A STUDY OF LITIGATION INVOLVING THE INTERPERSONAL RELATIONSHIPS OF THE PROFESSIONAL PERSONNEL, PATRONS AND STUDENTS OF PRIVATE SCHOOLS

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This work is dedicated to my loving wife.

H.C.G.

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CHAPTER I

INTRODUCTION

In the United States, the largest agency of formal education is public in nature in that it is supported through taxation and is open to those who wish to avail themselves of its facilities. The second agency is private in nature in that it is supported primarily through tuition and private contributions and is open to those who meet the requirements and who usually are financially able to afford the experience.

Much has been written in the area of law as it pertains to the public schools and more is appearing each day in books, magazines, and newspapers in a form which the layman can understand. As public education has grown, its administrators, especially, have become aware of the benefits to be derived from a knowledge of the legal aspect of school operation; however, there is much information which still lies buried in the maze of legal literature. Likewise, private education is growing. However, aside from some work[1] concerned

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[1]Robert F. Will, "An Analysis of the Legal Responsibilities of State Departments of Education for Non-Public Schools," (Unpub. doctoral dissertation. University of Maryland, 1958).

with the constitutional and statutory status of private schools, little has been done which involves the legal ramifications of the interpersonal relationships of those concerned with private schools. This study is concerned with the problem: What are the interpersonal relationships of the professional personnel, patrons and students of the private schools which have come before the courts for litigation? The study is concerned primarily with private schools of the elementary and secondary types, but examples from schools of higher education are included. The emphasis is on non-charitable type schools; however, where this distinction does not "color the law" examples from such charitable institutions of higher learning are used.

Need of the Study

The well known phrase, "Ignorance of the law is no excuse," is as important in the operation of private schools as it is in any other business or private activity. Not only is efficient operation dependent upon knowing what is unlawful but also upon what is lawful. To serve to the fullest extent of their capacities, it would seem necessary that all concerned with the activity of private schools not only be academically prepared to teach and guide but also prepared and secure in the knowledge that they are doing everything legally possible to maintain the best possible educational organization.

Private law, as well as public law, applies to private schools. The halo effect from the concept that the "king can do no wrong," which hangs over public schools is noticeably less apparent when the courts deal with private schools. Private schools are looked upon as corporations and thus come under private corporate law or are simply viewed as businesses for monetary gain and are so considered by the courts. It is this very fact that makes an awareness of the law important to those concerned with private schools. The private schools and their personnel may be sued in the civil and criminal courts. Those who are employed by the organization or administer it become liable for any crime, tort, or act of neglect or malfeance. The leniency of the courts toward public school corporations is not as often found here. For those, then, who should naturally be concerned with their responsibility and legal recourse, a source of such information becomes important. This information does exist; however, it is in such a form that until recently, only lawyers were equipped to ferret it out. The information presented in this work is not meant to eliminate the services of members of the legal profession nor will it.

Purpose

In any society or group of people there are rules and regulations which guide the activities of the members. Few

rules or regulations have ever been so clearly written or understood that no disputes or misunderstandings have arisen concerning them. These disputes and others not necessarily involved with violations and misunderstandings of specific rules and regulations are often settled in the courts. Legal sanctions or principles grow out of such court decisions which can serve as valuable guides in future interpersonal relations. With the knowledge that there has been litigation in the past involving private schools and that most likely there will be litigation in the future, it is the purpose of this study to discuss those interpersonal relations which have resulted in litigation. Such a discussion, it is hoped, will reveal the legal sanctions and principles which have grown out of the litigation so that those involved in private school work may avoid or at least be aware of those situations which often lead to expensive and disasterous litigation.

Research Procedure

There are several possible starting places when one sets out to search the law. For the purpose of the present study, the broad topic method has been chosen. In doing so, the outlines which appear in the different digest and encyclopedical systems have been of assistance.

The legal principles evolving from case law are divided, classified or keyed in three major types of works--the encyclopedical type, the digest type and the annotated

report type. Three compilations of an encyclopedical nature--American Jurisprudence, Corpus Juris and Corpus Juris Secundum were used. The nine series of the American Digest System were used as well as the Supreme Court Digest and the Federal Digest. American Law Reports was used for annotations.

The above could only be used to determine broad topics and principles which are dealt with in case law. It is true, that through a reading of these distillations, one is able to obtain the beginnings of an understanding of at least what principles and disagreements come before the courts; however, in such a work as this dissertation, it was impossible to stop there. It was necessary to search the original sources. This was done by referring to the court opinions and decisions which are noted in the encyclopediae and the digest systems. The National Reporter System contains the opinions and decisions of courts of record. There are nine regional reporters: The Atlantic Reporter, The Northeastern Reporter, The Southeastern Reporter, The Southern Reporter, The Southwestern Reporter, The Pacific Reporter, and The Northwestern Reporter. The Supreme Court Reporter and The Federal Reporter are also part of this system. The New York Supplement is a part of this system which contains only New York cases.

After the broad topics which were to be selected for inclusion in this work were designated, the digest systems were studied for material relating to the topic being worked

upon. From the digest outline, sub-topics and headings were noted along with cases cited. From here, there was no direct route. The procedure involved reference and cross-reference in the digest system itself, annotated reports, the National Reporter System and Shepard's Citations. Shepard's Citations was used to trace the history of the precedent of a case. From this volume it was possible to determine if later cases have disapproved, modified or reversed the decisions of the case at hand. Also, anytime a principle from one case is cited in another, this appears under the citation of the original case in Shepard's Citations.

It was not possible to read all of the cases involving a principle of law. However, it was necessary to read those cases cited in the encyclopedical works from which the broad principles had been distilled and also certain of the cases which were cited in the digest system in order to understand the more specific principles and exceptions.

All of the broad topics were considered in an initial study of the material. This was done in order that the complete outline of the dissertation could be kept in mind. Then, as each topic was considered separately, any material which was uncovered that referred to another topic was noted for further study under that topic.

Clarification of Terms

"Agent" refers to an individual acting for another at the other's direction.

"Cross-suit" is a case of litigation instigated by the defendant against the plaintiff which is tried simultaneously with the plaintiff's case.

"Gratuitous licensee" is one abroad on the property of another who may or may not benefit from the presence of the licensee.

"Invitee" refers to one who is abroad on the property of another at the request of the other, and they stand in the relationship of guest to host.

"Nominal damages" are awards or judgments of a token amount.

"Parol evidence" is oral testimony admitted into evidence to explain or prove the existence of a contract.

"Private Law" is for the benefit of the individual and is composed of the law of contract, agency, property, ownership and sale of real property, proprietorship, and the law of pleading and procedure.

"Public law" includes constitutional, administrative and criminal law and is concerned with the state in its political or sovereign function.

"Servant" for the purposes of this work means the same as agent.

"Statute of Fraud" has nothing to do with fraud, per se, but is a statute which requires a certain kind of evidence for certain classes of contracts.

"Tort" is a wrong against a person or property which violates or interferes with a right vested in the person or property.

"Ultra vires" is a descriptive term which means beyond the scope of authority.

CHAPTER II

CONTRACTS - DEFINITION AND EXPLANATION

A contract is a form of agreement which contemplates and creates an obligation. There are many contracts which a private school may enter such as those with builders and vendors, but this section will be concerned only with tuition contracts and teachers' contracts of employment.

Before approaching the specific contracts of tuition and teacher employment, it is necessary that a foundation of the idea of contract in its broader sense be laid. The author does not attempt to penetrate deeply the subject of contracts, for that is not necessary, nor is it the major purpose of this work. It is necessary, however, to formulate general definitions, present the essential elements of a contract, identify parties, and discuss the various kinds of contracts as they relate to tuition or teacher employment. As the subject is unfolded, more specific explanations will be given where needed.

Contract Defined: The opening sentence of this chapter is a definition of a contract, but it certainly lacks the specificity one would desire if it were to be used as a criterion to determine if, in fact, a contract existed between two parties. Black is slightly more specific when he says

a contract is "An agreement upon sufficient consideration to do or not to do a particular thing."[2] He refers here to a simple contract. Sir William Anson, in his Principles of the English Law of Contracts, defines a contract as an "Agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."[3] These definitions coupled with a study of the basic elements of a contract should give a better understanding of what a contract really is.

The concensus is that there are at least four basic elements in every contract; however, the elements are stated differently in many sources. Simply stated, they are as follows: (1) The parties involved have legal capacity; (2) The mutual agreement is intended to result in legal liability; (3) There is a giving and receiving of an adequate consideration; and (4) The agreement is in harmony with law and public policy.[4] Edwards, as well as other authors, adds a fifth element which declares that the contract must be specific in rights and liabilities to the extent that they are

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[2]Henry C. Black, Black's Law Dictionary (St. Paul, 1951), p. 394.

[3]Alfred W. Bays, Cases and Materials on Business Law (Chicago, 1951), p. 78.

[4]Ibid., p. 88.

enforceable.[5] This additional element undoubtedly has reference to what is known as ambiguous or uncertain language which has been used and if no party is aware or has reason to believe that the language will be differently understood by the other, no contract will result. However, "If either party is aware of the ambiguity and knows, or has reason to know, the meaning which will be adopted by the other party, a contract is formed, and he is bound by that meaning. In other words, a party using language is bound by the sense in which he reasonably should have apprehended it would be understood by the other party."[6] It is here that parol evidence is admitted to explain the terms of a contract and to determine if the parties were truly in mutual agreement. Therefore, the existence of the contract hinges rather on mutual agreement and understanding of the sense of the subject matter ultimately and not necessarily on any seeming vagueness on the face of the contract.

Mention has been made in the preceding statement of the parties to a contract. As Anson stipulated in the above quotation (footnote 3), two or more parties must enter into the agreement. This implies that there must be two or more legally competent parties. A legally competent party is, in most instances, an adult (in terms of the individual state statutes) of such mental capacity and is of such

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[5]Newton Edwards, The Courts and the Public Schools (Chicago, 1955), p. 200.

[6]Bays, p. 161.

physical capacity that the terms are understood and one not otherwise deprived by law of entering into a contract. The requirement of adult status may be misleading. Contracts with legal minors are voidable at the option of the minor except in the case of an implied or express contract for necessaries which is binding upon the minor. These contracts are binding, however, on the other party should he be an adult.

Kinds of Contracts: It is possible to classify contracts from several standpoints; however, here it is most important to consider only two classifications. One from the standpoint of form and expression and the other from the standpoint of validity are of importance. Actually, the latter often depends upon the former. In regard to form and expressions, there are three types of contracts--express, implied and constructive. The distinction between these types was set forth in Hertzog v. Hertzog.

'Express contracts are, where the terms of the agreement are openly uttered and avowed at the time of making; as to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay as much as his labour deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value.'

This is the language of Blackstone, 2 Comm. 443, and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and

accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed from circumstances as really existing, and then the contract, thus ascertained, is called an implied one.

/Constructive contracts are distinguished from implied contracts in that/ in one case /constructive/ the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other /implied/ it is a fact legitimately inferred. In one /constructive/ the intention is disregarded; in the other /implied/ it is ascertained and enforced. In one /constructive/, the duty defines the contract; in the other /implied/, the contract defined the duty.

We have, therefore, in law three classes of relations called contracts.

1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts, already sufficiently distinguished.

The court continues to amplify the concept of an implied contract by saying

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their service in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, as kindness in the other; and therefore, by common custom, compensation is mutually counted on in the one case, and in the other not.

A party who relies upon a contract must prove its existence; and this he does not do by merely proving a set of circumstances that can be accounted for by another relation

appearing to exist between the parties.

> Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not.[7]

From the standpoint of validity, contracts may be classified into three types also--binding, voidable and void. Binding contracts are such that include all of the basic elements and are enforceable against each of the parties by the other. The voidable contract has been discussed above in respect to minors. Most voidable contracts have some defect in form or subject matter; however, a voidable contract binds each party until the legally offended party successfully avoids the contract by litigation. Sometimes, as in the case of a contract between a minor and an adult for other than necessaries, only one party, the minor in this case, has the privilege of avoiding the contract. In other cases, the step to avoid may be taken by either party. A voidable contract may become, in fact, a binding contract by ratification which may involve overt behavior indicating acceptance of the terms of the contract after notice of defect, or may simply be a failure to act promptly to recind the contract after discovery of some defect which renders it voidable. Should a failure to act become evident, the court will

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[7] Hertzog v. Hertzog, 29 Pa. St. 465 (1857).

infer an acquiescence to the terms of the contract and declare it ratified. This is especially true if the second party has acted upon this failure to act of the first party.

A void contract is, to be sure, no contract at all. It is so lacking in form and subject matter that it is unenforceable. All contracts against law and public policy are void.[8]

The next two chapters deal specifically with contractual relationships. Chapter III is concerned with employment contracts and Chapter IV is concerned with tuition contracts. Chapter V is a discussion of school rules and regulations, and that chapter should also be considered in the light of contract principles since school rules and regulations, expressly or impliedly, become parts of some employment contracts and most tuition contracts.

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[8]Bays, p. 216.

CHAPTER III

EMPLOYMENT CONTRACTS

There are many texts and treatises which deal with the rules and principles of employment contracts.[9] In general, it is found that contracts of employment in private schools are governed by the same rules and principles as other employment contracts.[10] In this chapter, some of these will be presented as background and introduction; however, major emphasis will be placed on those which are illustrated in litigation connected directly with private schools.

A contract consists basically of an offer and an acceptance which may be accomplished verbally as well as in written form. Any contract may be oral provided there is no statute stipulating otherwise. (At least sixteen states stipulate specifically by statute that contracts of employment for public school teachers must be written). However, no state declares that teachers in private institutions of learning must enter into written contracts. Although this

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[9]For example see: Samuel Williston and George Thompson, Selections from Williston's Treatise on the Law of Contracts (New York, 1938); Restatement of the Law of Contracts (St. Paul, 1932); Arthur Corbin, Corbin on Contracts (St. Paul, 1950).

[10]McLaughlin v. Hall, 61 P. 2d 1219 (1936).

is true, most of the states in the Union have adopted provisions involving a Statute of Fraud which by their terms cover, in many instances, employment contracts in private schools. Where operative, the Statute of Fraud provides that any contract which is not to be performed within one year of its making must be in writing to be enforceable. It is true that teaching contracts are often nine or ten month contracts; however, even such a contract falls under the Statute where the performance thereof shall not be completed within one year. For example, assume that the school year runs from September 10th until June 27th. If a teacher enters into an oral contract for the next school year beginning on September 10th, anytime before June 27th the contract is not enforceable under the Statute because it cannot be performed within a year of its making.

The statement above, that the contract is not enforceable, actually has reference to the recovery of the agreed compensation for the period of the contract should it be breached. It is not possible to exact the specific performance of an employment contract for such a contract involves personal service. A decree for specific performance would be in the order of involuntary servitude which is illegal. Rather, in the event of a breached enforceable contract, the remedy is found in a suit in contract for compensatory damages.

For the injury caused by the non-performance of most contracts the primary if not the only remedy of the injured party is an action for damages for the breach.

In fixing the amount of these damages, the general purpose of the law is, and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract. In some cases, this rule of law enables the court to fix with mathematical exactness the amount of a plaintiff's recovery...; but frequently the jury must estimate under proper instructions from the court the amount which the plaintiff should receive.

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Compensation involves not only assessment of gains prevented by the breach but also of losses ensuing which would not have occurred had the contract been performed. From these must be deducted any saving to the plaintiff due to the nonperformance of the contract. The result will give the net loss to the injured party.

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...it is necessarily true that at the time of the breach of contract the time for performing the contract had arrived. It is, therefore, performance that the injured party was then entitled to, and it is not the contract of which he has been wrongly deprived by the breach, but the performance of the contract. The law in giving him a right of action for damages, therefore, should adjust the damages in such a way as to equal the value of the performance...[11]

In the case of a breached unenforceable contract (except void or voidable), the remedy is found in a suit in equity for nominal damages if no injury has been incurred or for compensatory damages if there exists partial performance for which the plaintiff has not been paid. The principle here is that no man may benefit from the labors of another without compensating him. Of course this does not mean that there may not be gratuitous labor. (Also, this principle is abrogated when public funds are involved and the contract is

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[11]Williston and Thompson, pp. 832-834.

ultra vires in nature).

It is usually said that the plaintiff is under a duty to mitigate damages; but the truth seems rather to be that damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, or humiliation are either not caused by the defendant's wrong or need not have been, and, therefore, are not to be charged against him.[12]

* * *

Cases, where humiliation of the plaintiff would follow a possible mitigation of damages, arise almost exclusively in regard to contracts of employment, either where possible mitigation involves further dealings with the wrongdoer, or where the nature of the possible substitute for the agreed employment is unreasonably inferior.[13]

As the above quotations from Williston and Thompson indicate, where an employment contract is breached by the employer, it is incumbent upon the employee to mitigate the damages by seeking compensation somewhere else. However, a teacher or principal is not expected to accept employment outside his field. Further, it is possible to incur damages beyond those resulting from the breached contract in attempting to mitigate. For instance, if one loses money on the sale of a house and incurs great expense in moving to a new job, these are loses due to attempted mitigation and are figured in the determination of net damages; however, except in unusual cases, the net damages may not exceed the wages or salary promised under the contract.

Cases from Litigation Involving Private Schools: Only one

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[12]Ibid., p. 847.

[13]Ibid., pp. 848-849.

case was found wherein the private school sued an employee for a breach of contract. Although this is as possible as the reverse situation, it does not often happen. Since the school cannot obtain a judgment for specific performance, it must seek damages. Damages would have to be figured on what the school lost as the result of the employee's breach less what the school saved by not having to pay the employee. Damages might also be figured on the difference between what the school was paying the defaulting employee and the expense of obtaining and paying a replacement should the replacement receive higher wages. Net damages, except in some extraordinary case, would probably not be of sufficient worth to entail litigation.

The following (except for one[14]) are cases initiated by employees against private schools.

-----In Prudeaux v. Douglas, the teacher plaintiff alleged that in his oral agreement he was to receive $300.00 a month; however, the owner defendant contended that the agreement was for $100.00 a month. The court said:

> Where a teacher's claim against the owner of a trade school for an amount above $500.00 as the balance of salary under an alleged oral agreement to pay $300.00 per month was not corroborated by at least one credible witness and other circumstances tending to show the stipulation in the contract for that salary, recovery was barred.[15]

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[14]Boston Conservatory of Music v. Dulfer, 152 N.E. 230 (1926).

[15]Prudeaux v. Douglas, 54 So. 2d 360 (1951).

This case illustrates an added danger or difficulty with oral contracts. The plaintiff must not only prove the existence of a contract but has the added burden or proving the terms. A credible witness to the contract is the simplest solution, but in this case there was none. Without a witness, the court had to weigh the testimony of the two adversaries. The defendant was able to show that his usual practice in hiring did not reflect the claims of the plaintiff and the court held that the,

> ...evidence was insufficient to sustain a judgment for the amount computed on the basis of a salary of $300.00 per month.

-----In the instance of a written contract for a year or any specified period of time, the continuance of the relationship after that time implies a renewal of the terms of the contract.[16] This point of law was discussed in McLaughlin v. Hall and the court said:

> Where the headmaster of a private school, who was employed for one year under a written contract, resumed his duties at the beginning of the succeeding school term and was discharged after one month, the presumption to be applied is that the headmaster was employed for the second year at the rate of compensation received during the first year, regardless of when the first year's employment ended.[17]

-----It has been said that the plaintiff must be able to prove the existence of a contract. In Pelotte v. Simmons, the school in question was run by an association of churches

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[16]Dickey v. Putnam Free School, 84 N.E. 140 (1908).

[17]McLaughlin v. Hall, 61 P. 2d 1219 (1936).

through a board of trustees. The trustees entered an employment contract for the principalship with the plaintiff; however, such contracts had to be approved by the executive board of the association. This approval did not occur. The plaintiff sued the trustees individually on the contract. The court struck down the plea of contract because the contract had not been approved and went on to say,

> Where the trustees of a school acted as such in employing a teacher, and the teacher knew that they were trustees, they were liable only in their representative capacity, and not in their personal capacity, for a breach of contract of employment.[18]

also, the court stated that,

> The defendants, though exceeding their authority, were held not liable for the principal's salary under the contract made as school trustees.[19]

When the plaintiff brought his suit against the trustees as individuals, he erred because he neglected to allege and prove a lack of good faith or fraud on the trustees' part.

-----The case of Behnke v. Turn Verein Einigkeit, illustrates the rule of law that the customs of a locality and occupation become part of a contract. As is so often the situation, the plaintiff Behnke, was hired by contract for a year to teach physical education; however, July and August were vacation months for the school and Behnke, as was the custom, was himself free. Sometime during his contract year, his

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[18] Pelotte v. Simmons, 152 S.E. 310 (1930).

[19] Ibid.

tendered resignation as of September 1, was accepted. The school refused to give him his wages due for July and August because he had taken a summer job. The court said in its decision that,

> Where a teacher was employed from year to year at a fixed salary per month under a contract whereby by custom July and August were vacation months during which he might use his time as he saw fit, and his employer accepted his resignation tendered to take effect September 1, he is entitled to his salary for July and August, when he performed all the services required from the time of the tender to September 1, though he was employed by a third person during July and August.[20]

-----In Boston Conservatory of Music v. Dulfer, the contract between the school and Dulfer, a music teacher, provided that if Dulfer should sever relations with the school that he would pay one-half of any fee paid to him by students he should directly or indirectly obtain for instruction as a result of his association with the Boston Conservatory of Music. Dulfer also implied in his agreement to abide by the school's rules and regulations. There was a rule against faculty smoking in class or practice rooms, and Dulfer was warned several times to stop smoking in these places. He did not, and as a result he was fired. Although he did not obey the rules, he did not breach the contract, per se. The court in its decision said:

> ...a provision in a contract that if the teacher should sever his connection with the school he should share with it any fees he might subsequently receive from pupils ob-

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[20] Behnke v. Turn Verein Einigkeit, 180 Ill. App 319 (1913).

tained through the school is held to have no application where the employment is discontinued in the manner provided for by the contract.[21]

This case turned on a technicality as to who really breached the contract. The court upheld the jury which decided that since there was no contract after the breach, the plaintiff could not be held to its provisions.

-----In Dickey v. Putnam Free School,[22] a private school and a public school shared the same building. As it happened, there was one principal over both schools. The public school paid $1,600.00 of the principal's salary and the private school paid $400.00. When the principal's contract was renewed by the public school, the trustees of the private school neither approved nor disapproved the renewal. The principal continued in his position unaware of the lack of approval on the part of the private school. The court held for the principal in his suit for the additional $400.00, since the private school had allowed the principal to continue without his knowing of any change, it had ratified the original contract and was in fact liable to the principal for its share of his salary.

-----The decision in Condell v. The New School for Social Research was based in part on the reasoning behind the shop right rule.

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[21]Boston Conservatory of Music v. Dulfer, 152 N.E. 230 (1926).

[22]Dickey v. Putnam Free School, 84 N.E. 140 (1908).

/The/ shop right,...shortly stated, is that where a servant, during his hours of employment, working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a nonexclusive right to practice the invention...This is an application of equitable principles. Since the servant uses his master's time, facilities and materials to attain a concrete result, the latter is in equity entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business.[23]

However, whereas in the case of patented inventions the title remains with the inventor (except where the contract stipulates otherwise), in this case the court said:

Theatrical scenery, designed by an instructor in a private school maintaining a studio theater and executed by him and students in the course of his employment, became the school's property, and he was not entitled to recover damages because of the school's agreement with a third party to use the scenery.[24]

-----In Bechtel v. Combs Broad Street Conservatory of Music, the court said:

The fact that part of the agreed compensation of a teacher for his services consists in instruction from another member of the faculty does not place such a teacher in the position of a pupil and render him liable to be discharged for failure to comply with his instructor's directions.[25]

Here the plaintiff's minor daughter became a member of the faculty of the conservatory and part of her compensation con-

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[23]Bays, pp. 465-466.

[24]Condell v. The New School for Social Research, 48 N.Y.S. 2d 733 (1944).

[25]Bechtel v. Combs Broad Street Conservatory of Music, 71 Pa. Super. Ct. 426 (1919).

sisted of one music lesson a week. Her instructor for this lesson directed her to play at the commencement exercises. This she refused to do and because of her refusal, was dismissed. The court decided that,

> ...the refusal of the daughter to play in a commencement concert was not a failure to comply with the terms of the contract, and the employer is liable for the damages sustained by reason of the daughter's discharge.[26]

-----In the case of Mackey v. United Civil Service Training Bureaus, the plaintiff, Mackey, was an agent of the school who solicited students for the school. Under his contract, Mackey was to receive a share of the fees of the students he acquired for the school. Mackey sought his commission as of the making of the contracts with the parents. However, the court said that the,

> Evidence is held to establish that the contract to solicit students for the school entitled the agent to his commissions as they were received from the students, and not to a full balance of the commissions on the basis that the student's contracts had been financed.[27]

Of course, if the contract had so stipulated, the school could have been liable for the commission at the time of the contract; however, this point was not clear in the contract, and the court reasoned that the commission was predicated on the fulfillment of the tuition contracts and not on the mere making of the contracts.

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[26] Ibid.

[27] Mackey v. United Civil Service Training Bureaus, 61 P. 2d 1311 (1936).

Summary

Employment contracts may be either written or oral (except where state statutes require a written form). It is often the case, however, that an oral contract may fall under the provision of the Statute of Fraud which requires that contracts not to be performed within one year must be in writing. If an oral contract is of this nature, it is not enforceable in its entirety subsequent to a breach. Should an unenforceable contract be breached, the injured party may look to the court of equity for remedy at least to the extent of performance. Oral contracts should always be witnessed by at least one credible witness.

Where an employer breaches a contract, it is incumbent upon the employee that he attempt to mitigate his injury from the breach. He should do this by seeking employment of a similar nature. He need not, however, incur great expense, inconvenience or bring humiliation upon himself as he attempts to mitigate his injury.

CHAPTER IV

TUITION CONTRACTS

Tuition contracts (even those including board, clothing and other charges) have been held, generally, to be entire contracts[28] in that the entire contract price, whether to be paid in installments[29] or not, may be recovered by the school should the other party breach the contract. Where a contract is for a definite payment and

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[28] Asheville School for Training in Christian Leadership v. Kirk, 269 Ill. App. 365 (1935); Bergman v. Bouligny, 82 A. 2d 760 (1951); Bingham v. Richardson, 60 N.C. 215 (1863); Bouligny v. Kirk 79 D. & C. 332 (1956); Bredt v. Perkiomen School, 47 D. & C. 691 (1943); Dunbar v. Peekskill Military Academy, 93 N.Y.S. 2d 642 (1949); Fessman v. Seeley, 30 S.W. 268 (1895); Fisher v. Hicks, 277 S.W. 799 (1926); Hall v. Mount Ida School for Girls, 155 N.E. 418 (1927); Ham v. Miss C. E. Mason's School, The Castle, 61 S.W. 2d 7 (1933); Hartridge School v. Riordan, 112 N.Y.S. 1089 (1908); Hitchcock Military Academy v. Myers, 245 P. 219 (1926); Hoadley v. Allen, 291 P. 601 (1930); Kabus v. Seftner, 69 N.Y.S. 983 (1901); Northwestern Military and Naval Academy v. Wadleigh, 267 Ill. App. 1 (1933); Peirce v. Peacock Military College, 220 S.W. 191 (1920); Rogers v. Councill, 266 S.W. 207 (1924); Stewart v. Loring, 81 Am. D. 747 (1862); Swavely v. Eno, 54 Pa. Super. Ct. 82 (1913); Tabor Academy v. Schwartz, 30 A. 2d 22 (1943); Teeter v. Horner Military School, 81 S.E. 767 (1914); Van Brink v. Lehman, 192 N.Y.S. 342 (1922); Vidor v. Peacock, 145 S.W. 672 (1912); Wentworth Military Academy v. Marshall, 283 S.W. 2d 868 (1955); William v. Stein, 166 N.Y.S. 836 (1917).

[29] Van Brink v. Lehman, 192 N.Y.S. 342 (1922).

schooling for a specific period, a student attended only part of the period or even not at all[30] is immaterial. This is true even though the contract does not mention a deduction or refund,[31] but it is particularly true where the parties have stipulated for a deduction or refund only in the event of some particular occurrence, such as illness of a specified length, and that has not happened.[32]

The following cases illustrate the principles set out in the preceding paragraph.

-----Where a parent had contracted for a full year of schooling for his two sons and the sons were withdrawn from school after the first semester, the court said the,

> ...military academy is held entitled to recover the tuition for the full year as stipulated in the application for admission signed by the parent, though the children were voluntarily withdrawn when the year was half over.[33]

-----Where a student in a military academy voluntarily quit during Christmas vacation, his parents were liable to the school for the balance due for the full school term, under terms of the catalogue, which formed part of the contract between the school and the parents, providing that any unpaid balance shall become immediately due and payable

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[30] Bingham v. Richardson, 60 N.C. 215 (1863).

[31] Peirce v. Peacock Military College, 220, S.W. 191 (1920).

[32] Hitchcock Military Academy v. Myers, 245 P. 219 (1926).

[33] Ibid.

if the student voluntarily withdraws during the term.[34]

-----Where a contract between parents and a school was entire and indivisible, providing that pupils entered for the entire school year, the owner of the school, having fully performed, or offered to perform, was entitled to recover the full amount due under the contract though the defendant's girl left before the end of the first term of the year.[35]

-----The full sum agreed to be paid as tuition for a student for a session is ordinarily recoverable upon withdrawal of the student, even though the contract does not especially provide that there can be no deduction, for, ordinarily, it would not cause the school any additional expense to perform.[36]

The preceding case points out the legal reasoning which allows a school to recover on a breached, entire contract which it is no longer required to perform. The school has provided a place for the student, hired teachers, and in general committed its facilities, and the withdrawal of one student does not appreciably decrease its expenses.[37] Further, unless there is a stipulation as to some proportionate return, as in the case of board, it is very difficult to equitably pro-rate for value received. To further support this idea, it is found in Bouligny v. Kirk that a,

Proprietor of a school may recover the entire charge of board and tuition for the term if an application for a reservation is made and accepted, a room reserved for the student, and notice of cancellation is first given by the parent of the student to the school shortly before the school term begins; it is not necessary to allege that other applications

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[34]Wentworth Military Academy v. Marshall, 283 S.W. 2d 868 (1955).

[35]William v. Stein, 166 N.Y.S. 836 (1917).

[36]Peirce v. Peacock Military College, 220 S.W. 191 (1920).

[37]This principle is also expressed in Hitchcock Military Academy v. Myers, 245 P. 219 (1926).

had been rejected for want of room.[38]

The reasoning behind the courts' decisions in the preceding cases is understandable in the case of the voluntary withdrawal of a student. However, the same general principles hold if the school should see fit to suspend or expel the student. It is settled law, that the school's rules and regulations, usually expressed in the school catalogue and other terms found in the catalogue, become part of the contract.[39] Should the application, registration form, or contract instrument state that the provisions of the catalogue constitute part of the contract or that the parents have read and agreed to the provisions of the catalogue, such is the case; for,

> Where a written application for enrollment of a minor son at a boarding-school, signed by the father, stated that he had examined the school catalogue and entered his son for the next school year subject to the terms outlined therein, the father could not avoid liability under the terms of the agreement as set-out in the application and catalogue on the ground that he had not read the contents thereof, in the absence of allegation and proof that the execution of the application without knowledge of the contents was induced by misrepresentation, fraud or breach of fiduciary relationship.[40]

However, the provisions of a catalogue also become part of the contract by implication. In Teeter v. Horner Military

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[38]Bouligny v. Kirk, 79 D.&C. 332 (1956).

[39]Culver Military Academy v. Staley, 250 Ill. App. 531 (1929); Head v. Theis, 150 A. 191 (1930); Heath v. Georgia Military Academy, 97 S.E. 2d 601 (1957); Northwestern Military and Naval Academy v. Wadleigh, 267 Ill. App. 1 (1933).

[40]Heath v. Georgia Military Academy, 97 S.E. 2d 601 (1957).

School, the court indicated very clearly that that there is,

> ...the principle of an implied promise, at least, that the pupil who has entered the school will comply with its reasonable rules and regulations, and that in a proper case he may be dismissed for failing to do so,[41]

and in Goldstein v. N. Y. U., the court said:

> ...but obviously, and of necessity, there is implied in such a contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued as a member thereof. The power of suspension or expulsion is an attribute of the government of educational institutions.[42]

Also, in Stewart v. Claudius, the court reiterated that,

> School rules and provisions contained in the school catalogue, advertisement, or application blank become part of the contract for tuition and other school charges, where notice thereof has been given to the parents or guardians, or their attention called thereto, and the contract for a complete course of instruction or for a specified period of time is entire, the school proprietor may recover the whole sum agreed on.[43]

Since, that if not expressly then impliedly, the school's rules and regulations governing behavior become part of a contract, and if a student's behavior violates the rules and regulations, then the contract has been breached. Further, should the student be expelled, then the school is prevented from fulfilling its part of the contract, not through its own actions, but rather through the action of breach by the student by his behavior.[44]

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[41] Teeter v. Horner Military School, 81 S.E. 767 (1914).

[42] Goldstein v. N.Y.U., 78 N.Y.S. 739 (1902).

[43] Stewart v. Claudius, 65 P. 2d 933 (1937).

[44] Kabus v. Seftner, 69 N.Y.S. 983 (1901).

It should be noted that there is precedence[45] for the abstract proposition that a catalogue, when properly circulated and made known to patrons who enter their children under the terms thereof, will constitute a binding written contract that cannot be altered, varied or modified, in the absence of actual fraud or mistake, by verbal testimony. In Vidor v. Peacock,[46] Mr. Vidor had entered his son, King, in school, paid $200.00 and given two notes of $100.00 each. The school had sent Mr. Vidor its catalogue which contained express provisions concerning withdrawal. Mr. Vidor based his case on the fact that he never signed the enrollment form which stated that he had read the catalogue and agreed to its terms. When he wanted to avoid the contract claiming the catalogue never became part of the contract, the court held that although he did not sign, his act in entering his son with no other provisions different from the catalogue implied acceptance of the terms of which he was familiar. To illustrate how closely a court will hold to a contract and the provisions of a catalogue, further facts from this case are of interest. The son developed ingrown toenails and while at home for treatment also contracted trachoma. The catalogue provided that in order to be re-

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[45] Aynesworth v. Peacock Military College, 225 S.W. 866(1920); Peacock Military College v. Hughes, 225 S.W. 221 (1920); Peacock Military College v. Scroggins, 223 S.W. 232 (1920); Peirce v. Peacock Military College, 220 S.W. 191 (1920); Vidor v. Peacock, 145 S.W. 672 (1912).

[46] Vidor v. Peacock, 145 S.W. 672 (1912).

leased from the terms of payment a student must be declared unfit or too severely ill for the school by a San Antonio doctor. Mr. Vidor had an out of town doctor treat his son. The court held that where parties have explicitly stated terms in the contract it will not alter them unless they are illegal or against public interest and that Mr. Vidor had not complied with the terms of the contract by presenting evidence of his son's illness in using an out of town doctor. (This point may have been decided differently if the son had been so sick that he could not have reached a San Antonio doctor).

Although it may seem as though the law is quite clear in respect to the entirety of contracts and the fact that catalogue regulations are implied in contracts, cases are tried on facts. Litigants often feel that the special facts in their cases are of such a nature as to distinguish their cases from those falling under the general rules of law. The following are examples of such cases, wherein some were decided for the school and some for the parents.

-----In an Illinois case, the court decided that,

> A written application for the admission for a specified money consideration of the defendant's minor son to the plaintiff's school and the plaintiff's subsequent letter which stated that the boy was 'duly enrolled, pending the receipt of honorable dismissal from his present school,' constituted a complete and binding contract, for a breach of which defendants were liable, although the certificate of honorable dismissal which, in the making of the application, defendants agreed to present, and which actually was obtainable, was not delivered.[47]

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[47] Asheville School for Training in Christian Leadership v. Kirk, 269 Ill. App. 365 (1934).

The defendants here felt as though they had entered into a conditional contract, i.e. there was some condition which had to be fulfilled before the contract ripened into a binding instrument. Specifically, the parents alleged that since the honorable dismissal had not been delivered, the school's acceptance had not been completed, and therefore the contract not made. The court, however, reasoned that the application had been accepted pending the receipt of the honorable dismissal and that since the certificate was available, its lack of delivery did not operate to spoil the contract.

-----In Heath v. Georgia Military Academy, the school president had agreed to refer a demand for the refund of tuition to the proper administrative authorities. The parents felt that this was an indication of accord in their demand by an official of the school. However, the court held otherwise and said, an,

> ...agreement by the president of a boarding-school to refer to the proper administrative authorities a demand for the refund of tuition and board upon the dismissal of a minor son from the school for infractions of rules did not constitute accord or satisfaction or show mutual recission of the written agreement to pay a specified amount for tuition and board for the entire year with provision that no part thereof would be refunded in the event of withdrawal or dismissal from the school, except for illness.[48]

-----In the original trial, the Missouri Military Academy, a corporation, sued a patron, Brady, for the unpaid bill of

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[48]Heath v. Georgia Military Academy, 97 S.E. 2d 601 (1957).

$371.24 for the actual attendance of his son and did not seek the full contract amount. The court found for the school. Brady appealed the case and the original decision was eventually affirmed by the Supreme Court of Oklahoma. Brady was a brother-in-law of the president of the academy and claimed that since the president owed him money personally to an amount greater than his bill for tuition, it was liquidated. The Supreme Court of Oklahoma held that the personal debts of an officer of a corporation do not become part of the corporation's contracts.[49]

-----In Ham v. Miss C. E. Mason's School, The Castle,[50] an Oklahoma City doctor attempted to avoid his contract for his daughter's tuition on the ground that at the time of his signing, he was incompetent as the result of an automobile accident. The evidence was conflicting as to the extent of the injuries and their affects upon his competence, and the jury found that he was competent. On appeal, the court sustained the jury verdict but went on to say that regardless of the situation at the time of signing, upon recovery the doctor had continued to acquiese in the contract, and this is itself ripened the contract into binding form.

-----In Chapin v. Little Blue School, the school catalogue

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[49]Brady v. Missouri Military Academy, 224 P. 707 (1924).

[50]Ham v. Miss C. E. Mason's School, The Castle, 61 S.W. 2d 7 (1933).

stated that "pupils, by their presence in the school, are registered for the full school year," and that "no abatement is made from these terms for any reason other than that of illness."[51] Chapin's son suffered from epileptic convulsions and was expressly received by the school on trial for the purpose of testing his capacity to meet the requirements of the school. The father's attention was never called to the catalogue regulations, and he never agreed to be bound thereby, but he did pay in advance the required tuition fee and expenses for one half of the year. Within a few weeks, the oral contract was terminated because of the severe attacks of the son. Here, the father was entitled to recover a proportion of his advance payment in that his special agreement covered the contingency which developed.

-----Some cases turn on the meaning of such terms as "registered," "enrolled," "admitted," and "entered." In a recent case, Rosenbaum v. Riverside Military Academy,[52] Rosenbaum requested that a place be reserved for his son and paid the school $1,000.00 plus some incidental fees. In the fall, he and his son appeared at the school at the beginning of the term. The boy's luggage was moved to his room, and while the boy was busy, the father returned to his hotel to rest. Upon his return to the school, the son in-

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[51] Chapin v. Little Blue School, 86 A. 838 (1913).

[52] Rosenbaum v. Riverside Military Academy, 92 S.E. 2d 541 (1956).

formed his father that he did not wish to stay. With that, the luggage was collected, and they left the school. Rosenbaum sued the school for the return of his advanced tuition fee. The school refused on the ground that the son had been enrolled. This point was important because the contract contained the provision that if the son did not enroll, all but $25.00 would be returned to the father. The court held that the evidence authorized and compelled the finding that the son never became enrolled in or admitted to the school even though there were some indications of entering; never was the decision voiced, and the act of leaving was acknowledged as a conclusive decision of not to enter or enroll. These terms can seldom be used to stand upon in litigation unless the contract explicitly or impliedly defines them. In this case, the contract was explicit enough for the court to find for the father. The contract is usually binding as of its making unless it is conditional upon physical entrance or some other requirement.

-----Rule v. Connealy,[53] illustrates the issuing of a promissory note in connection with a conditional contract. The defendant in this case was pressed to enter into a contract in the summer but he was not sure that the contract could be fulfilled. The school representative then provided that his final assent was not necessary until October 1st. With

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[53]Rule v. Connealy, 237 N.W. 197 (1931).

this understanding, the defendant issued a promissory note to cover the cost in the event of his final assent. Prior to October 1st, the defendant elected not to give his assent. The school then sued on the promissory note. The Supreme Court of North Dakota held that since a promissory note must first be shown to be an expression of an obligation and that there was no obligation since the conditional contract never ripened, the note could not hold.

-----In Peirce v. Peacock Military College,[54] the defendant, Peirce, tested the legality of a contractual statement refusing a reduction or refund of board or tuition in the event of a student's withdrawal for other than reasons of sickness. He averred that such a statement operated as a penalty clause. It is a principle of law that penalty clauses are unenforceable. Peirce reasoned that the provision operated as a penalty clause in that he was forced to pay by contract for his breach by the terms of the contract itself. A penalty clause provides for punishment in the event of a breach, and as has been said, is unenforceable; however, the courts will allow provisions for liquidated damages. Provisions for liquidated damages are actually attempts to forecast probable damages in the event of a breach. Admittedly, there is a fine line of distinction here, and the courts often have difficulty in determining the real intent of a clause; however,

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[54] Peirce v. Peacock Military College, 220 S.W. 191 (1920).

in the case of Peirce, the court held that the statement in question was not a penalty clause, but rather a provision insuring the entirety of the contract.

-----In Kentucky Military Institute v. Bramblet, the school had revised its catalogue over the summer and raised the fees $50.00. Bramblet's son returned to the school for the third term at the old fee rate, and the father paid $200.00 as a first installment. The son was found guilty of hazing and was dismissed from the school in November. The school sued the father for the full tuition fee at the new rate. The court ruled that not only could the school not claim the new terms of an entire contract but that the higher rate would not be allowed. The school was allowed to retain the amount of the first installment and the court held further that,

> Should a condition exist where there is no contract but a parent has paid a certain fee and the son has been sent from the school, the parent obligated himself for so much of that term as that certain fee would pay for and may not recover any thereof of the theoretically unused part of the term paid for in that the son's conduct prejudiced his right to be in school.[55]

-----In a similar case, Rogers v. Councill,[56] a boy was duly enrolled and remained for about a month and left the school. His mother had paid the school $240.00. There was a statement that the parent must bear the cost of a full year if

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[55]Kentucky Military Institute v. Bramblet, 164 S.W. 808 (1914).

[56]Rogers v. Councill, 266 S.W. 207 (1924).

the son was suspended, expelled or withdrawn without cause. In this case, the mother won and did not have to pay because the school did not show in its pleading that the student was suspended, expelled or withdrawn without cause. It is incumbent upon a plaintiff in a breach of contract suit to prove the breach.

-----In Kentucky Military Institute v. Cohen, Cohen entered his son in school for which the fees were $500.00 for tuition, $10.00 for a uniform and $10.00 for a quartermaster card. Cohen paid $30.00 in advance on the tuition, $10.00 for the card, $62.50 for railroad fare and issued a check for $369.00 which he stopped. After three days in school, the son left because of untenable treatment by the teachers and students. There was an entire contract. The school sought $494.00 and in a cross-suit, the father sought $5,500.00 -- $5,000.00 for the humiliation of his son, $400.00 for cost in preparing his son for school and $100.00 for transportation. The court allowed the father to recover his advance of $30.00, $10.00 for the card and $62.50 for transportation and sustained the school's demurrer to the $5,000.00. The court said that,

> Damages for money expended for clothing, trunks, and similar articles for a son sent to a private school are not recoverable by the father, the presumption being that they can be used; but where, on account of intolerable treatment by the teachers, the child left after three days, the railroad fare and money advance to the school for tuition is recoverable.[57]

-----In Bergman v. Bouligny, the defendant's daughter was in

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[57] Kentucky Military Institute v. Cohen, 198 S.W. 874 (1917).

school, and her father contracted for the next year by paying $50.00 to reserve a place. During the summer, the girl's mother wrote that for personal reasons the daughter would not return the following year. The school sued in this case for $1,350.00 less $200.00 which represented an amount in the catalogue to be reduced as board not to be paid in such cases. The defendant pleaded that the rate of reduction was arbitrary and provided a defect in the contract; however, the court said:

> Where a school catalogue provided for the deduction of $25.00 a month for board in case of protracted illness of a student, and the student failed to return to school for reasons other than illness, and the school entered a voluntary credit of $25.00 a month, and the parent of the student offered no testimony as to the value of board or food and made no showing that he was entitled to a greater deduction than that provided in the catalogue of which he had knowledge, the food credit allowance of $200.00 which was granted by the school suing the parent for breach of contract was not arbitrary.[58]

-----Northwestern Military and Naval Academy v. Wadleigh,[59] illustrates that contracts for necessaries which may be otherwise unenforceable are binding only so far as they are performed. In this case, a mother entered into a contract with the plaintiff school which was to provide her son with board, lodging, clothing, a course in military training and business instruction for an annual charge of $1,200.00. The son withdrew from the academy without the consent of the academy and thus prevented it from fulfilling its part of

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[58] Bergman v. Bouligny, 82 A. 2d 760 (1951).

[59] Northwestern Military and Naval Academy v. Wadleigh, 267 Ill. App. 1 (1933).

the contract which it was ready, willing and able to do. The plaintiff sued the husband/father. In its pleading, the plaintiff averred that by virtue of the Smith-Hurd Revised Statute of 1931, c. 68 Section 14 of the Illinois Code, providing for the joint liability of a husband and wife for the expenses of the family and of the education of the children, the father became liable for the balance of $500.00 due under the contract. The court rejected this plea pointing out quite clearly that such a liability for necessaries generally, and particularly under the cited statute, involves only those benefits actually received and not those contracted for. The court also rejected the plea that the father was liable on the theory of an implied contract since he permitted his son to enter the academy with knowledge of the terms and conditions of admission and training which were contained in a catalogue sent to him on his request.

Although the decision in this case did not turn on these erroneous pleadings, had the plaintiff not sued the mother, the legally liable party, in her own right, it would have lost the case.

-----The case of Torbett v. Jones illustrates a lack of consideration in the contractual relationship. The school had claimed in its catalogue and at the time of contracting that it had high standards, and its students were accepted at other institutions. The school had originally withheld the student's accumulated credits in an attempt to force the payment of an unpaid portion of his fees. This case was an

attempt to collect those same fees. During the trial, the defense introduced evidence that the school had been dropped from the Southern Association (for accreditation) and that the school's credits were not acceptable at the local schools. The court said:

> Where a private school refused to release the credits earned by the pupil on the ground that the pupil was indebted to the school, and the credits, even if released, would not have been accepted by accredited schools, the parent's contract to pay the stipulated tuition was rendered invalid for want of consideration.[60]

There are in any contracts of tuition for instruction certain implied provisions which the school is expected to fulfill. These imply in the absence of anything to the contrary, that schoolrooms and facilities will be reasonably fit for the purpose intended, that the teaching staff will be of reasonable skill and judgment in the field in which instruction is to be given and will exercise ordinary care and diligence to accomplish the purpose of the contract.[61] and that the board and lodging to be furnished shall be clean, decent, and reasonably wholesome and suitable to the pupils of the school.[62] Where the school issues a prospectus outlining or setting forth the course of study, on the faith of which a contract for instruction is made, it is bound to give instruction in each of the studies or branches

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[60] Torbett v. Jones, 86 S.W. 2d 898 (1935).

[61] Barngrover v. Maack, 46 Mo. App. 407 (1891).

[62] Horner Military School v. Rogers, 83 S.E. 345 (1914).

of study so indicated, although the details and amount of instruction in each are, within reasonable limits, left to the discretion of the officers or teachers of the school.[63]

-----In Mount Ida School for Girls v. Kerr, the jury found that where an agent of the school had assured a girl that the school had a course in interior decoration that would suit her needs and that the girl discovered upon enrolling that she had had the course in high school and the school offered to send her to Boston or to start a course, that the school was not "willing, ready and able" to fulfill the contract by its terms. The student was not obliged to go to Boston nor to wait for the school to establish such a course.[64]

-----The case of Horner Military School v. Rogers, was a suit to recover on an entire contract. Rogers had signed a contract for a year's schooling, room and board for his son. He withdrew his son and refused to pay the contract price because of the living accommodations provided by the school. He introduced evidence that the room assigned to his son contained "... two old homemade bedsteads, two old dirty and filthy mattresses, a piece of mirror, a goods box for a bureau, and an old wash stand."[65] The lower court had ignored this evidence in its charge to the jury and instructed the jury to consider only whether the contract was entire or not

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[63] Barngrover v. Maack, 46 Mo. App. 407 (1891).

[64] Mount Ida School for Girls v. Kerr, 154 A. 565 (1931).

[65] Horner Military School v. Rogers, 83 S.E. 345 (1914).

and if Rogers had breached it by removing his son. The appeal court remanded the case to the lower court on the basis of the evidence of the school's failure to fulfill its implied agreement that the living accommodations would be clean, decent and of a quality suited to the pupils enrolled.

-----In Lyon v. Sparks,[66] there was a cross-suit which claimed that the food provided the defendant's child was not only of insufficient quantity but also impure and unfit to eat. This claim was dismissed for lack of evidence; however, had the condition been proved, the school would have breached the contract by failing to fulfill its implied agreement to provide sufficient, eatable food of a quality suited to the pupils enrolled.

-----In Lenox Hall v. Seelye,[67] the defendant parents had placed their daughter in school for the prime purpose of her receiving a music education in practice and harmony. The school had no class in harmony that year and charged extra for private lessons. Since the school had not fulfilled its part of the contract, it lost its suit for recovery of the extra charges and the fees for the second semester when the student was withdrawn from the school because of dissatisfaction by the parents.

Although the weight of authority throughout the nation is that tuition contracts are entire, Michigan does not hold

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[66]Lyon v. Sparks, 112 P. 340 (1910).

[67]Lenox Hall v. Seelye, 190 P. 737 (1927).

to this rule. Michigan holds to the general contract law wherein the extent of recovery on a breached contract is that of proven damages. The classic case pointing up this rule is that of The Mount Ida School for Girls v. Rood.[68] The school was located in Massachusetts and was suing in the courts of Michigan. It was determined that the contract had been made in Michigan; therefore, the laws of Michigan governed. Since Michigan does not allow an automatic recovery of the contract price, and since the school pleaded in terms of Massachusetts' theory, the school lost the case. As the court pointed out, under Michigan law, the injured party must prove the extent of damage.

Georgia courts, upon occasion, have in a similar manner held to the general contract rule concerning proved damages in connection with breached contracts. In a 1926 case, Georgia Military Academy v. Rogers, the court said:

> The parent having breached the contract by refusal to send his son to the private school, it was entitled to recover proved damages for the breach thereof.[69]

However, this is apparently not settled law in Georgia. There are more recent cases which do follow the weight of authority.[70]

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[68] The Mount Ida School for Girls v. Rood, 235 N.W. 227 (1931).

[69] Georgia Military Academy v. Rogers, 134 S.W. 829 (1926).

[70] Mathews v. Riverside Academy, 163 S.E. 238 (1932); Heath v. Georgia Military Academy, 97 S.E. 2d 601 (1957).

Summary

It is general contract law that, "the loss or injury actually sustained, rather than the price paid or agreed to be paid on full performance, is the proper measure of damage for a breach of contract."[71] However, in the case of tuition and board contracts in private schools, this rule has been modified to allow for provisions of entirety in contracts. It has been judicial reasoning that since private schools provide the service they do and that damages are almost impossible to assess in that the loss of one student does not appreciably reduce the cost of operation, a provision for full payment upon expulsion or withdrawal (except in the case of prolonged and incapacitating illness) is justified.

A school catalogue, prospectus and generally circulated rules and regulations become part of a contract. In most instances of litigation, the contract instrument so stipulates the inclusion; however, even where such stipulations are not made, the courts have held that these adjuncts become part of the contract by implication.

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[71] 15 A.J. 445.

CHAPTER V

RULES AND REGULATIONS

There is little if any question today but that private schools do have the power to adopt rules for the regulation of their pupils.[72] The authorities of a private school may require their pupils to obey the school's rules, provided the rules are reasonable, and may suspend or dismiss those who disobey.[73] It is important that those reasonable rules be enforced for the purpose contemplated and not maliciously or arbitrarily.[74]

Reasonableness: The determination of the reasonableness of a rule and whether its violation is sufficient cause for suspension or dismissal are questions of law for the court to decide and not a jury.[75] Many decisions have been found

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[72]Dwyer v. Cashen, 232 Ill. App. 493 (1924); Hoadley v. Allen, 291 P. 601 (1930); Miami Military Institute v. Leff, 220 N.Y.S. 799 (1926); State ex rel. Burpee v. Burton, 45 Wis. 150 (1878); Teeter v. Horner Military School, 81 S.E. 767 (1914); Vidor v. Peacock, 145 S.W. 672 (1912); William v. Stein, 166 N.Y.S. 836 (1917).

[73]Teeter v. Horner Military School, 81 S.E. 767 (1914).

[74]Hood v. Tabor Academy, 6 N.E. 2d 818 (1937).

[75]Kentucky Military Institute v. Bramblet, 164 S.W. 808 (1914).

in error on procedure because judges have charged the jury with the duty of deciding the above questions.

The following cases illustrate rules and regulations the courts have found to be reasonable.

-----In Curry v. Lasell Seminary Co., the school's rules provided that the students were not to be absent from the school for holidays, outings, recesses, etc., without the school's approval. Further, the school gave notice that it did not encourage parents to, nor favor their request for special permission to take their children out. Since all of the students did not have parents who could visit them and take them out, the school felt that if some were allowed this privilege, the practice would be subversive to good discipline and morale. After the school had made the extraordinary allowance of three Sunday visits at home in six weeks to the plaintiffs, the daughter was again taken out of the school over the school's denial of permission. The court said that the,

> ...defendant was not bound to allow the plaintiffs' daughter to remain in the school unless with the understanding that she should not be absent during the term time without permission of the officers thereof and that it /school/ was to have absolute discretion to determine as to when an absence would be permitted.[76]

-----In Hood v. Tabor Academy, the school had as one of its rules the prohibition of smoking in the village of Marion. The plaintiff and his son, Brevoort, knew of this

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[76]Curry v. Lasell Seminary Co., 46 N.E. 110 (1897).

rule. As it happened, some of the teachers overheard Brevoort say he was going to have a smoke in town. When questioned if he did violate the rule, he denied it but later admitted the infraction. Brevoort was expelled on this infraction and an accumulation of other discipline breaches which rendered his conduct in other respects unsatisfactory. The court said in this case by the parents to recover part of the tuition they paid, the,

> Evidence is held insufficient to establish that the student's expulsion by the private educational institution for the accumulation of breaches of discipline, including smoking, was arbitrary or capricious, or that it was not made in good faith and for reasonable cause.[77]

-----In Hoadley v. Allen, the court stated plainly that,

> It is well established by a long line of decisions /citing cases/ in practically all of the states in the Union that a private school has the power to adopt rules for the regulation of its pupils, and to dismiss the pupils who violate them.[78]

Here, Allen entered his seventeen year old daughter in the Marlborough School. The school had a rule which prohibited the students from leaving the premises without permission. On January 8th, Allen's daughter left the school at 9:30 pm unchaperoned and stayed all night in a hotel. She returned the next day with her parents. Although there was no indication of improper conduct, the daughter was expelled. The court held that the school's rule was reasonable and that the daughter had violated the rule, and therefore

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[77] Hood v. Tabor Academy, 6 N.W. 2d 818 (1937).

[78] Hoadley v. Allen, 291 P. 601 (1930).

was properly expelled.

-----/Not only must rules be/ reasonable, but also enforced for the purpose contemplated, and not maliciously or arbitrarily, /and/ it would seem imperative and essential to the welfare of the school that the power to suspend the offending pupil at once from its privileges be allowed the officer who must necessarily decide for himself whether the case required that remedy, unless some other method was provided for that purpose.[79]

In this case, Teeter's son had been entered in school on January 1st and remained for the rest of that school year. He had returned to the school the following fall and was expelled about October 1st. The general charge against him was an accumulation of excessive demerits. The specific offenses included: smoking, visiting, leaving his room when he was required to be in it, and throwing something in the assembly hall. In regard to this, the court said that the,

Expulsion of a cadet for repeated misconduct and violation of rules, for which 'excessive demerits' had been imposed was justified, as amounting almost to defiant insubordination.[80]

-----In Fessman v. Seeley,[81] the father of a continually truant pupil refused to permit the school teacher to whip his son for misconduct and took no steps himself to correct the boy. The court found that the school was justified in expelling the pupil for his truancy and the lack of cooperation on the part of the father.

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[79]Teeter v. Horner Military School, 81 S.E. 767 (1917).

[80]Ibid.

[81]Fessman v. Seeley, 30 S.W. 268 (1895).

-----In Manson v. Culver Military Academy,[82] the facts reveal that the plaintiff's son, a cadet, left an extra duty squad twice without permission in direct violation of the school rules. He also had an accumulation of demerits which was in excess of that set by the regulations as being sufficient for dismissal. The court held that the cadet's dismissal must be upheld in the absence of any evidence that the dismissal was unreasonable or oppressive, or that the superintendent acted maliciously, unfairly, or from any improper motive.

-----The case of Kentucky Military Institute v. Bramblet[83] involved a violation of a rule forbidding hazing. Bramblet's son, a third year cadet, had been expelled for hazing; the school pointed out in its pleading and evidence, that the cadet was familiar with the rule, for it was stated in the school catalogue and defined in the book of rules with which every cadet was familiar. Bramblet pleaded that the school's action was arbitrary and unjust because his son had never before been guilty of misconduct. The court struck down this plea for lack of evidence of any arbitrary action. The court said it would not interefere with or revise a rule which was not unlawful or against public policy.

-----In Hall v. Mount Ida School for Girls,[84] the secret

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[82]Manson v. Culver Military Academy, 141 Ill. App. 250 (1908).

[83]Kentucky Military Institute v. Bramblet, 164 S.W. 808 (1914).

[84]Hall v. Mount Ida School for Girls, 155 N.E. 418 (1927).

marriage of a girl student was regarded as sufficient ground for her expulsion where the court took the view that the school had contracted to receive her as a "miss," and that there was an implied condition that the status would continue until the end of the school year, which condition had not been waived.

-----In Horner School v. Wescott,[85] several cadets went into a grogshop on Sunday and got drunk. The court upheld the expulsion of the cadets and accepted the view advanced by the school that a dismissal was equivalent to a voluntary withdrawal since the cadets consciously and voluntarily violated a school rule which they knew meant inevitable expulsion.

-----In Kabus v. Seftner,[86] the suspension of a student until an apology should be offered for improper and insubordinate conduct in repeatedly charging an instructor with lying was regarded as proper.

Some of the foregoing violations or infractions may seem quite harmless, or the rules themselves might seem out of step with modern life; however, in the instance of private schools this is not the concern of the courts. In Tanton v. McKenney et al,[87] the court cited Pugsley v. Sellmeyer, in which the court explained its role.

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[85]Horner School v. Wescott, 32 S.E. 885 (1899).

[86]Kabus v. Seftner, 69 N.Y.S. 983 (1901).

[87]Tanton v. McKenney, 197 N.W. 510 (1924).

The question therefore is not whether we approve this rule as one we would have made as directors of the district, nor are we required to find whether it was essential to the maintenance of discipline. On the contrary, we must uphold the rule, unless we find that the directors have clearly abused their discretion, and that the rule is not one reasonably calculated to effect the purpose intended, that is of promoting discipline in the school...[88]

Actually, the courts are prone to declare any rule reasonable which does not infringe upon the constitutional rights of the individual, is unlawful or against public policy.[89] The court reasons that the school authorities are, within reasonable bounds, a substitute for the parent, exercising his authority.[90] The following is often quoted in cases concerning discipline in both public and private schools:

In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty. These obligations are inherent in any proper school system and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed it would be impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly. The teacher is responsible for the discipline of his school, and for the progress, conduct, and deportment of his pupils. It is his imperative duty to maintain good order, to require of his pupils a faithful performance of their duties. If he fails to do so, he is unfit for his position. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power,

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[88] Pugsley v. Sellmeyer, 250 S.W. 538 (1923).

[89] Kentucky Military Institute v. Bramblet, 164 S.W. 808 (1914).

[90] Semple School for Girls v. Yielding, 80 So. 158 (1918).

in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adequate remedy.[91]

Unreasonable Rules: Unreasonable rules center around those rights and freedoms guaranteed by the state and Federal Constitutions. As has been pointed out above, it is quite reasonable for a private school to require its students to attend religious or devotional services in the school chapel;[92] however, to require students to attend a particular church in the town or surrounding community is considered unreasonable. In the same case noted above where a Jewish cadet was required to attend a Presbyterian Church, the court said:

> This was an unusual and unreasonable requirement, which he [cadet] was justified in refusing to obey. The courts do not go so far as to sanction such a requirement. The regulations of a school in this respect that are sustained by the courts are only those requiring attendance upon the exercises or religious services conducted by the school itself as being part of the curriculum and instruction of the institution. Certainly, the proposition to compel a student to march from one church to another of various demoninations and of conflicting faiths, independent of the school itself, and located outside its boundries and beyond its authority and control, cannot by any wild stretch of the imagination come within the principle laid down by the courts in sanctioning compulsory attendance by the student upon the religious services conducted by the school itself.[93]

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[91] State ex. rel. Burpee v. Burton, 45 Wis. 150 (1878).

[92] Miami Military Institute v. Leff, 220 N.Y.S. 799 (1926).

[93] Ibid.

Summary

Private schools have the right to make any reasonable rules and regulations which are intended to promote education within each school. Whether a rule is reasonable or not will be decided by the courts and not by juries. The courts are not prone to declare any rule unreasonable unless some constitutional or statutory right is violated; the courts will not judge the wisdom of a rule, but will determine if it is arbitrary, malicious or not in concert with public policy.

Students, through either the express or implied terms of their parent's contract, are expected to adhere to the rules and regulations of the school. An infraction is cause for dismissal at the discretion of the school. It is incumbent, however, upon the school in the face of charges of arbitrary action, to prove that its action was taken as that considered best for the continued operation of the school.

CHAPTER VI

TORT LIABILITY

The question of the tort liability of individuals involved in the corporal punishment of pupils has been treated several times.[94] This chapter on tort liability is concerned with questions other than those involving corporal punishment. However, because the question of liability connected with corporal punishment is usually of vital interest to private and public educators, material concerning this question will be found in Appendix A and Appendix B of this work. Appendix A contains an extraction, in toto, from the Restatement of the Law of Torts on the subject of corporal punishment and offers the general principles of liability. Appendix B contains an annotation, in toto, from the American Law Reports on the same subject and supports the general principles with case material. From this material, it will be found that there is little distinction to be made between the liability of public school teachers and private school teachers. All

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[94]Edwards, pp. 601-615; Madaline K. Remmlein, School Law, (New York, 1950) pp. 232-253; 43 ALR 2d 469; Restatement of the Law of Torts, Vol. I, Topic 2, Sections 147-155.

teachers are endowed with immunity from liability for corporal punishment which is reasonable in nature and which is administered for a legitimate purpose in a rational and malice-free manner. Teachers are representatives of society with a responsibility delegated to them by society. To accomplish their task, teachers are considered to be in loco parentis. Since parents have the right and moral duty to punish their children within certain limits, this right and duty devolves upon teachers as they stand in the place of parents.

In American Law Reports, there are several annotations which deal with the subject of tort liability in schools.[95] However, there is no one annotation which specifically treats the tort liability of non-charity type private schools. The material for this chapter is drawn from the scattered references in the annotations and from court decisions which do not turn on the principle of immunity granted to schools deemed to be charitable in nature.

The legal principles, rules and tests which are applied in the determination of the right to charitable immunity are a study in themselves. An annotation from the American Law Reports has been appended to this work as Appendix C. There, particular facts and conditions which are determinative of charitable status will be found. Appendix C is by no means an exhaustive discussion of the

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[95]See Appendix B.

subject; however, it does indicate what is considered by courts when they are determining if an institution is in fact charitable in nature and eligible for immunity from tort liability on that basis. In general, it will be found that the basis for immunity is in the fact that where funds are placed in trust to provide a service needed by society, those funds are not considered to be properly used to indemnify those suffering from torts of the charity.

Where the rule of charitable immunity is not applied, it is found that the tort liability of private schools is governed by the general rules or principles which control tort actions against private persons or ordinary business corporations. In the cases decided without regard to the question of charitable immunity, the courts have only concerned themselves with the question of the existence of liability upon the individual facts presented.

The following cases and comments illustrate the rules and principles which control tort actions of private persons or business corporations. These have been selected in the light of the scope of this work, ie. those actions arising out of the relationships between patrons, personnel and students of private schools.

-----In the State of Utah, no immunity from tort liability is extended to charitable institutions. The case of Brigham Young University v. Lillywhite,[96] is one from Utah which

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[96]Brigham Young University v. Lillywhite, 118 F. 2d 836 (1941).

involves the question of negligence in the supervision of students in laboratory work. The points illustrated are that the degree of supervision must be commensurate with the dangerous nature of the work and the experience of the students; an institution may become liable for the acts of its agent or servant when he is acting within the scope of his employment; and, class participation does not constitute a joint endeavor wherein the contributory negligence of one member of a group is attributable to another.

Since the laws of Utah do not afford a charitable institution immunity from tort liability, the general rules of agency and tort liability were held applicable in this action. Therefore, not only did the negligent instructor become liable for his tort of negligence but also the institution which did not deny that the instructor was a paid intructor of that institution and was acting in the scope of his duties at the time of the accident complained of. The facts reveal that an inexperienced group of students in a chemistry class were allowed by the instructor to proceed with an experiment during his absence from the room. While absent from the room, one of the students improperly combined some chemicals, applied heat, and an explosion occurred which injured the complaining student. The court observed through the evidence that it was not the practice to permit unsupervised experiments in other schools and that a reasonably prudent person could foresee possible disaster in the unsupervised experimenting of inexperienced students in a chemistry laboratory.

It was held in this appeal case that the original trial jury had sufficient evidence to warrant its finding that the instructor was negligent and that the University became liable through its employee's negligence.

The University pleaded non-liability on the theory that the class was a joint enterprise and therefore, the contributory negligence of the student who caused the explosion was attributable to the complaining student. The principle of contributory negligence provides that if the injured party has contributed to the negligent act, he has no cause for action. The court here refused to hold that the class was a joint enterprise; therefore, no negligence could be attributed to the complaining student.

-----The following case illustrates that supervision need not be constant except where conditions warrant it, that essentially harmless objects may be left unguarded and that should such objects be used in an injury of a person, alleged negligence will not lie if it cannot be shown that a reasonable prudent person would anticipate that such an object would be utilized in the injury of a person. In this case of Kos v. Catholic Bishop of Chicago,[97] a pupil sustained injuries while eating her lunch in a classroom provided by the school when she was struck by a hand-brush used for floor cleaning which had been thrown by another pupil. The brush was kept in a place where it would be available for use in

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[97] Kos v. Catholic Bishop of Chicago, 45 N.E. 2d 1006 (1942).

cleaning the floors after the lunch period was over. The court held that the brush was inherently a harmless object, and its mere presence in the lunchroom could not be held to render the room unsafe or constitute negligence on the part of the defendant school.

The plaintiff also alleged that the pupil who had thrown the brush was older and known to have habitually fought, quarreled, and "rough-housed" with the younger pupils. The plaintiff averred that it was dangerous and unsafe for the injured six and one-half year old pupil to eat her lunch in the room with those older pupils unless the room were constantly supervised by responsible adults. But the court said that this contention rendering the school liable for their failure to exercise supervision over the pupils while eating was untenable. If school authorities were obliged to stand guard over children on the school premises at all times, it would be fairly impossible to conduct schools without peril to the authorities who maintain and operate them.

The court also held that the failure on the part of the school in not removing the brush was not the proximate cause of the injury. The intervening cause of the injury was the act of the pupil who threw the brush, and there was no evidence that the presence of supervision supplied by the school would have prevented it.

-----Conley v. Martin,[98] also involves the question of super-

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[98] Conley v. Martin, 42 A. 2d 26 (1945).

vision but again points up the necessity of the plaintiff's proving that the defendant's act or omission was the proximate (legal) cause of the injury. Here, an eleven year old pupil was attending a boarding and training school for the treatment and cure of young persons afflicted with stammering. The school maintained a playground for the use of the children, and they were forbidden to go anywhere else on the school grounds except under the supervision of an adult. The young plaintiff was not mentally deficient and fully understood from the time of his entrance into the school that he was not to be abroad unattended. On the day of the injury in question, the plaintiff, at the suggestion of another boy, left the school grounds proper for an adjoining area also owned by the school. In order to reach the property, the boys had to cross a swamp or pigpen or both, and climb over two fences. While on their excursion, the two boys attempted to climb an old silo which was in poor repair. The young plaintiff slipped on a loose rock on the silo when he reached the top and fell, sustaining the injury in question.

The court refused to support the claim that the school's failure to maintain the walls of the silo was the proximate cause of the injury or that the school negligently allowed the plaintiff to be upon the ground of the school unattended where the evidence showed that the boy deliberately and with understanding stole away from the group and thus violated the school's rule.

-----Ingerson v. Shattuck School,[99] illustrates the duty of the plaintiff in alleging negligence by omission and also alleged contributory negligence on the part of the plaintiff. In this action, a paying spectator at a football game, was injured when she was struck by two players who had tumbled over and rolled across the line against her. It was not the custom to fence or rope off the playing field at the defendant school or similar small schools or colleges in that part of the state. Further, if such barriers had been used, it could be inferred that they had been employed to keep the spectators off of the field and not the players on the field. The plaintiff alleged that the school was liable for her injuries since it negligently failed to rope or fence the field. The court concluded that a rope would not have prevented the players from rolling under it and a fence might have caused the plaintiff greater injury if it, along with the players, crashed down upon her. Thus, the plaintiff failed to show that the failure to rope or fence the field was a negligent act of omission for it could not reasonably have been foreseen under the circumstances that such an omission was likely to result in injury to anyone or that the suggested action would have prevented it.

The plaintiff also alleged that the school was liable for negligence in that it did not provide space and proper seats for spectators. However, the court struck down this

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[99] Ingerson v. Shattuck School, 239 N.W. 667 (1932).

plea because the plaintiff did not show that she had sought a seat among those provided. The court also struck down another plea that the school was negligent by virtue of the fact that it did not provide enough police or patrolmen during the game to properly police the grounds. There were only between 200 and 300 spectators for which the school provided the supervision of the athletic director and other school employees. The court held that the presence of more supervisory personnel would not have assured the prevention of injury to the plaintiff.

-----A case involving Dartmouth College, Currier v. Dartmouth,[100] was decided in a lower court in view of the eleemosynary character of the corporation and that the work being done was in furtherance of the chartered trust. However, although the court on appeal upheld the judgment, it is interesting to note that it pointed out that it was unnecessary to determine the question of nonliability of the college because of its immunity. The facts reveal that the school owed the plaintiff no duty in regard to the occurance of his injury. As it happened, the superintendent of buildings and grounds had issued an invitation to students, staff and towns people to view the felling of an old chimney which was a school land mark. At the "ceremony," the plaintiff was injured by falling rubble. The plaintiff averred that the superintendent negligently fell the chimney and thereby

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[100]Currier v. Dartmouth, 105 F. 886 (1900).

through his action brought liability upon the school. But the court concluded that the school had not issued the invitation, expressly or impliedly, and that the lookers-on were on the premises without invitation by the school. The building superintendent operated outside the scope of his employment and in so doing his invitation was not the invitation of the college. Therefore, the college owed those present no protection except from hidden dangers of which it was aware or should have been aware and each individual was charged with his own protection.

-----In Cortright v. Rutgers College,[101] the plaintiff was an invitee of the college; however, it is shown in this case that an invitee is expected to use the places provided, expressly or impliedly, and that liability does not extend beyond the provisions.

The plaintiff in this case attended a concert on the campus. There was a sidewalk of more than sufficient width leading from the building in which the concert was held to the street and parking areas. When the concert was over, the plaintiff left the building with a large number of people and used the walk for a short distance. Instead of continuing with the crowd on the walk to the parking lot, the plaintiff took a short-cut to the parking area across the lawn. As it happened, there had been a wire stretched across the lawn to keep people from walking on the grass. The

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[101] Cortright v. Rutgers College, 198 A. 837 (1938).

plaintiff fell over the wire and sustained the injuries complained of in this case. The court held that the school could not be held liable for neglecting its duty to protect invitees to the campus because it had provided more than adequate by-ways of the usual type and could expect that people would use them for ingress and egress. There was no reason to believe on the part of the school that persons attending the concert would wander on the campus and further such wandering was not within the scope of the invitation. The school had taken reasonable care to provide for the guests and when the guest departed from the limits of the invitation and went upon the lawn, the duty of the school was at an end.

This case is to be contrasted with the following case where a graduate was invited back to his university and was injured as he wandered about.

-----In Guilford v. Yale University,[102] the plaintiff, Guilford, was a graduate of the defendant University. He had been invited to attend the commencement exercises and class reunions. This was a general invitation to be abroad upon the campus and to participate in the general festivities of the occasion. The class reunion headquarters were in a building on the campus. Behind this building, there was a retaining wall beyond which there was a considerable drop-off. After the headquarters building was closed one night,

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[102] Guilford v. Yale University, 23 A. 2d 917 (1942).

Guilford walked toward the retaining wall to answer a call of nature. As he did so, he fell over the wall and sustained injury. The court on appeal held that the jury had sufficient evidence upon which to find that the plaintiff was free of contributory negligence and had not exceeded the limits of his invitation. The University was guilty of negligence in failing to anticipate the danger from the particular use made of the premises by the plaintiff. It was not an unreasonable burden upon the University to expect it to provide adequate facilities and grounds free from traps dangerous to life and limb.

-----Again in a California case, it is found that a university became liable when it negligently allowed a dangerous situation to persist. In this case, Stockwell v. Leland Stanford Junior University,[103] Stockwell was one of 2,000 students who participated in a campus-wide cleanup program. The 9,000 acres of campus were officially declared a game refuge, and signs were displayed at numerous places forbidding hunting and the possession of guns. However, for two years, guns had been used promiscuously on the campus. The authorities were aware of the situation.

Stockwell was injured by a bullet from a BB gun while riding in a truck on the campus during the clean-up. The court held that under the existing circumstances, wherein

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[103] Stockwell v. Leland Stanford Junior University 148 P. 2d 405 (1944).

a dangerous situation existed of which the school authorities were well aware and a student was injured, the evidence was sufficient to support the fair inference that the University failed to exercise reasonable care to protect its students from the danger. This was particularly true on the day of the injury since a large number of students were to be abroad in an area where most of the guns had been noted. Further, the school employed seven or eight police officers, but only two were on duty the day of the accident despite the gathering of a large number of students in the danger area. The defendant claimed that the willful and malicious act of the one who fired the gun was the proximate cause of the accident, and, therefore even if negligence on its part were assumed, this fact alone relieved it of liability. The court rejected this plea and said there was no evidence that the gun was fired wilfully or maliciously and that the determination of the act as an intervening cause which broke the chain of causation was a question for the jury to decide and not one of law over which it had power of review.

-----In Keyser v. Richards,[104] the plaintiff alleged that the individual negligence of several of the school personnel taken both individually and collectively contributed to the continued ill health of his son who finally died in a state of complete collapse.

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[104] Keyser v. Richards, 130 A. 41 (1925).

The facts reveal that the plaintiff entered his son in the defendant's school after the son's two year absence from any school. The plaintiff notified the school authorities that his son had not been able to attend school because of a long series of illnesses among which were tonsilitis, rheumatism, chorea, heart lesion and endocarditis. He requested that his son receive personal supervision from the head and that the boy should not be required to participate in violent exercise. He also made it clear that he should be notified at anytime his son appeared to be unwell.

On February 1st, the boy became ill and was sent to the school infirmary. The father was not notified, as he had requested, and did not learn of his son's illness until February 4th when he happened to call the school. He was told the boy had a cold or grippe. On February 6th, the boy was released from the infirmary although he had not completely recovered.

On February 11th, the pipes in the dorm broke and caused the ceiling, walls and floor of the boy's third floor room to become thoroughly wet. He was removed to a dry room; however, the next day he was moved to a room on the second floor, directly under his third floor room, which was equally damp. He stayed in the second floor room until February 16th and was ill all of the time.

On February 16th, the boy awoke and asked the housekeeper to take his temperature. She refused and ordered him to attend his classes. Instead, he went to the school doctor

who took his temperature, found that he had a fever and placed him in the infirmary. The plaintiff arrived on February 18th to visit his son and found him in a cold room with the window up and the wind blowing through the room from the outside where the temperature was below freezing. The plaintiff asked to see the doctor, but he did not come. While he waited, he observed that his son had to get up out of bed and walk through cold and drafty halls to the toilet. He asked that a bed pan and urinal be provided and that his son be kept in bed. The nurse agreed.

On February 21st, the boy was very ill with rheumatic fever and endocarditis; however, he was moved from the private room to the general ward to make room for a visiting bishop. He had to make this move by walking unassisted down the stairs and through several halls.

On February 25th, the plaintiff again complained to the doctor who became very angry and told the plaintiff to remove his son if he were not satisfied. This was impossible because of the boy's condition.

On March 5th, the doctor told the plaintiff he proposed to administer sodium caccadylate, a preparation of arsenic. The plaintiff told the doctor that in the past arsenic compounds had been shown to produce ill effects on the boy. He asked the doctor to contact the boy's home doctor for confirmation. The doctor failed or refused to do it. He administered the drug for two or three days. At the end of that time, the boy showed signs of collapse and died on March 13th.

As it happened the father lost this case because of improper pleading. It was not shown that any one act or the acts collectively caused the death of the boy. The case does illustrate, however, how a series of events can lead to an end which is fraught with possible litigation.

-----In Perbost v. San Marino Hall School for Girls, the plaintiff's daughter fell or slipped on some grease which was on a school driveway. The plaintiffs sued on the theory that the school was negligent in its maintenance thereby allowing an unsafe condition to exist. The court said here in regard to the alleged negligence that,

> In an action against a private school by a pupil and guardian for injuries resulting from a fall on the driveway of the school, an instruction that the jury must find from a preponderance of the evidence that the defendants must either have created the condition, known of it, or should have known of it, and that unless one of the conditions could be found to have existed defendants could not be found negligent is correct.[105]

The court said further in regard to the facts that,

> The mere presence of oil or grease on the driveway of a private school would not necessarily indicate an unsafe condition, but only an unreasonable accumulation of grease or oil might indicate a condition from which a jury could reasonably find negligence in respect of a pupil.[106]

-----In Hellman v. Greater Miami Hebrew Academy,[107] a child was hurt while playing on the academy's playground monkey bar. The court held that there was no cause for action and

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[105] Perbost v. San Marino Hall School for Girls, 199 P. 2d 701 (1948).

[106] Ibid.

[107] Hillman v. Greater Miami Hebrew Academy, 70 So. 2d 688 (1954).

rejected the case because the plea sought to make the school an insurer of the child's safety. The law merely contemplated that the school shall furnish a reasonably safe place to play commensurate with the knowledge and impulses of the using children.

-----In another playground case, Walter v. St. Michael's Roman Catholic Church,[108] a pupil was injured when pushed onto a banana peel by another pupil. The court held that the plea attempting to establish that the school was negligent in selecting its teachers or in providing adequate supervision both of which allegedly contributed to the accident, was not supported by sufficient evidence. Also, the court pointed out that the proximate cause of the accident was the unforeseen intervention of the other pupil. No reasonably prudent person could be expected to foresee the particular action of the other pupil.

-----The case of Martin v. Roman Catholic Archbishop of Los Angeles,[109] also involved the question of liability in connection with supervision. In the facts of the case, some boys had broken a window as they pushed out of school at the end of the day. The punishment for the act included a tour of weed-pulling either after school or on Saturday. The plaintiff went on Saturday and found no supervision at the

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[108] Walter v. St. Michael's Roman Catholic Church, 118 N.Y.S. 2d 852 (1953).

[109] Martin v. Roman Catholic Archbishop of Los Angeles, 322 P. 2d 31 (1958).

appointed place. He decided to play football with a group gathered in the vicinity for that purpose. In the course of play, his arm was broken. The parents in this case sued for the amount of the bills resulting from the broken arm. The basis for the suit was a plea that the school was negligent in not providing supervision for the weed-pulling. The court held that there was no negligence in placing boys on their honor to pull weeds as a disciplinary measure without supervision. The non-dangerous nature of the work and the age of the boys would not necessitate a reasonably prudent person's concluding the necessity of supervision. Further, there was no evidence that the presence of supervision could have altered any injury should the boy have decided to play football.

-----In Gleason v. Academy of the Holy Cross,[110] a nun invited her mother to visit the academy. While there, the mother decided to observe the singing of a Mass from a balcony in the rear of the chapel. On entering the balcony, she fell on a step which was poorly lighted and unusually constructed. The authorities knew of the danger of the step because others of the school had fallen on it. The defendants alleged that the mother was a gratuitous licensee and therefore the school owed her no special care. The court ruled that the school was negligent and that the fact that the plaintiff was a gratuitous licensee did not alleviate those in charge from the negligence.

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[110] Gleason v. Academy of the Holy Cross, 168 F. 2d 561 (1948).

-----In Easton v. United Trade School Contracting Co.,[111] the employing school became liable through the negligent acts of its employee. Here, the defendant company conducted a school for instruction in automobile driving. One of the teachers who taught driving was also a student in the school. He was employed as a chauffeur and instructor. While out with a student, he permitted an incompetent pupil to drive the car and while doing so, the plaintiff was injured on the highway. The court said that the teacher's poor judgment became the poor judgment of the school since the employee was acting in the stead of the school. The pupil-driver was responsible for his act as was the teacher, and the defendant school under whose directions all of the things were done, was likewise responsible.

-----The principle of agency and an employee's subsequent responsibility for an agent's torts found in the above case is also present in the case of Malmquist v. Hellenic Community,[112] except in this case the employee went so far outside the scope of his employment that the connection of liability in the employee's act to the employer was broken.

The school's bus driver was authorized to make a tour of the city during the afternoon to collect the students and deliver them to the school. However, on one afternoon

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[111] Easton v. United Trade School Contracting Co., 159 P. 597 (1916).

[112] Malmquist v. Hellenic Community, 203 N.W. 420 (1925).

the bus driver drove thirteen blocks off his customary route on a mission of his own. While on this side trip, the bus was involved in a collision with another automobile. The plaintiff in this case attempted to sue the school on the theory that the torts of its agent became the torts of the school. The court denied this plea on the grounds that the driver was so far outside of the scope of his duty when the accident occurred that the school could not be connected with the act.

-----In Smith v. Leo,[113] Smith was invited to a dancing school dance in an attempt to interest him in taking lessons. He paid his admission and was subsequently expelled for no established reason. The court allowed him to collect compensatory damages to recompense him for the damage to his good name, favor and credit where he was brought into public scandal, infamy and disgrace as a result of the unprovoked action by authorities of the school.

-----In Kenney v. Gurley,[114] the plaintiff alleged that the school had indulged in libel when it had stated by letter to her parents that she could not be readmitted to the school because she had contracted a venereal disease. The lower court found for the plaintiff; however, on appeal the court reversed the decision and remanded it to the lower court because there was no evidence that malice was present in

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[113] Smith v. Leo, 36 N.Y.S. 949 (1895).

[114] Kenney v. Gurley, 95 So. 34 (1923).

the action taken by the school.

-----In Ryan v. Peekskill Military Academy,[115] the facts reveal that the school officials wrote a letter to parents explaining that certain unnamed instructors had been dismissed. In the letter such terms as "insidious plots to overthrow the school management" and "inciting rebellion" were used. It was alleged that the statements said or inferred that the dismissed instructors were communists and that their actions were part of a communist plot. The court said that these were strong phrases which might well reflect directly on the plaintiff's abilities as teachers and expose them to public hatred, ridicule and contempt, and that such, might be actionable. However, such was to be determined by a jury, and where the jury found such not to be libelous, a plea for libel per se was inappropriate.

Summary

The broad general principles of tort liability found in this chapter may be listed as follows:

1. Every individual is responsible for his own torts unless the law affords him immunity or he is adjudged legally unable to be charged with responsibility because of some mental or physical condition.

2. An employer is responsible and liable for the torts

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[115] Ryan v. Peekskill Military Academy, 133 N.Y.S. 2d 374 (1954).

of his agents and servants. Liability falls upon the employer for both authorized and unauthorized acts so long as the agents or servants have acted within the scope of their authority.

3. An unofficial or unauthorized act of an agent acting outside the scope of his agency will not bring liability upon his employer.

4. An act of omission cannot be declared negligent if it cannot be shown that a reasonably prudent person could foresee that such an omission would likely cause injury.

5. Contributory negligence on the part of the plaintiff will generally bar his plea of negligence on the part of the defendant.

6. The proximate cause of a negligent act must be attributable to the tortfeasor. Any intervening act over which the tortfeasor has no foreseeable control breaks his privity and thus his liability.

7. Where instruction of a dangerous nature is carried on, constant and commensurate superivsion must be provided. The knowledge and experience of the students is a factor to be considered in the extent of supervision necessary.

8. A mere looker-on must take care of himself except as against wantonness or wilfulness or except under some peculiar circumstances of some undisclosed danger.

9. An invitee can expect only reasonable care on the part of his host for his well-being. An invitee is expected to utilize those facilities made available to him and when

he utilizes others without the knowledge or foresight of the host and is hurt, he may not claim negligence on the part of the host.

10. Each individual at any age is charged with a degree of responsibility for his own protection commensurate with his age and mental capacity. Others may rely in their judgment on such when determining what supervision is necessary.

11. A school cannot be an insurer of safety but must provide a reasonably safe place for work and play.

12. The existence of libel or slander is a question of fact for a jury to decide. The truth of a libelous or slanderous statement is a complete defense to an action for such (except where constitutional or statutory enactments provide that the act must be free of malicious motives).

CHAPTER VII

GENERAL SUMMARY

The study was concerned with the controversies among the personnel, patrons and students of private schools which have come before the courts in litigation. The resulting cases from such controversies were studied in order to determine what situations have led to litigation as well as to point out the legal principles which the courts have established or applied in their decisions regarding this litigation. Since it is only with difficulty and inconvenience that most people who wish to are able to become familiar with the law, especially that pertaining to private schools, the topics included herein were selected and brought together so that the usual time consuming process of legal research would be lifted from those who seek such information.

The methods of legal research were used. An orderly search of the legal encyclopedical works such as American Jurisprudence, Corpus Juris, and Corpus Juris Secundum, was made to determine the broad areas of litigation involving private schools. From these, two broad topics were selected. One major topic was concerned with the contrac-

tual relationships of tuition contracts and employment contracts including a discussion of rules and regulations since they become, expressly or impliedly, parts of most tuition contracts; and the second major topic involved liability in which tort liability was the primary concern. The nine series of the American Digest System were used to further identify cases concerned with the selected topics. Cases were selected for inclusion herein according to three main criteria. (1) Did the decision reflect the weight of authority and involve the principles of law usually applied in such controversies? (2) Did the court break precedent or apply any unusual point of law in view of the facts of the case? (3) Were the facts of the controversy of such a nature as to demonstrate different situations fraught with possible litigation?

Contractual Relationships

Contracts in General: A contract is a legally binding mutual agreement between two or more competent parties which involves a consideration of money or service and is in harmony with the law and public policy. A contract may be oral or written (except where statutes require them to be written), express, implied or constructive, or binding, voidable or void. Actually, a void contract is no contract at all.

Employment Contracts: Contracts of employment in private schools do not differ in law from other contracts of employ-

ment. However, since teaching contracts are for service which may not be completed within a year of the contract, they may fall under the provisions of the Statute of Fraud. If this is the case, they must be in writing to be enforceable in their entirety in the event of a breach. The remedy for a breached enforceable contract is a suit in contract for the contract price less mitigation, but the remedy of an unenforceable contract is a suit in equity for nominal or compensatory damages. The cases selected represented controversies including: oral contracts where no credible witnesses were in evidence; the continuance of a working relationship after the expiration of the contract; situations where contracts were entered into by one body but affirmed by another; contracts involving by implication customs and habits of localities; provisions for fee-splitting in the event of contract severence; a situation where a private school shared facilities with a public school; the shop right rule; and agents soliciting students.

Tuition Contracts: Tuition contracts and even those involving board have been generally held to be entire contracts. This rule of law is a modification of the general rule that in the event of a breached contract, relief is awarded in accordance with the extent of proved damages. This modification is justified on the basis of the fact that the school has provided a place for the student, hired teachers and in general committed its facilities, and the

withdrawal of one student does not appreciably decrease its expenses. Sometimes the entire nature of the contract is put forth in the school catalogue or brochure. The courts have ruled repeatedly that the provisions of catalogues and brochures become, expressly or impliedly, parts of the contract except where the language of the contract obviously negates this.

Controversies over tuition contracts are the most numerous of any in regard to litigation concerning private schools. Even though the rules and principles are well established and apply in most of the states, litigation still arises prompted by the belief that the special facts of the situation distinguish the plea from the general group.

Rules and Regulations: A student, through his parent's contract, impliedly or expressly, agrees to abide by the rules and regulations of the school. An infraction of the rules may be considered by the school as grounds for dismissal. If a dismissal occurs, the contract is considered breached by the conduct of the student providing, of course, the school has not aggravated the situation or acted in an arbitrary or malicious manner.

In litigation involving school rules and regulations, the courts will only decide if they are reasonable or not. The courts do not attempt to determine if the rules are wise but will look to see if those declared reasonable were enforced for the purposes contemplated.

Among others, the courts have found the following rules to be reasonable and actions involving such behavior or the disobedience of such rules to be cause for dismissal: a regulation requiring pupils to attend religious or devotional exercises in the school chapel; a rule that pupils shall not be allowed to be absent from school except at regular recesses; a pupil shall not be truant or go home without permission; girls may not leave the school premises without permission; marriage of a pupil is forbidden and grounds for expulsion; hazing is forbidden; drinking of alcoholic beverages is forbidden; students must apologize for misbehavior; lying is forbidden; excessive demerits are cause for dismissal; students may not enter certain restaurants or places of amusement; and smoking is forbidden.

Tort Liability

A tort is a wrong against person or property involving some legal right vested in that person or property. This topic was discussed in the light of those cases where the doctrine of charitable immunity did not apply and hence, the general laws of tort liability were in force. The legal principles may be found in the chapter summary. Some of the situations which gave rise to the actions in tort included in this chapter are as follows: a college chemistry instructor left a laboratory and a student caused explosion occurred; a child was injured when hit by a scrub-brush while eating lunch in a school room;

a child fell from a silo kept in poor repair on a school-owned farm adjacent to the campus; a spectator was injured by football players while standing on the sidelines during a game; a student spectator was injured while watching the felling of a chimney; a guest was injured by falling over a wire on a lawn after attending a concert on the campus; a visiting graduate was injured when he fell over a retaining wall into a ditch while answering a call of nature; a student was injured by a BB gun bullet while on a campus clean-up; a student fell on a greasy driveway; a child was hurt while playing on a monkey bar; a child was hurt when pushed and fell on a banana peel; a guest fell on a step while going to chapel; a boy was hurt playing football when he was supposed to be pulling weeds; a student was injured while riding in the car of a school employee; a teacher allowed a student to drive a school car in which an accident occurred; a school bus driver had an accident in the bus while he was on an errand of his own; a guest was expelled from a dance and claimed defamation of character; a school published the fact that it had dismissed some instructors for insidious plots and inciting a rebellion; and, a school informed a student's parents by letter that she had contracted a venereal disease.

Privilege or immunity from liability in the discipline of children is treated in Appendix A of this work and in Appendix B. Appendix C includes a discussion of the doc-

trine of charitable immunity.

In general, it appears from this study that there is a body of law peculiar to private schools especially in the area of tuition contracts. Even though the courts tend to look upon private schools of other than a charitable nature as corporations or simple businesses in search of monetary gain, it is recognized by the courts that the educational work carried on by these schools is of such an important nature that they hesitate to hamper the progress of this work with undue restrictions and excessive openings for liability. Although there is a body of law which seems to be peculiar to private schools, such schools in their every-day operation must be guided by the general principles of corporation and business law, and the law of torts, contracts, and agency.

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APPENDIX A

PRIVILEGE TO DISCIPLINE CHILDREN

from

THE RESTATEMENT OF THE LAW OF TORTS

Chapter 6, Topic 2

TOPIC 2. PRIVILEGE TO DISCIPLINE CHILDREN.

Scope Note: This Topic deals only with the privilege which is given in aid of the education and training of children to persons against whom a child may maintain a civil action under the principles of the law of Torts if the privilege is abused. It is, therefore, not concerned with the privilege of a parent to discipline his child. There is no case which indicates any tendency to bring the relation of parent and child as such, including its duties and privileges, within the scrutiny of the courts at the complaint of the child in an action of tort. The only protection for the child is the parent's amenability to criminal punishment if he exceeds the privilege accorded to him by law. The disciplinary privilege of a parent is, therefore, of importance only in the criminal law. It has no importance in the law of Torts, since the parent, as such, being immune from suit, does not need the protection of his privilege to give him immunity from civil liability.

Section 147. GENERAL PRINCIPLE.

One other than a parent who has been given by law or has voluntarily assumed in whole or in part the parental function of training or educating a child or one to whom the parent has delegated such training or education, is privileged to apply such reasonable force or to impose such reasonable confinement upon the child as he reasonably believes to be necessary for its proper training or education except insofar as the parent has restricted the privilege of a delegate to whom he has entrusted the child's education or training.

Comment:

a. The word "parent" as used in this Topic, includes all persons who share the immunity against civil liability which the law gives to a natural and legitimate parent. The question whether a stepfather, adopted parent or person otherwise standing in loco parentis shares the immunity of the natural parent under the rules of the law of Persons is not within the scope of the Restatement of this Subject.

b. The rule stated in this Section determines the existence of a privilege on the part of any person other than a parent who is exercising in whole or in part the parental function of training or educating a child. Such persons, unlike the parent, are under a liability to the child enforceable in a civil action of tort for any harm intentionally done to it unless the act which causes the harm is privileged. The privilege here stated is, therefore, important as protecting the actor from liability to the child enforceable by a civil action to which he would

otherwise be subject.

c. The rule stated in this Section applies to any person other than a parent who is exercising the parental function of training and educating a child. It applies to persons to whom the law has given complete or partial charge of such matters. Thus, it includes a guardian appointed by a court to take charge of the person of the child, the officers of a state orphanage or reformatory home, the teachers and other officials in a public school to which the parent is required to send his child for education, and one to whom the child is bound by poor guardians or some other public body authorized so to do. It also includes any person whom the parent has entrusted as his delegate the performance of the whole or any part of his parental duties and privileges for the purpose of training or educating his child. In the latter case, the parent has the power to determine the extent of his privilege which he chooses to give his delegate. In such case, the delegate has only so much of the parental privilege as the parent confers upon him. Thus, the normal privilege of a schoolmaster in a private school to inflict certain punishments for the purpose of maintaining school discipline or effectively performing his duties as schoolmaster are not available to one who receives a child upon whom the parent has stipulated that the usual punishments shall not be inflicted.

Section 148. EXCESSIVE FORCE.

One, other than a parent, who, in whole or in part, is in charge of the education or training of a child is not privileged to apply any force or impose any confinement which is unreasonable either,

(a) as being disproportiate to the offense for which the child is being punished, or

(b) as not being reasonable, necessary and appropriate to compel obedience to a proper command.

Comment:

a. The rule stated in the Section applied to two situations: first, the privilege to punish for a past offense committed or reasonably believed to have been committed by the child; second, the privilege to enforce obedience to a command given by the person in charge of the child. In determining whether the punishment inflicted for an offense is reasonable, one of the most important factors is the comparison between the severity of the punishment and the gravity of the offense for which it is inflicted.

b. Reasonableness of means employed. In determining whether a force or confinement is reasonable when applied or imposed to compel obedience to a command given to a

child by the person in charge of him, three factors are important. The first factor is the character of the command as being one obedience to which is necessary for the proper training or education of the child. In determining this, account is to be taken, where the entire training, as distinguished merely from the education of a child is in charge of the actor, of the desirability of inculcating in the child habits of obedience to commands of those who are in authority over him which are not obviously improper. The second factor is the necessity of the actor using the particular means which he adopts in order to compel the child to obey his commands. As in all cases in which the question arises as to whether there has been an excessive means of carrying out the purpose for which the privilege is given, the actor is not privileged to use a means to compel obedience if a less severe method is likely to secure obedience. The third factor is the character of the command and the importance both to the present welfare and the future training or education of a child of his obedience to it. Thus, it may be permissible to use very considerable force or to impose a prolonged confinement upon a child to prevent it from playing in the public streets amid heavy traffic although similar methods would not be permissible to compel a child to take his elbows from the dinner table.

Section 149. PUNISHMENT DEGRADING IN CHARACTER OR PERMANENTLY HARMFUL.

One other than a parent who has been given by law or has voluntarily assumed, in whole or in part, the parental function of training or educating a child, or one to whom the parent has delegated such training or education, is not privileged to inflict upon a child a punishment which is degrading in character or which is liable to cause serious or permanent harm.

Comment:

a. The privilege to punish a child is given for the benefit of the child and for the purpose of securing his proper education and training. A punishment which does serious or permanent harm to the child or which is of such a character as to injure his self-respect is obviously detrimental and not beneficial to his future.

Section 150. FACTORS INVOLVED IN DETERMINING REASONABLENESS OF PUNISHMENT.

In determining whether a punishment is excessive, the nature of the offense, the apparent motive of the offender, the influence of his example upon other children of the same family or group, the sex, age, and physical and mental condition of the child, are factors to be considered.

Comment:

a. The punishment which the actor has the privilege to inflict upon a child must be proportionate to the character of the offense and to a certain degree depends upon the character or apparent character of the offender. Thus, a more severe punishment may be privileged for an intentional offense than for a mere error of judgment or careless inattention. So too, the fact that a child has shown a fixed tendency to certain types of misconduct may justify a punishment which would be clearly excessive if imposed upon a first offender. If one child in a family or group has shown himself to be a ringleader in misconduct, the necessity of correcting his mischievous tendencies in order that the other children may not be contaminated may justify a punishment more severe than would be permissible if there were no other children likely to be misled by his example. The age and sex of the child may also be important. A punishment which would not be too severe for a boy of twelve may be obviously excessive if imposed upon a child of four or five. So too, it may be excessive to punish a girl for a particular offense in a manner which would be permissible as a punishment for the same offense committed by a boy of substantially the same age.

Section 151. PURPOSE OF PUNISHMENT.

Force applied or confinement imposed for any purpose other than the proper training or education of the child or for the preservation of discipline is not privileged although applied or imposed in an amount and upon an occasion which would be privileged had it been applied for such purpose.

Comment:

a. The application of force or the imposition of confinement upon a child is privileged only if applied or imposed for the purpose either of correcting the child's faults, thus improving its character, or of compelling obedience to proper commands. If the force is applied or imposed for any other purpose, as to satisfy a violent antipathy taken by a schoolmaster to his pupil, it is not privileged even though the offense is one which would justify the punishment if it were inflicted upon the child for the proper purpose of correcting its faults and so molding its character.

Section 152. PARTIAL CONTROL OF CHILD.

One who is charged only with the education or some other part of the training of a child has the privilege stated in Section 147 only insofar as the privilege is necessary for the education or other part of the training which is committed or delegated to the actor.

Comment:

a. Schools, camps, etc. The rule stated in this Section applies not only where the function of educating and training a child has been delegated by the parent or one standing in loco parentis to it, but also where the child is committed by law to the actor for such purposes. Thus, it applies not only to a boarding school or camp or to a private day school to which the child has been sent by the parent or person in loco parentis, but also to public schools to which the parents are required to send their children unless they elect to send them to a private school. Where the child is sent to a boarding school or summer camp, the privilege of the school or camp authorities extends to matters necessary not only to the education but also to the general training of the child. The same is true where the child is committed to a public institution. On the other hand, the privilege of a day school, whether public or private, is confined to matters necessary to the education of the child, except that the school authorities are privileged to maintain the discipline necessary not merely to the education of the particular child but to the education of the children as a group and to prevent the school from becoming a nuisance to the neighborhood. Thus, except insofar as the conduct of the children in the vicinity of the school is such as to cause an unreasonable annoyance to the neighborhood, the authorities of a day school whether public or private, are not privileged to punish a child for offenses committed outside of the school premises or in their immediate vicinity.

Section 153. POWER OF PARENT TO RESTRICT PRIVILEGE.

(1) An actor who is in charge of the educational training of a child soley as the delegate of its parent is not privileged to inflict a punishment which the parent has forbidden or to punish the child for doing or refusing to do that which the parent has directed the child to do or not to do.

(2) An actor who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, notwithstanding the parent's prohibitions or wishes.

Comment on Subsection (1):

a. Private schools. Insofar as the actor is voluntarily performing a part of a parent's function of training and educating his child as the delegate of the parent, he acquires only so much of the parent's privilege as the parent chooses to delegate to him. Thus, if a private school chooses to accept a pupil whose parent has stipulated that

the punishments usual in the school shall not be inflicted upon him, the schoolmaster is not privileged to inflict the usual punishments even though they are otherwise permissible. If the punishment inflicted by such a schoolmaster is not excessive and is inflicted upon a proper occasion, the fact that the school or institution forbids it does not destroy the schoolmaster's privilege. This is so unless the parent's knowledge of the rules is shown to have operated as an inducement to send the child to a particular school, in which case the parent may be assumed to have delegated only so much of his privilege as is consistent with the school rules.

Comment on Subsection (2):

b. The words "public officer" include a teacher in a public school, provided by the State for the Education of its children and the staff of a reformatory or other institution to which children are committed for education or training even though such commitment is a penalty for delinquency. Such persons do not act as the delegates of the parent but as officers of the State or municipality, carrying out the public policy thereof.

c. Public schools. This Subsection applies not only where the parent is required to send his child to a public school but also where, having the option to send the child to such a school or to a private school, he elects the former. It is also applicable where the parent, without obligation to do so, sends his child to a high school or State college or university. In such cases, the fact that the parent expresses a desire that the child should not be punished in a particular way or for a particular offense does not restrict the privilege of the school authorities. The will of the parent cannot defeat the policy of the State. The school authorities, therefore, have such disciplinary privilege as is reasonably necessary to secure the education of the child irrespective of the wishes of its parent. The same is true where the parent sends the child to a public school in preference to a private school as a matter of economy or choice. However, no order of the school board or other body in charge of the public schools can confer upon the school authorities any privilege in excess of those stated in this Topic.

Section 154. PRIVILEGE OF ONE IN CHARGE OF GROUP.

One who is in charge of the training or education of a group of children is privileged to apply such force or impose such confinement upon one or more of them as is reasonably necessary to secure observance of the discipline necessary for the education and training of the children as a group.

Comment:

a. A schoolmaster or the staff in charge of a summer camp is privileged to use reasonable force for the purpose of preserving the discipline necessary for the proper education or training of the children as a group irrespective of whether the conduct of a child is such as to require the use of such force for its individual training or education.

Section 155. EFFECT OF EXCESSIVE FORCE.

If the actor applies a force or imposes a confinement upon a child which is in excess of that which is privileged,

(a) the actor is liable for so much of the force or confinement as is excessive,

(b) the child has the privilege stated in Sections 63 to 75 to defend himself against the actor's use or attempted use of the excessive force or confinement.

Comment:

a. An excessive punishment inflicted by one who is privileged under the rule stated in Section 147 makes the actor liable for that part of the punishment which is in excess of that which he is privileged to inflict. It does not make him liable for so much of the punishment as was inflicted before the privilege was abused by the excessive punishment. The child is privileged to use force to defend himself from the excessive punishment under the rules stated in Sections 63 to 75.

APPENDIX B

CORPORAL PUNISHMENT

from

AMERICAN LAW REPORTS

43 ALR 2d 469

I. Scope and related annotations

a. Scope.

In this annotation it is sought to determine whether, and to what extent, a teacher[1] may administer[2] physical chastisement[3] to a pupil[4] without thereby incurring civil liability.[5]

b. Related annotations.

For the reader's convenience, the following annotations

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[1]The term "teacher" is, for present purposes, definable as any school authority. Thus, cases involving a civil liability of a school principal, or school board officer, for punishment administered to a pupil are within the scope of the present discussion; on the other hand, such civil actions against persons only remotely participating in the disciplinary functions of school teachers and officers -- for example, an action against the driver of a school bus -- fall outside of the body of case law which this annotation is concerned.

[2]As to the liability of a teacher for an assault upon a pupil made by one other than the teacher, see, for example, Mack v. Kelsey (1889) 61 Vt 399, 17 A 780.

[3]As to the liability, in damages, of school authorities for punishment of a pupil by suspension from the school, see, for example, Burdick v. Babcock (1871) 31 Iowa 562.

[4]The reader should note that the term "pupil" as used in the annotation title does not extend to infants confined in correctional institutions. For a case dealing with the civil liability of the superintendent of such a correctional institution for corporal punishment administered to one confined therein, see Burrage v. Gill (1930) 15 La App 126, 130 So 857.

[5]On the question whether a teacher's act in inflicting corporal punishment upon a pupil constitutes grounds for his discharge from employment, see, for example, Berry v. Arnold School Dist. (1940) 199 Ark 1118, 137 SW2d 256.

And for a case involving the question of the effect upon a parent's liability for assault upon a teacher of the fact that the assault was motivated by the teacher's excessive corporal punishment of the child, who was his pupil, see Endicott v. Robertson (1922) 211 Mo App 508, 244 SW 947.

are noted as dealing with questions closely related in interest to the one presently under discussion:

Criminal homicide or assault by an excessive or improper punishment inflicted on child by parent or one in loco parentis, 37 ALR 704, supplemented in 64 ALR 292.

Right of one in loco parentis other than teacher to punish child, 43 ALR 507.

Right to discipline pupil for conduct away from school grounds, 41 ALR 1312.

Personal liability of public school officers, or teachers, or other employees for negligence, 32 ALR2d 1163.

As to the liability of a parent or a person, other than a teacher, in loco parentis, for personal tort against a minor child, see the annotation in 19 ALR2d 423.

2. Summary

It is a well-established rule of the law of torts that a teacher is immune from liability for physical punishment, reasonable in degree, administered to a pupil.[6] The teacher is held[7] (and in some jurisdictions is stated by statute)[8] to stand in loco parentis, and to share the parent's right to obtain obedience to reasonable commands by force.[9]

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[6]See Sec 3a, infra.

[7]See Sec 3c, infra.

[8]See Sec 3e, infra.

[9]Note that Sec 147 of the Restatement of Torts states that one other than a parent who has been given by law or who has voluntarily assumed in whole or in part the parental function of training or educating a child, or one to whom the parent has delegated such training or education, is privileged to apply such reasonable force upon the child as he reasonably believes to be necessary for the child's proper training and education, except insofar as the parent has restricted the privilege of one to whom he has entrusted the child's education or training.

But a teacher's right to use physical punishment is a limited one.[10] His immunity from liability in damages requires that the evidence show that the punishment administered was reasonable,[11] and such a showing requires consideration of the nature of the punishment itself,[12] the nature of the pupil's misconduct which gave rise to the punishment,[13] the age[14] and physical condition of the pupil,[15] and the teacher's motive[16] in inflicting the punishment.[17] If consideration

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[10]The Restatement of Torts, in Sec 148, embodies the view that one, other than a parent, who, in whole or in part, is in charge of the education or training of a child is not privileged to apply any force or impose any confinement which is unreasonable either as being disproportionate to the offense for which the child is being punished, or as not being reasonably necessary and appropriate to compel obedience to a proper command.

[11]The question of reasonableness is one of fact. See Sec 5, infra. Note that, in some instances, it has been stated that there is a presumption of reasonableness. See Sec 6, infra.

[12]See Sec 7, infra.

[13]See Sec 8, infra.
In Sec 151 of the Restatement of torts, the rule is stated that force applied by one having a privilege of administering reasonable physical punishment to a child for any purpose other than the proper training or education of the child or for the preservation of discipline is not privileged although applied or imposed in an amount and upon an occasion which would be privileged had it been applied for such purpose.

[14]See Sec 9, infra.

[15]See Sec 10, infra.

[16]See Sec 11, infra.

[17]Section 150 of the Restatement of Torts states the principle that in determining whether a punishment administered to a child, by one (such as a teacher) having the privilege of reasonable punishment, is excessive, factors to be considered are the nature of the child's offense, the child's apparent motive, the influence of the child's example on other children of the same group, and the sex, age, and physical and mental condition of the child.

of all of these factors indicates that the teacher violated none of the standards implicit in each of them, then he will be held free of liability;[18] but it seems liability will result from proof that the teacher, in administering the punishment, violated any one of such standards.[19]

II. Teacher's administration of reasonable corporal punishment as "privileged"

3. General rule.

a. Generally.

It is a well-established principle of the law of torts[20] that corporal punishment which is reasonable in degree, and which is administered by a teacher to a pupil as a disciplinary measure, is "privileged" in the sense that the administration of such punishment does not give rise to a cause of action for damages against the teacher.

Alabama.--Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

Arkansas.--Berry v. Arnold School Dist. (1940) 199 Ark 1118, 137 SW2d 256 (dictum).

Connecticut.--Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841; O'Rourke v. Walder (1925) 102 Conn 130, 128 A 25, 41 ALR 1308 (rule supported by implication); Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377.

Illinois.--Swigart v. Ballou (1903) 106 Ill App 226 (rule supported by implication); Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889.

Indiana.--Cooper v. McJunkin (1853) 4 Ind 290.

Kentucky.--Hardy v. James (1872) 5 Ky Ops 36 (rule supported by implication).

Maine.--Stevens v. Fassett (1847) 27 Me 266; Patterson v.

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[18]For cases holding that the evidence showed the teacher's nonliability, see Sec 14, infra.

[19]For cases holding that the evidence showed the teacher's liability, see Sec 13, infra.

[20]The principle is expressly recognized in the Restatement of Torts. See Sec 2 supra.

Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

Missouri.--Haycraft v. Grigsby (1901) 88 Mo App 254, later app 94 Mo App 74, 67 SW 965; Cook v. Neely (1910) 143 Mo App 632, 128 SW 233 (dictum); Christman v. Hickman (1931) 225 Mo App 828, 37 SW2d 672.

Nebraska.--Clasen v. Pruhs (1903) 69 Neb 278, 95 NW 640, 5 Ann Cas 112 (recognizing rule).

New Hampshire.--Kidder v. Chellis (1879) 59 NH 473; Heritage v. Dodge (1886) 64 NH 297, 9 A 722; Wilbur v. Berry (1902) 71 NH 619, 51 A 904 (rule supported by implication).

North Carolina.--Drum v. Miller (1904) 135 NC 204, 47 SE 421, 65 LRA 890, 102 Am St Rep 528.

Ohio.--Guyten v. Phodes (1940) 65 Ohio App 163, 29 NE2d 444 (rule supported by implication); Quinn v. Nolan (1879) 7 Ohio Dec Reprint 585, 4 WL Bull 81.

Pennsylvania.--Guerrieri v. Tyson (1942) 147 Pa Super 239, 24 A2d 468 (dictum). And see Harris v. Galilley (1937) 125 Pa Super 505, 189 A 779, and Rupp v. Zintner (1937) 29 Pa D and C 625, both of which were decided under Pennsylvania statute delegating parental disciplinary authority to teacher.[1]

Tennessee.--Marlar v. Bill (1944) 181 Tenn 100, 178 SW2d 634; Phillips v. Johns (1930) 12 Tenn App 254 (recognizing rule).

Vermont.--Hathaway v. Rich (1846) 19 Vt 102; Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156; Melen v. McLaughlin (1935) 107 Vt 111, 176 A 297.

Wisconsin.--Morrow v. Wood (1874) 35 Wis 59, 17 Am Rep 471 (recognizing rule).

b. Privilege as abrogated by statute.

A teacher's privilege to administer reasonable physical punishment to a child is, in some jurisdictions, embodied in statutes. See Sec 3e, infra.

On the other hand, in one case it was contended that a teacher's privilege to administer moderate corporal punishment to a child to maintain school discipline had been abrogated by particular statutory provisions. This was in Stevens v. Fassett (1847) 27 Me 266, which involved a

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[1]As to this statutory provision, see Sec 3e, infra.

statute providing that a school superintending committee should expel from any school any obstinately disobedient scholar; the contention made was that this provision made it unlawful for a teacher to use physical force upon a pupil in order to obtain obedience to school rules. The court rejected this contention, reasoning that the rule by which teachers are accorded the privilege of moderate physical punishment is a well-established one, and, if the statute had been intended to abrogate this rule, and to deny entirely the right of a teacher to employ such measures in the government and discipline of his school, it was to be expected that it would contain a more explicit declaration of that intention. In addition, it was pointed out, the statute specified merely the action which might be taken against an obstinately disobedient pupil, and did not indicate that other action, fundamentally less severe, might not be taken against pupils who had simply omitted to comply with the reasonable commands and kindly persuasions of instructors.

c. Rationale of general rule; teacher as person in loco parentis.

A teacher's immunity from civil liability for reasonable physical punishment administered to a pupil results from judicial recognitions that, as to his pupils, the teacher stands in loco parentis and shares, insofar as matters relating to school discipline are concerned, the parent's right to use moderate force to obtain the child's obedience.

Alabama.--Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

Connecticut.--Sheehan v. Sturges (1885) 53 Conn 481, 2A 841 (recognizing rule); Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377.

Illinois.--Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889.

Indiana.--Cooper v. McJunkin (1853) 4 Ind 290.

Maine.--Stevens v. Fassett (1847) 27 Me 266; Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

New Hampshire.--Heritage v. Dodge (1886) 64 NH 297, 9 A 722 (rule supported by implication).

North Carolina.--Drum v. Miller (1904) 135 NC 204, 47 SE 421, 65 LRA 890, 102 Am St Rep 528.

Ohio.--Quinn v. Nolan (1879) 7 Ohio Dec Reprint 585, 4 WL Bull 81 (rule supported by implication).

Tennessee.--Marlar v. Bill (1944) 181 Tenn 100, 178 SW2d

643; Phillips v. Johns (1930) 12 Tenn App 354 (recognizing rule).

Texas.--Prendergast v. Masterson (1917, Tex Civ App) 196 SW 246.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156.

For example, in Stevens v. Fassett (1847) 27 Me 266, the court said that the right of a parent to keep his child in order and obedience is secured by the common law, and he may lawfully correct his child being under age, in a reasonable manner, for the benefit of his education; a parent may also delegate a part of his parental authority during his life to the tutor or schoolmaster of his child, who is then in loco parentis and has such portion of the power of the parent as may be necessary to answer the purpose for which he is employed.

d. Express delegation of parental authority.

In at least one action against a school teacher who had administered corporal punishment to a pupil, it was found that, under the facts presented, parental authority to punish the child was expressly delegated by the parent. This was in Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889, which involved the corporal punishment of a student in a school specially created for truants and incorrigibles. The evidence showed that the pupil's mother had twice written to the school principal, reciting the boy's refusal to attend school, and asking the principal to see what could be done, and to "take whatever steps are necessary" to make the boy come to school. The court ruled that such letters were properly admissible in evidence as embodying an express delegation to the school principal and teachers of the parent's authority to correct her son.

e. Statutory delegation of parental authority.

The reader should note that in some jurisdictions the privilege to discipline pupils is expressly accorded to teachers by statute. See, for example, the Pennsylvania statute involved in Harris v. Galilley (1937) 125 Pa Super 505, 189 A 779, to the effect that every teacher in the public schools in the state should have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians, or persons in parental relation to such pupils might exercise over them.

In connection with the Pennsylvania statute, it may

be noted that in Appeal of School Dist. of Old Forge (1941) 43 Pa D & C 167, the court ruled that the authority delegated to a teacher by such statute extended to all pupils in the school in which the teacher was employed, and not merely to those pupils under the teacher's immediate control.[2]

It may also be noted that in Rupp v. Zintner (1937) 29 Pa D & C 625, this statute was held to authorize teachers to administer no more than reasonable punishment; a teacher, although standing by virtue of the statute, in loco parentis to a pupil, may nevertheless be held liable in damages for an unreasonable physical punishment of the pupil, notwithstanding that the pupil's parents could only be prosecuted criminally for such unreasonable punishment.

4. Persons within scope of rule.

a. Generally: identity of "teacher"

Assuming the existence of the rule by which a teacher is "privileged" to administer reasonable corporal punishment to a pupil, a question may arise as to whether, in a particular situation, the person who administered such punishment had the status of a "teacher," or whether the person to whom the punishment was administered had the status of a "pupil." On the first question -- the "teacher" issue -- there are a number of pertinent decisions.

In Peck v. Smith (1874) 21 Conn 442, the court, in holding that a person charged with the duties of a school district committee was not liable for assault for physically ejecting from a school building a pupil who had been insubordinate and used profane language, stated that evidence of the defendant's status was admissible to explain the character in which he was acting, that is, that he was not acting as a stranger but colore officii.

Kidder v. Chellis (1879) 59 NH 473, was an action for damages for assault and battery in which plaintiff, a school pupil, contended that defendant was without legal right to administer corporal punishment because he had not complied with a statute providing that no person should be employed or paid for services as a teacher until he should produce and deliver a certificate of the school committee of the town that he was qualified to instruct in the subjects to be

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[2]Note that the School Dist. of Old Forge Case (Pa) supra does not fall precisely within the scope of this annotation, since it deals with the question whether a teacher may properly be discharged from her employment for administering corporal punishment to a pupil.

taught in the school in which he was employed to teach. Conceding that the defendant had not complied with the statutory provision, the court said that it did not necessarily follow that the plaintiff could recover for the assault, which was in the form of punishment administered to maintain discipline in the school. The court said that the defendant was actually keeping a school in a schoolhouse, and sustained to other occupants of the school the relation of teacher, and they to him that of pupils. Although defendant was not a public teacher by legal appointment, he was a teacher in fact, and his authority to govern the school could not be contested by those who sought to avail themselves of its advantages.

In connection with the above decisions, Mansell v. Griffin (Eng) (1908) 1 KB 160, 1 BRC 708, 12 Ann Cas 350--Div Ct, app dismd (1908) 1 KB 947, 1 BRC 718--CA, is to be noted for a holding that a teacher was not liable in damages for administering corporal punishment to a pupil for a breach of school discipline, notwithstanding that the teacher was not specifically authorized by school regulations to inflict corporal punishment upon pupils, especially where neither the teacher herself, nor the child's parents, knew of any lack of such authority.

Providing an interesting contrast with the views discussed above is Prendergast v. Masterson (1917, Tex Civ App) 196 SW 246, which presented the question whether a school superintendent was within the protection of the rule that a teacher may, without civil liability, inflict corporal punishment upon a child to compel the child's compliance with reasonable school rules. Defendant, from whom damages were sought for an assault upon plaintiff, who was a pupil, contended that he had taken active charge of the high school which plaintiff attended and had active control thereof at the time he assaulted plaintiff, and that therefore he and plaintiff occupied toward each other the relationship of teacher and pupil. Defendant contended, further, that if he did not occupy the relationship of teacher toward pupil, then he was a public officer charged with the duty to maintain order in the high school, and therefore it was not unlawful for him to assault plaintiff as he did. In addition, defendant argued that if he was not entitled to defend plaintiff's suit on either of the above grounds, he had a sufficient defense in the custom which recognized a right in a superintendent of schools to chastise pupils therein. Answering these contentions, the court said, first, that there was nothing in the rules of the school board which authorized defendant as a superintendent to take control of the high school to the exclusion of the teachers therein; second, if, as superintendent, defendant was a public officer, he did not thereby have a right to chastise plaintiff, since such a right was not conferred by law on any public officer

as such; and third, if it was a custom for superintendents of schools to chastise pupils therein, the custom existed in violation not only of well-established principles of law, but in violation of a provision of a criminal statute denouncing as a crime the use of lawful violence upon the person of another.

And for a case which supports, by implication, the principle that to be within the scope of a teacher's privilege to administer reasonable corporal punishment to a pupil as a disciplinary measure, it is necessary that the person who administered such punishment be responsible for maintaining order and discipline, see Suits v. Glover (1954) 260 Ala 449, 71 So 2d 49, 43 ALR2d 465.

b. Identity of "pupil."

It seems that in only one case has there been made an argument that the rule that a teacher's physical punishment of a pupil is privileged as rendered inapplicable by the fact that the person punished did not, as a technical matter, have the status of a "pupil." In Stevens v. Fassett (1847) 27 Me 266, the contention was made that the privilege normally accorded to a teacher to administer moderate corporal punishment to a pupil to secure obedience to reasonable rules did not exist because the pupil punished was of such an age that he was not legally entitled to enrollment in the school.[3] It appeared that a teacher had used physical force upon a student who was over twenty-one years of age and was not entitled to enrollment in the school. The court, ruling that the privilege existed regardless of the pupil's age, said that when one over the legal age presents himself as a pupil, and is received and instructed by the teacher, he cannot claim the privilege of attending the school and at the same time be subject to none of the duties incident to the status of a pupil; if such a person is disobedient, he is not exempt from the liability to punishment, so long as he is treated as having the character which he assumes; he cannot plead his voluntary act and then insist that it is illegal as an excuse for creating disturbance, and escape consequences to which he would be subject either as a refractory, incorrigible pupil, or as one who persisted in interrupting the ordinary business of the school.

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[3]Note that this contention involved a point distinct from the question whether the age of a child who is punished was such that the very fact of punishment showed an abuse of the teacher's privilege. On the latter point (that is, whether punishment administered to a pupil was, in consideration of his age, reasonable), see Sec 9, infra.

III. Determination of reasonableness

5. Generally; reasonableness as jury question.

The very nature of the rule which accords to a teacher the privilege to physically punish a pupil makes it clear that where it is sought to hold a teacher liable in damages for such punishment administered to a pupil, the crucial question is the reasonableness of the punishment.

The courts are in harmony in holding that whether particular punishment administered was, under the facts and circumstances, reasonable, is a question of fact to be determined by the jury.

Connecticut.--Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841; Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377.

Illinois.--Swigart v. Ballou (1903) 106 Ill App 226 (rule supported by implication).

Kentucky.--Hardy v. James (1872) 5 Ky Ops 36 (rule supported by implication).

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

Missouri.--Haycraft v. Grigsby (1901) 88 Mo App 354, later app 94 Mo App 74, 67 SW 965; Christman v. Hickman (1931) 225 Mo App 828, 37 SE2d 672.

Nebraska.--Clasen v. Pruhs (1903) 69 Neb 278, 95 NW 640, 5 Ann Cas 112 (recognizing rule).

Pennsylvania.--Harris v. Galilley (1937) 125 Pa Super 505, 189 A 779; Rupp v. Zintner (1937) 29 Pa D and C 625 (rule supported by implication).

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156.

6. "Presumption" of reasonableness.

a. View that reasonableness is presumed.

In a few cases the courts, in dealing with the question whether, for purposes of determining a teacher's civil liability, punishment administered by the teacher to a pupil was reasonable, have taken the view that there exists a presumption of reasonableness.

Illinois.--Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889.

Missouri.--Haycraft v. Grigsby (1901) 88 Mo App 354, later app

94 Mo App 74, 67 SW 965.

Tennessee.--Phillips v. Johns (1930) 12 Tenn App 254 (recognizing rule).

In connection with the view which accords a presumption of reasonableness to corporal punishment administered to a pupil by a teacher, Haycraft v. Grigsby (1901) 88 Mo App 354, later app 94 Mo App 74, 67 SW 965, merits individual attention. In that case it appeared that the trial court instructed the jury that the presumption was that punishment inflicted upon a student by a teacher was in the exercise and within the bounds of the teacher's lawful authority. The court said that if this instruction meant that the law presumed that the punishment was not undeserved nor excessive, it was a bad mode of stating the rule that the burden was on the pupil to establish the punishment's undue violence or lack of just provocation by the weight of evidence. The court said that in the absence of testimony, the presumption would be that the punishment was reasonable, but after evidence was introduced in regard to the matter, presumptions concerning it ceased to exist, and the issue of whether it was excessive or proper was then to be determined, like any other question in the case, from the weight of the evidence. And, it was added, in the instant case there was abundant testimony on both sides of the question, and the jury should not have been instructed that there was a presumption favorable to either side.

b. View that teacher is entitled to benefit of doubt.

Differing (it would seem) only in terminology from the cases holding that the reasonableness of punishment administered to a pupil by a teacher is to be presumed, are the following decisions in which the courts stated that in the determination of reasonableness the teacher is entitled to the benefit of any doubt that may exist.

Connecticut.--Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377.

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156; Melen v. McLaughlin (1935) 107 Vt 111, 176 A 297.

Thus, for example, in Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156, the court said that in determining the reasonableness of corporal punishment administered to a pupil by a teacher as a disciplinary measure, considerable allowance

should be made to the teacher by way of protecting him in the exercise of his discretion, and expecially was this allowance to be made where it appeared that the teacher acted from good motives and not from anger or malice. A teacher, the court said, is not to be held liable on the ground of excessive punishment unless the punishment is clearly excessive and would be held so in the general judgment of reasonable men, and if there is any reasonable doubt whether the punishment was excessive, the teacher should have the benefit of that doubt.

7. Factors to be considered; nature of punishment.

a. Generally.

Perhaps the most important of the factors which the courts require to be taken into consideration in determining whether corporal punishment administered by a teacher to a pupil is privileged (with the result that the teacher is immune from civil liability therefor) is the nature of the punishment itself--that is, the form which the punishment took, including both the means by which the punishment was inflicted[4] and the extent of resultant injury to the pupil. The necessity that this factor be considered is either expressly or impliedly supported by the statements of the courts in the following cases:

Alabama.--Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

Arkansas.--Berry v. Arnold School Dist. (1940) 199 Ark 1118, 137 SW2d 256.

Connecticut.--Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841.

Indiana.--Cooper v. McJunkin (1853) 4 Ind 290.

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

North Carolina.--Drum v. Miller (1904) 135 NC 204, 47 SE 421, 65 LRA 890, 102 Am St Rep 528.

Ohio.--Quinn v. Nolan (1879) 7 Ohio Dec Reprint 585, 4 WL Bull 81.

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[4]As to the various means of punishment used in cases in which the teacher was held liable, see Sec 13, infra. As to such means in cases in which the teacher was held not liable, see Sec 14 infra.

Pennsylvania.--Harris v. Galilley (1937) 125 Pa Super 505, 189 A 779; Rupp v. Zintner (1937) 29 Pa D and C 625.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156.

Thus, in Cooper v. McJunkin (1853) 4 Ind 290, the court, acknowledging a teacher's right to chastise a pupil moderately, said that it did not follow that a choleric schoolmaster would be justified in beating and cutting the head and face of a wayward boy with any weapons which his passions might supply.

And in an action by a pupil against a teacher to recover damages for physical punishment administered to the pupil by the teacher, it was held in Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818, that the trial court had erred in telling the jury that in order for a teacher to be liable for assault committed in connection with physical discipline of a pupil, the punishment administered must be so clearly excessive that all persons would agree as to its excessiveness. The court said that the true criterion, is the general judgment of reasonable men, and, under this criterion, a teacher is liable if he inflicts a punishment the nature of which is such that the general judgment of such men, after thought and reflection, would clearly call it excessive; the rule stated by the trial court, which would permit a teacher to proceed in severity of punishment until it became so great as to excite the instant condemnation of all men, was said to be clearly wrong.

b. Punishment causing permanent injury.

In Rupp v. Zintner (1937) 29 Pa D and C 625, the court, in a case in which it appeared that a pupil suffered permanent injury to his ear as a consequence of being struck over the ear by a teacher, commented that, if a teacher feels that corporal punishment must be administered to a pupil, "nature has provided a part of the anatomy for chastisement," and tradition holds that such chastisement should be there applied.

On the other hand, in Drum v. Miller (1904) 135 NC 204, 47 SE 421, 65 LRA 890, 102 Am St Rep 528, the court, after stating that a teacher has authority to correct his pupil by corporal punishment when the pupil is disobedient or inattentive to his duties, said that any act done by the teacher in the exercise of this authority, and not prompted by malice, is not actionable, although it may cause permanent injury, unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result from the act.

8. Offense for which punishment administered.

a. Generally.

In ascertaining whether a teacher, in physically chastising a pupil, has overstepped the bounds of his privilege to inflict reasonable punishment and is thus liable in damages for the harm caused, the nature of the pupil's conduct which gave rise to the punishment is to be considered.

Alabama.--Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

Arkansas.--Berry v. Arnold School Dist. (1940) 199 Ark 1118, 137 SW2d 256 (rule supported by implication).

Connecticut.--Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377 (rule supported by implication).

Illinois.--Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889.

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

Missouri.--Haycraft v. Grigsby (1901) 88 Mo 354, later app 94 Mo App 74, 67 SW 965.

New Hampshire.--Kidder v. Chellis (1879) 59 NH 473.

Ohio.--Quinn v. Nolan (1879) 7 Ohio Dec Reprint 585, 4 WL Bull 81.

Tennessee.--Marlar v. Bill (1944) 181 Tenn 100, 178 SW2d 634.

Texas.--Prendergast v. Masterson (1917, Tex Civ App) 196 SW 246 (rule supported by implication).

Vermont.--Lander v. Seaver (1859) 32 Vt 144, 76 Am Dec 156; Melen v. McLaughlin (1935) 107 Vt 111, 176, A 297.

Wisconsin.--Morrow v. Wood (1874) 35 Wis 59, 17 Am Rep 471 (rule supported by implication).

Thus, for example, it has been said that in determining what is a reasonable corporal punishment, the apparent motive and disposition of the offending pupil, and the influence of his example upon others, are to be considered.

Connecticut.--Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377.

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am

Rep 818.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156

In connection with the principle that in determining whether corporal punishment of a pupil by a teacher was reasonable the offense of the child, or the reason why the punishment was administered, is to be considered, Kidder v. Chellis (1879) 59 NH 473, merits more detailed attention. In that case it appeared that plaintiff, a pupil in a public school, was not prepared when called upon to recite in a course on public speaking; defendant, the teacher, tried to explain the usefulness of the exercise to plaintiff, but the latter persisted in his refusal to speak, and defendant then informed him that he might have a period of three days to consider the matter, and if he then continued to refuse to speak, it would be necessary for him to leave the school. At the expiration of the period the pupil refused to speak, and the defendant sent him home to stay until he would, and, upon the pupil's return to school that afternoon, still refusing to conform to the teacher's requirement that he engage in public speaking, the defendant, telling him that he must leave, took hold of him and put him out of the schoolhouse. The teacher's effort in ejecting the pupil was sharp and vigorous, but was no more than was reasonably necessary to overcome the resistance of the plaintiff. On the day that he was physically ejected from the school, the plaintiff notified the defendant that he was acting according to the directions of his parents. Dealing with the question of the teacher's liability was affected by the fact that the offense punished was one committed by the pupil at his parents' direction, the court said that such direction by the parents, namely, that they did not desire him instructed in public speaking, did not limit the defendant's authority as his teacher in lieu of the finding of fact that the regulation was a reasonable and useful one to the school. The parents, it was said, could not require the teacher to receive their child under his instruction, without conforming to his reasonable rules. Since the pupil was informed that it was necessary for him to submit to the rule regarding public speaking or leave the school, and he remained, by so remaining he tacitly consented to submit, and gave the teacher authority to compel obedience.

It has been held that a teacher has no right to inflict corporal punishment upon a pupil to enforce an unreasonable rule. Berry v. Arnold School Dist. (1940) 199 Ark 1118, 137 SW2d 256 (dictum).

And it may be noted that in Morrow v. Wood (1874) 35 Wis 59, 17 Am Rep 471, the court said, by way of dictum, that a teacher has no right to administer corporal punishment to a pupil where the pupil's offense, giving rise to the

punishment, amounted to no more than obedience to the command of the pupil's father in respect to a particular course of study. The evidence there showed that the pupil's father had instructed him not to study geography, but to devote all of his time to other courses; that the teacher insisted that the child study geography, and that, upon his refusal to do so, the teacher resorted to force to compel obedience. The court took the view that, upon the facts presented, the teacher had no right or authority to chastise the pupil.

An Illinois court has ruled that in determining the reasonableness of corporal punishment administered to a pupil by a teacher, not only the acts of the pupil which were the immediate cause of the punishment are to be considered, but in addition, evidence should be admitted to show the pupil's past misconduct. Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889. To the same effect, see Sheehan v. Sturges (1885) 53 Conn 481, 2A 841, infra, rubric 14.

But a different view was taken in Haycraft v. Grigsby (1901) 88 Mo App 354, later app 94 Mo App 74, 67 SW 965. There it appeared that the trial court, in instructing the jury, stated that the "disposition" of the pupil was an element to be considered in determining what degree of punishment a teacher might properly administer to him. The court said that the expression was misleading, and if it was intended to refer to the pupil's temper or disposition at the time of the punishment, it was used ambiguously. The pupil's general disposition was said to be no more helpful to ascertain how much he ought to have been whipped, or whether he ought to have been whipped at all, than was the teacher's in ascertaining whether she whipped him excessively; the inquiry was properly to be directed to the pupil's docile or refractory conduct at the time he was punished.

b. Particular offenses held punishable.[5]

The courts have ruled that (assuming that it is otherwise reasonable) physical punishment administered to a pupil by a teacher will not render the teacher civilly liable if the punishment was administered for such misconduct as

--assaulting the teacher. Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841.

--abusing other pupils. O'Rourke v. Walker (1925) 102 Conn 130, 128 A 25, 41 ALR 1308.

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[5]Cases holding that particular pupil conduct is, by its nature, such as not to be punishable, are dealt with in Sec 8a, supra.

--bringing obscene writing and pictures to school. Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156.

--injuring or destroying school property. Id.

--insubordination. Suits v. Glover (1954) 260 Ala 449, 71 So 2d 49, 43 ALR2d 465; Berry v. Arnold School Dist. (1940) 199 Ark 1118, 137 SW2d 265 (dictum); Peck v. Smith (1874) 41 Conn 442; Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889; Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156.

--using profane language. Peck v. Smith (1874) 41 Conn 442; Deskins v. Gose (1885) 85 Mo 485, 55 Am Rep 387, infra, rubric 8(c).

--violating school rules. Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465; Berry v. Arnold School Dist. (1940) 199 Ark 1118, 137 SW2d 265; Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841; Deskins v. Gose (1885) 85 Mo 485, 55 Am Rep 387 (rule forbidding use of profane language, or quarreling or fighting on way home from school); Heritage v. Dodge (1886) 64 NH 297, 9 A 722; Marlar v. Bill (1944) 181 Tenn 100, 178 SW2d 634.

--quarreling or fighting. Deskins v. Gose (1885) 85 Mo 485, 55 Am Rep 387, infra. rubric 8(c).

--scuffling in school hall. Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

c. Offenses outside of school.

The courts are in agreement that a teacher's privilege to administer reasonable corporal punishment to a pupil is applicable to the pupil's misconduct when away from the school if correction of such misconduct is related to the maintenance of school order and discipline.

Thus, it has been said that the test of a teacher's right and jurisdiction to administer corporal punishment for offenses not committed on school property or going and returning therefrom, but after return of the pupil to his home, is not the time or place of the pupil's offense, but its effect upon the morale and efficiency of the school, whether it is in fact detrimental to the school's good order and to the welfare and advancement of the pupils therein. O'Rourke v. Walker (1925) 102 Conn 130, 128 A 25, 41 ALR 1308. The court said that if the conduct punished is detrimental to the best interests of the school, it is punishable, and, at least where school board rules so authorize, by corporal infliction. Any other principle, it was said, would result in a serious loss of discipline in school and possible harm to innocent pupils in attendance.

The O'Rourke Case (Conn) supra, is to be particularly noted for its holding that the punishability of the acts involved there (abuse of two small girl pupils) was not affected by the fact that such acts occurred on property owned by the mother of the pupil punished. Noting that the claim was made that the girls who were abused were trespassers upon the property of the mother, the court said that this claim was of no avail, there being nothing in the record to show that the pupil punished was acting under the direction of his mother; and, it was added, even if he were, such conduct as that participated in by him would not be lawful.

The question whether physical punishment administered to a pupil by a teacher was made actionable because it was administered in consequence of the pupil's conduct when outside the school was also presented in Deskins v. Gose (1885) 85 Mo 485, 55 Am Rep 387. There it appeared that plaintiff, a pupil, had been whipped with a switch by his teacher as a consequence of the pupil's use of profane language and engaging in quarreling and fighting away from the schoolhouse after school had adjourned for the day and while the pupils were on their way to their respective homes in violation of a standing rule against the use of profane language, quarreling, or fighting among the pupils, either at the schoolhouse or on their way home, which the defendant teacher had issued and often spoke of in the presence of the school and the plaintiff. The trial court refused to instruct the jury that the plaintiff, while in attendance at school as a pupil, was under the control of defendant as teacher, and that defendant had a right to punish him for an infraction of the rule in question, and that the verdict of the jury should be for the defendant unless they believed that the punishment inflicted was unreasonable or excessive. Reversing a judgment for plaintiff, the court said that the trial court erred in refusing to give the instruction requested, taking the view that the portion of the rule which forbade use of profane language, or quarreling, or fighting when pupils were on their way to their homes, was within the authority of the teacher. In support of this holding it was pointed out that the effects of pupils engaging in such conduct when on the way to their homes would necessarily be felt in the schoolroom, since it would engender hostile feelings among the pupils, arraying one against the other, as well as among the parents, destroying that harmony and good will which should always exist among the scholars who are daily brought in contact with each other in the schoolroom.

And in Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156, the court stated the rule to be that when a student, outside of school property and not during school hours, commits an offense which has a direct and immediate tendency to injure the school and bring the teacher's authority into contempt, especially when the offense is committed in the presence of

other pupils and of the teacher and with a design to insult the teacher, the teacher has the right to administer corporal punishment to the pupil for such acts if the pupil again returns to school. But, it was added, such out-of-school misbehavior must have not merely a remote and indirect tendency to injure the school, but instead, a direct and immediate bearing upon the welfare of the school, or the authority of the teacher and the respect due him.

To the same effect as the above decisions, see also Cleary v. Booth (Eng) (1893) L QB 465, in which the English court took the view that a teacher's authority to administer reasonable punishment to a pupil, to secure obedience to school rules, extended to a case where the pupil's disobedient conduct was in the form of an assault upon a fellow student while the two were on their way to school.

9. Age of pupil.

It is firmly established that in determining whether a teacher is liable in damages for physical punishment of a pupil on the ground that such punishment was not reasonable in character, the age of the pupil punished is to be considered.

Alabama.--Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

Connecticut.--Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841; Calway v. Williamson (1944) 130 Conn 575, 36 A 2d 377.

Indiana.--Cooper v. McJunkin (1853) 4 Ind. 290.

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

Missouri.--Haycraft v. Grigsby (1901) 88 Mo App 354, later app 94 Mo App 74, 67 SW 965.

Ohio.--Quinn v. Nolan (1879) 7 Ohio Dec Reprint 585, 4 WL Bull 81.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156; Melen v. McLaughlin (1935) 107 Vt 111, 176 A 297.

As to the effect of the age of the pupil punished upon a teacher's liability for particular physical punishment, see the factual analysis of the cases in Sec 13 and 14, infra.

10. Physical condition of pupil.

a. Generally.

Since what is reasonable punishment for a strong, healthy child may cause serious, permanent harm to a slight child, or one whose health is poor, it is held that the ascertainment of whether, on the one hand, particular punishment of a pupil by a teacher was privileged as reasonable, or, on the other, the teacher is liable in damages for such punishment, required that the physical condition of the child who was punished be taken into consideration.

Alabama.--Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

Connecticut.--Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841; Calway v. Williamson (1944) 130 Conn 575, 36, A2d 377.

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

Missouri.--Haycraft v. Grigsby (1901) 88 Mo App 354, later app 94 Mo App 74, 67 SW 965.

Ohio.--Quinn v. Nolan (1879) 7 Ohio Dec Reprint 585, 4 WL Bull 81.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156; Melen v. McLaughlin (1935) 107 Vt 111, 176 A 297.

As to the effect of the physical condition of the pupil punished upon a teacher's liability for particular physical punishment, see the factual analysis of the cases in Sec 13 and 14, infra.

b. Pupil's unusual susceptibility to harm.

In connection with the principle that the physical condition of a child is to be considered in determining whether punishment administered by a teacher gives rise to a cause of action for assault and battery, Quinn v. Nolan (1879) 7 Ohio Dec Reprint 585, 4 WL Bull 81, is to be noted for the court's statement that if a teacher, from the knowledge she had of a pupil and from his appearance, would be justified in supposing the pupil to be like other children of his age, and inflicted only a proper punishment, then the teacher would not be liable for damages even though some hidden defect in the pupil's consititution should cause injury to his health to follow the punishment. The court's comment was that it is the duty of parents who send to school children whose health or disposition would render the punishment permitted by the rules of the school dangerous or improper, to see that the teacher is informed of this fact.

And for a case embodying implicit support for the proposition that a teacher is not liable for reasonable corporal

punishment administered to a child, notwithstanding that because of the child's unusual susceptibility to harm from the type of punishment rendered, which susceptibility was unknown to the teacher, the results of the punishment were more serious than would normally have been the case, see Mansell v. Griffin (Eng) (1908) 1KB 160, 1BRC 708, 12 Ann Cas 350--Div Ct, app dismd (1908) 1 KB 947, 1 BRC 718--CA.

11. Teacher's motive.

The courts have held that in deciding the reasonableness of physical discipline of a pupil by a teacher, the teacher's motive in administering the discipline must be considered.

Alabama.--Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465.

Connecticut.--Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377 (rule supported by implication).

Illinois.--Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889.

Indiana.--Cooper v. McJunkin (1853) 4 Ind 290.

Maine.--Patterson v. Nutter (1886) 78 Me 509, 7 A 273, 57 Am Rep 818.

Missouri.--Haycraft v. Grigsby (1901) 88 Mo App 354, later app 94 Mo App 74, 67 SW 965.

New Hampshire.--Heritage v. Dodge (1886) 64 NH 297, 9 A 722.

North Carolina.--Drum v. Miller (1904) 135 NC 204, 47 SE 421, 65 LRA 890, 102 Am St Rep 528.

Pennsylvania.--Harris v. Galilley (1937) 125 Pa Super 505, 189 A 779; Rupp v. Zintner (1937) 29 Pa D and C 625 (rule supported by implication).

Tennessee.--Marlar v. Bill (1944) 181 Tenn 100, 178 SW2d 634.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156; Melen v. McLaughlin (1935) 107 Vt 111, 176 A 297 (rule supported by implication).

England.--Mansell v. Griffin (1908) 1 KB 160, 1 BRC 708, 12 Ann Cas 350--Div Ct, app dismd (1908) 1 KB 947, 1 BRC 718--CA.

For example, it is held that a teacher who, with legal malice or wicked motives, inflicts chastisement upon a child,

is liable for damages for assault. Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR2d 465 (rule supported by implication);[6] Drake v. Thomas (1941) 310 Ill App 57, 33 NE 2d 889.

And in Cooper v. McJunkin (1853) 4 Ind 290, the court (which acknowledged--and criticized--the right of a teacher to chastise a pupil moderately)[7] emphasized the necessity that teachers understand that whenever correction is administered in anger or in insolence, or in any other manner than moderation and kindness, accompanied with that "affectionate moral suasion" so eminently due from one placed by the law in loco parentis, the courts must consider them liable for assault and battery.

Similarly, in Haycraft v. Grigsby (1901) 88 Mo App 965, which was an action for assault and battery brought by a pupil against a teacher, the court, commenting that a teacher has a right to inflict reasonable punishment for misconduct by whipping but has no right to inflict unreasonable or excessive corporal punishment in that mode or any other, said that a teacher cannot administer punishment in any degree maliciously, there being no such thing as reasonable punishment from a malicious motive; the punishment must be administered for a salutary purpose--to maintain the discipline and

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[6]It is necessary to note that, in the Suits Case (Ala) supra, the court said that to be "guilty of an assault and battery" the teacher must "not only inflict on the child immoderate chastisement," but he must do so with "legal malice or wicked motive." Although the Suits Case was a civil action for damages, it seems probable that the rule thus stated was intended to express a principle of the criminal law of assault. A rule by which a teacher would be free of tort liability for immoderate punishment of a pupil, merely because of the teacher's lack of wrongful motivation, would not only fly in the face of the authorities dealt with in Sec 7, supra, but would, it is submitted, be entirely inconsistent with fundamental principles of civil justice.

[7]The court commented that the public seemed to cling to despotism in the government of schools which had been discarded everywhere else; that the very act of resorting to the rod demonstrated the incapacity of a teacher for one of the most important parts of his vocation, namely, school government; and that it could hardly be doubted that public opinion would, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government only the resources of his intellect and heart.

efficiency of the school. In that case it was held that the trial court had erred in instructing the jury that although a teacher imposed immoderate and unreasonable punishment upon a pupil, yet two school directors who were present with the teacher at the time the punishment was administered would not be liable unless they maliciously advised and directed the teacher to administer the punishment, or aided and assisted her; the court said that the proper rule was that if the directors advised or encouraged an immoderate whipping, or assisted in it, they would be liable, whether their motive was malicious or not.

In Heritage v. Dodge (1886) 64 NH 297, 9 A 722, it appeared that plaintiff, a school pupil, was physically disciplined by defendant, a teacher, when plaintiff disturbed the school by making a noise resembling a cough, which defendant understood was intended as an act of contempt and defiance of his authority. In an action to recover for assault and battery, plaintiff requested the trial court to instruct the jury that if the plaintiff could not help coughing, then the defendant was not justified in punishing him, although the defendant believed that plaintiff coughed for the purpose of defying his authority and disobeying the school rules. The court, holding the trial court's refusal to give the requested instruction proper, over-ruled plaintiff's exception to a verdict for defendant, saying that the instruction requested made the defendant liable without regard to whether he exercised reasonable judgment and discretion in determining whether plaintiff was guilty of intentional misconduct as a scholar. A teacher, the court said, is not required to be infallible in his judgment, and it is up to him to determine when and to what extent correction is necessary; like other persons clothed with discretion, a teacher cannot be made personally responsible for an error in judgment when he has acted in good faith and without malice.

On the other hand, courts have recognized that if corporal punishment inflicted upon a student is clearly excessive, then the teacher should be held liable in damages for assault, notwithstanding that he acted from good motives in inflicting the punishment and in his own judgment considered it necessary and not excessive.

Connecticut.--Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377.

Pennsylvania.--Rupp v. Zintner (1937) 29 Pa D and C 625.

Vermont.--Lander v. Seaver (1859) 32 Vt 114, 76 Am Dec 156.

IV. Teacher's liability under particular circumstances; factual classification of cases

12. Generally.

In the sections which follow, it is sought to demonstrate the operation of the general principles already discussed by viewing actions for damages for physical punishment of a pupil by a teacher from a point of view of result--that is, from the point of view of the teacher's liability or non-liability under particular circumstances. Since the basic question in cases of this kind (the question of reasonableness) is one of fact,[8] these holdings can furnish only the roughest sort of guide in the determination whether a particular instance of pupil punishment can be successfully litigated. But the importance of these actual holdings is to be emphasized--the general legal principles applicable to pupil punishment situations are especially interdependent, and it is only by a careful balancing-out of the effects that juries (acting under proper instructions), or appellate courts, or lawyers advising their clients, can reach a sound conclusion.

13. Teacher held liable.

A teacher's civil liability for physical punishment of a pupil has been held established in the following cases, in which it appeared--

--that the punishment was administered by a school principal who was charged with disciplining pupils after the pupil had been impudent to one of his teachers; that the pupil punished was ten years of age, weighed eighty-nine pounds, and was somewhat below average height for his age; that the principal, after the pupil had refused to leave a schoolroom and go to the principal's office, grasped the pupil by the wrist, pulled him across the floor, and because of the pupil's struggling and kicking, pushed the pupil to the floor and first knelt on the pupil's abdomen with one knee, and then sat on his abdomen; and that, during the period when the principal was kneeling and sitting on the pupil and as a result of pupil's efforts to free himself of the principal's weight, the pupil sustained a skin burn or abrasion becoming infected, developed into osteomyelitis.

Calway v. Williamson (1944) 130 Conn 575, 36 A2d 377.

--that the punishment was administered by a teacher as a consequence of a difference of opinion or understanding between the teacher and a pupil with regard to a trivial

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[8] See Sec 5, supra.

matter occurring in play in which the teacher took part with his pupils on equal terms, and that the punishment took the form of an assault upon, and a beating of, the pupil by the teacher. Hardy v. James (1872) 5 Ky Ops 36.

--that the punishment was administered by the school principal who, as a teacher, was authorized by statute to exercise parental control over pupils; that the punishment was administered as a consequence of the principal's belief that the pupil was causing a commotion in the school auditorium; that the punishment was in the form of a slap on the back of the pupil's neck with the principal's open hand; and that the pupil suffered permanent injury as a consequence of the punishment. Harris v. Galilley (1937) 125 Pa Super 505, 189 A 779 (holding evidence sufficient to support jury verdict in favor of pupil).

--that the punishment was administered by a teacher who, by statute, had been delegated parental disciplinary authority; that the punishment was administered as a consequence of the pupil's conduct in tapping on his desk with a pencil; that the punishment took the form of a blow over the pupil's right ear, which injured his eardrum and permanently impared his hearing in that ear. Rupp v. Zintner (1937) 29 Pa D and C 625.

--that the punishment was administered by a teacher as a consequence of defendant's inability to solve an arithmetic problem at the blackboard; that the punishment consisted of a blow with an arithmetic book over the pupil's left kidney, the blow being inflicted at the time when the pupil was bent over to pick up an eraser which had been shaken from her hand by the teacher; that the pupil was a girl eleven years old, and that as a consequence of the punishment the pupil suffered great pain, and it was necessary for her to remain, for a period of almost two months, in a plaster jacket extending from her armpits downward to about a quarter or half the length of her legs. Melen v. McLaughlin (1935) 107 Vt 111, 176 A 297.

--that the punishment was administered by a teacher as a consequence of the pupil's disobedience of the teacher's requirement that the pupil study geography, the disobedience springing from the fact that the pupil's father had ordered him not to study geography. Morrow v. Wood (1874) 35 Wis 59, 17 Am Rep 471.

--that the punishment was administered by a teacher as a consequence of the pupil's refusal to kneel down after he had been misbehaving himself; that the punishment consisted in the teacher dragging the boy by the ear in order to compel him to kneel; that the pupil was seven years of age, and that, as a result of the punishment, a cartilage in the pupil's

ear was fractured or ruptured and the pupil required extensive medical attention. Lefebvre v. La Congregation des Petits Freres (1890, Quebec) Montreal L 6 SC 430.

In connection with the cases dealt with above, it may be noted that in Serres v. South Santa Anita School Board (1935) 10 Cal App 2d 152, 51 P2d 893, the court held that a cause of action for battery was stated by a complaint alleging that the plaintiff, a minor, while engaged in athletic activities on school grounds, became engaged in an altercation for which defendant, a teacher, proceeded to punish plaintiff by commanding him to bend over and grasp his ankles, and then, after withdrawing some distance to give force and momentum to the blow, advanced rapidly and negligently and with the use of great and excessive force delivered with his open palm a violent blow upon the coccyx bone of the plaintiff, thereby fracturing plaintiff's coccyx. The court commented that the use of the word "negligent" in describing the teacher's actions did not change the cause of action into one for negligence, since the facts alleged showed that the teacher was charged with responsibility for his deliberate acts constituting a battery.

And note also Cooper v. McJunkin (1853) 4 Ind 290, in which a complaint alleging that a teacher unlawfully and with inhuman violence beat, bruised, and gashed the face of a pupil, was held not answered by a plea that the punishment administered was moderate correction, necessary for the good government of a school, and inflicted as a consequence of the pupil's negligence and disorderliness. The court, remarking that to call the acts complained of, which were acts of extreme violence, moderate correction, did not change their character, said that the teacher's pleading was not a denial of the pupil's allegations, nor did it confess and avoid them, and such pleading, professing to answer the whole declaration was bad on demurrer.

In line with the Cooper Case (Ind) supra, is Hathaway v. Rich (1846) 19 Vt 102, which was an action by a pupil against a teacher for assault and battery. The court, reversing a judgment in the defendant's favor, said that plaintiff's complaint charging that defendant had laid hold of him, and struck him a great number of violent blows with a rawhide, and with clubs, sticks, fists, and feet, thereby wounding him and tearing his clothes, was not sufficiently answered by defendants's plea that the assault was authorized by virtue of the teacher--pupil relationship. The court said that from defendant's pleading it could not be determined what degree of severity in punishment was called for by plaintiff's alleged misconduct as a student, but it was clear that defendant's allegations as to such misconduct (namely, that the plaintiff behaved and conducted himself "saucily and contumaciously" toward defendant) disclosed nothing to justi-

fy defendant in proceeding to the extraordinary length described in plaintiff's complaint.

And in Haycraft v. Grigsby (1901) 88 Mo App 354, later app 94 Mo App 74, 67 SE 965, the courts, in an action against a teacher and against school directors who aided and assisted the teacher, for injuries sustained by a pupil as a consequence of corporal punishment administered to him, reversed a judgment in defendants' favor, commenting that the record produced a strong impression that the pupil was maltreated and that while he might have needed correcting, unnecessary harshness was shown toward him. The evidence giving rise to this comment was as follows: the teacher, upon allegedly detecting the pupil talking to another boy and scratching his desk, told him to come forward and take a whipping, and when he did not come forward, started toward him; whereupon the pupil took a piece of broom handle out of his desk, brandished it and struck at the teacher; immediately thereafter, one of two school directors, who was present in the room with the teacher, took hold of the pupil and brought him back to the teacher, who whipped him rather severly; later in the day, when the pupil was requested to recite his lesson, he was unable to read (plaintiff's evidence showing that such inability was due to the fact that the pupil was crying, while defendant's evidence tended to show that the pupil was sulky), whereupon the teacher struck the slate out of the pupil's hand, and gave him an extremely severe flogging, badly striping and bruising his arm and shoulder and raising a lump on his head the size of a walnut.

Although not embodying a holding that a teacher was liable for damages as a consequence of corporal punishment administered to a pupil, Drum v. Miller (1904) 135 NC 204, 47 SE 421, 65 LRA 890, may also be noted at this point. In that case it appeared that defendant, a teacher, in order to attract the attention of plaintiff, a pupil, who had turned his head to see what was causing a disturbance in the schoolroom, threw a pencil at plaintiff and struck him in the eye, inflicting a very painful and serious wound which caused partial, if not total, blindness. At the trial the jury was charged that before they could return a verdict for the plaintiff, it was necessary for them to find that the defendant was, at the time, able to foresee, by the exercise of ordinary care, not only that injury would result from his act, but that the particular injury which was received by the plaintiff was the natural and probable consequence of his act. Reversing a judgment in defendant's favor, on the ground that this instruction was erroneous, the court said that if, upon a new trial, the jury found that the defendant acted maliciously, he would, of course, be liable to the plaintiff for the consequent injury and damage; but, if defendant inflicted a permanent injury in attempting to enforce the discipline of his school and in so doing failed to exercise ordinary care, he would still be

liable to the plaintiff if the jury found that the injury was the natural and probable result of his negligence and that the defendant, in the light of the attending circumstances, and in the exercise of ordinary care, ought reasonably to have seen that a permanent injury--not necessarily by specific injury--could be the natural and probable consequence of his act.

For a case in which a school superintendent was held liable for physical chastisement of a pupil, on the ground that the superintendent did not come within the scope of the privilege accorded to teachers to administer moderate corporal punishment to a pupil, see Prendergast v. Masterson (1917) Tex Civ App 196 SW 246, supra, 4a.

14. Teacher held not liable.

The rule that a teacher is immune from civil liability for reasonable physical punishment of a pupil has been held applicable, and to bar recovery against the teacher, in the following cases, in which it was shown--

--that the punishment was administered by a teacher who was responsible for maintaining order and discipline and authorized to administer corporal punishment as necessary as punishment for infractions of the school rules; that the teacher acted without anger; that the punishment was administered as a consequence of the pupil's infraction of school rules by being insubordinate and engaging in scuffling in the school hall; that the pupil was eight and one-half years old and in good health; that the evidence conflicted on the question whether the punishment was (as alleged by the teacher) in the form of a paddling with ping-pong paddle, or (as alleged by the pupil) in the form of a whipping with a slat from an apple crate; and that, although the evidence was conflicting on whether the pupil was paddled on his buttocks only, whether the skin was broken, and whether more than five licks were administered, it appeared that the pupil remained in school the remainder of the school day on the day the incident occurred, and did not miss any time from school other than the day following the incident. Suits v. Glover (1954) 260 Ala 449, 71 So2d 49, 43 ALR 2d 465.

--that the punishment was administered, by one who was acting as a school district committee, as a consequence of the pupil's insubordination, and use of profane language when the defendant asked whether the pupil could not do a better job of removing from a school stovepipe chalk marks which the pupil had placed thereon; and that the punishment was in the form of the committee's laying his hands upon the pupil's shoulder and leading him to the door and out of the schoolhouse, using no other violence, nor any force unnecessary to the ejection of the pupil. Peck v. Smith (1874) 41 Conn

442.

--that the punishment was administered by a teacher as a consequence of the pupil's habitually bad conduct and assaults upon the teacher (the assaults having occurred more than a week prior to the punishment) that the teacher did not inform the pupil at the time of the punishment of the reason therefor; and that the punishment was in the form of a whipping. Sheehan v. Sturges (1885) 53 Conn 481, 2 A 841. The court said that it was not necessary that the teacher should, at the time of inflicting the punishment, remind the pupil of his past and accumulated offenses, since the pupil knew them well enough without having them brought freshly to his notice.

--that the punishment was administered by a school principal who, by rules of the school board, was authorized to inflict on any pupil corporal punishment for misconduct in connection with the regulation of the school; that the reason for the punishment was the pupil's conduct in abusing two small girl students on their way home from school after school hours; that the punishment was in the form of eight strokes on each hand with a flat stick two and one-half feet long and over one-half inch thick, used in the school for that purpose only; and that the punishment was not excessive, and no injury was caused thereby. O'Rourke v. Walder (1925) 102 Conn 130, 128 A 25, 41 ALR 1308.

--that the punishment was administered by a teacher in a school especially created for truants and incorrigibles; that the teacher acted without malice; that the punishment was administered as a consequence of the pupil's obstreperous and insubordinate conduct in disobeying the instructions of another teacher; that the pupil was a big boy, fifteen years of age, weighing about two hundred pounds; that the punishment was in the form of blows on the pupil's thighs with a paper tube and that on the day following the punishment, the pupil attended school and bore no marks or bruises upon his thighs. Drake v. Thomas (1941) 310 Ill App 57, 33 NE2d 889.

--that the punishment was administered by a teacher as a consequence of the pupil's refusal to surrender the teacher's desk at which the pupil had been allowed to sit temporarily; that the punishment was in the form of the forcible ejection of the pupil by the teacher with the assistance of another; and that the pupil was over twenty-one years of age. Stevens v. Fassett (1847) 27 Me 266 (dictum).

--that the punishment was administered by a teacher as a consequence of a pupil's infraction of a school rule by using profane language and quarreling and fighting when on his way home after school, and that the punishment was in the form of a whipping with a switch. Deskins v. Gose (1885)

85 Mo 485, 55 Am Rep 387 (reversing judgment in favor of plaintiff and remanding cause for new trial on ground that trial court erred in refusing to instruct jury that teacher could administer corporal punishment as consequence of pupil's misconduct when away from school.)

--that the punishment was administered by a teacher as a consequence of the pupil's refusal to recite in a public-speaking class as required by the teacher, and that the punishment was in the form of physical ejection of the pupil without excessive force, by the teacher. Kidder v. Chellis (1879) 59 NH 473.

--that the punishment was administered by a teacher as a consequence of the pupil's disturbance of the school by making a noise resembling a cough which the teacher understood was intended as an act of contempt and defiance of his authority; and that the punishment was moderate in extent. Heritage v. Dodge (1886) 64 NH 297, 9 A 722 (overruling pupil's exceptions to verdict in favor of teacher).

--that the punishment was reasonable in extent and was administered as a consequence of pupil's disobedience to reasonable school regulations. Wilbur v. Berry (1902) 71 NH 619, 51 A 904.

--that the punishment was administered by a teacher, acting without malice, as a consequence of the pupil's violation of a school regulation by going into a classroom during recess and raising the windows, and as a consequence of the pupil's denial of such act when first asked about it; that the pupil was between ten and eleven years of age; and that the punishment was slight, being in the form of blows with a ruler. Marlar v. Bill (1944) 181 Tenn 100, 178 SW2d 634.

APPENDIX C

TORT LIABILITY

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160 ALR 250

III. Particular facts determinative of charitable status

While in some cases the question whether the activities or purpose of a school or college are such as to clothe the institution with the legal status of a charity is not discussed by the courts, even though some rule of immunity is applied, it would seem that where the claim of charitable immunity is made, this would constitute an affirmative defense which must be adequately pleaded and proven.

Whether a school or college, or any other organization, is entitled to the status of a charity so as to be entitled to an exemption from tort liability is a question that would ordinarily seem to be determinable upon the facts of each individual case, but some generalities have been voiced by the courts.

A public charity is not necessarily confined to institutions or corporations which confine their gifts or assistance to the poor and needy, and one of the earliest forms of public charity known to the law was that of a school and college. Parks v. Northwestern University (1905) 121 Ill App 512 (Affirmed in (1905) 218 Ill 381, 75 NE 991, 2 LRA (NS) 556, 4 Ann Cas 103).

But in order for a college to be a public charity for the purpose of ascertaining its immunity from tort liability, the controlling purpose must be for the common and public benefit, and if it was created by the incorporators, or thereafter was administered and maintained by their successors, for money-making, this essential element is lacking even if it may at times have expended money for purposed or rendered gratuitous services, which in common speech are called charitable. Hall v. College of Physicians and Surgeons (1925) 254 Mass 95, 149 NE 675.

In determining whether a corporation is charitable for the purpose of determining its liability for tort, it is clear that a corporation is to be deemed eleemosynary or charitable where its property is derived from charitable gifts or bequest and is administered, not for the purpose of gain, but in the interest of humanity, and an educational institution, established and endowed by private charity, falls clearly within the classification. Ettlinger v. Randolph-Macon College (1929; CCA 4th) 31 F2d 869.

However, the fact that the charter of a college corporation stated that it was formed "for the purpose of establishing and maintaining a college for the prosecution and promotion of educational, scientific, and medical purposes," was held in Hall v. College of Physicians and Surgeons (1925) 254 Mass 95, 149 NE 675, not necessarily to make it a public charity, since the corporation would be acting within its

charter powers if it charged every student in full for tuition, and clinical patients for medical care and treatment.

But the fact that the charter of a charitable corporation engaged in the operation of a school provided that it might sue and be sued was held in Abston v. Waldon Academy (1907) 118 Tenn 24, 102 SW 351, 11 LRA (NS) 1179, not to render the rule of exemption inapplicable, the court saying that there was abundant scope for the operation of this clause without overturning the principle of immunity, based as it was upon well-considered authority, and upon sound public policy.

Upon the question of the conclusiveness of its charter as regards the character, kind, or purposes of a corporation, see annotation in 199 ALR 1012.

Effect of income from tuition or other school or college activities.

By analogy to the view that the fact that patients of a charitable hospital who are able to pay are required to do so does not deprive the hospital of its eleemosynary character so as to permit a recovery in an action in tort against the hospital, the fact that a school or college otherwise formed or conducted as a charitable institution requires its students to pay tuition, or tuition and room and board, has been held not to deprive the institution of its charitable character.

United States.--Ettlinger v. Randolph-Macon College (1929; CCA 4th) 31 F2d 869; Higgons v. Pratt Institute (1930; CCA 2d) 45 F2d 698, 30 NCCA 217.

Colorado.--St. Mary's Academy v. Solomon (1925) 77 Colo 463, 238 P 22, 42 ALR 964.

Georgia.--Butler v. Berry School (1921) 27 Ga App 560, 109 SE 544 (holding that the fact that all of the pupils were required to give a portion of their time to work in the various departments of the school, and that some of them paid a part of their expenses, did not take the school out of the general rule laid down as to the immunity, or change its character as a charitable institution.

Illinois.--Parks v. Northwestern University (1905) 121 Ill App 512 (affirmed in (1905) 218 Ill 381, 75 NE 991, 2 LRA (NS) 556, 4 Ann Cas 103).

New York.--Collins v. New York Post Graduate Medical School and Hospital (1901) 59 App Div 63, 69 NYS 106.

Tennessee.--Abston v. Waldon Academy (1907) 118 Tenn 24, 102 SW 351, 11 LRA (NS) 1179.

Texas.--Southern Methodist University v. Clayton (1943) 142 Tex 179, 176 SW2d 749; Baylor University v. Boyd (1929; Tex Civ App) 18 SW2d 700 (requiring payment by patients of hospital operated by university).

Thus, in Parks v. Northwestern University (1905) 121 Ill App 512 (affirmed in (1905) 218 Ill 381, 75 NE 991, 2 LRA (NS) 556, 4 Ann Cas 103), the court said: "The amounts thus received from plaintiff and other students are not for private gain, but contribute to the funds of the institution and enable it more effectually to accomplish the purposes for which it was founded and organized. The fact that the defendant received from the plaintiff and other students tuition, does not make it the less a public charity, nor does it expose the trust fund to the liability of being depleted or frittered away by the negligence of its officers, professors, or employees. In case of injury the wrongdoer, not the trust funds, must respond."

And it has been said that it is a matter of general and common knowledge that the tuition and other charges of public educational institutions and those which are privately endowed are much lower than would be required to pay even their running expenses, being purposely made low so that education may be placed within the reach of those who need it, and, where the evidence specifically shows that the charges made by such an institution cover only a part of the cost of carrying on its work, such institutions are not only engaged in a work of charity, but the pay students as well as others are the beneficiaries thereof; and, apart from the fact that the amount a student pays does not equal the cost of his education, he is a beneficiary of the charity for the reason that but for the charitable gift made to the institution and the charitable work which it is carrying on, it would not exist to serve him. Ettlinger v. Randolph-Macon College (1929:CCA 4th) 31 F2d 869.

In Scott v. Wm. M. Rice Institute (1944: Tex Civ App) 178 SW2d 156, it was held that the fact that a college operated its athletics at a small profit which was not passed to its general funds, but was held as a contingent fund to cover any loss which might occur in the future, did not operate to deprive the college of its immunity from tort liability to a paying spectator who was injured at a college football game, the court saying that the holding of a small profit in suspense or reserve to be applied to losses in lean years was merely a method of keeping books, that such contingent fund was as much a part of the assets of the college as its general fund and as much devoted to its general purposes, and that a charitable corporation did not have to be unfortunate or unskillful in the management of its activities or finances in order to enjoy immunity from tort liability.

The fact that a non-profit organization incorporated for the purpose "To maintain and support an industrial school and asylum for the sustenance and education of male orphan children," and which was largely maintained by charitable contributions, received a small or partial compensation from the different counties from which wayward boys were sent and that it received a small sum annually from the sale of surplus farm products and manufactured articles, did not change its charitable character, or render it a private business corporation so as to make it liable to the inmates for the negligence of its servants, where due care was used in their selection. Corbett v. St Vincent's Industrial School (1903) 79 App Div 334, 79 NYS 369 (affirmed in (1903) 177 NY 16, 68 NE 997).

The fact that a charitable corporation operating a post-graduate medical school and hospital required hospital patients to pay a small weekly sum for room, board, and other incidentals, and also charged tuition fees to those attending the course of instruction, was held in Collins v. New York Post Graduate Medical School and Hospital (1901) 59 App Div 63, 69 NYS 106, not to change the status of the corporation as a charitable institution so as to make it liable for the negligence of a surgeon in the performance of an operation for which no charge was made to the patient.

In Heinemann v. Jewish Agri. Soc. (1942) 178 Misc 897, 37 NYS2d 354, where it appeared that a charitable corporation was organized for the purpose of assisting Jewish people to become established as farmers in this country, and to that end maintained a farm for the purpose of giving instruction in farming and enabling applicants for assistance to discover whether they were suited to farm life, it was held that the fact that applicants for such benefits were required to pay a stated weekly sum for their board while at the farm did not take them out of the class of beneficiaries of the charity, where it appeared that this charge was considerably below the actual cost of the service rendered, the court also concluding that the applicants, to the extent of the excess cost, were beneficiaries.

b. Schools or function entitled to charitable immunity.

Under the facts appearing in a number of cases, it has been held that a school or college was formed or operated as a charitable institution and thus entitled to the immunity from tort liability enjoyed by such organizations.

So, where the statute incorporating an institution of learning for the instruction of persons of both sexes in science and literature provided that the income or proceeds of the stock should be appropriated to no other use than the benefit of the institution as contemplated by the statute, it

was held in Hill v. Tualatin Academy (1912) 61 Or 190, 121 P 901, that the statute created a charitable institution which was immune from the consequence of the negligent acts of its officers or employees.

In Baylor University v. Boyd (1929);(Tex Civ App) 18 SW 2d 700, it was held that a hospital operated by a university was a charitable institution where it was not conducted for profit, but on the contrary, where, if at the end of any fiscal year, there should be a surplus, over the expense of maintaining and operating the hospital, derived from payments by its patients and public contributions, such surplus was placed in the general fund of the hospital and used for its general charitable purposes.

In other cases it has also been held that a school or college was so formed or conducted as to have the characteristics of a charitable institution, and to be entitled to the immunity from tort liability extended to such organizations--

--where a college was operated by a nonstock corporation chartered and organized by the Conference of the Methodist Episcopal Church for the purpose of carrying on without profit the work of education, and the corporation was supported by charitable gifts and bequests, the tuition paid by the students not being sufficient for the support of the college. Ettlinger v. Randolph-Macon College (1929; CCA 4th) 31 F2d 869.

--where it appeared that an industrial school was chartered for the purpose of the education of poor country girls and boys, that the charter made no provision for capital stock and none was ever issued, that the school was not conducted for private or corporate gain, none of the officers or directors received any salary, and the only salaries paid were to the teachers and instructors; that while a nominal charge was made against each pupil able to pay, a number of them never paid anything and no student paid anything like his or her per capita expenses of operating the school; that it was supported primarily by voluntary contributions, and that it had never received any funds or property except that "donated by charitably inclined people" for the purpose of carrying out the aims of the school as declared in its charter. Butler v. Berry School (1921) 27 Ga App 560, 109 SE 544.

--where the charter of an incorporated university provided that its entire funds, whether from tuition fees received from students or other sources, was to be used solely for educational purposes, that the corporation had no capital stock, could not declare dividends or share profits, everything that it held in trust was to be applied in such a manner as to best accomplish the purpose for which it was created, and that it depended on the income from its property and the endowment and gifts of benevolent persons for funds to carry out the sole

object for which it was created. Parks v. Northwestern University (1905) 218 Ill 381, 75 NE 991, 2 LRA (NS) 556, 4 Ann Cas 103.

--where a home was founded and maintained under a trust created by gifts for the sole purpose of affording an education and maintenance for destitute boys, and whatever advantages the institution offered were conferred without compensation. Farrigan v. Pevear (1906) 193 Mass 147, 78 NE 855, 7 LRA (NS) 481, 118 Am St Rep 484, 8 Ann Cas 1109.

--where it appeared that an incorporated college was organized without capital stock as a charitable association; that no founder or organizer of the corporation was entitled to receive any pecuniary profit from the operation of a hospital or other activity of the corporation, and that all its funds, however derived, were held in trust for the purpose of conducting a school of osteopathy, medicine, and surgery, and to conduct infirmaries and hospitals. Roberts v. Kirksville College of Osteopathy and Surgery (1929; Mo App) 16 SW2d 625.

--where it appeared that an incorporated post-graduate medical school and hospital was established for the purpose of further instruction of persons already possessing the degree of doctor in medicine, and the maintenance of a hospital for the treatment of diseased and injured persons, that the corporation had no capital stock, that its funds were derived from public and private donations, the board of paying patients, and the tuition fees of those attending the school, all of which was devoted to the corporation's charitable uses and purposes; that the officers, directors, faculty, physicians, and surgeons rendered their services gratuitously, and no charges were made for medical services rendered at the hospital aside from the small weekly sum for room, board, and other incidentals to those who were able to pay. Collins v. New York Post Graduate Medical School and Hospital (1901) 59 App Div 63, 69 NYS 106.

--where a corporation was organized "to maintain and support an industrial school and asylum for the sustenance and education of male orphan children," and where it appeared that the affairs and business of the organization were managed by five directors all of whom served without compensation, that its incorporation was approved by the state board of charities, that its immediate management was in charge of a charitable order known as the Christian Brothers, none of whom received any compensation or salary for their work and labor, and the only persons connected with the institution who received any compensation for their services were those who had charge of some department of work requiring technical skill; that there were no shares of stock of the corporation, no one could receive any financial benefit from the operation of the institution and that it was largely supported by charity.

Corbett v. St. Vincent's Industrial School (1903) 79 App Div 334, 79 NYS 369 (affirmed in (1903) 177 NY 16, 68 NE 997.

--where it was shown that a university was incorporated as an institution of higher education, that it was owned and maintained by the Methodist Church and governed by a board of trustees elected by subordinate bodies of the church, that it had no capital stock and nobody could receive any pecuniary profit from its operation; that football was one of the forms of physical training of its students, and that while there was an income from athletic contests, football was not self-sustaining, and over a period of fifteen years this department showed a net loss of $55,000 to the university's general fund; and that besides moneys received from athletic contests, the general fund was comprised of tuition and fees collected from students and of income realized from gifts and endowments, from which all expenses of the operation of the university were paid. Southern Methodist University v. Clayton (1943) 142 Tex 179, 176 SW2d 749.

In Heinemann v. Jewish Agri. Soc. (1942) 178 Misc 897, 37 NYS2d 354, it was held that a corporation was a charitable institution where it appeared that it was organized for the purpose of assisting Jewish people to become established as farmers in this country, and to that end maintained a farm for the purpose of giving instruction in farming and enabling applicants for assistance to discover whether they were suited to farm life, and provided for their temporary support, that it granted loans to mechanics, artisans, and tradesmen, to enable them to secure larger earning and accumulate savings for the acquisition of homes or suburban, agricultural, and industrial districts, and proposed to encourage and assist in the establishment of co-operative creameries, factories, and storage houses, and in the removal of industries pursued in tenements or shops in crowded sections of cities to agricultural and industrial districts. (It is to be noted however that in this case, the court appears to have applied the New York rule which does not exempt charitable institutions from liability from tort where the injuries result from the negligence of mere servants or agents).

c. Schools or functions not entitled to charitable immunity.

In some cases the courts have held that the facts shown in a particular case were insufficient to support a finding that a school or college was formed or operated as a charitable institution so as to be entitled to the exemption from liability extended to such organizations.

So, in University of Louisville v. Hammock (1907) 127 Ky 564, 106 SW 219, 14 LRA (NS) 784, 128 Am St Rep 355, it was held that a hospital maintained by a university which was an

adjunct of its school of medicine, maintained principally because of the advantages it afforded to the students and professors of that institution, but which, however, was also conducted for compensation and profit, was not a purely public charity, so as to be exempt from liability for the negligence of its servants, nothwithstanding the fact that it also received and treated some patients at the hospital who were unable to pay.

So also, although conceding that hospitals organized for charitable purposes are not liable to their patients for injuries arising from the negligence of their employees, were reasonable care is used in the selection and retention of employees, the court, in Baker v. Leland Stanford Junior University (1933) 133 Cal App 243, 23 P2d 1071, held that a hospital operated by a university was not exempt from responsibility for the torts of the servants operating the hospital where it appeared that, although the corporate defendant was created for the purpose of administrating an educational trust, there was nothing in the act of the legislature relative to the trust, or creating the corporation, or in the trust itself, which provided that any trust fund should be used for said hospital, nor were such funds ever so used, that no charity was dispensed by the hospital, but on the contrary, that the usual and customary rates charged by other hospitals were charged by it, and no pretense was made of receiving patients unable to pay for the services rendered, except in some instances where the payment was guaranteed by an independent organization.

In Hall v. College of Physicians and Surgeons (1925) 254 Mass 95, 149 NE 675, it was held that there was sufficient evidence from which the jury could find that a medical college was not a public charity, but was conducted primarily for the private ends of those who managed it, where it appeared that the school's charter merely declared that the corporation was formed "for the purpose of establishing and maintaining a college for the prosecution and promotion of educational, scientific, and medical purposes," that the only written evidence of the administration of the college and its sources of revenue, which was contained in a schedule of charges for tuition, recited that a limited number of suitable persons who gave satisfactory evidence of their inability to pay the regular college fees might be enrolled as students, and that there might be opportunity afforded for a limited number of nurses and special assistants to earn a part of their expense while in college; that the balance of the evidence in this regard was entirely oral, and indicated that the income of the college was derived principally from fees, of students and in part from a trust fund with other minor donations, that an incorporated dispensary occupied part of the building in which the college was located, to which the students of the college were assigned, that such dispensary

was stated to be an advantage to the college, and was advertised in the catalog to make the college more attractive to students; that some of the students visited the sick at their homes with physicians, all of whom were on the staff of the dispensary, while some were employed by the college, that during one year there was an interchange of patients for treatment between the corporations and at that time and prior thereto there were no fixed fees at the dispensary and those who came were treated whether they could or could not pay, and all moneys received went into the treasury of the dispensary; and that while there was a great deal of charitable work done at the dispensary, three fourths of the patients were not charitable patients, and the remunerations of professors were enhanced because of the dispensary, and although it was not conducted for profit, its managers "were ready to receive profits and accept them at any time."

The fact that the statute which incorporated "The board of trustees of the Associate Reformed Presbyterian Synod" declared the Synod to be "a religious association engaged in the propagation of the Gospel" and the fact that another statute amending the charter of a college associated with the Synod and placing the college under its jurisdiction declared the character of the Synod to be a public charity, was held in Vermillion v. Woman's College (1916) 104 SC 197, 88 SE 649, to be insufficient to prove beyond dispute that the college was a charitable institution, the court concluding that a consideration of the statutes indicated that while they warranted an inference that the college was a public charity, they did not prove that fact beyond dispute, since they were not inconsistent with the view that the college was a private corporation conducted for gain, and that the Synod might be invested with like authority over a private enterprise conducted for gain, on account of the benefits which would probably and naturally inure to such an institution by reason of its association with a great religious organization.

In Barr v. Brooklyn Children's Aid Soc. (1921) 190 NYS 296, it was held that a complaint of an inmate of a school seeking damages for injuries allegedly resulting from the negligence of the defendant's servants, agents, and employees did not entitle the defendant to a judgment on the pleading upon the ground that the action was one against a charitable institution, where, although the complaint recited that the defendant was incorporated under an act relating to the incorporation of benevolent, charitable, scientific, and missionary societies, it was alleged that the defendant, for a monetary consideration, maintained the place where the injuries were received, and that children of plaintiff's age not only received board and lodging, but received instructions in various subjects, and it was nowhere alleged in the complaint that the defendant was a charitable institution, the court

saying that while the complaint could not be said to allege that the defendant was a benevolent, scientific, or missionary" institution, yet, taken from the most favorable view, the complaint might intend to exclude the only class of institutions which could be held, as a matter of law, not to be liable, viz., charitable institutions.

VITA

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