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CHAPTER 17

State and Municipal Government

JOSEPH C. DUGGAN

A. MUNICIPAL GOVERNMENT

§17.1. Public welfare: Enforcement of lien on real estate. The provisions of G.L., c. 188A, §4,[1] relative to the enforcement of liens on real estate of recipients of old age assistance, had not been construed by the Supreme Judicial Court in certain respects[2] prior to the case of *Town of Tisbury v. Hutchinson.*[3] In this case, the plaintiff town had filed a bill in equity against the administratrix of the estate of one Chadwick to enforce a lien, a certificate of which on earlier date had been recorded in the registry of deeds against real estate owned by Chadwick at his death. After Chadwick's death, real estate taxes and interest thereon accrued in the amount of $620.68. Under Section 4 of Chapter 188A, whether a lien for old age assistance may be enforced after a recipient's death depends upon whether the fair market value of the recipient's real estate and the cash surrender value of the recipient's life insurance "at the time of his decease" exceed $1500. Therefore, a town, asserting a lien for old age assistance under Section 4, may not have recourse to the first $1500 of value of the real estate and insurance in order to satisfy that lien; however, the Supreme Judicial

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§17.1. [1] Section 4, as amended in 1951, reads in part as follows: "The ownership . . . of an interest in real estate by an applicant . . . shall not disqualify him from receiving [old age] assistance . . . provided, however, that the town shall take a lien on such property as a condition of granting old age assistance. . . .

"The town shall place on record in the proper registry of deeds . . . an instrument . . . creating a lien upon such real estate for the amount of assistance paid by it, including amounts paid subsequently to the recording of the lien, which lien shall be prior to any lien thereafter recorded. . . . Such lien shall be enforceable by a . . . bill in equity. . . . No lien shall be enforced under this section when the combined value of the recipient's interest in real estate at the time of his decease, based on fair market value, together with the amount of cash surrender value in life insurance exempted under section five, amounts in the aggregate to fifteen hundred dollars or less."

[2] Henderson v. Town of Yarmouth, 335 Mass. 647, 141 N.E.2d 518 (1957); Weaver v. City of New Bedford, 335 Mass. 644, 140 N.E.2d 309 (1957).

[3] 338 Mass. 514, 155 N.E.2d 876 (1959).

Court held in the present case that no provision of Section 4 precludes a town from asserting its lien for taxes[4] against the first $1500 of value. The Court, in affirming the decree of the lower court, found that the trial judge had properly ordered the amount of taxes accruing after the death of Chadwick to be deducted from the first $1500 of proceeds of the sale. It was also noted by the Court, in passing upon several collateral questions arising out of the factual situation in the case, that a lien of a town for old age assistance is not subordinated by anything in Section 4 to the expenses of administering the estate of a deceased recipient of assistance — the right to sell real estate to pay debts and expenses given by G.L., c. 202, §§1, 2 and 14, is subject to liens existing at the time of the recipient's death.[5] Also, a town is not barred by laches in enforcing its lien;[6] and public auction is a reasonable method of judicial sale to enforce a lien when equitable enforcement of the lien is expressly authorized as under Section 4.[7]

§17.2. Tort: Liability for negligence arising out of operation of water system. The 1959 SURVEY year brought forth no substantially new developments in the law of tort liability arising out of the negligence of a municipality in connection with its commercial undertakings. In *D'Urso v. Town of Methuen*,[1] the plaintiff received verdicts for personal injury and property damage to his automobile when he ran into a trench, excavated by the water department of the defendant town upon a public way. The defendant town contended that it was not liable except for a defect in the highway under G.L., c. 84, §15, and that the plaintiff could not recover unless the negligence of the town was the sole cause of his injury; the town in effect contended that if the negligence of the plaintiff was a contributing cause of the accident there could be no recovery under Section 15.[2] The short answer, of course, to this contention was that the plaintiff was not confined to the Section 15 statutory remedy; he was free to pursue his remedy at common law, for here the defendant town was engaged in a commercial rather than a governmental undertaking.[3] The Court in its decision cited the case of *Sloper v. City of Quincy*[4] wherein it had held that a municipality was liable for negligence in digging a trench in connection with its water system "just as a private corporation would be liable in

[4] G.L., c. 60, §37, as amended through Acts of 1943, c. 478, §1.

[5] See Tyndale v. Stanwood, 182 Mass. 534, 536, 66 N.E. 23, 24 (1903); 1 Newhall, Settlement of Estates §119, at 358-359 (4th ed. 1958).

[6] See Sears v. Treasurer and Receiver General, 327 Mass. 310, 326, 98 N.E.2d 621, 632 (1951).

[7] See National Radiator Corp. v. Parad, 297 Mass. 314, 319-320, 8 N.E.2d 794, 796-797 (1937).

§17.2. [1] 338 Mass. 73, 153 N.E.2d 655 (1958).

[2] Ige v. City of Cambridge, 208 Mass. 571, 576, 95 N.E. 557, 558-559 (1911).

[3] Iver Johnson Sporting Goods Co. v. City of Boston, 334 Mass. 401, 135 N.E.2d 658 (1956); Cole Drug Co. of Massachusetts v. City of Boston, 326 Mass. 199, 93 N.E.2d 556 (1950); Hand v. Inhabitants of Brookline, 126 Mass. 324 (1879).

[4] 301 Mass. 20, 24, 16 N.E.2d 14, 17 (1938).

performing a similar service." In the *D'Urso* case, as in the *Sloper* case, as the liability of the defendant did not arise from a failure on its part to keep the way in proper repair, but arose from its act of digging a pit and leaving it insufficiently or improperly filled and unguarded, in the course of its conduct in maintaining a commercial water system, G.L., c. 84, §18, relative to notice of injury, did not apply.

An interesting question of damages arose in *Bond Pharmacy, Inc. v. City of Cambridge*,[5] in which the plaintiff, in an action of tort, sought to recover for the alleged negligence of the defendant in allowing water to enter the plaintiff's premises. The Court pointed out that even if there were negligence on the part of the defendant, the plaintiff could not recover if the damage caused by this negligence was purely conjectural, a point which was well illustrated by the recent case of *A. DaPrato Co. v. City of Boston*.[6] In the *DaPrato* case there was evidence warranting a finding of negligent delay in shutting off the water, but because there was no evidence from which a jury could find the extent of damage caused by the delay, the defendant received a directed verdict. However, in the *Bond Pharmacy* case, the damage caused by the delay in shutting off the water was not a matter of conjecture. On the basis of the testimony of an employee of the plaintiff that he called the water department at five o'clock, and in view of the testimony of the superintendent of the water department, that it took "approximately an hour" to close the circuit, the jury could have found that the water should have been shut off at about six o'clock and that the damage occurring after that time was chargeable to the defendant on the basis that the delay of four hours could be found to be negligent.[7] Earlier cases, embracing similar facts, have held that plaintiffs are not obliged to establish their damages with the "exactness of mathematical demonstration." [8]

§17.3. Nuisances: Injunctions. A final decree in equity was entered enjoining the town from maintaining a nuisance in the operation of the town dump in *Turner v. Town of Oxford*.[1] The judge in the lower court found that papers, rubbish and other waste material were scattered over a portion of the plaintiff's land, which abuts and adjoins the parcel of land used by the town as a public dump, and that this condition constituted a trespass to the plaintiff's land and amounted to a nuisance. However, the judge expressly found that the plaintiff had suffered no damage. In view of this latter finding, the Supreme Judicial Court did not decide whether the town could be held liable at law for damages resulting from the operation of the dump by its

5 338 Mass. 448, 156 N.E.2d 34 (1959).

6 334 Mass. 186, 134 N.E.2d 438 (1956).

7 See Cole Drug Co. of Massachusetts v. City of Boston, 326 Mass. 199, 200-201, 93 N.E.2d 556, 557 (1950).

8 Dalton v. Demos Bros. General Contractors, Inc., 334 Mass. 377, 378-379, 135 N.E.2d 646, 647-648 (1956); Piper v. Childs, 290 Mass. 560, 563, 195 N.E. 763, 764 (1935).

§17.3. 1 338 Mass. 286, 155 N.E.2d 182 (1959).

board of health.[2] The Court, in affirming the decree of the lower court, was of the opinion that the lower court's decree was too broad, and confined its final decree to a prohibition of what the judge had found to be objectionable. The town was thus enjoined from permitting the dump to be used in a manner resulting in the scattering of papers, rubbish and other waste material over any portion of the plaintiff's land.

In the case of *Board of Health of Woburn v. Sousa,*[3] the defendants were by final decree permanently enjoined from keeping swine on certain premises in Woburn and from transporting offensive substances through the streets of Woburn, without in each instance obtaining a permit as required by the regulations of the board.[4] The defendants had been keeping about a thousand swine on their premises and had been transporting offensive materials through the streets without obtaining permits. It was noted by the Court that boards of health, although not without authority to institute a suit for the town, nevertheless should bring it in the name of the town.[5] Pursuant to at least three legislative delegations of power, G.L., c. 111, §§31, 122 and 143, boards of health of cities or towns may require a permit for keeping swine. *Inhabitants of Quincy v. Kennard*[6] held it was within the power of a board of health to require a permit for the keeping of swine as a condition of doing what could have been absolutely prohibited. The requirement of a permit is a traditional method of regulation, and a regulation calling for a permit certainly may be adopted when there exists some statutory delegation of authority — as here may be found in Section 143 — to prohibit absolutely.

§17.4. Eminent domain: Damages and validity of taking. The petitioners, in *Swan v. City of Newton,*[1] owned land abutting on a private way 40 feet wide (Brentwood Avenue) appearing on a plan dated 1923, and recorded with the registry of deeds; however, prior to 1955, it had a dirt surface and, as a private way, was in fact constructed and used only to a width of 24 feet. On February 7, 1955, the defendant city took by eminent domain an easement for a public street 40 feet wide. The petitioners, in the year 1950, completed a house on their land which included a basement garage below the ground surface level, with access by a driveway declining from the traveled edge of the private way to the garage; the petitioners' driveway, therefore, had a gradual slope leading from the garage to the edge of the dirt road. At the

2 Gosselin v. Town of Northbridge, 296 Mass. 351, 352-353, 5 N.E.2d 573, 574 (1937).

3 338 Mass. 547, 156 N.E.2d 52 (1959).

4 The regulations so far as here relevant read: "1. No individual . . . shall keep . . . swine within the limits of this municipality without first obtaining a permit from the board of health. . . . 2. A license to transport garbage, offal or other offensive substances along the public highways of this municipality must be obtained from the board of health in accordance with Chapter 111, Section 31A."

5 See Board of Health of Wareham v. Marine By-Products Co., 329 Mass. 174, 175, 107 N.E.2d 11, 11-12 (1952).

6 151 Mass. 563, 24 N.E. 860 (1890).

§17.4. 1 1959 Mass. Adv. Sh. 733, 158 N.E.2d 347.

trial there was testimony given that trees, bushes, brush and rubbish went to the edge of the dirt road. After February 7, 1955, the city constructed the avenue as a public street, 24 feet wide; in addition, the city also constructed sidewalks 8 feet wide on each side of the avenue approximately six and a half inches above the road level. The grade of the driveway was so altered as to deprive the petitioners of the use of the garage and the driveway as means of access thereto; it was also found by the jury that the petitioners' driveway as it existed prior to 1955 did not unreasonably obstruct the rights of others in Brentwood Avenue as a private way.

The question whether "the petitioners were barred from recovering damages for the loss of use of their garage and . . . driveway" was submitted to the Supreme Judicial Court for determination. The Court was of the opinion that the action of the board of survey of Newton in approving the plan upon which Brentwood Avenue appeared as a private way 40 feet wide, prior to any city action laying out a public highway or taking land for a highway, did not prevent the petitioners from using the undeveloped area in any way that did not interfere with the existing rights of others, so long as the petitioners did not construct over that undeveloped land a "way for public use" in a manner inconsistent with the approved plan:[2] the city gained no rights in the avenue other than the power to require that action to construct a way for public use, if taken by persons having rights in the avenue, should comply with the plan. And since it was found by the jury that the petitioners' pre-1955 driveway did not "unreasonably obstruct the rights of others" in Brentwood Avenue as a private way, and in view of the fact that the city gained no rights in the avenue by the approval of the 1923 plan, the petitioners, therefore, when taking was made in 1955, were entitled to maintain for their own private use their driveway as it then was.[3] The city action, in making a formal taking to establish Brentwood Avenue, thus took from the petitioners substantial value existing in their driveway and caused them damage; the petitioners were not barred, by any interest of the city or others, from seeking assessment of such damage under G.L., c. 79.

Although *Garabedian v. City of Worcester*[4] arose out of a petition for the assessment of damages from the taking of the petitioner's land by the city of Worcester, the exceptions which brought the case before the Supreme Judicial Court involved the judge's charge to the jury. The judge explained to the jury adequately and clearly that the measure of damages for the taking was the fair market value of the property;[5] however, he suspended his charge at four o'clock and continued

2 See Crocker's Notes on Common Forms §839 at 453 (7th ed., Swaim, 1955).

3 Carter v. Sullivan, 281 Mass. 217, 225, 183 N.E. 343, 346-347 (1932). See Perry v. Hewitt, 314 Mass. 346, 350, 50 N.E.2d 48, 50 (1943); 3 Tiffany, Real Property §811 (3d ed. 1939).

4 338 Mass. 48, 153 N.E.2d 622 (1958).

5 G.L., c. 79, §12; Epstein v. Boston Housing Authority, 317 Mass. 297, 299, 58 N.E.2d 135, 137 (1944).

with it on the following morning. This being a split charge, the judge was requested by the petitioner to restate the entire charge. The Court, in overruling the exceptions of the petitioners, stated that the lapsed time between the first and second parts of the charge was not of sufficient duration to require, on the resumption of the charge, a restatement of what previously had been said, and that the need for repetition was a matter within the discretion of the trial judge.[6]

Another case originating under a petition for the assessment of damages under G.L., c. 79, was *Parrotta v. Commonwealth.*[7] The petitioners therein alleged that they owned a parcel of land located at a corner in the city of Chelsea. On January 4, 1955, the Commonwealth's Department of Public Works laid out and took over a certain road to be a limited access highway in accordance with the provisions of G.L., c. 81, §7c. The public work in the area immediately adjacent to the land of the petitioners consisted in part of tearing up the public ways that abutted the corner, the building of a subsurface road, and then the building, by way of a roof over the subsurface highway, of a new level upon which to relocate the former public ways. The plans for the public work entailed the closing of the public highways abutting and adjacent to the land of the petitioners; the construction, of necessity, seriously interfered with the use of the petitioners' real estate, diminished the value thereof and caused loss to petitioners. These happenings took place without any formal taking of real estate. Notwithstanding the absence of a formal taking, G.L., c. 81, §7, nevertheless provides: "When injury has been caused to the real estate of any person by the laying out or alteration of a state highway, he may recover compensation therefor from the commonwealth under chapter seventy-nine." Furthermore, G.L., c. 81, §7c, states: "If a limited access way is laid out in whole or in part in the location of an existing public way, the owners of land abutting upon such existing public way shall be entitled to recover damages under chapter seventy-nine for the taking of or injury to their easements of access to such public way." In view of these two statutes, compensation under G.L., c. 79, is recoverable whether or not there was a partial taking of land.[8]

§17.5. School committee: Inadequate appropriation and employee compensation. Decisions during the 1959 SURVEY year, as in recent years, manifest the readiness with which the Supreme Judicial Court will view litigation in this field as attempts to impair the traditional supremacy of the school committee in the field of education. This propensity was shown in *Graves v. Town of Fairhaven,*[1] in which a petition was brought under G.L., c. 71, §34, to determine the amount of the deficiency in the appropriation by the respondent town for the support of its public schools for the year 1957. The town appealed the de-

[6] Wenton v. Commonwealth, 335 Mass. 78, 82, 138 N.E.2d 609, 612 (1956).
[7] 1959 Mass. Adv. Sh. 1019, 159 N.E.2d 342.
[8] See Nichols v. Commonwealth, 331 Mass. 581, 584, 121 N.E.2d 56, 58 (1954).

§17.5. [1] 338 Mass. 290, 155 N.E.2d 178 (1959).

cree entered by the lower court ordering the town to provide, by borrowing, the amount of the deficiency together with a further sum representing 25 percent of the amount of the deficiency.

The salient facts were as follows: The school committee, on or about January 10, 1957, submitted its school budget to the town finance committee. Subsequently, on February 28, 1957, the school committee voted to amend and increase its request; however, this amended request was never formally presented in writing to the finance committee. At the annual town meeting on March 9, 1957, a motion in accordance with the school committee's amended request was defeated, the town appropriating a substantially reduced figure. The defendant town contended that in order to arrive at any figure constituting "a deficiency" within the meaning of G.L., c. 71, §34, the court below was required to have before it evidence of the amount necessary to support the public schools for the year in question and evidence that the appropriations made and included in the annual budget were insufficient to meet that figure. Although this argument appeared not to be totally without merit, the Supreme Judicial Court nevertheless sloughed this contention off by stating: "If this is an argument that we should overrule the long line of cases[2] [that have previously been decided by the Court], the challenge comes much too late." In answer to the contention that the school budget (presented to the finance committee on January 10, 1957) was not submitted seasonably, the Court quoted the language of earlier cases[3] which previously held that G.L., c. 44, §31a, requiring municipal department heads in cities to submit detailed estimates for the ensuing year by December 1, did not apply to the school committee;[4] similarly, compliance by the school committee of a town with G.L., c. 41, §59,[5] is not a condition precedent to relief under G.L., c. 71, §34.[6]

The question whether the city council had power to prescribe hours of employment for the janitors employed in the public schools of the city of Gloucester was the issue raised in *O'Connell v. School Committee of Gloucester.*[7] The plaintiffs, janitors employed in the public schools of the city, in behalf of themselves and as a committee representing other employees doing similar work, brought a bill in equity for declaratory relief whereby they sought a declaration that certain

[2] Illig v. Town of Plymouth, 337 Mass. 239, 149 N.E.2d 140 (1958); Lynch v. City of Fall River, 336 Mass. 558, 147 N.E.2d 152 (1958); Leonard v. School Committee of Springfield, 241 Mass. 325, 135 N.E. 459 (1922).

[3] See 1958 Ann. Surv. Mass. Law §19.3.

[4] See Lynch v. City of Fall River, 336 Mass. 558, 147 N.E.2d 152 (1958); Young v. City of Worcester, 333 Mass. 724, 726, 133 N.E.2d 211, 212-213 (1956); Hayes v. City of Brockton, 313 Mass. 641, 649, 48 N.E.2d 683, 688 (1943).

[5] G.L., c. 41, §59 provides in part as follows: "committees . . . of a town authorized by law to expend money shall furnish to the town accountant . . . not less than ten days before the end of the town financial year, detailed estimates of the amounts necessary for the proper maintenance of the departments under their jurisdiction for the ensuing year."

[6] See Illig v. Town of Plymouth, 337 Mass. 239, 149 N.E.2d 140 (1958).

[7] 1959 Mass. Adv. Sh. 957, 158 N.E.2d 868.

ordinances enacted by the city council in 1946[8] were applicable to them and entitled them to the benefits of a forty-hour week and time and one-half pay for overtime. The custodial personnel of the city's schools had made numerous demands upon the school committee to establish a forty-hour week for them since the 1946 ordinances were passed and the school committee had consistently refused to accede to these demands. The lower court ordered the entry of a final decree declaring that the ordinances in question, enacted by the city council, did not apply to the plaintiffs, and that the Gloucester school committee at all times since the effective date of the ordinances had exclusive jurisdiction to fix the hours of employment and the compensation of the plaintiffs.

The Supreme Judicial Court, in affirming the decree of the lower court, predicated its decision upon G.L., c. 71, §68, which provides, inter alia, that "school committees, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, [and] shall keep them in good order." The Court had on earlier occasion construed this statute in the case of *Ring v. City of Woburn*,[9] wherein it was held that the duty imposed upon school committees to maintain schoolhouses included by necessary implication the power to employ janitors and custodians. That case held also that the city was required by G.L., c. 71, §34, to provide money for janitors' salaries in the amounts fixed by the school committee. Quite obviously, the control given by these statutes to the school committee over the school buildings and grounds and the duty to keep the buildings in good order coupled with the committee's power to employ and fix the compensation of those employed in this work includes the power to fix their hours of employment. Prior decisions of the Supreme Judicial Court have left no doubt that the committee's power in this respect was exclusive. Furthermore, in this case, since the city of Gloucester was operating at this time under a Plan E charter, Section 33 of G.L., c. 43, clearly solved the question raised; it is there provided that the school committee may "appoint, suspend or remove at pleasure such subordinate officers or assistants, including janitors of school buildings, as it may deem necessary for the proper discharge of its duties and the conduct of its business; it shall define their terms of service and their duties, and shall fix their compensation."

Actions of contract were brought by the plaintiffs in *Collins v. City of Boston*,[10] in which they sought to recover unpaid balances of compensation for their services during the 1951-1952 school year. It should be noted that the legislature has enacted a long series of acts dealing specifically with the powers of the Boston school committee. The provisions of one statute applicable in this case confers upon the school committee the broad and unusual power whereby four fifths of all

[8] The ordinances in question in substance established a five-day, forty-hour work week for all the employees in the "labor service . . . of the city."

[9] 311 Mass. 679, 687-688, 43 N.E.2d 8, 13-14 (1942).

[10] 338 Mass. 704, 157 N.E.2d 399 (1959).

members of the committee are empowered to appropriate directly funds for school purposes.

The defendant school committee on April 2, 1951, appropriated the maximum amount authorized by statute, which fell short of the sum necessary to meet the needs of the school system. The city council on June 4, 1951, appropriated an additional sum of $1,000,000, specifying that $755,258 of that total was for "instruction." Later that year on August 31, 1951, after all appropriations for the fiscal year 1951 had been made, the school committee voted a new schedule of compensation granting increases in pay to take effect as of September 1, 1951. The auditor and treasurer of the defendant city refused to pay the increases granted by the school committee's vote of August 31, 1951, on the ground that there was no appropriation available at the time the vote was passed and it was, therefore, illegal and void. The Supreme Judicial Court, in holding that the school committee vote of August 31, 1951, was valid, rejected the argument of the defendant city that the *Collins* case was not governed by the principle announced in *Leonard v. School Committee of Springfield*,[11] which held that G.L., c. 42, §32, "did not effect any change in the powers of a school committee to establish the salaries of teachers within the total amounts appropriated for school purposes." The Court was unable to find any provision limiting the Boston school committee, in any respect here relevant, in its freedom to deal with funds which the committee itself had power to appropriate for school purposes. Since there was an appropriation available here, the basic question was whether the Boston school committee lacked the power to reallocate sums already appropriated for instruction in order to provide for the salary increases. The Court found no applicable statutes that deprived the school committee of freedom of action with respect to any part of the appropriation available for instruction.

§17.6. Municipal finance: Expenditure of public money for public purpose. *City of Boston v. Merchants National Bank of Boston*[1] served to remove some constitutional doubts relative to the erection, with public funds, of buildings in which public and private purposes would be jointly served. In this case, the city of Boston was authorized and empowered under Acts of 1954, c. 164, "to construct, operate and maintain at a convenient location in said city a municipal auditorium." By a later statute,[2] the city was further authorized to borrow money outside its debt limit for the purpose of constructing the auditorium and to that end accepted the defendant bank's bid for temporary notes. Subsequently, the defendant bank advised that it would refuse to complete the purchase of the notes owing to "substantial doubt as to the constitutionality of the enabling legislation." Perhaps

11 241 Mass. 325, 135 N.E. 459 (1922), discussed in 1958 Ann. Surv. Mass. Law §19.3.

§17.6. 1 338 Mass. 245, 154 N.E.2d 702 (1958).
2 Acts of 1957, c. 718, §1A.

the defendant's doubt was engendered by the action of the auditorium commission in directing the architects to design the municipal auditorium so that it would be suitable not only for public exercises and hearings but also for rental for privately sponsored exhibitions and shows. That money raised by taxation can be used only for public purposes and not for the advantage of private individuals is an established and undoubted principle of constitutional law.[3]

The Supreme Judicial Court, in its decision that the erection of the proposed auditorium was a public purpose, noted that Boston, a cultural, educational, and historical center, might disappear from the list of great convention cities were it to have no indoor place suitable for public gatherings of about five thousand people. The defendant bank, in its brief, stated that the city's interpretation of the statute showed that "the General Court, as well as the city, contemplated the construction of a building in which public and private purposes were to be jointly served, and that included in the building were facilities unneeded for public use and required only for private or commercial purpose." The summary answer to this contention would be that any interpretation by municipal officials has slight, if any, significance in ascertaining legislative intent; however, the Court, obviously with an eye towards the conservation of tax dollars, made the practical comment that the structure need not be designed so as to become an unnecessary drain on the taxpayers; that if a sound financial scheme embraces facilities that tend to make possible a more nearly full-time use, it is not to be presumed that the dominant purpose ceases to be public and becomes private.[4]

§17.7. Compensation plans: Acceptance, revocation and amendment. In *Brucato v. City of Lawrence*,[1] the Supreme Judicial Court was faced with the problem of whether a city or town, which once accepts a statute enacted subject to local acceptance, retains the power to revoke its acceptance. The plaintiffs, welfare department workers, on September 16, 1957, were receiving the salaries then provided under a compensation plan established under G.L., c. 31, §47D. On September 16, 1957, the city council voted to accept G.L., c. 31, §47E, which provided that certain annual "step-rate" pay increases be given to employees under the compensation plan. On January 13, 1958, the city council voted to rescind the action taken on September 16, 1957. The mayor refused to provide any 1957 supplemental appropriation to pay for the increases in pay of employees of the welfare department in that year. The city auditor disallowed payments of any increase in salary to these employees on the ground that payment would be in violation of G.L., c. 44, §33A,[2] giving as a reason that the city budget for 1957

[3] Opinion of the Justices, 320 Mass. 773, 775, 67 N.E.2d 588, 590 (1946); Opinion of the Justices, 231 Mass. 603, 611, 122 N.E. 763, 766 (1919).

[4] See Talbot v. Hudson, 16 Gray 417, 422 (Mass. 1860).

§17.7. [1] 338 Mass. 612, 156 N.E.2d 676 (1959).

[2] Section 33A reads: "The annual budget shall include sums sufficient to pay the salaries of officers and employees fixed by law or by ordinance. . . . No ordinance

had been adopted on March 4, 1957, and did not include a provision for any increases for the plaintiffs.

That the legislature may provide that a statute expressed in terms of general application shall take effect in each city and town only upon its acceptance by such city or town, or by some public body in that community, is neither unusual nor uncommon.[3] A vote of the designated body accepting the legislation for any particular city or town is thus made a condition precedent to any effectiveness of the statute in that city or town. It cannot be questioned that the legislature may provide that a city or town which once accepts a statute enacted subject to local acceptance shall have power to revoke its acceptance; however, in the absence of some indication in the language, the form or the subject matter of a particular statute enacted subject to local acceptance that an acceptance once given may be revoked, the effect of a valid acceptance by a city or town is to make the statute operative in that community until the statute is repealed or amended. Therefore, once the condition precedent stipulated by the legislature to the taking effect of the statute in the community is satisfied, it becomes applicable statute law, subject to change, as in the case of other statutes, only by subsequent action of the legislature.[4] General Laws, c. 31, §47E, accepted by the city council on September 16, 1957, contains no express provision for revocation of a city's acceptance of the section, once validly given; consequently, if the acceptance of Section 47E on September 16, 1957, was effective, the city could not thereafter rescind its acceptance, and the vote of rescission on January 18, 1958, would thus be rendered a nullity.

The defendant city contended that the acceptance of Section 47E was invalid because made in violation of G.L., c. 44, §33A,[5] in which two prohibitions here pertinent provide that (a) "no ordinance providing for an increase in . . . salaries . . . shall be enacted . . . except by a two thirds vote of the city council, nor unless it is to be operative for more than three months during the financial year in which it is passed," and, (b) no "increase in rate [shall be] made by ordinance, [or] vote . . . during the financial year subsequent to the submission of the annual budget unless provision therefor has been made by

providing for an increase in the salaries or wages of municipal officers or employees shall be enacted except by a two thirds vote of the city council, nor unless it is to be operative for more than three months during the financial year in which it is passed. . . . No new position shall be created or increase in rate made by ordinance, vote or appointment during the financial year subsequent to the submission of the annual budget unless provision therefor has been made by means of a supplemental appropriation."

[3] Robinson v. Selectmen of Watertown, 336 Mass. 537, 546, 146 N.E.2d 900, 906-907 (1957); Mayor of Gloucester v. City Clerk of Gloucester, 327 Mass. 460, 464, 99 N.E.2d 452, 455 (1951); Graham v. Roberts, 200 Mass. 152, 157-158, 85 N.E. 1009, 1011-1012 (1908).

[4] See Holt Lumber Co. v. City of Oconto, 145 Wis. 500, 505-507, 130 N.W. 709, 711-712 (1911); Northern Trust Co. v. Snyder, 113 Wis. 516, 532-533, 89 N.W. 460, 464-465 (1902); 2 McQuillan, Municipal Corporations §9.15 (3d ed. 1949).

[5] Quoted in note 2 *supra*.

means of a supplemental appropriation." Clearly, the city council's acceptance of G.L., c. 31, §47E, in September, 1957, made the section applicable as statute law to Lawrence for three months in 1957; but, under the wording of Section 47E, no step-rate increase for any employee could result until July 1, 1958: thus, Section 47E would have no practical effect by way of requiring expenditure until July 1, 1958. Obviously, this type of salary increase would have had precisely the substantive effect which G.L., c. 44, §33A, of the municipal finance act seems designed to prevent: the enactment by a city council in one financial year of a salary to have no effect by way of expenditure in that year but requiring expenditures in later years. The Court, however, in reading G.L., c. 31, §47E, together with G.L., c. 44, §33A, noted that Section 47E required a vote by a simple majority of the council to become effective whereas the restrictions of Section 33A required a two-thirds vote of the city council for salary increases. The Court thus took this anomaly as an indication that the legislature did not effectively provide that the prohibitions of Section 33A were to be applicable to an acceptance of Section 47E by a city council; therefore, the provisions of Section 47E were accepted by a valid vote of the city council which could not be rescinded on January 13, 1958.

The validity and effect of a vote of the annual town meeting purporting to amend the classification and pay plan of the town, by increasing salaries, was at issue in *Blomquist v. Town of Arlington*.[6] In 1949, in accordance with G.L., c. 41, §108A, the town adopted a classification and pay plan which, at an adjourned session of the annual town meeting, duly called and held on March 20, 1957, it attempted to amend. Upon the motion, there being 106 votes in the affirmative and 91 in the negative, the moderator declared that the motion was lost because it lacked a majority of the entire membership of 251, which he ruled was necessary to amend a by-law under Robert's Rules of Order. The master in the court below had found that the by-laws of the defendant town contained a provision that "the government of the town meeting shall be determined by the rules of practice contained in Robert's Rules of Order Revised (75th Anniversary Edition)," which rules required that a by-law be amended by a vote of the majority of the entire membership. The Court pointed out that the topics made subject to "the rules of practice contained in Robert's Rules," such as the government of town meetings, were matters of procedure, and that the legal effect of any given number of votes upon any subject considered was a matter of substantive law.[7] If the town by-laws were given the meaning ruled by the moderator, and as here contended by the town, the town by-laws would be in excess of the authority conferred by the enabling act[8] and would thus constitute an impairment of the authority of the town meeting to act by majority vote.

[6] 338 Mass. 594, 156 N.E.2d 416 (1959).

[7] Ogden v. Selectmen of Freetown, 258 Mass. 139, 141, 154 N.E. 555, 555-556 (1927).

[8] G.L., c. 39, §15, provides: "A town may pass by-laws, subject to this section, for the regulation of the proceedings at town meetings."

§17.8. Contracts: Competitive bidding and specifications. A case of first impression in the Commonwealth was *Pacella v. Metropolitan District Commission*,[1] in which a petition under G.L., c. 29, §63, was brought to enjoin the awarding of a public contract for the construction of certain water distribution lines. The specifications issued by the awarding authority called for the use of a particular type of patented pipe which was then being exclusively manufactured and sold by only one company. The master in the lower court found, however, that there was in common use an alternative to this patented pipe which was functionally its equal in every respect. The petitioners did not suggest that there had been a failure to comply with the formal procedural requirements of G.L., c. 29, §8A; they contended that the specifications, which were publicly advertised, were so unreasonably restrictive in scope that true competition was precluded and that the situation was one in which the form of an invitation for competing bids was complied with, yet the substance was subverted by the deliberate adoption of specifications that required the use of a single manufacturer's product, and foreclosed bidders from offering the functionally equal product of others. In view of the lack of applicable Massachusetts precedents, the petitioners argued that courts in other jurisdictions had construed statutes requiring public advertisement for proposals for government work as implying also a requirement of specifications that actually invite competition not only (a) among persons bidding against each other for the completed work, but also (b) among suppliers of component materials or equipment. Much authority was cited by the petitioners in which it was held that specifications cannot properly specify a patented product unless products functionally equivalent are also permitted.[2] The Supreme Judicial Court, however, rejected these cases as stating the rule too broadly. And from the labyrinth of conflicting authority elsewhere, the Court chose to adopt, as the better rule, the proposition that a patented article may be specified under the requirement of competitive bidding.[3]

B. State Government

§17.9. Right of public employees to join vocational or labor organizations. A new Section 178D was added to Chapter 149 of the General Laws wherein the right to form or join vocational or labor organizations was given to employees of the Commonwealth or of any of its political subdivisions. However, this section was not made applicable to police officers so employed.[1]

§17.8. [1] 1959 Mass. Adv. Sh. 941, 159 N.E.2d 75.

[2] Nicolson Pavement Co. v. Painter, 35 Cal. 699, 707 (1868); Monoghan v. City of Indianapolis, 37 Ind. App. 280, 286-295, 76 N.E. 424, 425-428 (1906); Dean v. Charlton, 23 Wis. 590, 601-602 (1869).

[3] Connecticut v. Board of Purchase & Supplies of Stamford, 111 Conn. 147, 156-162, 149 Atl. 410, 413-415 (1930); Adams v. Van Zandt, 199 N.Y. Supp. 225 (Sup. Ct. 1923); see also 10 McQuillin, Municipal Corporations §29.42 (3d ed. 1949).

§17.9. [1] Acts of 1958, c. 460.

§17.10. Hours of work without interval for meal. Chapter 149, Section 100, of the General Laws, subsequent to the 1957 amendment, provided that no woman was to be employed for more than six hours at one time in a factory, manufacturing or mechanical establishment or workshop without an interval of at least thirty minutes for a meal; those women so employed in a mercantile establishment for the same length of time were to have an interval of forty-five minutes for a meal. It was further provided that a child was not to be employed for more than six hours at any one time without an interval of at least forty-five minutes for a meal. The amendment to this section passed during the 1959 SURVEY year[1] made a slight change whereby minors — who before this amendment were to have forty-five-minute intervals for meals with no reference made to the particular work performed — were to be given the same treatment as women whereby they would have thirty-minute intervals and forty-five-minute intervals for meals dependent upon the type of work performed.

§17.11. Witness fees for state police officers. Section 53B of G.L., c. 262, concerning witness fees for state police officers attending court as witnesses, allowed such officers on duty at night, or on vacation or furlough, or on a day off, a witness fee in the amount of three dollars for each day's attendance except for the first attendance as arresting officer. Acts of 1959, c. 57, amended the section to allow a three-dollar witness fee for such attendance inclusive of the first day's attendance as arresting officer.

§17.12. Embalmers and funeral directors: Reciprocal agreements. By Chapter 528 of the Acts of 1958, an amendment was made to G.L., c. 112, by inserting therein a new Section 85A whereby the Board of Registration in Embalming and Funeral Directing is authorized to enter into reciprocal agreements with other states, allowing its licensees to conduct funerals in such other states.

§17.10. [1] Acts of 1958, c. 461.