters of a school district may vote to raise money for school purposes, although such appropriation has been refused at the annual meeting.[2]

Where it appears that a site for a school-house has been chosen, it will not be invalidated because the clerk has made irregularities or omissions in describing the site selected.[3]

Where it appears from the record of a school district that the meeting was held on the day appointed, the presumption of law is that it was held in suitable time in the day, and in pursuance of the warning; and if a party claims it to have been held otherwise, the burden of proof rests upon him.[4]

[1] School District *v.* Blakeslee, 13 Conn., 227.

[2] State *v.* Lewis, 35 N. J. L., 377.

[3] Merritt *v.* Farris, 22 Ill., 303.

[4] School District *v.* Blakeslee, 13 Conn., 227.

The intention of a corporation can be ascertained only by the language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation can, for this purpose, be inquired into.[1]

Its records are proper and legitimate evidence in its behalf, of its votes, in a suit to which such district is a party.[2]

Under a statute which requires that school district meetings shall be called by posting notices thereof "on the district school-house and one other public place within the limits of said district," notices posted "one at the school-house and one at the grist-mill, both in said district," comply with the law and constitute sufficient notice.[3] In New York it is provided by statute that the proceedings of a district or neighborhood shall not be held illegal for want of due notice to all persons qualified to vote thereat, where the omission to give such notice is not shown to have been wilful and fraudulent.[4]

[1] Bartlett *v.* Kinsley, 15 Conn., 327; School District *v.* Atherton, 12 Metc. (Mass.), 105.

[2] School District *v.* Blakeslee, 13 Conn., 227.

[3] Fletcher *v.* Lincolnville, 20 Me., 439.

[4] N. Y. Rev. Stat., vol. ii., chap. xv. tit. vii., sec. 7, p. 62.

CHAPTER VIII.

EMPLOYMENT OF SCHOOL TEACHERS.

1. Parties to the Contract.—2. A Certificate Prerequisite.—3. Character of the Contract.—4. Conditions of the Contract.—5. Breach of the Contract.—6. Remedies.—7. Defences.

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1. Parties to the Contract.

The employment of public-school teachers is very generally regulated by statute, and it will be found that in all the States the authority to employ teachers is conferred upon officers variously styled as directors, trustees, or committees. It is through these agencies that the school district or school township acts, and when the officer acts within the scope of his authority he binds the district.

School districts are *quasi* corporations, and are capable of suing and being sued,[1] and on breach

[1] 2 Kent's Comm. *274; 2 Bouvier's Law Dict., title, "Quasi Corporation;" School Commissioners *v.* Aiken, 5 Port. (Ala.), 169; McLoud *v.* Selby, 10 Conn., 390; Trustees of School *v.* Tatman, 13 Ill., 27; State *v.* Hulin, 2 Oregon, 306; Code of Iowa, 1873, sec. 1716; Whitmore *v.* Hogan, 22 Me.,

of a contract legally made with the district or town, through its proper officer, a right of action accrues as against such district or town.[1]

A contract made by such school officer with a person to teach in a public school in the district for a period extending beyond the trustee's term of office is valid and binding on his successors in office.[2]

Any person possessing the proper certificate of qualification required by law, and who does not labor under some legal disability, is competent to enter into a contract to teach.[3]

564; O'Neal *v.* School Commissioners, 27 Md., 227; School District *v.* Thompson, 5 Minn., 280; Littleworth *v.* Davis, 50 Miss., 403; Denniston *v.* School District, 17 N. H., 492; Horton *v.* Garrison and Hoffman, 23 Barb. (N. Y.), 176; Wharton *v.* School Directors, 42 Pa. St., 358; District No. 3 *v.* Macloon, 4 Wis., 79; Puterbaugh *v.* Township Board, etc., 53 Mo., 472; Grant *v.* Fancher, 5 Cowen, 309.

[1] Puterbaugh *v.* Township Board, etc., 53 Mo., 472; Cascade *v.* Lewis, 43 Pa. St., 318.

[2] Gillis *v.* Space, 63 Barb. (N.Y.), 177; Silver *v.* Cummings, 7 Wend. (N.Y.), 181; Wilson *v.* East Bridgeport School District, 36 Conn., 280; Wait *v.* Ray, 67 N.Y. (Court of Appeals), 36. But where the contract is wholly to be carried out in the future, so as to divest future boards of the power to select such teachers as they shall desire, it is invalid. School Directors *v.* Hart, 4 Bradw. R., 224; Stevenson *v.* School Directors, 87 Ill., 255.

[3] In some of the States, trustees or directors are prohibited by statute from employing their near relatives, and such

An infant possessing the requisite qualifications may, with the assent of his parent or guardian, contract to teach school.[1]

Where a minor with his parent's consent contracts for himself, or where he is compelled to go abroad and do for himself, the minor is entitled to receive his earnings, and payment to him is a full satisfaction.[2]

It has been held, however, that emancipation of a minor does not enlarge his capacity to contract, but merely entitles the minor to his earnings.[3]

contracts are made void. Thus, in New York no person who is within two degrees of relationship by blood or marriage to any such trustees shall be so employed (as teachers), except with the approval of two thirds of the voters of such district present and voting upon the question at an annual or special meeting of the district. N. Y. Rev. Stat., vol. ii., chap. xv., tit. 7, sec. 9, p. 70.

[1] Monaghan *v.* School District No. 1, 38 Wis., 100 ; 1 Parsons on Contracts, * 310, and notes "i," "j," and "k."

[2] Farrell *v.* Farrell, 3 Houst. (Del.), 633 ; Nightingale *v.* Withington, 15 Mass., 272 ; Jenney *v.* Alden, 12 Mass., 375 ; Angell *v.* McLellan, 16 Mass., 28 ; Whiting *v.* Earle, 3 Pick. (Mass.), 201 ; Nixon *v.* Spencer, 16 Ia., 214 ; Wolcott *v.* Rickey *et al.*, 22 Ia., 171 ; Galbraith *v.* Black, 4 S. & R. (Pa.), 207 ; The Ætna, 1 Ware (U. S.), * 462 ; Stone *v.* Pulsipher, 16 Vt., 42 ; Conover *v.* Cooper, 3 Barb. (N.Y.), 115 ; Godfrey *v.* Hays, 6 Ala., 501 ; Lord *v.* Poor, 23 Me., 569 ; Steele *v.* Thatcher, 1 Ware (U.S.), * 91.

[3] 1 Parsons on Contracts, * 311 ; Person *v.* Chase, 37 Vt., 647 ; Schouler on Domestic Relations, * 561.

It is well enough to bear in mind that, as a general rule, an infant who makes a definite contract to perform services may put an end to it whenever he chooses. In such a case the infant may recover proportional compensation for the services performed, subject to any reasonable offsets.[1] Although no suit can be maintained against a minor for breach of contract of service, yet damages sustained by reason of such breach of the contract may be set off against the minor's claim for services.

At common law married women are disabled from making such contracts,[2] but in many of the States legislation for the removal of this disability has been adopted.[3]

Where one member of a board of directors or trustees contracts with the other member or members, such a contract has sometimes been held void on the grounds of public policy.[4] Sometimes

[1] Schouler on Domestic Relations, * 561.

[2] 1 Parsons on Contracts, * 345.

[3] In the following-named States and Territories the right to make contracts and receive wages is given to married women by statute—viz., Colorado, Connecticut, Dakota Territory, Delaware, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, Wyoming Territory, and Wisconsin.

[4] Pickett *v.* School District, 25 Wis., 551.

the school office has been held to be vacated thereby; the duties of teacher and trustee are incompatible.[1]

2. A Certificate Prerequisite.

Before any contract to teach can be entered into, and as a prerequisite thereto, the teacher must have and produce a certificate of mental and moral qualifications, signed by the proper examining officer.[2]

Circumstances cannot supersede the necessity of this certificate, nor can the committee waive it so as to bind the district.[3]

In Tennessee the common-school commissioners are indictable for employing a teacher who has no examiner's certificate.[4]

In Vermont, however, it is held that the requirement of the law is satisfied if the certificate

[1] Ferguson *v.* True and Walker, 3 Bush (Ky.), 255.

[2] Jenness *v.* School District No. 31, 12 Minn., 448; Robinson *v.* The State, 2 Coldw. (Tenn.), 181; Baker *v* School District, 12 Vt., 192; Goodrich *v.* Fairfax, 26 Vt., 115; Welch *v.* Brown, 30 Vt., 586; Harrison Township *v.* Conrad, 26 Ind., 337; Jackson *v.* Hampden, 20 Me., 37; Botkin *v.* Osborne, 39 Ill., 609; Casey *v.* Baldridge, 15 Ill., 65; Barr *v.* Deniston, 19 N. H., 170; Finch *v.* Cleveland, 10 Barb. (N.Y.), 290.

[3] Baker *v.* School District, 12 Vt., 192; Goodrich *v.* Fairfax, 26 Vt., 115; Welch *v.* Brown, 30 Vt., 586.

[4] Robinson *v.* the State, 2 Coldw. (Tenn.), 181.

is obtained on the evening of the first day of school.[1] So, if it appears that a certificate was made out at the proper time, by the proper officer, upon satisfactory evidence of qualifications, this will suffice, although by accident or neglect the certificate was not put into the teacher's hands.[2]

In Vermont, it is said, the certificate need not contain any statement of the good moral character of the teacher, although a good moral character is essential, and must be inquired into by the examiner.[3]

The certificate of a majority of the superintending committee of a town, produced by the schoolmaster to the agent employing him, is a valid certificate under Maine Rev. Stat., ch. 17, although that majority did not act together in the examination.[4]

If the teacher has obtained a certificate without fraud, or use of improper arts on his part, although the certificate was issued without any examination having been made, still, it is said, this complies with the law to such an extent that the lack of examination is no defence to an action for the teacher's salary.[5]

[1] Paul *v.* School District, 28 Vt., 575.

[2] Blanchard *v.* School District, 29 Vt., 433.

[3] Crosby *v.* School District, 35 Vt., 623.

[4] Stevens *v.* Fassett, 27 Me., 266.

[5] George *v.* School District No. 8, 20 Vt., 495.

Any contract made with a teacher who does not possess the required certificate of qualifications is void, and the teacher can draw no pay under it.[1] And this is so, even though the superintending school committee, whose duty it is to make the examinations, neglects or wantonly refuses to examine the teacher.[2]

A school district has no right to waive this requirement of the law, and consent to judgment. Any person interested as a taxpayer in the district may enjoin such judgment.[3]

The county superintendent is not entitled to an injunction to restrain a person from teaching a public school, or the officers from paying for such services out of the school funds of the district, on the ground that such teacher is acting without a certificate of qualifications in violation of the laws of the State. Such a proceeding may be maintained by any citizen or resident of the district,

[1] Smith *v.* Curry, 16 Ill., 147; Casey *v.* Baldridge, 15 Ill., 65; Botkin *v.* Osborne, 39 Ill., 609; Harrison Township *v.* Conrad, 26 Ind., 337; Jackson *v.* Hampden, 20 Me., 37; Dore *v.* Billings, 26 Me., 56; Barr *v.* Deniston, 19 N. H., 170; Baker *v.* School District, 12 Vt., 192; Goodrich *v.* Fairfax, 26 Vt., 115; Welch *v.* Brown, 30 Vt., 586.

[2] Jackson *v.* Hampden, 20 Me., 37.

[3] Barr *v.* Deniston, 19 N. H., 170.

but not by the county superintendent, merely by virtue of his office.[1]

Under a statute which declares that the certificate which the school commissioner is required to grant to teachers after examination shall not be valid for more than a year without the approval of such certificate by the commissioner indorsed thereon, and which requires every teacher to obtain and produce such certificate before employment, the spirit of the law was complied with, although the commissioner did not approve the certificate in writing, but declared the teacher competent, and gave his sanction to the previous arrangement of the school in the presence of the trustees.[2]

A teacher's certificate of qualifications obtained from the school commissioner is *prima facie* evidence of his being qualified to perform the duties of a teacher, and it devolves upon the school directors to prove incompetency or neglect of duty when they have dismissed him for either of these causes.[3]

[1] Perkins *v.* Wolf *et al.*, 17 Iowa, 228 ; Barr *v.* Deniston, 19 N. H , 170.

[2] Barnhart *v.* Bodenhammer, 31 Mo., 319.

[3] Neville *v.* School Directors, 36 Ill., 71.

3. Character of the Contract.

The contract is, in many of the States, required by law to be reduced to writing. Where this is the case, questions arise as to the ratification of a parol contract, and its effect.

In Kansas it is said that one teaching in a school without a written contract is entitled to receive the reasonable value of the services performed.[1]

In Iowa, where a teacher had made a parol contract with the directors of a school district to teach nine months, and had taught seven, receiving pay therefor, after which he was discharged, it was held, that although the contract did not comply with the statute requiring such engagements to be in writing, nevertheless the acceptance of part-performance was a ratification, rendering the district liable on the contract.[2] Where the law requires the contract to be in writing, and there is a written contract between the teacher and the district, it will be conclusively presumed, in the absence of fraud, accident, or mistake, that

[1] Jones *v.* School District, 8 Kan., 362.

[2] Cook *v.* Independent District of North McGregor, 40 Iowa, 444; Athearn *v.* The Independent School District of Millersburg, 33 Iowa, 105.

it contains the entire agreement of the parties as to the subject-matter covered by it.[1]

4. Conditions of the Contract.

The contract of the teacher is to teach his pupils what he has undertaken, and to have a special care of their morals.[2]

The contract is for the personal services of the teacher, and such teacher cannot substitute a proxy, however competent. If a teacher leaves his place and fails to resume it, and when requested to return insists that it is sufficient that he has left a competent substitute, this is cause enough for dismissal.[3]

The law does not require the highest order of talents or qualifications in a teacher. It only requires average qualifications and ability, and the usual application to the discharge of his duties to fulfil his contract.[4]

The contract is necessarily subject to any conditions imposed by the law from which the power to contract is derived. Thus where a statute empowers the board of directors to employ teachers and remove

[1] Mann *v.* The Independent School District, etc., Supreme Court of Iowa, October, 1879. Reported in Northwestern Reporter, vol. ii. (N. S.), No. 11, p. 1005.

[2] 1 Starkie, 421.

[3] School Directors, etc., *v.* Hudson, 88 Ill., 563.

[4] Neville *v.* School Directors, 36 Ill., 71.

them at pleasure, the statute enters as part of any contract made under it, and the teacher employed by contract under it may be discharged, notwithstanding the terms of his employment.[1]

It sometimes becomes a question whether the statute under which the contract is made gives the right to dismiss a teacher at pleasure. It does not, unless clearly so expressed in the statute. Thus Wagn. (Mo.) Stat. 1243, sec. 7, making it "the duty of the directors to manage and control its local interests and affairs," and giving them power to hire legally qualified teachers, gives them no authority to dismiss a teacher unless for good and sufficient cause shown.[2] In case of their wantonly obstructing him in the discharge of his duties, or dispossessing him of the school-house, they would be individually liable in damages for tort.[3]

A clause in a contract between a school district board and a teacher, reserving the right to discharge the teacher whenever he fails to give satisfaction, is valid, under a statute which provides that the county superintendent may dismiss "for incompetency, cruelty, or immorality."[4]

[1] Jones *v.* Nebraska City, 1 Neb., 176; Wood *v.* Inhabitants of Medfield, 123 Mass., 545; Knowles *v.* Boston, 12 Gray (Mass.), 339.

[2] McCutchen *v.* Windsor, 55 Mo., 149.

[3] Id.

[4] School District *v.* Colvin, 10 Kan., 283.

Where the contract between a teacher and the school district contained a stipulation that she would leave if the school was not satisfactory, it was held that dissatisfaction with her school, and not personal unpopularity in the district, would be a reason for dismissal under this provision.[1]

When a teacher has been irregularly dismissed, his subsequent continuance in the school, with the assent of a majority of the trustees, is a waiver of such dismissal, and a satisfaction of the original employment.[2]

Unless such power is conferred by statute, the trustees of a school district have no right to dismiss a teacher holding the proper certificate, without cause, and against his consent, before the expiration of his contract.[3]

Where the teacher of a public school contracted to "faithfully and impartially govern and instruct the children, . . . to strictly conform to the rules established by the board of directors, . . . to perform all the duties required of her by part 8, sec. 41, of the school laws," and it was provided in the contract that if she should be dismissed by the subdirector for a violation of any of the stipulations therein, that she would not be entitled to compensation after such dismissal, it was held that the subdirector had a right to dismiss her for a failure to

[1] Richardson *v.* School District, 38 Vt., 602.

[2] Finch *v.* Cleveland, 10 Barb. (N.Y.), 290.

[3] Id.

control the school, even if she was not unfaithful in the discharge of her duties.[1]

Where the word "month" in school contracts is not defined by statute, careful officers and teachers avoid any question by making their contracts for a certain number of weeks.

The word month has various meanings, there being calendar months, solar months, and several kinds of lunar months.

In law the word "month" means either a calendar or lunar month. The civil or calendar months are the months as adjusted in the common or Gregorian calendar, and known as January, February, etc. A lunar month, the period of one synodical revolution of the moon, is, in mean length, 29 days, 12 hours, 44 minutes, and 2.87 seconds, but in popular usage four weeks are called a lunar month.

Under the old English common law the word "month," whenever it occurred, was construed to mean a lunar month of four weeks, except in mercantile contracts, in which it was construed to mean a calendar month.

In some of the States it is provided by statute that the word "month" used in contracts, instruments, and statutes shall be taken to mean calendar months.

The tendency of the courts of this country is to

[1] Eastman *v.* Rapids, 21 Iowa, 590.

give the word the meaning of calendar month,[1] and in contracts such as that of a teacher it is generally so held, unless there is some statute to the contrary. In New York it is provided by Rev. Stat., vol. ii., chap. xix., tit. 1, sec. 4, p. 799, that where the word "month" occurs in any statute, act, deed, written or verbal contract, or private instrument whatever, it shall be held to mean a calendar month, unless otherwise expressed.

The school month is defined by statute in many of the States.

In Mississippi[2] and Wisconsin[3] a school month is twenty days.

In Maine, in the absence of an agreement to the contrary, a school month is four weeks, of five and a half days each.[4]

In Arizona,[5] Arkansas,[6] California,[7] Iowa,[8] Kan-

[1] Sheets *v.* Selden, 2 Wallace, 177. And see Bishop on Contracts, Sec., 748, and cases cited in note.

[2] Rev. Code of Mississippi, chap. xxxix., art. viii., sec. 2022.

[3] Rev. Statutes of Wisconsin (1878), chap. xxvii., sec. 459.

[4] Rev. Statutes of Maine, chap. xi., tit. ii., sec. 54.

[5] Compiled Laws of Arizona (1877), chap. xxiii., p. 233, sec. 32.

[6] Arkansas Digest, chap. 120, sec. 5429.

[7] Hittell's Codes and Statutes of California, vol. i., Political Code, art. xii., sec. 1697.

[8] Code of 1873, sec. 1757.

sas,[1] Louisiana,[2] Michigan,[3] Minnesota,[4] Missouri,[5] Nevada,[6] New Jersey,[7] and Ohio,[8] the school month consists of four weeks, of five days each.

In Kentucky,[9] Illinois,[10] and Pennsylvania, the school month is twenty-two days.

No deduction from the teacher's wages can lawfully be made on account of holidays, such as Christmas, January 1st, July 4th, and the fasts and thanksgivings appointed by the President of the United States and the Governor of the State.

A contract to teach school does not imply that the teacher is to sweep out, make fires, or do any janitorial work, nor would the fact that his predecessor had done such work without extra compensation make any difference. It must be part of the con-

[1] Compiled Laws of Kansas, chap. xcii., art. v., sec. 2.

[2] Voorhies' Rev. Statutes of Louisiana, sec. 1278, p. 332.

[3] Compiled Laws of Michigan, vol. i. chap. cxxxvi., sec. 24, p. 1194.

[4] Statutes of Minnesota, 1878, chap. xxxvi., sec. 31.

[5] Myer's Supplement to Wagner's Statutes of Missouri, chap. cxxiii., art. i., sec. 90, p. 426.

[6] Compiled Laws of Nevada, vol. ii., chap. cxii., sec. 50, p. 267.

[7] Rev. Statutes of New Jersey, p. 1077, sec. 44.

[8] Rev. Statutes of Ohio, vol. i., tit. iii., chap. ix., sec. 4016.

[9] General Statutes of Kentucky (1879), chap. xviii., art. xi., sec. 4.

[10] Statutes of Illinois, chap. cxxii., sec. 54.

tract, or the teacher cannot be required to do such work.

5. Breach of the Contract.

If the contract is broken in any manner by the teacher, he of course forfeits his right to any further compensation, and renders himself liable to dismissal.

If a teacher in a public school, although he has been employed for a definite time, proves to be incompetent and unable to teach the branches of instruction he has been employed to teach, either from a lack of learning or from an utter want of capacity to impart his learning to others, or if in any other respect he fails to perform the obligations resting upon him as a teacher, whether arising from the express terms of his contract or by necessary implication, he has broken the agreement on his part, and the trustees are clearly authorized to dismiss him.[1]

As has been stated, in treating of the conditions of the contract, the law does not insist upon the highest talents. But it does require the teacher to bring to his work at least average abilities, and the usual industry and application to the discharge of his duties.[2] If he fails in this respect his contract is broken.

[1] Crawfordsville *v.* Hays, 42 Ind., 200; Bays *v.* The State, 6 Neb., 167.

[2] Neville *v.* School Directors, 36 Ill., 71.

The school district on its part contracts to pay, at the times fixed in the contract, such sums as the teacher will be entitled to as salary. A failure on the part of the district to make such payment gives the teacher a right of action. The teacher is peculiarly entitled to be paid for his important and arduous services by those who employ him.[1]

If a teacher is employed for a definite time, and during the period of his employment the district officers close the schools on account of the prevalence of small-pox in the city, and keep them closed for several months on that account, and the teacher continue ready to perform his contract, he is entitled to full wages during such period. The act of God is not an excuse for non-observance of a contract unless it renders performance impossible. If it merely makes it difficult and inexpedient, it is not sufficient. Although under such circumstances it is eminently prudent to dismiss school, yet this affords no reason why the misfortune of the district should be visited upon the teacher.[2]

[1] 1 Bing., 357 ; 8 J. B. Moore, 368.

[2] Dewey *v.* Union School District, Supreme Court of Michigan (April 30, 1880), Northwestern Reporter, vol. v., No. 5, p. 646.

6. Remedies.

The remedy of the board for failure of the teacher is dismissal.[1]

The teacher has one of two remedies—action on the contract,[2] or a writ of *mandamus.*[3] *Mandamus,* and not an action for money had and received, is the proper remedy to compel a clerk of the school district to pay over money in his hands applicable to a warrant issued in favor of a teacher for salary. The funds are the funds of the district until he parts with the custody of them.[4]

A teacher is entitled to a writ of *mandamus* to compel the trustees to pay arrears of salary due him.[5]

He has his option to bring suit to recover the money, or proceedings for a writ of *mandamus* to compel its payment. And if an order has been issued to him, and it remains unpaid, he may still have his choice of remedies. The creditor of a cor-

[1] Crawfordsville *v.* Hays, 42 Ind., 200.

[2] Puterbaugh *v.* Township Board, etc., 53 Mo., 472 ; Cascade *v.* Lewis, 43 Pa. St., 318 ; Rolfe *v.* Cooper, 20 Me., 154.

[3] Howard *v.* Bamford, 3 Oreg., 565 ; Apgar *v.* Trustees, 34 N. J. L., 308, s.c., 5 Vroom, 308 ; Cross *v.* District Township of Dayton, 14 Iowa, 28 ; High's Ex. Legal Rem., sec. 351.

[4] Howard *v.* Bamford, 3 Oreg., 565.

[5] Apgar *v.* Trustees, 34 N. J. L. J. R., 308, or s.c. 5 Vroom, 308.

poration is not restricted to *mandamus* as his sole remedy.[1]

Where the school law allows the local directors to employ a teacher, the latter may sue the township board of education for breach of the contract.[2]

When the school trustees take away a teacher's pupils from her school-room, although she had a contract with them and was ready and willing to teach the school, they are nevertheless not individually liable to her.[3]

But where the teacher is wrongfully dismissed on charge of incompetency or any similar charge, he is entitled to recover from the district his wages for the balance of the term contracted for.[4]

Where the teacher has performed services without any contract, or without a proper contract, he is nevertheless entitled to recover the reasonable value of his services.[5]

It has been held that the declaration in an action by the teacher for salary must contain an averment that a certificate of qualification was exhibited to the directors prior to the commencement of school.[6]

[1] Cross *v.* The District Township of Dayton, 14 Iowa, 28.

[2] Puterbaugh *v.* Township Board, etc., 53 Mo., 472.

[3] Morrison *v.* McFarland, 51 Ind., 206.

[4] Ewing *v.* School District, etc., 2 Bradwell (Ill.), 458.

[5] Offut *v.* Bourgeois, 16 La. Ann., 163 ; Jones *v.* School District, 8 Kan., 362.

[6] Smith *v.* Curry, 16 Ill., 147 ; Botkin *v* Osborne, 39 Ill ,

Mandamus will lie to compel the officers of a school district to reinstate a teacher whom they have removed without authority.[1]

7. Defences.

The fact that the teacher did not possess nor exhibit the certificate of qualification required by law will, in most of the States, defeat any recovery by the teacher.[2] This requirement is always enforced with great strictness, because it is the best safeguard the public has against the impositions of incompetent teachers. It is true that incompetent teachers may be dismissed, but always at the expense of confusion and delay, and the school interests are too important to be thus trifled with.

In an action by a teacher to recover for his services, proof of his employment by the agent, and that he rendered the services, makes a *prima facie* case, and if the town would avail itself of the want of a cer-

609; Stevenson *v.* School Directors, 87 Ill., 255. But see *contra*, Doyan *v.* School District, 35 Vt., 520.

[1] Gilman *v.* Bassett, 33 Conn., 298.

[2] Botkin *v.* Osborne, 39 Ill., 609; Smith *v.* Curry, 16 Ill., 147; Casey *v.* Baldridge, 15 Ill., 65; Harrison Township *v.* Conrad, 26 Ind., 337; Dore *v.* Billings, 26 Me., 56; Baker *v.* School District, 12 Vt., 192; Goodrich *v.* Fairfax, 26 Vt., 115; Welch *v.* Brown, 30 Vt., 586; Stevenson *v.* School Directors, 87 Ill., 255.

tificate it must show the fact, as it will be presumed that the agent did his duty.[1]

Although a teacher of a public school may not be entitled to recover her wages by reason of having neglected to obtain the certificate required by law, yet the town alone is entitled to make that objection; and if money has been paid by the town to the school agent, to be by him paid to the teacher, he will hold it to her use, and cannot object to the want of a certificate.[2]

But whether money placed in his hands by the town was placed there absolutely for the use of the school teacher is a question of fact for the jury.[3]

Payment of the teacher's wages by the town to the committee does not discharge the town's liability to the teacher.[4]

Incompetency, incapacity, or failure to perform any of the obligations resting upon him as a teacher, will authorize the dismissal of a public teacher, and defeat any recovery for salary after such dismissal.[5]

As previously stated, the production of a teacher's certificate casts the burden upon the school directors

[1] Rolfe *v.* Cooper, 20 Me., 154, but *contra*, Stevenson *v.* School Directors, 87 Ill., 255.

[2] Dore *v.* Billings, 26 Me., 56. [3] Id.

[4] Clark *v.* Great Barrington, 11 Pick. (Mass.), 260.

[5] Crawfordsville *v.* Hays, 42 Ind., 200; Bays *v.* The State, 6 Neb., 167.

to prove incompetency or neglect of duty, when they rely upon either of these causes as grounds for dismissal. The certificate is *prima facie* evidence of the teacher's qualification.[1] Incompetency of a teacher is a question of fact to be found from the evidence.[2]

Where in an action for wages it was pleaded, among other defences, that the plaintiff was incompetent to manage the school, that she was unreasonable in her requirements of the pupils in the school, and was uneven in her treatment of them, and partial and abusive in her treatment of certain ones in her school, and that she failed in all respects as a teacher of said school, it was held that evidence of particular instances of mismanagement in her government of the school was admissible.[3]

It has been held in an action to recover salary that evidence that a majority of the voters in the district were dissatisfied with the plaintiff, and that the plaintiff and the prudential committee who employed plaintiff knew this at the time the plaintiff was employed, is inadmissible.[4]

Where an order on the treasurer was left at a teacher's boarding-house in full for her services, which order she took, but returned in two or three

[1] Neville *v.* School Directors, 36 Ill., 71.

[2] Ewing *v.* School District, etc., 2 Bradw. (Ill.), 458.

[3] Holden *v.* School District, 38 Vt., 529.

[4] Nason *v.* School District No. 14, 20 Vt., 487.

hours, saying that she did not accept it, it was held that she lost none of her rights thereby.[1]

The fact that a teacher who had been dismissed carried off the school register, but returned it to the school district clerk before bringing suit for wages, will not defeat a recovery for wages.[2]

A teacher cannot lawfully be paid for his services until he has made a report to the superintending committee, when required by law.[3]

It is no defence to a teacher's suit to recover salary that the certificate was given to the teacher without any actual examination, when the certificate was obtained by him without fraud or the use of improper arts on his part.[4]

[1] Richardson *v.* School District, 38 Vt., 602.

[2] Wells *v.* School District, 41 Vt., 353.

[3] Moultonborough *v.* Tuttle, 26 N. H. (6 Fost)., 470 ; Jewell *v.* Abington, 2 Allen (Mass.), 592. But *contra*, Crosby *v.* School District, 35 Vt., 623.

[4] George *v.* School District No. 8, 20 Vt., 495.

CHAPTER IX.

SCHOOL REGULATIONS.

1. By whom made.—2. By whom enforced.—3. Regulations as to Admission.—4. Regulations as to Attendance.—5. Regulations as to the Use of the Bible, etc.—6. Regulations as to Studies.—7. Regulations as to Conduct, etc.—8. General Principle.

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1. By whom made.

In many of the States the statutes creating the boards of directors, trustees, or committees, expressly confer upon them the authority to make all needful rules for the regulation of the schools under their care and control.[1] And the right to do so is undoubtedly to be implied where the statute gives the board the control and custody of the schools.[2]

[1] Burdick *v.* Babcock, 31 Iowa, 562 ; Iowa Code of 1873, sec. 1734 ; Sewell *v.* Board of Education, 29 Ohio St., 89 ; Morrow *v.* Wood, 35 Wis., 59 ; Donahoe *v.* Richards, 38 Me., 376 ; Donahoe, *prochein ami*, *v.* Richards *et al.*, 38 Me., 379.

[2] Board of Education of Cincinnati *v.* Minor, 23 Ohio St., 211 ; Ferriter *et al.* *v.* Tyler *et al.*, 48 Vt., 444 ; Spear *v.* Cummings, 23 Pick., 224 ; The People *v.* Easton, 13 Abb. (N.Y.), Pr. N. S., 159.

While the principal or teacher of a public school is subordinate to the school board, or board of education of his city or district, and must enforce regulations adopted by it for the government of the school, and execute its lawful orders in that behalf, yet, in matters concerning which the board has remained silent, he has authority, as *in loco parentis*, to enforce obedience to his lawful commands, subordination, civil deportment, respect for the rights of other pupils, and all obligations inherent in every school system, and constituting the common law of the school, which every pupil is presumed to know. In a proper case, and when not deprived of the power by the affirmative action of the board, such teacher has the inherent authority to suspend a pupil from the school; though such suspension, with the reasons therefor, should be promptly reported to the board.[1]

2. By whom enforced.

Since the regulations are made for the government of the school, and the school is under the immediate control and supervision of the teacher, the execution of the rules and orders of the directors necessarily devolves upon the teacher, and in the execution of

[1] State *v.* Burton, 45 Wis., 150; Guernsey *v.* Pitkin, 32 Vt., 224; Lander *v.* Seaver, 32 Vt., 114; Ward *v.* Flood, 48 Cal. 36.

proper rules he is not liable for any damages that ensue.[1]

3. Regulations as to Admission.

Questions sometimes arise in respect to the authority of teachers and directors to refuse admission to the free public schools under certain circumstances.

A principal of a public graded school may refuse a child admission as a pupil, provided such child has not education sufficient to enter the lowest grade of such school.[2]

Persons residing out of the State cannot send their minor children into it, and by any method give them a domicile in the State which shall entitle them to acquire an education in the public schools.[3]

Nor can parents entitle their children to the benefits of the common schools of an adjoining district by binding the children out as apprentices in such district for the sole purpose of sending them to school there. They would be trespassers and liable in damages to the district.[4]

[1] Sewell *v.* Board of Education, 29 Ohio St., 89; Guernsey *v.* Pitkin, 32 Vt., 224; State *v.* Burton, 45 Wis., 150.

[2] Ward *v.* Flood, 48 Cal., 36; Trustees, etc., *v.* The People *ex rel.*, etc., 87 Ill., 303.

[3] Wheeler *v.* Burrow, 18 Ind., 14.

[4] School District *v.* Bragdon, 23 N. H. (3 Fost.), 507.

Neither the teacher nor school board has authority to make any discrimination between children of different races. Persons of African descent cannot lawfully be denied admission to the common schools, and in most of the States they cannot be compelled to attend separate schools.[1]

[1] Dove *v.* Independent School District, etc., 41 Iowa, 689; Smith *v.* Directors, etc., 40 Iowa, 518; Clark *v.* Board of Directors, etc., 24 Iowa, 266; Chase *v.* Stephenson, 71 Ill., 383; People *v.* Board of Education, 18 Mich., 400; State *v.* Southmeyer, 7 Nev., 342; State *v.* Cincinnati, 19 Ohio, 178; Stewart *v.* Southard, 17 Ohio, 402. See also, Civil Rights Bills, Rev. Statutes of United States, 2d ed., title xxiv., and sec. 5507, chap. vii., title lxx.; Slaughter House Cases, 1 Woods, 21; Slaughter House Cases, 16 Wallace, 36; Coger *v.* Northwestern Packet Co., 37 Iowa, 145. For cases holding that to require colored children to attend separate schools equally as good, is not an unjust discrimination and not unlawful, see Ward *v.* Flood, 48 Cal., 36; Cory *v.* Carter, 48 Ind., 327; People *v.* Easton, 13 Abb. (N.Y.), Pr. N. S., 159; State *v.* McCann, 21 Ohio St., 198, and Dallas *v.* Fosdick, 40 How. Pr., 249. The following extract from the opinion in the case of Clark *v.* Board of Directors, etc., 24 Iowa, 266, will amply repay a perusal:

"That the board of directors is clothed with certain discretionary powers as to the establishment, maintenance, and management of schools within its district cannot be denied. Doubtless the board may, in its discretion, fix the boundaries within which children must reside, in order to be entitled to admission to a certain school; or may fix the grade of each school, and require certain qualifications, or proficiency in studies, or the like, before any pupil shall be entitled to admission therein.

Mandamus will lie to compel the admission of a child so excluded, and, although the proceedings are

"But this discretion is limited by the line which fixes the *equality of right* in all youths between the ages of five and twenty-one years. . . . It is not competent for the board of directors to require the children of Irish parents to attend one school and the children of German parents another; the children of Catholic parents to attend one school and the children of Protestant parents another. And if it should so happen that there be one or more poorly-clad or ragged children in the district, and public sentiment was opposed to the intermingling of such with the well-dressed youths of the district in the same school, it would not be competent for the board of directors, in their discretion, to pander to such false public sentiment, and require the poorly-clothed children to attend a separate school.

"The term 'colored race' is but another designation, and in this country but a synonym for African. Now it is very clear that if the board of directors are clothed with a discretion to exclude African children from our common schools, and require them to attend (if at all) a school composed wholly of children of that nationality, they would have the same power and right to exclude German children from our common schools, require them to attend (if at all) a school composed wholly of children of that nationality, and so of Irish, French, English, and other nationalities, which together constitute the *American*, and which it is the tendency of our institutions and policy of the government to organize into one harmonious *people*, with a common country, and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation, and happiness of *mankind*."

for the benefit of the child, the father is the proper party to make the application for the writ, he being the child's natural guardian, and charged with his education.[1]

The legally appointed guardian of such minor may also procure a writ for the same purpose.

4. Regulations as to Attendance.

It is competent for a board of school directors to provide, by rule, that pupils may be suspended from school if they shall be absent or tardy, except for sickness or other unavoidable cause, a certain number of times within a fixed period.[2]

"Any rule of the school, not subversive of the rights of the children or parents, or in conflict with humanity or the precepts of divine law, which tends to advance the object of the law in establishing public schools, must be considered reasonable and proper. It requires but little experience in the instruction of children and youth to convince any one that the only means which will assure progress in their studies is to secure their attention—the application of the powers of their minds to the studies in which they are instructed. Unless the pupil's mind is open to receive instruction, vain will be the effort of the teacher to lead him forward in learning.

[1] People *v.* Board of Education, etc., 18 Mich., 400.

[2] Burdick *v.* Babcock, 31 Iowa, 562.

"This application of the mind in children is secured by interesting them in their studies. But this cannot be done if they are at school one day and at home the next—if a recitation is omitted or a lesson left unlearned, at the whim or convenience of parents. In order to interest a child, he must be able to understand the subject in which he is instructed. If he has failed to prepare previous lessons, he will not understand the one which the teacher explains to him. . . . The rule requiring constant and prompt attendance is for the good of the pupil, and to secure the very objects the law has in view in establishing public schools.

"It is therefore reasonable and proper. . . . It is required by the best interests of all the pupils of the school. Irregular attendance of pupils not only retards their own progress, but interferes with the progress of those pupils who may be regular and prompt.

"The whole class may be annoyed and hindered by the imperfect recitations of one who had failed to prepare his lessons on account of absence. The class must endure and suffer the blunders, promptings, and reproofs of the irregular pupil, all resulting from failure to prepare lessons which should have been studied when the child's time was occupied by direction of the parent in work or visiting. Tardiness is a direct injury to the whole school.

"The confusion of hurrying to seats, gathering together of books, etc., by tardy ones, at a time when all should be at study, cannot fail to greatly impede the progress of those who are regular and prompt in attendance. The rule requiring prompt and regular attendance is demanded for the good of the whole school. While it may be admitted that absence and tardiness are acts committed out of school hours, yet as their *effects and consequences* operate upon the school—the pupils when assembled for instruction—they are therefore subject to control by rules for the government of the school. If the effects of acts done out of school hours reach within the school-room during school hours, and are detrimental to good order and the best interest of the pupils, it is evident such acts may be forbidden. Truancy is a fault committed away from school. Can it be pretended that it cannot be reached for correction by the school board and teachers?

"A pupil may engage in sports beyond school that will render him unfit to study during school hours. Cannot these sports be forbidden? The view that acts, to be within the authority of the school board and teachers for discipline and correction, must be done within school hours, is narrow and without regard to the spirit of the law and best interest of our common schools. It is in conflict, too, with authority. See upon this point Lander *v.* Seaver, 32

Vt., 114, and Sherman *v.* Inhabitants of Charlestown, 8 Cush., 160. The doctrine we have above endeavored to sustain is, in these cases, distinctly announced.

"The rule in question, as we have shown, operates directly upon the order of the school—upon the pupils when assembled for instruction. It promotes efficiency of the school, and secures the progress of the pupils in their studies. It is, therefore, a rule for the *government of the school*, and must be regarded as proper and reasonable, and within the authority of the school officers to prescribe and enforce. . . . Again, it is said that the rules visit upon the child punishment for the parent's offence. That is, the child is kept from school through the fault of the parent, and is punished for the act of the parent in detaining him. . . . If the good of the children were to be considered only, there would be force in this argument; but it is completely answered by the consideration that the parent's act is an injury to the whole school. . . . The child, through no fault of his own, or of his parents, may be afflicted with a contagious disease, yet, as the good of other pupils demand it, he may be for that reason forbidden attendance at school. Spear *v.* Cummings, 23 Pick., 225. . . . The good of the whole cannot be sacrificed for the advantage of one pupil, who has an unreasonable father. Upon the

parent must rest the great responsibility of depriving his child of the opportunities of education, which the laws of the State so generously offer. If the education of children were compulsory upon parents, who could be reached by proper penalties, as for an offence, for failure to send their children to school, in that case the child could be relieved from the hardship of expulsion, and the parent made responsible for his acts in detaining him from school.

"As the law now is, no other means can be devised for enforcing the rule requiring regular and prompt attendance, than the penalty of expulsion."[1]

In the case of James Ferriter *et al.* *v.* J. M. Tyler *et al.*, in the Supreme Court of Vermont,[2] the decision in which contains another exhaustive discussion of the power of the directors to prescribe the hours of attendance, etc., the complainants were members of the Catholic church in the village of Brattleboro'. On June 4th, 1875, the priest of said church, acting for the complainants, sent to the respondents, who were the prudential committee of that school district, a request that the children might be excused from attendance at school on all holy days, and especially on that day, it being Holy Corpus Christi day.[3]

[1] Per Beck, J., in Burdick *v.* Babcock, 31 Iowa, 562.

[2] Ferriter *et al.* *v.* Tyler *et al.*, 48 Vt., 444.

[3] The most splendid festival of the Church of Rome. It was

The committee replied that the request could not be granted, as it would involve closing some of the schools and greatly interrupting others. It further appeared that about sixty Catholic children, by direction and command of their parents, were kept from school to attend religious services on the 4th of June, 1875, being, as stated in the bill, "Holy Corpus Christi" day. All, or nearly all, applied either that afternoon or next morning, and were told by the committee that, as they had absented themselves without permission, and in violation of the rules of the schools, which they well understood, they could not return without an assurance from their parents or their priest that in future they would comply with the rules of the schools, at the same time assuring the children and many of their parents, and also the priest, that if the schools would not be again interrupted in like manner they would gladly admit said children to them; that the priest and parents refused, saying they claimed as a matter of right that they might take their children from the schools on all days which they regard as holy days. The bill asked an injunction to restrain the respondents from

instituted in 1264, in honor of the Consecrated Host, and with a view to its adoration, by Urban IV., who appointed for its celebration the Thursday after the festival of the Trinity, and promised to all the penitent who took part in it indulgence for a period of from forty to one hundred days.

preventing the admission of the children to the schools.

The court below dismissed the bill, and the Supreme Court, Barrett, J., delivering the opinion, affirmed the decree dismissing the bill.

Judge Barrett places the decision upon the ground taken in the Iowa case previously quoted from—viz., That it is the right of the directors of the public schools to prescribe the hours of attendance of the pupils, to make a proper system of punishments, etc.

In so doing the public rights and convenience must govern, without regard to the wishes, convenience, or private preferences of parents or others.

This rule applies to the attendance of children on public or private religious worship on week-days during the prescribed hours of school. Such purpose is no excuse for the violation of a rule of school. The following is quoted from the opinion : " All are subjected alike to the law and its administration. The Methodist, who regards his camp-meeting as demanding as much of his conscience as the Episcopalian does his Christmas or Lent ; the Episcopalian, who regards the feast and fast days of his church as demanding as much of his conscience as the Catholic does his holy " Corpus Christi" ; the Congregationalist, and Presbyterian, and Baptist, and other sects, who care for none of these things, and whose prayer-meetings and protracted meetings demand as much of their consciences as in the case of those before

named, and the man of no preference and no religion—*all* and all their children are subjected alike to the school laws and to their administration.

"Let it be granted that parents and others may, upon their own respective reasons, control the attendance of the scholars, as against the official right of the committee in that behalf, and practically the ground of system and order and improvement has no existence. For the parents and guardians of the scholars may each on his own motion, and on his own notions, withhold their respective scholars from the schools. In this respect, so far as its effect on the schools is concerned, it makes no difference whether the occasion and motive involve conscience, will, whim, or the pocket." [1]

In Spear *v.* Cummings, Chief Justice Shaw says: "The law provides that every town shall choose a school committee, who shall have the general charge and superintendence of all the public schools in such towns," and that "this includes the power of determining what pupils shall be received and what pupils rejected. The committee may for good cause determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parents shall refuse to comply with regulations necessary to the discipline and good management of the school." [2]

[1] Ferriter *et al.* *v.* Tyler *et al.*, 48 Vt., 444. [2] 23 Pick., 224.

A rule barring the doors of school-houses against little children coming from great distances in the winter, for being a few minutes tardy, is unreasonable and unlawful, as being in its practical operation little less than wanton cruelty.[1]

5. Regulations as to the Use of the Bible, etc.

Perhaps no other question treated of in this volume has excited the interest, alarmed the understandings, or aroused the feelings of the people to such an extent as the question whether the Bible should be read in our public schools or excluded therefrom.

It must be borne in mind that the Constitution of the United States goes only to the length of ordaining that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.[2]

Mr. Story says of this article : "It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject. The situation, too, of the

[1] Thompson *v.* Beaver, 63 Ill., 353.

[2] Article 1, Amendments.

different States equally proclaimed the policy as well as the necessity of such an exclusion.

"In some of the States Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, Quakers; and in others, again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment.

"The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the infidel, may sit down at the common table of the national councils, without any inquisition into their faith or mode of worship." (Story on the Constitution, sec. 1879.)

No inhibition is laid upon the States, but by the compacts under which some of the newer States were admitted into the Union they were required to pro-

vide by an ordinance *irrevocable*, without the consent of the United States and the people of the State, that perfect toleration of religious sentiment shall be secured. Apart from these few exceptions, it is left entirely optional with the States to pass any law respecting religion not inconsistent with the constitution of the State by which such law is adopted. The State constitutions, however, contain the same principle, but differently expressed. No general rule can be laid down which shall apply with critical accuracy to each of the States. But it is safe to say, from an examination of the State constitutions, that they do not go to the length of ostracizing the Bible, and do not necessarily exclude the Bible from the public schools. A stranger to our institutions might reasonably infer, from much of the public discussion of the question, that our public schools are hotbeds of sectarian religion, in which the consciences of some of the children are continually suffering violence and persecution. Such a thing as sectarian teaching, or the teaching of any religion as religion, or of any irreligion, is in fact unknown to the public-school system.

It is the custom in many of the public schools to open the exercises of the day with reading a few verses of the Bible without note or comment. In some of the large cities this custom has been abandoned by the school boards. The whole sub-

ject is usually left to the discretion of the board of directors, as are other rules prescribing studies, etc.

Where the law leaves such a discretion with the board, as it generally does, the courts have refused to restrain, coerce, or interfere with such discretion. No court of last resort has ever held that a rule adopted by a public-school board, requiring that the Bible should be read in the schools under its charge, is unconstitutional. On the contrary, it has been held by the highest courts in several of the States that such a rule is entirely proper and not unconstitutional.[1]

It has been decided that a rule requiring every pupil to read a particular version of the Holy Bible, though it may be against the conscience of some to do so, violates neither the letter nor the spirit of the constitution of Maine.[2]

It was held in Massachusetts that a school committee of a town has the legal power to pass a rule requiring a school to be opened by reading from the Bible and prayer every morning, and that each child shall bow the head during such prayer, and that any pupil shall be excused from bowing the head whose parents request it; and where any pupil refuses to obey the rule, and his parents refuse to request that

[1] Cooley on Torts, 289.

[2] Donahoe *v.* Richards, 38 Me., 376.

he shall be excused, the committee may expel such pupil from the school.[1]

In 1870 arose the case of the Board of Education of Cincinnati *v.* Minor, involving the question of the right of the board to prohibit the reading of religious books, including the Holy Bible, in the public schools of Cincinnati. The Superior Court of that city granted a perpetual injunction restraining the board from carrying out its prohibition. The majority opinions were delivered by Judges Hagans and Storer, and Judge Taft delivered a dissenting opinion. The Board of Education appealed the cause to the Supreme Court of Ohio, and that court in 1872 held that the management of the public schools being under the exclusive control of directors, trustees, and boards of education, the judicial power will not direct what instruction shall be given, or what books shall be read therein.[2] This case created great interest, and the discussion in the Superior Court of Cincinnati and in the Supreme Court of Ohio is perhaps the most exhaustive discussion extant on the subject.

The Supreme Court of Illinois has recently decided a similar case. The suit was an action on the case brought by Edward McCormick against Cora Burt

[1] Spiller *v.* Woburn, 12 Allen (Mass.)., 127.

[2] Board of Education of Cincinnati *v.* Minor, 23 Ohio St., 211.

and the directors of the school she was teaching, to recover damages on account of his suspension by the directors from the benefits of the school, for the non-observance of a rule adopted by them for the government of the school.

The rule provided that the teacher might read as an opening exercise every morning, not occupying more than fifteen minutes, a chapter from the King James translation of the Bible. No one was required to be present at such exercise unless he chose to do so, and while such exercise was being conducted every pupil was required to lay aside his books and remain quiet.

The plaintiff refused to obey the rule, and for the non-observance of the rule, which he claimed was void as interfering with the religious convictions of himself and his father, he was suspended from "all the rights and privileges of said school until he should express a willingness to comply with the rule."

Section 48 of the Illinois school law makes it the duty of the directors "to adopt and enforce all necessary rules and regulations for the management and government of schools; . . . to direct what branches of study shall be taught, and what text-books and apparatus shall be used in the several schools." The court held that under this section the directors exercise judgment and discretion in the

expulsion or suspension of a pupil for refusal to obey proper rules and regulations, and that they are not liable in damages for the expulsion or suspension of a pupil, where they act in good faith, and not wantonly or maliciously.[1]

Thus the tendency of the ablest judicial decisions is to view favorably those statutes which intrust the control of the schools and the selection of text-books and studies to the local school boards to be regulated according to the wants of the community, and where there is no statutory or constitutional provision to the contrary, and the general management of the schools is intrusted to the various school boards, such boards would, under the authorities, have the right to prescribe, or to prohibit, the use of the Bible and the Lord's Prayer.

Speaking on the subject of religious liberty and equality, Mr. Cooley says: "But while thus careful to establish religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires and as seems meet in finite and dependent beings. Whatever may be the

[1] McCormick *v.* Burt, Supreme Court of Illinois, March 17th, 1880. Reported in Northwestern Reporter, Illinois Supplement, vol. i., No. 5, p. 340.

shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the universe, and of acknowledging with thanksgiving his boundless favors, at the same time that we bow in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures; or when religious teaching is encouraged by exempting houses of religious worship from taxation for the support of the State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of any one denomination or sect; but the power to do any of these things will not be unconstitutional simply because of being susceptible of abuse."[1]

In some of the States there are statutes concerning the use of the Bible in the public schools.

In Massachusetts it is provided that the committee shall require the reading of the Bible in the schools without note or comment.[2]

[1] Cooley's Constitutional Limitations, 470.

[2] Supplement General Statutes of Massachusetts, chap. lvii., sec. 1.

In New Jersey the statute makes lawful the reading of the Bible and the use of the Lord's Prayer in the public schools of that State.[1]

In Indiana,[2] Iowa,[3] Louisiana,[4] and Mississippi,[5] it is enacted that the Bible shall not be excluded from the public schools.

In Iowa and Louisiana it is added that no child shall be compelled to read it contrary to the wishes of his parent or guardian.

In conclusion it may be laid down:

(1.) That under the constitutions of the American States sectarian or denominational religious teaching in the public schools is not only improper but unlawful.

(2.) That where a school board is charged with the control and regulation of public schools and of the studies and text-books used therein, it is proper and lawful for such school board to prescribe the reading of the Bible, without note or comment, as an exercise in such schools.

[1] Rev. Statutes of New Jersey, p. 1081, sec. 65.

[2] Statutes of Indiana, Rev. of 1876, vol. i., chap. ccxxiv., sec. 167, p. 815.

[3] Code of 1873, sec. 1764.

[4] Voorhies' Rev. Statutes of Louisiana, sec. 1288, p. 338.

[5] Rev. Code of Mississippi, chap. xxxix., art. xiii., sec. 2048.

6. Regulations as to Studies.

A rule prescribed by a board of education, that a pupil failing to come prepared with a required exercise or with a reasonable excuse shall be suspended, is a reasonable rule, such as the board has authority to adopt.[1]

A requirement by a teacher of a district school, that the pupils studying grammar shall write English composition, is a reasonable rule, and refusal to comply therewith, in the absence of a request from the parents that he be excused therefrom, will justify expulsion of the pupil from school.[2]

No parent can insist that his child shall be placed or kept in particular classes, when by so doing others will be retarded in their studies, or that his child shall be taught studies not in the prescribed course of the school, or be allowed to use a text-book different from that in use in the school, or that he shall be allowed to adopt methods of study that interfere with other pupils in their studies.

If a study has no connection with the studies which a pupil wishes to pursue, it can make no difference to the other pupils, or those in charge, whether such pupil undertake that study or not, and

[1] Sewell *v.* Board of Education, 29 Ohio St., 89.

[2] Guernsey *v.* Pitkin, 32 Vt., 224; Sewell *v.* Board of Education, 29 Ohio St., 89.

if such a study is interdicted by the pupil's parent the child should be admitted to advanced standing, along with his class or grade, if he passes a satisfactory examination of the other studies in his class.[1]

There are several cases which seem to hold that a teacher cannot punish nor the directors or trustees expel a pupil for refusing to pursue any study not prescribed by law, and from which the parents or guardian request that the child be excused.[2]

But where the study from which the parent wishes the child to be excused is one in which the child must necessarily acquire some proficiency before it can pursue other studies in a course, it may well be said that none of the decisions above referred to negative the idea that the child might be denied entrance to such advanced class. While parents may have the right to say that their children shall not pursue particular studies not prescribed by law, yet the school must not be burdened and annoyed by irregular study, and proficiency in one study may be a requisite for admission to another of the same course.[3]

[1] Trustees of School, etc., *v.* The People *ex rel.* Van Allen, 87 Ill., 303.

[2] Ruleson *v.* Post, 79 Ill., 567; Morrow *v.* Wood, 35 Wis. 59.

[3] Ward *v.* Flood, 48 Cal., 36; Trustees of School *v.* The People *ex rel.* Van Allen, 87 Ill., 303.

Where such study is not connected with the studies to be pursued, and proficiency in it is not requisite in order to pursue other studies in the same course, then it seems the parents have a right to prohibit such study, and the child cannot lawfully be whipped, expelled, or refused advanced standing, solely because of his refusal to pursue such study.[1]

7. Regulations as to Conduct, etc.

The general school committee of a town has power to exclude therefrom a child of immoral or licentious character, though such character be not manifested by any acts in the school-room. This was held in a case in which there was no prescribed rule on the subject. Chief Justice Shaw says : " It seems to be admitted, if not it could hardly be questioned, that for misconduct in school, for disobedience to its reasonable regulations, a pupil may be excluded. Why so? There is no express provision in the law (as it then was) authorizing such exclusion ; it results by *necessary implication* from the provision of law requiring good discipline. It proves that *the right to attend is not absolute*, but one to be enjoyed by all on reasonable conditions." Again, " But the court are of opinion . . . that a power is vested in the general school committee, or the master with their ap-

[1] Trustees of Schools, etc., *v.* The People, etc., 87 Ill., 303 ; Ruleson *v.* Post, 79 Ill., 567 ; Morrow *v.* Wood, 35 Wis., 59.

probation and direction, to exclude a pupil . . . for good and sufficient cause." [1]

It is undoubtedly true that trustees or committees have the power, and it is their duty, to dismiss or exclude a pupil from their school when, in their judgment, it is necessary for the good order and proper government of the school so to do.[2]

They may do so to prevent a pupil from bringing contagion into a school.[3]

It has even been held that the teacher may, when necessary to maintain proper discipline in school, expel a pupil, and if the prudential committee insist upon the return of such scholar to school when his presence would be fatal to the maintenance of discipline, the teacher may lawfully quit the school and yet recover wages up to the time she quit.[4]

But the case in which this was decided was an aggravated one, and the decisions of other States do not warrant the teacher in going so far. It is better merely to suspend the pupil, and report the matter to the board for such further action as may seem fit.

The school authorities have a right to exclude from

[1] Sherman *v.* Charlestown, 8 Cushing, 160 ; Peck *v.* Smith, 41 Conn., 442.

[2] Stephenson *v.* Hall *et al.*, 14 Barb., 222.

[3] Spear *v.* Cummings, 23 Pick., 225.

[4] Scott *v.* School District No. 2 in Fairfax, 46 Vt., 452. And see The State *v.* Williams, 27 Vt., 755.

their grounds or buildings any one who enters therein to disturb the peace or interfere with the legitimate exercises of the school.[1]

Where a member of the district school committee was present at the opening of school for the day, and one of the larger boys of the school addressed him, in the presence of other pupils, in a profane and insulting manner, and such committeeman ordered the boy out of the room, and, on his refusing, put him out by force, using no more force than was necessary, the committeeman was justified in so doing.[2]

In most of the States there is a statute making it a criminal offence for any one wilfully to disturb or interrupt any school or religious meeting.

In case any one should *wilfully* disturb or interrupt the school, it would be proper for the teacher or any one cognizant of the facts to lodge a complaint against the offender before a justice of the peace.[3]

8. General Principle.

The general principle running through all of these decisions is that the directors or trustees, as the case may be, have the power and authority to pro-

[1] Hughes *v.* Goodell, 3 Pittsb. L. J. (Pa.), 264.

[2] Peck *v.* Smith, 41 Conn., 442.

[3] State *v.* Leighton, 35 Me., 195; Township of Soldier *v.* Barrett, 47 Iowa, 111.

mulgate and enforce such orders, rules, and regulations as are not subversive of the legal rights of the parents or children, or in conflict with humanity and the principles of Divine law, and which tend to advance the object of the law in establishing schools.[1] And that whatsoever has a direct and immediate tendency to injure the school in its important interests, or to subvert the authority of those in charge of it, is properly a subject for regulation and discipline, and this is so *wherever* the acts may be committed.[2]

There is, nevertheless, a limit to the powers of the school directors, and that limit is the needfulness or reasonableness of the rule.

A board of directors having made a rule that no pupil should, during the school term, attend a social party, the plaintiff, a pupil of the school, violated the rule, and was expelled from school for so doing, it was held that under the law the board had power to make needful rules for the government of pupils while at school, but no power to follow them home and govern their conduct while under the parental eye; and that in prescribing the rule it had gone beyond its powers.[3]

The Wisconsin court has thrown out a suggestion

[1] Burdick *v.* Babcock, 31 Iowa, 562.

[2] Lander *v.* Seaver, 32 Vt., 114.

[3] Dritt *v.* Snodgrass, 66 Mo., 286.

which teachers may profitably heed, and that is that the directors are the prime rule-makers for the schools under their control. It is always well for a teacher to suggest any matter of regulation to the board where there is sufficient time to do so, and they should bear in mind that while they may, when necessary, make rules in the absence of any established by the board, yet their power is in this respect limited, and the law comparatively unsettled.[1]

Whenever it is necessary for a teacher to act at once in order to maintain order and discipline, and to protect the schools from the misconduct of a pupil, the teacher is doing his duty and right by suspending such pupil, and he is justified in doing this without waiting for an order of the directors.[2]

Neither the teacher, with a legal certificate of qualifications and lawfully employed, nor the board of school directors or trustees, are liable in damages for tort by reason of having expelled a child from school, so long as they act in good faith. If they err in good faith in the discharge of their duties they are not liable.[3]

[1] State *v.* Burton, 45 Wis., 150 ; Morrow *v.* Wood, 35 Wis., 59.

[2] State *ex rel.*, etc., *v.* Burton, 45 Wis., 150.

[3] Donahoe *v.* Richards *et al.*, 38 Me., 376 ; Donahoe, etc., *v.* Richards *et al.*, 38 Me., 379 ; Sewell *v.* Board of Education, 29 Ohio St., 89 ; Spear *v.* Cummings, 23 Pick., 224 ; Boyd *v.* Blaisdell, 15 Ind., 73 ; Stephenson *v.* Hall, 14 Barb., 222. But

It has been said that to make either liable there must be malice, wilfulness, or an evil mind bent on mischief,[1] but this may be inferred from the acts.

Nor is the teacher who suspends or expels a pupil liable on an implied contract to teach. There is no implied contract between teacher and pupil in our public schools that the former shall teach the latter. The only contract of the teacher is with the board of directors employing him,[2] and he is accountable to the board alone for his acts as teacher, unless he is stirred by malicious motives, and thus renders himself amenable to the law.

The parent cannot limit the teacher's authority over the pupil, nor deprive him of it except by removing the child from the school.

where the child is entitled to go to the school, and the expulsion is wrongful, see *contra*, Roe *v.* Deming, 21 Ohio St., 666.

[1] Dritt *v.* Snodgrass, 66 Mo., 286; Commonwealth *v.* Seed, 5 Pa. L. J. R., 78.

[2] Stuckey *v.* Churchman, 2 Bradw. (Ill.), 584.

CHAPTER X.

CORPORAL PUNISHMENT.

THE teacher who contracts to manage a public school undertakes to do something more than merely to prescribe lessons and hear recitations. The teacher assumes to govern the school, to maintain quiet and order in and about the school-house during school hours, and to compel such conduct on the part of the pupils as shall most conduce to their own welfare and that of the school as a whole.

The authority to command this would be nugatory if the teacher were not armed with some coercive power. We accordingly find the law to be that a school-teacher stands *in loco parentis* in relation to the pupils committed to his charge, while they are under his care, so far as to enforce obedience to his commands, lawfully given in his capacity of school-master, and he may therefore enforce them by moderate correction.[1]

[1] Hawkins, P. C., chap. 60, sec. 23; 2 Wharton Am. Cr. Law, sec. 1259 and note thereto; Commonwealth *v.* Seed, 5 Pa. Law J. Rep., 78; The State *v.* Pendergrass, 2 Dev. and Bat. (Law), 365; Anderson *v.* The State, 3 Head (Tenn.), 455;

He undoubtedly has the right to chastise his pupils for any conduct which interferes with the order and discipline of the school.

If, however, the teacher administer more than a reasonable punishment, he becomes criminally liable, and the absence of actual ill-will, vindictive feeling and hatred, will not excuse him. Malice is essential, but it may be inferred from the circumstances. Every one is presumed to intend the natural and necessary consequences of their acts. Therefore the intent of the assault may be and should be determined from the excessiveness of the battery which immediately followed.

The teacher must exercise a reasonable discretion, and must be governed as to the manner and severity of the punishment by the nature of the offence, the age, size, and apparent powers of endurance of the pupil, and it is a question for the jury to say whether the punishment is excessive.[1]

State *ex rel.* Burpee *v.* Burton, 45 Wis., 150 : John Morris' case, I. City Hall Recorder, 52–55 ; Cooper *v.* McJunkin, 4 Ind., 290.

[1] Commonwealth *v.* Randall, 4 Gray (Mass.), 36 ; Cooper *v.* McJunkin, 4 Ind., 290 ; Gardner *v.* The State, 4 Ind., 632 ; Fitzgerald *v.* Northcote, 4 F. & F., 656, and note p. 663 ; Anderson *v.* The State, 3 Head (Tenn.), 455 ; Johnson *et ux. v.* The State, 2 Humph., 283 ; Commonwealth *v.* Blaker, 1 Brewster (Pa.), 311 ; John Morris' case, I. City Hall Recorder, 52–55 ; Lander *v.* Seaver. 32 Vt., 114 ; Hathaway *v.*

A schoolmaster is not relieved from liability for damages for the punishment of a pupil, which is manifestly immoderate and unnecessary, by the fact that he acted in good faith and without actual malevolence, honestly thinking that the punishment was proper and necessary both for the welfare of the pupil and the discipline of the school.[1]

There are some cases which hold, that in order to render a teacher liable criminally the circumstances must show strong reason to believe he was actuated by bad, malevolent motives, using his legal authority for the gratification of a mind bent on mischief.[2]

The weight of carefully considered decisions would perhaps require the law to be stated thus : Malice is necessary to make a teacher liable for the castigation of a pupil, but the malice may be presumed from the circumstances. If the punishment is inflicted with unreasonable and immoderate violence the teacher is liable, although no wicked, malicious intent existed. Where the teacher acts wantonly for the gratification

Rice, 19 Vt., 102 ; Redden *v.* Gates, Supreme Court of Iowa, October, 1879, reported in Northwestern Reporter, vol. ii. (N. S.), No. 11, p. 1079.

[1] Lander *v.* Seaver, 32 Vt., 114 ; Commonwealth *v.* Randall, 4 Gray (Mass.), 36 ; Anderson *v.* The State, 3 Head (Tenn.), 455.

[2] Commonwealth *v.* Seed, 5 Pa. L. J. Rep., 78 ; State *v.* Pendergrass, 2 Dev. & Bat. (Law), 365.

of wicked, malevolent motives, he is liable, no matter how moderate the punishment may be.

In a case in North Carolina, the defendant, a school-teacher, was indicted for an assault and battery. After using mild measures toward a little girl of six or seven years without success, the teacher whipped the child with a whip to such an extent as to leave marks which passed away in a short time. Two marks also were found to have existed, one on the arm and one on the neck, which appeared as if made with a larger instrument, which also disappeared in a few days. The inferior Court instructed the jury that "as the child was of tender years, if they believed the defendant had whipped her, with either a switch or other instrument, so as to produce the marks described to them, she was guilty." On appeal the Supreme Court held that this instruction was erroneous, and that, under the circumstances, the punishment was not in excess of the teacher's authority. The opinion of the Supreme Court was

[1] Commonwealth *v.* Seed, 5 Pa. L. J. Rep., 78; Lander *v.* Seaver, 32 Vt., 114; Commonwealth *v.* Randall, 4 Gray (Mass.), 36; Anderson *v.* The State, 3 Head (Tenn.), 455; Fitzgerald *v.* Northcote, 4 F. & F., 663 n.; Johnson *et ux.* *v.* The State, 2 Humph., 283; Commonwealth *v.* Blaker, 1 Brewster (Pa.), 311; Hathaway *v.* Rice, 19 Vt., 102; 2 Wharton Cr. Law, sec. 1259. And see Starr *v.* Litchfield, 40 Barb. (N.Y.), 543; State *v.* Williams, 27 Vt., 755.

delivered by Gaston, J., who said: "It is not easy to state, with precision, the power which the law grants to schoolmasters and teachers with respect to the correction of their pupils. It is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents is to train up and qualify their children for becoming useful and virtuous members of society. This duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction when he shall believe it to be just and necessary.

"The teacher is the substitute of the parent; he is charged in part with the performance of his duties, and in the exercise of these delegated powers is invested with his power. The law has not undertaken to prescribe punishments for particular offences, but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments, within the limits of this grant, to the discretion of the teacher.

"The line which separates moderate correction from immoderate punishment can only be ascertained by reference to general principles.

"The welfare of the child is the main purpose for which pain is permitted to be inflicted.

"Any punishment, therefore, which may seriously endanger life, limbs, or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare.

"We hold, therefore, that it may be laid down as a general rule, that teachers exceed the limits of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain only. When the correction administered is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely, we think, on the *quo animo* with which it was administered.

"Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and, like all others intrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose. The best and wisest of mortals

are weak and erring creatures, and, in the exercise of functions in which their judgment is to be the guide, cannot be rightfully required to engage for more than honesty of purpose and diligence of execution. His judgment must be presumed to be correct because he is the judge, and also because of the difficulty of proving the offence, or accumulation of offences, that called for correction; of showing the peculiar temperament, disposition, and habits of the individual corrected; and of exhibiting the various milder means that may have been ineffectually used before correction was resorted to.

"But the master may be punishable when he does not transcend the powers granted, if he grossly abuse them. If he use his authority as a cover for malice, and, under the pretext of administering correction, gratify his own passions, the mask of the judge shall be taken off, and he will stand amenable to justice as an individual not invested with judicial power."[1]

In an Iowa case it was held that "any punishment with a rod which leaves marks or welts on the person

[1] The State *v.* Pendergrass, 2 Dev. & Bat., 365. This case is one which perhaps states the extent of the teacher's authority as fully as any extant. The rule making the teacher's liability rest upon an actual wicked motive, although adhered to in the case of Commonwealth *v.* Seed, 5 Pa. Law J. Rep., 78, is too strong—the weight of authority warrants only the rule that malice is a necessary ingredient which may be expressly shown, or inferred from the circumstances.

of the pupil for two months afterward, or much less time, is immoderate and excessive, and the court would have been justified in so instructing the jury." [1] In the same case the following instruction was held not erroneous: "The legal objects and purposes of punishment in schools are like the objects and purposes of the State in punishing the citizen. They are threefold: First, the reformation and the highest good of the pupil; second, the enforcement and maintenance of correct discipline in school; and third, as an example to like evil-doers. And in no case can the punishment be justifiable unless it is inflicted for some definite offence or offences which the pupil has committed, and the pupil is given to understand he or she is being punished for. And if you find from the evidence that the punishment in this case was inflicted upon the prosecutrix without her knowing what she was being punished for, then the punishment was wrongful on the part of the defendant. Punishment inflicted when the reason of it is unknown to the punished, is subversive and not promotive of the true objects of punishment, and cannot be justified." In sustaining this instruction the Supreme Court says: "The object of all punishment must be to accomplish the purposes specified in the instruction.

[1] Per Seevers, J., in State of Iowa *v.* Mizner, 50 Iowa, 145.

"The definition is an admirable one, and cannot, we think, be improved.

"If the pupil does not know why the punishment was inflicted, reformation cannot be expected therefrom. Just the contrary result might be expected. Counsel mistake the meaning of the instruction. It does not require the teacher to state to the pupil in clear and distinct terms the offence for which he or she is being punished. It only requires that the pupil, as a reasonable being, should understand from what occurred for what the punishment is inflicted."[1]

The teacher must often act promptly to maintain order, without waiting for the views of the directors or trustees.

Where a pupil, in school hours, places himself in the desk of the instructor, and refuses to leave it at the request of the master, such pupil may lawfully be removed by the master; and for that purpose he may immediately use such force, and call to his assistance such aid from any other person, as may be necessary to accomplish the object, without the direction or knowledge of the superintending committee; and the case is the same if the person is not a pupil, but one having no right in the school.[2]

When the relation of schoolmaster and pupil, or any similar relation, is established in defence of a

[1] The State of Iowa *v.* Mizner, 50 Iowa, 145.

[2] Stevens *v.* Fassett, 27 Me., 266.

prosecution for assault and battery, the legal presumption is that the chastisement was proper, and this, to warrant a conviction, must be rebutted by showing that it was excessive or without cause.[1]

Where the relation of schoolmaster and pupil or parent and child exists, and the chastisement is not without cause, it is not the infliction of punishment which constitutes the offence, but the excess ;[2] and what shall be deemed excessive is not a question of law for the court, but is a question of fact to be determined by the jury.

In a criminal prosecution the offence must, of course, be proven beyond a reasonable doubt, and if there is any reasonable doubt that punishment administered by a teacher was excessive, the teacher should have the benefit of the doubt.

It has also been held in a civil suit against the teacher, that if there is any reasonable doubt that the punishment was excessive, the teacher should have the benefit of it.[3]

[1] Anderson *v.* The State, 3 Head (Tenn.), 455 ; The State *v.* Pendergrass, 2 Dev. & Bat. (Law), 365 ; Commonwealth *v.* Randall, 4 Gray (Mass.), 36.

[2] Commonwealth *v.* Randall, 4 Gray (Mass.), 36 ; Johnson *et ux.* *v.* The State, 2 Humph., 283 ; Anderson *v.* The State, 3 Head (Tenn.), 455 ; Lander *v.* Seaver, 32 Vt., 114 ; Hathaway *v.* Rice, 19 Vt., 102 ; Commonwealth *v.* Blaker, 1 Brewster, 311.

[3] Lander *v.* Seaver, 32 Vt., 114.

So far as the question of jurisdiction is concerned, while there is a dearth of judicial decisions as to the exact limits of the teacher's jurisdiction, yet the spirit of the decisions is that the authority of the schoolmaster extends over the person of the pupil from the time the pupil arrives on the school premises until it leaves, and over the school premises both in and out of school hours. And also that for conduct out of school hours and off the school premises, in violation of a rule of the school, and which conduct has a direct and immediate tendency to injure the school or its discipline, the authority attaches and the pupil may be punished therefor.[1] But whatever punishment is to be administered must be inflicted on the school premises.

Although a teacher has in general no right to chastise a pupil for misconduct committed out of school after the dismissal of school for the day, and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school or subvert the teacher's authority. This was held in a case in which the pupil, a boy eleven years old, an hour and a half after the school had closed for the day, and when he was at his home, and engaged in

[1] Lander *v.* Seaver, 32 Vt., 114; Hurd on Habeas Corpus, p. 50.

his father's service, used saucy and disrespectful language to the teacher in the presence of some of his fellow-pupils. For this the teacher whipped the boy next morning on his return to school.

The court, sitting in full bench, and upon argument and careful consideration, sustained the action of the teacher, and in doing so used the following language: "But where the offence has a direct tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with the design to insult him, we think he has a right to punish the scholar if he comes to school again."

There was no prescribed rule in that respect, and the court passed directly upon the teacher's right to maintain respect for his authority, even as against acts done out of school which are directed against his authority.[1]

If a person who has attained majority voluntarily attends school, creating the relation of teacher and pupil, he thereby waives any privilege of age, and subjects himself to like discipline with those who are within the school age. Such pupil may be punished

[1] Lander *v.* Seaver, 32 Vt, 114; Burdick *v.* Babcock, 31 Iowa, 562. But as to the limit, see Murphy *v.* Board of Directors, etc., 30 Iowa, 429; Dritt *v.* Snodgrass, 66 Mo., 286.

for refractory conduct, provided the punishment be reasonable under the circumstances.[1]

It has been held in Wisconsin that a teacher was not authorized to inflict corporal punishment upon a child for the purpose of compelling it to pursue a study which it was forbidden by its father to pursue. In this case, however, the teacher assumed the right to control the child's studies, and there was no rule of the school board requiring the pupil to pursue the study which his father had forbidden.[2] It is expressly stated in the opinion, that this decision is not intended to interfere with the duties of the school board in making and enforcing proper and reasonable rules.

If the rules of a school prescribe certain studies, and require attendance at particular hours, and the parents may not excuse therefrom, yet the teacher should not in such case resort to whipping the pupil for failure to pursue the studies or attend at the hours fixed by the rules. The remedy in such case is expulsion from the school.[3]

In New Jersey corporal punishment is forbidden by statute.[4]

[1] The State *v.* Mizner, 45 Iowa, 248; Stevens *v.* Fassett, 27 Me., 266, 287.

[2] Morrow *v.* Wood, 35 Wis., 59.

[3] The State of Iowa *v.* Mizner, 50 Iowa, 145.

[4] Rev. Statutes of New Jersey, p. 1087, sec. 98.

In England it has been held, that where a schoolmaster wrote to a parent and obtained the parent's consent to beat the pupil severely to subdue his alleged obstinacy, and the teacher beat the boy for two hours and a half secretly in the night, and with a thick stick, until the pupil died from the effects of the beating, such teacher was guilty of manslaughter only, no malice having been proved.[1]

[1] R. v. Hopley, 2 F. & F., 202.

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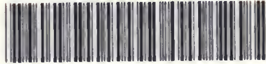
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