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Chapter 18: State and Municipal Government

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CHAPTER 18

State and Municipal Government

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A. Court Decisions: State Government

§18.1. State Contributory Retirement Appeal Board: Accidental disability and death benefits and allowances. The state Contributory Retirement Appeal Board, created by G.L., c. 32, §16(4), continues to blaze a legal trail in a somewhat obscure but an increasingly important branch of the law, moneywise at least. In 1945, in answer to a persistent demand, the various public retirement systems were, to a degree, harmonized by the General Court.[1] Among these were provisions assuring teachers of substantially equal acidental disability and death benefits to those received by other public employees. Today we have in this state fundamentally sound and uniform contributory retirement systems for our public employees providing substantial superannuation, ordinary and accidental disability retirement allowances, and death benefits, toward which they contribute about 5 percent of their compensation. The public treasuries contribute the balance. Comments are sometimes made relative to the accidental disability retirement allowances. Generally speaking, under G.L., c. 32, §7, these amount to about two thirds of the annual compensation of the employee with added allowances for minor dependents. In cases of accidental death, the benefits are paid to the widow. On the whole it is generally accepted that the systems serve a vital purpose. Recently, however, several cases have been before the Supreme Judicial Court to determine whether the injury or death arose out of and while in the course of employment. In *Baruffaldi v. Contributory Retirement Appeal Board*,[2] it was held that the death of a public employee already afflicted with a diseased heart, by the impact upon it of the excitement arising from an altercation with a contractor in the course of his employment, entitled his widow to accidental death benefits under G.L., c. 32, §9. In other words, it might seem that the insertion

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§18.1. [1] Acts of 1945, c. 658, effective January 1, 1946.

[2] 337 Mass. 495, 150 N.E.2d 269 (1958), noted in 1958 Ann. Surv. Mass. Law §§13.3, 19.9.

of the words "personal injury" in Sections 7 and 9 of Chapter 32 by the provisions of Acts of 1945, c. 658, has brought claims for accidental injury and death under the retirement laws into the same category as claims for workmen's compensation under the provisions of Chapter 152 of the General Laws. In view of the background of the two systems, their widely divergent provisions, and the benefits provided in each, an interesting source of speculation is provided.

§18.2. Accidental disability retirement: Effect of medical panel report. Another aspect of accidental retirement allowances under G.L., c. 32, was discussed and decided in the case of *Kelley v. Contributory Appeal Board.*[1] Sections 6 and 7 of Chapter 32 provide that before an application for an accidental disability retirement allowance may be granted, a medical panel must be set up as therein provided and, after examining the applicant, must prepare and file with the retirement board a certificate of its findings as to the nature of the injury, its permanency, and whether it was or might be service connected. It was held in *Hunt v. Contributory Retirement Appeal Board*[2] that a favorable medical panel report was a condition precedent to the allowance of an application for an accidental disability retirement allowance. In the *Kelly* case the medical panel certified: "We are of opinion that the disability noted above is *not* the natural and proximate result of the accident or hazard undergone on account of which retirement is claimed." The Boston Retirement Board on the basis of the report of the medical panel denied the application, and the state board allowed a motion to dismiss the appeal for the same reason. The Supreme Judicial Court, upon a petition for review under the state Administrative Procedure Act,[3] ordered that the appeal board remand the case to the Boston Retirement Board for further proceedings in accordance with the opinion, saying, "The two sections, 6 and 7, read together require, for affirmative board action, a certificate of the incapacity and that it *might* be service connected." [4] The Court also discussed the power of the appeal board to order retirement if there is a negative medical certificate in proper form, saying:

> . . . we think there is no right to or power of review of the finding of the medical panel if the certificate does not disclose, or there is no claim of, error of law. The statute prescribes no appeal from the panel determination. . . . It follows that the appeal board may not affirm the decision of the local board on a negative certificate without giving the applicant an opportunity to show such wrong or illegal action, but that the applicant does not have an opportunity for a retrial of the medical facts, where there has been a determination of them by the panel, applying proper procedures and correct principles of law.[5]

§18.2. [1] 341 Mass. 611, 171 N.E.2d 277 (1961).
[2] 332 Mass. 625, 127 N.E.2d 171 (1955).
[3] G.L., c. 30A, §14.
[4] 341 Mass. 611, 614, 171 N.E.2d 277, 279 (1961).
[5] 341 Mass. at 617, 171 N.E.2d at 280.

§18.3. Accidental death benefits: State Contributory Retirement Appeal Board and Administrative Procedure Act. In the case of *McCarthy v. Contributory Retirement Appeal Board,*[1] the Supreme Judicial Court ruled on conflicting evidence, in a petition for review under the Administrative Procedure Act, that the petitioner, the widow of a state representative who collapsed while engaged in a debate in the House and died some years later, was not entitled to accidental death benefits under Section 9 of Chapter 32, and affirmed the decision of the State Board of Retirement denying her application for accidental death benefits. The Court said: "Whether McCarthy's death was within the terms of Section 9(1) was a question to be decided by the appeal board. If its decision rested on substantial evidence — and we hold that it did — the judge had no power to set it aside." [2]

Another interesting case covering, in general, the same subject matter may be found reported in the case of *State Board of Retirement v. Contributory Retirement Appeal Board.*[3] The Court held, upon conflicting evidence, that a finding of the Superior Court that death was the natural and proximate result of a personal injury sustained in the course of employment under the provisions of G.L., c. 32, §9, was unsupported by substantial evidence. The Court further held that the State Board of Retirement was an aggrieved party under the provisions of the state Administrative Procedure Act.

§18.4. Contributory retirement law: Superannuation allowance: "Moral turpitude." An interesting decision was rendered by the Supreme Judicial Court in *Essex County Retirement Board v. Contributory Retirement Appeal Board.*[1] It was held that the conviction for a criminal offense under the circumstances disclosed by the evidence constituted a removal by operation of law for "moral turpitude," depriving the intervenor of the right to a superannuation retirement allowance.[2]

§18.5. State Board of Public Welfare: Appeal by municipality from order increasing recipient's old-age assistance allowance. In *Town of Natick v. Department of Public Welfare,*[1] it was held that the respondent properly ordered the petitioner to increase the old-age assistance allotment to one of its recipients. The Supreme Judicial Court ruled that the petitioner municipality was a proper party to petition for a review of the action of the respondent under the provisions of the state Administrative Procedure Act.[2] It was further held that there was no basis for the petitioner's contention that, under the act, its substantial rights had been prejudiced because the agency decision was

§18.3. [1] 342 Mass. 45, 172 N.E.2d 120 (1961).
[2] 342 Mass. at 49, 172 N.E.2d at 123.
[3] 342 Mass. 58, 172 N.E.2d 234 (1961).

§18.4. [1] 342 Mass. 322, 173 N.E.2d 627 (1961).
[2] G.L., c. 32, §10(1).

§18.5. [1] 341 Mass. 618, 171 N.E.2d 273 (1961).
[2] G.L., c. 30A, §14.

unsupported by substantial evidence.[3] On the evidence the Court stated that the petitioner's contention that the evidence required the use of the room-and-board basis set out in the respondent's standards, rather than the household expense plan, was not established.

§18.6. Boston Redevelopment Authority: Administrative matter: Status of executive director after legislative consolidation. *Simonian v. Boston Redevelopment Authority*[1] involved a rather unusual situation concerning the internal organization of the Boston Redevelopment Authority. The petitioner sought a writ of mandamus to restore him to the position of executive director of the authority as it existed under its earlier votes and to exclude another from acting in that office under later votes. The petition was dismissed. The authority was organized under G.L., c. 121, §26QQ. Under that section read with Section 26N, it was authorized to employ an executive director and other agents and employees and determine their duties. On October 27, 1957, the authority voted the executive director's duties in detail, and on December 11, his salary was fixed at $12,000. Under Chapter 299 of the Acts of 1958, amending Section 26QQ, no non-civil-service permanent employee could, after six months, be discharged, removed, or lowered in rank or compensation except for just cause and in accordance with Sections 43 and 45 of Chapter 31 of the General Laws. Section 12 of Chapter 652 of the Acts of 1960 transferred to the authority the powers of the State Housing Board under G.L., c. 121A, over Boston projects and established the authority as a planning board under G.L., c. 4, §70, with all the duties of the city planning board in Boston, and transferred its employees without loss of status, including the planning administrator, planning director, and others. A consolidation took place, and the duties of the executive director were somewhat changed. It was held that tenure statutes such as Chapter 299 relate primarily to pay, title, and formal rank and that substantial changes in duties may be made in due course without affecting such status; that there may be greater scope for such changes in high executive posts than in lower ones. In any event Acts of 1960, c. 652, expanded the statutory mandate of the authority and justified internal reorganization and reallocation of duties of employees, particularly those in key positions. The protection of a tenure statute must yield to the legislative intent. The reorganization and the change of petitioner's duties were reasonable adjustments. It was further stated that in important aspects the petitioner's employment status was unimpaired. His pay was increased. Moreover the petitioner retained all the attributes of his post that were consistent with the decision to make the change in top command.

§18.7. State Racing Commission: Licenses. A petition for review of two decisions of the State Racing Commission was brought by Bay State

[3] Id. §14(8).

§18.6. [1] 342 Mass. 573, 174 N.E.2d 429 (1961).

Harness Horse Racing and Breeding Association.[1] One decision granted a license to the petitioner to conduct parimutuel harness racing for 57 days in 1961, and the other granted a similar license to the Eastern Racing Association for 33 days. General Laws, c. 128A, §3, provides that licenses may not be issued for more than an aggregate of 90 days in one year. The petitioner alleged that it had expended large sums of money in acquiring its track and facilities and otherwise in promoting harness horse racing for a period of over ten years and that, in spite of these facts, the respondent had arbitrarily and capriciously reduced its number of licensed racing days. The petition prayed that the Eastern license be set aside and that the commission reconsider Bay State's application for ten additional days. An interlocutory decree sustaining the commission's demurrer and a final decree dismissing the petition were reversed by the Supreme Judicial Court and the case was remanded. While the commission has broad discretion in the performance of its duties, it must conform to general standards of public interest, convenience, and necessity concerning both the persons by whom and the manner in which the tracks are conducted, including the parimutuel gambling, and the interests of members of the public in racing competition honestly managed and of good quality.

Judicial review may be obtained under the Administrative Procedure Act by any person aggrieved by a final decision of an "agency" in an "adjudicatory proceeding." The commission is such an agency, and the application for a racing license is an "adjudicatory proceeding." Consequently the proceedings before the commission relative to the application for a license must be conducted under Sections 10 and 11 of G.L., c. 30A. The provisions of Chapters 30A and 128A of the General Laws require subsidiary findings of fact to support the decision of the commission. Bay State was aggrieved by the denial of its request for a license for the extra ten days it sought; it was further aggrieved by the grant to Eastern. The circumstances require a fair comparative consideration of both applications. Bay State was entitled to have findings of fact upon all material issues of fact.

§18.8. Proceedings against the Commonwealth: Title to land. In *Executive Air Service, Inc. v. Division of Fisheries and Game,*[1] two cases were brought against the division, the Commonwealth, and the Coonamessett Ranch Company. In the first case the plaintiff brought a bill in equity for a declaratory decree, under G.L., c. 231A, and in the second sought relief by a petition under G.L., c. 258, relating to claims against the Commonwealth. Demurrers to both cases had been sustained below.

The plaintiff for many years has operated an airport in the town of Falmouth. The airport is located on about eighty acres of land leased

§18.7. [1] Bay State Harness Horse Racing & Breeding Assn. v. State Racing Commission, 1961 Mass. Adv. Sh. 951, 175 N.E.2d 244.

§18.8. [1] 342 Mass. 356, 173 N.E.2d 614 (1961).

to the plaintiff by the defendant ranch company. The Division of Fisheries and Game acquired by purchase from the ranch company two parcels of land at Falmouth containing about 1400 acres, which included land covered by the plaintiff's lease. In the deeds, which are subject to the plaintiff's lease, the Commonwealth is the grantee. The land is registered, and certificates of title have been issued by the Land Court. General Laws, c. 131, §25, provides that property cannot be acquired "without the approval of the selectmen," and this approval was not obtained. The division has assumed control of the 1400 acres and has ordered the plaintiff to terminate its activities at the airport. One of the prayers is for a binding declaration as to the validity of the deeds and of the certificates of title. There were two demurrers to the bill, one by the Commonwealth and the division, and one by the ranch company. One common ground of the demurrers was that proceedings under G.L., c. 231A, will not lie against the Commonwealth. The Supreme Judicial Court held that this ground of the demurrer was good. The enactment of the declaratory judgment procedure did not constitute consent by the Commonwealth to become a defendant in this type of suit. Under our system of jurisprudence, the Commonwealth cannot be impleaded in its own courts except with its consent, and when that consent is granted, it can be impleaded only in the manner and to the extent expressed in the statute. The Court stated that in other states it is generally held that sovereign immunity is not affected by declaratory judgment procedure. A similar view prevails in the federal courts.[2] Since the case involves the Commonwealth's title in real estate, it is the real party in interest, and the case cannot proceed without it.

The petition in the second case contained substantially the same allegations as did the bill in the first case. There were prayers for injunctive relief against the Commonwealth and the division and for damages. One of the grounds for demurrer was that a petition under G.L., c. 258, may be brought for damages but not to try title to land or restrain the Commonwealth. The Court stated that the object of Chapter 258 was not to create a new class of claims for which the Commonwealth had never before been held responsible, but to provide a convenient tribunal for the hearing of claims of the character that civilized governments had always recognized although the satisfaction of them has usually been sought by direct appeal through the legislature. There is no jurisdiction under Chapter 258 to issue an injunction against the Commonwealth. The Commonwealth has not consented to any procedure to adjudicate its title to this real estate.

§18.9. Lord's Day Statute: "Shop and business." In *Commonwealth v. Chamberlain*,[1] the defendants were charged in separate

2 Developments in the Law — Declaratory Judgments — 1941-1949, 62 Harv. L. Rev. 787, 821-825 (1949).

§18.9. 1 1961 Mass. Adv. Sh. 1091, 175 N.E.2d 486. The opinion also decided the companion case of Commonwealth v. Martenson.

complaints with keeping their shops open on the Lord's day for the purpose of doing business or work in violation of G.L., c. 136, §5, which stems, as may be generally known at the bar, from legislation passed over two and one-half centuries ago. Section 5 in its present form reads as follows:

> Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

Waiving a jury the defendants were tried upon an agreed statement of facts, found guilty, and the Supreme Judicial Court affirmed.

The defendants were owners and operators of coin-operated laundries and provided washing and drying machines. Neither defendant was present at his laundry on the date charged in the complaint. The patrons, upon placing coins in coin-operated machines, performed the labor necessary for their requirements. The Court held that the place of business of each defendant was a "shop" under the statute; a sale is not required for violation of the statute. The constitutionality of Section 5 had been upheld in *Commonwealth v. Chernock*.[2] Section 5 violates the provisions of neither the state nor the federal Constitutions. The decision agrees with *Gallagher v. Crown Kosher Super Market of Mass., Inc.*[3]

§18.10. Housing authority: Scope of authority. *Costonis v. Medford Housing Authority*[1] is interesting because it clarifies the scope of authority of an agent of a housing authority created under G.L., c. 121, §26K. The case was an action of contract or tort to recover a balance under a painting contract and a sum of money for extras. The Supreme Judicial Court held that the executive director of the defendant had authority to modify the written contract. Ordinarily a written contract, before breach, may be varied by a subsequent parol agreement upon sufficient consideration, this rule applying both to sealed instruments and simple contracts.[2] A housing authority has the contracting powers of a private corporation, and an agent in charge of its transactions has broad authority. The general and special findings of a trial justice will stand if warranted in law upon any possible view of the evidence. The findings of the trial justice that the executive director had apparent authority to waive the provisions of the written contract and to order extra work were justified.

2 336 Mass. 384, 386, 145 N.E.2d 920, 922 (1958).
3 366 U.S. 617, 81 Sup. Ct. 1122, 6 L. Ed. 2d 536 (1961).

§18.10. 1 1961 Mass. Adv. Sh. 1153, 176 N.E.2d 25.
2 The Court followed Zlotnick v. McNamara, 301 Mass. 224, 225, 226, 16 N.E.2d 632, 633 (1938), in so holding.

B. Municipal Government: Court Decisions

§18.11. Bailment: Adverse possession. *Town of Warren v. Ball*[1] was an action of replevin for two ancient pieces of fire apparatus known as hand tubs. The jury found for the plaintiff, and the defendant's exceptions were overruled. There was conflicting evidence for the consideration of the jury concerning the circumstances under which the hand tubs were delivered to the defendant's testator. The jury could have found that the tubs were left in his care and safekeeping. The defendant argued in support of a motion for a directed verdict that there was no evidence of a bailment of the tubs and that, even if there was, the demand for their return must be made within a reasonable time, and that a demand, as in this case, 11½ years later was not within a reasonable time. The Supreme Judicial Court stated that the true principle is that the time when the demand must be made depends on the construction to be put upon the contract in each case. The demand must be made within a reasonable time, but what is a reasonable time is a question of law to be determined in reference to the nature of the contract and the probable intention of the parties as indicated by it. When there is nothing to indicate an expectation that a demand is to be made quickly or that there was to be a delay in making it, the prescriptive period for bringing such an action after the cause of action accrues should ordinarily be treated as the time within which a demand must be made. It could have been found that the transaction between the parties, being a bailment, was to continue into the future for a substantial period of time before the plaintiff would be expected to demand the return of the tubs. The bailor or beneficiary would not ordinarily take steps to assert his rights until there had been a repudiation by the bailee or trustee. While the evidence established that the testator's possession for the statutory period was open and continuous, it fell far short of establishing as a matter of law that such possession was hostile to the town and hence adverse. Until the plaintiff's demand was refused in October, 1957, Ball's possession could have been found to be consistent with a bailment.

§18.12. Taxpayer's suit: Necessity of municipal expenditure. *North v. City Council of Brockton*[1] was a taxpayer's suit under G.L., c. 40, §53, brought against the city council, the city manager, and the chief engineer of the fire department. Its purpose was to enjoin the expenditure of money or the incurring of obligations under an ordinance reducing the work week of the members of the fire department from fifty-six to forty-eight hours. The Supreme Judicial Court ordered a new interlocutory decree to be entered sustaining the demurrer and a new final decree dismissing the petition. The Court

§18.11. [1] 341 Mass. 350, 170 N.E.2d 341 (1960).

§18.12. [1] 341 Mass. 483, 170 N.E.2d 470 (1960).

stated that a taxpayer's petition under G.L., c. 40, §53, cannot be brought to challenge an ordinance passed by the city council unless some illegal expenditures are contemplated by the passing of the ordinance. Massachusetts cases have emphasized the basic provision that the town or its officers must be about to raise or expend money or incur obligations. The petition did not contain any such allegations. The nearest approach is found in allegations upon information and belief that, if the forty-eight-hour work week becomes effective, in order to give the city adequate fire protection it will be necessary to appoint additional fire fighters at an increased payroll cost of $115,000 and that there will be other great additional costs.

§18.13. Mandamus: Discretionary act. *Denunzio v. City Manager of Cambridge*[1] involved a petition for a writ of mandamus alleging that the city council of Cambridge had passed an order granting an increase in the retirement allowance of the petitioner in accordance with the provisions of G.L., c. 32, §90A, but that the city manager at all times had refused to approve the order. Section 90A provides among other things that a city which accepts it by two-thirds vote of the city council and with the approval of the mayor may increase the retirement allowance of any former employee who had been retired on account of injuries sustained or hazard undergone in the performance of his duties. The briefs are premised on the showing of the petition and answer that the city manager[2] had not given the approval which Section 90A specifies. In dismissing the petition the Supreme Judicial Court stated that there is nothing to suggest that the statute providing for approval was specifying only a ministerial act for the mayor or the city manager, as the case may be. It is basic in our system that much legislation is effective only upon the approval of the executive. This is the requirement of Section 90A. Mandamus does not lie to compel the city manager to exercise his judgment or discretion in a particular way.

§18.14. City land: Transfer from one department to another. The case of *Bouchard v. City of Haverhill*[1] was a taxpayer's bill under G.L., c. 40, §53. From an interlocutory decree sustaining a demurrer and a final decree dismissing the bill, the petitioner appealed. Both decrees were affirmed by the Supreme Judicial Court.

In 1955 the city acquired land by eminent domain for a new school building. The school committee approved the site and the building is nearing completion. In 1959 the city manager determined that a portion of the land was not needed for school purposes and so advised the city council. The city council thereupon transferred it to the fire department on condition that no engine house built upon it should contain a workshop. About a month later the school committee,

§18.13. [1] 341 Mass. 420, 169 N.E.2d 877 (1960).

[2] The city manager acted under G.L., c. 43, §104, in place of the mayor, who is the designated approving authority under G.L., c. 32, §90A.

§18.14. [1] 342 Mass. 1, 171 N.E.2d 848 (1961).

having determined that the portion of the school land was no longer needed for school purposes, relinquished it to the city council in conformity with G.L., c. 40, §15A. The petition alleged that the determination of the manager, the orders of the council, and the vote of the school committee were invalid and that the city was about to raise and expend money for the fire station. The Court held that the vote of the council was valid although not specifying the purpose for which the land was transferred, since it was admitted that the city was about to erect a fire station on the land, which was a public purpose. The vote could be amended. Further, the vote of the council, although preceding that of the school committee, could remain ambulatory until action by the school committee.

§18.15. Adverse possession: Municipal corporations. The petitioner in the action of *Cerel v. Town of Framingham*[1] sought to register his title to certain real estate, a portion of which was claimed by the town. In the Land Court a decision was entered for the petitioner "free from any rights of the respondent." The Supreme Judicial Court affirmed. The lower court found that in 1888 the town took certain land in Natick by virtue of Acts of 1887, c. 403, and constructed filter beds, some of which were outside of the land taken and inside the locus in dispute. Until 1936 the locus was substantially covered by two filter beds cared for by the town sewer department. The only use was for the filter beds. Several times land was taken from the property for highway purposes. In 1936 the use of the locus for filter beds was abandoned. In 1950 the town selectmen by lease allowed a third party to maintain a sign upon the property.

The locus was excluded from the land acquired under Acts of 1887, c. 403. The trial judge found that from 1889 to 1936 the town did not formally take the locus by adverse possession nor authorize its employees to do so, nor ratify any action of the employees in doing so. A town may acquire title to real property by adverse possession within its limits. The Supreme Judicial Court assumed in its opinion that land might be so acquired outside its limits. The disseisin, however, must be the corporate action of the town. The town employees had no authority in themselves to build or maintain the sewerage beds in the locus, and the town failed to show corporate action.

§18.16. Local option statute: Acceptance. The case of *Oleksak v. City of Westfield*[1] brought to light a rule of law sometimes overlooked in the administration of municipal business. This was a suit in equity brought by members of the police department of the defendant against the city, the chief of police, the city auditor, and the city treasurer for a declaratory judgment to determine whether the city had properly accepted Section 108E of G.L., c. 41, providing among other things for minimum annual compensation of regular police officers in accepting municipalities. Section 108E provides:

§18.15. [1] 342 Mass. 17, 171 N.E.2d 840 (1961).

§18.16. [1] 342 Mass. 50, 172 N.E.2d 85 (1961).

> Notwithstanding the provisions of any general or special law to the contrary, the minimum annual compensation of each regular police officer of the police department of any city or town shall be not less than the following: . . . This section shall become effective when accepted in a city having a plan E charter by the affirmative vote of a majority of all the members of the city council, and, in the case of other cities, by vote of the city council, subject to the provisions of the charter. . . .

Westfield is incorporated under Acts of 1920, c. 294, as amended, and does not have a plan E charter. The city council has eleven members. On December 3, 1959, when ten were present, it was unanimously voted to accept G.L., c. 41, §108E. Later on sums were appropriated to make Section 108E effective. Both votes of the council were approved by the mayor. It was contended by the defendants that the vote of December 3 violated Sections 28, 29, 30, and 31 of the city charter, all relating to city ordinances. In ordering a decree declaring that Section 108E had been validly accepted by the city, the Supreme Judicial Court pointed out the difference between a local ordinance and the acceptance of a local option statute of general import, the former being subject to amendment or repeal and the latter being beyond the power of the council to rescind without express statutory authorization. Provisions in the charter governing ordinances did not apply to the acceptance of local option statutes.

§18.17. Retirement: Veteran. The case of *Weiner v. City of Boston*[1] disclosed an unusual situation. It was an action in contract to recover instalments of a pension claimed to be due under an alleged retirement in accordance with G.L., c. 32, §58, as amended. In 1917 the plaintiff enlisted in the Medical Department Enlisted Reserve Corps. He passed the physical examination, was sworn in and assigned a service number. He continued his studies at Harvard Medical School. He engaged in daily drill under the supervision of army training officers. The plaintiff was never called into active service and was honorably discharged. The plaintiff was recognized as a veteran by the civil service division under G.L., c. 31, §23, when his name was placed on the civil service eligible list from which he was employed by the defendant in 1925. The plaintiff's application for retirement was approved. The defendant's ordinances require the city auditor to sign a draft to pay a retirement allowance, and the auditor has not signed such a draft. No retirement allowance has been paid. The Supreme Judicial Court held that an action in contract was a proper method to determine the validity of the plaintiff's claim. Action of the Civil Service Commission and the city did not estop the city from denying that plaintiff was not a "veteran" under G.L., c. 32, §58. Moreover, the plaintiff was not a "veteran" within the provisions of G.L., c. 31, §23, because he had not "served in the army . . ."

§18.17. [1] 342 Mass. 67, 172 N.E.2d 96 (1961).

§18.18. Public officer: Municipal corporations. *Commonwealth v. Oliver*[1] provides more light in determining the status of certain public officers and their responsibilities. This was a report of the questions of law arising on motions of three members of the Municipal Light Commission of Taunton and the manager of the plant to quash indictments under G.L., c. 266, §51; c. 268, §9; and c. 149, §§44A-44L. The Supreme Judicial Court stated that each of the defendants was an officer of the city of Taunton within the purview of G.L., c. 266, §51; the manager, although acting under the direction and control of commissioners, is nevertheless an officer of the city within the scope of G.L., c. 268, §9. The Court held invalid, however, the indictments that charged the awarding of a contract "for the alteration, remodeling and repair of a public building in the amount of $18,324 . . . without competitive bids in accordance with the procedure set forth in . . . c. 149, s. 44A to 44L, inclusive." Despite the provisions of G.L., c. 149, §180, providing that whoever violates a provision of the chapter for which no specific penalty is provided shall be punished by a fine of not more than $100, this provision does not apply to Sections 44A to 44L. Failure to follow the technical requirements of bidding is not the type of act that is criminal in nature, particularly since the sections are not precise and definite in many aspects. Merely because one act may be clearly required does not permit application of criminal sanctions for failure to comply.

§18.19. Schools: Acceptance of referendum by committee. *Murphy v. City of Cambridge*[1] is an appeal by the plaintiffs from final decrees in the Superior Court dismissing two bills that were brought by professional employees in the school department of Cambridge against the city and the school committee. The school committee voted to establish new positions; the plaintiffs, among others, were appointed; and a budget was adopted for 1957, which included salaries for those appointed. A referendum vote was taken which was adverse to the action of the committee. Accordingly, the committee voted to "honor the mandate of the voters" and struck from its budget the monies that had been inserted to cover the new positions. The Supreme Judicial Court held that the plaintiffs had only expectancies but neither contracts nor tenure. The decision of the committee after the referendum has been recorded, and the department is thus to be operated without the new positions to which the plaintiffs had been appointed.

§18.20. Civil service: Classification. In *Crowley v. City of Boston*[1] it appeared that in June, 1952, a classification plan and compensation plan were formulated by the director of civil service for certain civil service positions in Boston under G.L., c. 31, §2A(b). It classified

§18.18. [1] 342 Mass. 82, 172 N.E.2d 241 (1961).

§18.19. [1] 342 Mass. 339, 173 N.E.2d 616 (1961). The opinion also decided a companion case with the same name.

§18.20. [1] 342 Mass. 344, 173 N.E.2d 647 (1961).

the plaintiff as a senior clerk. He was then a civil service employee in the traffic department under the title "clerk" and was paid weekly. His service in that position began on January 14, 1952. The plan provided for a right to seek from the director a review of the classification, and an appeal from his decision to the commission. A rule provides that the commission may decline to entertain an appeal from the decision of the director more than thirty days after notice. However, on July 27, 1955, after a hearing the commission voted to accept the plaintiff's late appeal from an adverse decision of the director and granted to him the allocation of senior traffic investigator. The present action was brought to recover the difference between what the plaintiff was entitled to under the new allocation and what he was actually paid. The Supreme Judicial Court held that the plaintiff was entitled to recover the balance from the time of the lower allocation in 1952, but recovery would not include increment increases because no written recommendation to that effect was given to the mayor as required by subrule (f). The plaintiff was entitled to interest only from the date of the writ.

§18.21. Municipal contract: Validity. An exception to the action of the judge who, on motion, ordered a verdict for the defendant after the opening statement of the plaintiff's counsel brought the case of *Singarella v. City of Boston*[1] before the Supreme Judicial Court. The plaintiff was the low bidder for the construction of a sewage disposal system on Long Island, Boston. The contract was awarded. Contracts with the city over a certain amount must be in writing and the mayor must affix his signature of approval thereto. Contract forms were sent to the mayor with a letter stating that the plaintiff was the lowest bidder. The mayor fully understood the contract. He signed on the bottom of the letter, "approved J. B. Hynes, Mayor of Boston, Mass. 8/20/58." The letter was at all times stapled to the contract form. Subsequent to the mayor's approval, the plaintiff and the hospital trustees executed the contracts, and the city auditor also signed the contract. The plaintiff started work but was stopped by the city.

For the purpose of determining the propriety of the judge's ruling, all the statements in the opening must be taken as true. The opening would support an ordinary contract upon a sufficient consideration. The plaintiff was ready, willing, and able to perform, and the defendant's breach had interefered with the plaintiff's performance, to his damage.

Acts of 1890, c. 418, §6, provides:

> All contracts made by any department of the city of Boston . . . shall, when the amount involved is one thousand dollars or more . . . be in writing and no such contract shall be deemed to have been made or executed until the approval of the mayor of said city has been affixed thereto in writing. . . .

§18.21. [1] 342 Mass. 385, 173 N.E.2d 290 (1961).

Under the circumstances the mayor's signature of approval on the letter informing him of the trustees' desire to award the contract to the plaintiff and not on the contract itself could not be said to be a failure to comply with the statute. At all times it has been "affixed" to the contract by being stapled thereto. The statute requires no more. The mere acceptance of the lowest bid by the city does not constitute a contract. The statute does not require approval of an executed contract, it merely states that no contract shall be deemed to have been executed until it is approved. The plaintiff was, therefore, entitled to proceed with his case.

§18.22. Police officer: Payment by private contractor. Some light is thrown upon the legal status of a police officer performing traffic duty for, and being paid by, a private contractor in the case of *Yates v. City of Salem*.[1] The case was an action of contract to recover city wages from October 18, 1959, to the date of the writ. The plaintiff on September 16, 1958, his "day off," was assigned to traffic duty for a contractor engaged in relocating the old Salem depot. He accepted the assignment and was paid by the contractor. He worked under the direction of the contractor, the state engineer, "and for the city marshal." While so working in uniform performing the work of a police officer he was struck by a motor vehicle "without fault of his own and was totally incapacitated." He was given a leave of absence with pay from September 17, 1958, until October 17, 1959, except for a short period. On October 17, 1959, his name was removed from the payroll and from October 18, 1959, he continued on leave without pay, although remaining totally incapacitated. The city's motion for a finding was allowed. The Supreme Judicial Court sustained the plaintiff's exceptions. The plaintiff was a public officer controlling vehicular traffic and was injured while in uniform and performing his work. He was not acting in the capacity of employee of the contractor. It was irrelevant to the issue of performance that he was paid by the contractor. There was error in finding for the defendant. The police officer, under G.L., c. 41, §111F, was entitled to be paid for the period claimed.

§18.23. School committee: Out-of-state travel. A case shedding more light on municipal liability for out-of-state travel expenses may be found in *Day v. City of Newton*.[1] This case involved a petition under G.L., c. 71, §34, by taxpayers to require that an amount deleted from the school budget be provided together with 25 percent additional thereof. The Superior Court granted the relief sought, and the Supreme Judicial Court affirmed. It appeared from the evidence that the board of aldermen deleted from the annual budget of the school committee $1100 of the $9500 requested for out-of-state travel and restricted the appropriation to the purposes of providing funds "for

§18.22. [1] 342 Mass. 460, 174 N.E.2d 368 (1961).

§18.23. [1] 342 Mass. 568, 174 N.E.2d 426 (1961).

recruiting teachers outside the state and sending members of the professional staff to meetings of national organizations and to conferences of subject matter areas." This excluded an item to cover travel expenses of members of the school committee in January, 1959. The Court sustained the finding that these expenses for out-of-state travel were "necessary" expenditures under G.L., c. 71, §34. Within a wide limit, "necessary" means reasonably deemed by the committee to bear a relation to its statutory mandate. Further, G.L., c. 40, §5(34), does not vest in the appropriating body control over out-of-state travel by the school committee or its agents. However, an appropriating body may ferret out and exclude patently illegal items or subitems in any category of expenditure.

§18.24. School committee: Dismissal of teacher. Another decision has recently come down from the Supreme Judicial Court relating to a school committee's right of dismissal, *MacKenzie v. School Committee of Ipswich*.[1] This case was an appeal by the committee from a final decree in the Superior Court reversing the committee's vote of dismissal of the petitioner teacher under G.L., c. 71, §42. Section 43A of the chapter provides for an appeal to the Superior Court by a teacher dismissed under Section 42, the decision of the court to be final, "except as to matters of law." The petitioner at a special meeting of the school committee at which, among others, the superintendent of schools was present muttered an uncomplimentary remark to him, under the circumstances set forth in the opinion. The judge's finding that the teacher's utterance was improper and unbecoming conduct was plainly justified, if not in fact required. The judge, however, ruled that this was not, nevertheless, the conduct contemplated by the statute as a cause for dismissal, under the circumstances. The Supreme Judicial Court held this was error, absence of effect of the unbecoming conduct upon the pupils being irrelevant. Whether the teacher's act interfered with the efficiency of the school system had to be determined by the committee in context.

The Court further held that errors of law in proceedings in the Superior Court under G.L., c. 71, §43A, may not be brought to the Supreme Judicial Court by an appeal and that a writ of certiorari is the only available method of review. Since the issues had been fully argued, the Court ordered the appeal dismissed, without prejudice, however, to the timely filing of a petition for a writ of certiorari under G.L., c. 249, §4.

§18.25. Referendum: Certification of signatures. *Sharpe v. Registrars of Voters of Northampton*[1] adjudicated some important questions concerning the certification by registrars of voters of signatures upon referendum petitions. The Superior Court overruled demurrers and ordered that a writ of certiorari issue against the respondents to quash

§18.24. [1] 1961 Mass. Adv. Sh. 864, 174 N.E.2d 657.

§18.25. [1] 1961 Mass. Adv. Sh. 873, 174 N.E.2d 648.

their certification of names on a referendum petition brought under G.L., c. 44, §8A, which statute had been accepted in Northampton. The appeals were dismissed and judgment was affirmed.

The Court stated that the irregular procedure joining city councilors did not destroy the force of the petition for a writ of certiorari against the registrars, the only proper parties. The correct practice in proceedings of this kind is to hear arguments from one interested without making him a party.[2] While not specifically stated in the statute governing municipal referenda, the Court held that the names on such referenda have to agree with those on the voting lists, as is specifically required for state-wide referenda. The exclusion by the trial court, however, of thirty-one signatures because "Mr." or "Mrs." was added was erroneous. The titles were surplusage and did not affect the signatures properly written. Moreover the addition of the thirty-one signatures to those found valid would not affect the result.

§18.26. Referendum statute: Acceptance. Another case involving a municipal attempt to accept a local option statute was decided by *Fisher v. City of Holyoke*.[1] A petition for a writ of mandamus was brought by the members of the fire department against the city, its mayor, city auditor, and city treasurer seeking an order requiring the respondents to take action to carry out the provisions of Acts of 1958, c. 621, which inserted Section 108D in G.L., c. 41, and provides for a minimum annual compensation of not less than $5000 for permanent fire fighters of cities and towns accepting the section. It further provides that the section shall become effective in cities not having a plan E charter "by vote of the city council subject to the provisions of the charter." The city charter is contained in Acts of 1896, c. 438. After an abortive attempt to accept Chapter 621 of the Acts of 1958, the board of aldermen again voted to accept it. The order passed a second reading and was presented to the mayor for his approval. The mayor returned it to the board without his approval and with a message setting forth his reasons, after which the board passed the order over the mayor's veto. Thereafter the action of the board was made the subject of a referendum petition under G.L., c. 43, §§38, 42. In a special election the vote was in the negative and against the acceptance.

Acts of 1953, c. 343, entitled "An Act providing for the initiative and referendum for the City of Holyoke," was accepted by the voters of the city on November 3, 1953. The Court held that the provisions so accepted became a part of the Holyoke city charter and they fall within the phrase "subject to the provisions of the charter" contained in Acts of 1958, c. 621. The statutory phrase means all the provisions of the charter and not just some of them. General Laws, c. 43, §42, describes the referendum procedure upon the final passage of any measure, and G.L., c. 43, §37, defines "measure" to include an ordinance or vote passed by a city council. The petition was therefore dismissed.

[2] Marcus v. Commissioner of Public Safety, 255 Mass. 5, 150 N.E. 903 (1926).

§18.26. [1] 1961 Mass. Adv. Sh. 929, 175 N.E.2d 393.

§18.27. Dump: Nuisance. The case of *Lenari v. Town of Kingston*[1] arose from a bill in equity to enjoin the town from maintaining a dump so as to constitute a nuisance. From decrees overruling the plaintiff's exceptions to the master's report, confirmation of the report, and a final decree dismissing the bill of complaint, the plaintiff appealed. The Supreme Judicial Court reversed the decrees.

It appeared from the evidence that the plaintiff owned a cranberry bog with a building on it. The town acquired a parcel of land to the north of the plaintiff's. Prior to town ownership of this parcel the plaintiff had no difficulty concerning smoke, odor, dust, fires, rodents, flies, or vermin. After the defendant acquired its land the town began the operation of a dump thereon. The dump was about 950 feet from the plaintiff's land. Since its location, the dump has spread in the direction of the plaintiff's land. At one point the dump is 100 feet or less from the boundary line. The usual material is brought to the town dump. Intermittently tar paper and other inflammables were burned and made heavy dark smoke. Sewage at one time was permitted to flow upon the plaintiff's land, causing damage. The Court held that smoke, odors, flies, rodents, and wild dogs coming from the defendant's dump onto the property of the plaintiff may well constitute a nuisance. The case was remanded to the Superior Court for further findings relative to fires on the defendant's dump and other offensive conditions alleged to have existed on the plaintiff's property since the operation of the dump began.

§18.28. Zoning: Open meetings law. The Open Meetings Law[1] was construed by the Supreme Judicial Court in the case of *Elmer v. Board of Zoning Adjustment of Boston.*[2] The plaintiff, being aggrieved by a decision of the board, appealed to the Superior Court. This is the appeal of the board from the decree of the lower court that the decision of the board be annulled. The Supreme Judicial Court ordered a new decree that the decision of the board was not in excess of its authority and no modification was necessary.

The vote of the board was not invalid because taken at an executive session following deliberations at executive sessions of which no notice had been given in compliance with G.L., c. 39, §23A. Chapter 437 of the Acts of 1960, inserting a new Section 23C in Chapter 39, requiring that notice of such open meetings be given, took effect as stated therein as of January 5, 1959, and the legality of the meeting of August 5, 1959, and earlier meetings was to be determined thereunder. Section 23C in substance provides that upon proof of failure to comply with the various provisions requiring notice of open meetings and records of them, any justice of the Supreme Judicial or the Superior Court shall issue an appropriate order requiring the offending officer to comply therewith, ". . . but action otherwise duly taken at any meeting shall

§18.27. [1] 1961 Mass. Adv. Sh. 963, 175 N.E.2d 384.

§18.28. [1] G.L., c. 39, §23A.
[2] 1961 Mass. Adv. Sh. 1063, 176 N.E.2d 16.

not be invalidated by the failure . . . to carry out the said responsibilities for public notice of meetings." Failure to give notice of the meetings of the board did not invalidate the action of the board. The Court further found that the action of the board, in changing two areas to different residence zones, was valid and of the kind which the Boston zoning statute permits.

§18.29. Public works contract: Bidding. The petitioner in *Chick's Construction Co. v. Wachusett Regional High School District School Committee*[1] appealed from an order dismissing its petition for a writ of certiorari. It had sought to quash the action of the committee in awarding a general contract to Granger for the construction of an addition to the Wachusett Regional High School and prayed that the contract be awarded to it. Granger was allowed to intervene. The order for dismissal of petition was affirmed by the Supreme Judicial Court.

Granger's bid was the lowest, $907,700; Chick's was the next lowest, $907,785. Chick's contended that the Granger bid was invalid because there was an omission of an entry in the item relative to the cost of "rock excavation," violating that portion of G.L., c. 149, §44F, stating that every general bid that is on a form not completely filled in or which is incomplete, conditional, or obscure, or which contains any addition not called for, is invalid and the awarding authority shall reject every such general bid.

Permitting Granger to intervene as a party respondent was irregular because only the members of the tribunal whose action is to be questioned were proper respondents. It was not improper, however, to hear argument from Granger as an interested private party, and all concerned in the case appear to have assented to the irregularity.[2]

Under Massachusetts decisions rejection of the Granger bid would have been justified because on its face it did not comply with the requirements of the statute; on the other hand minor deviations from requirements will not require rejection of a bid. Moreover, a writ of certiorari will not be granted unless the petitioner demonstrates that substantial justice requires it even though defects of some comparatively inconsequential nature may appear on the record.

The Court further stated that it did not appear that the dismissal of the petition was not in the exercise of the judge's sound discretion. Granger's bid was a complete bid for the complete work as specified. It was a bid to do the whole job at a fixed price. The lowest bidder had been awarded the contract. The public interests had not been adversely affected.

§18.30. Trailer coach park: Licensing. The subject of municipal regulation of trailers and trailer coach parks arose in the case of *Cliff v. Board of Health of Amesbury*.[1] The plaintiff filed an applica-

§18.29. [1] 1961 Mass. Adv. Sh. 1077, 175 N.E.2d 502.
[2] Marcus v. Commissioner of Public Safety, 255 Mass. 5, 8, 150 N.E. 903, 905 (1926).

§18.30. [1] 1961 Mass. Adv. Sh. 1101, 175 N.E.2d 489.

tion with the defendant for a license to construct and operate a trailer coach park under G.L., c. 140, §§32B and 32H. The application was denied and the plaintiff appealed to the Superior Court under Section 32K of the chapter and further filed a petition for a writ of certiorari. The trial judge dismissed the appeal and sustained a demurrer to the petition for writ of certiorari. The action of the Superior Court was affirmed.

The plaintiff submitted his plans to the state Department of Public Health, which were approved by it. The application was denied by the defendant because of an inadequate supply of water. Since a right of appeal from the decision of the defendants was provided by G.L., c. 140, §32K, a petition for a writ of certiorari would not lie because such a writ only issues when no other adequate remedy is available.

Trailers are subject to regulation under the police power. The board of health concluded that a health problem might be created if a license for a 108-unit trailer coach park was issued in an area where some permanent residents of the town were not presently receiving an adequate supply of water. A refusal to grant a license in such circumstances was not arbitrary or capricious. General Laws, c. 140, §32H, does not require a local board of health to issue a license after approval by the state department.

§18.31. Municipal corporations: Recall election. A municipal recall election in the town of Saugus was ordered in *Donahue v. Selectmen of Saugus,*[1] which was a petition for a writ of mandamus to compel the respondents to order a recall election with respect to three of its members. A single justice made findings and rulings and ordered the writ to issue subject to a determination of the full court of the rulings, and reserved and reported the case.

Saugus has accepted a town manager form of government under Acts of 1947, c. 17, as amended. There is a five-man board of selectmen chosen for two-year terms. Holders of elective office other than town meeting members may be recalled in the manner provided upon the filing with the town clerk of an affidavit containing the name of the officer sought to be recalled and a statement of the grounds for recall. The "ground" stated was that the selectmen sought to be recalled voted to award an all-alcoholic beverage goods license detrimental to the best interests of the town. After the provisions of Chapter 17 had been complied with, the three selectmen sought to be recalled voted against an order for an election. In ordering the writ to issue, the Supreme Judicial Court said that "the recall election should be held on a Tuesday as soon as reasonably may be. The statutory requirement that the election be held not less than twenty-five nor more than thirty-five days after the date of the town clerk's certificate is in the circumstances directory as the single justice ruled." [2]

§18.32. Municipal corporations: Subdivision control and zoning.

§18.31. [1] 1961 Mass. Adv. Sh. 1137, 176 N.E.2d 34.
[2] 1961 Mass. Adv. Sh. at 1140, 176 N.E.2d at 37.

Zoning and subdivision control were before the Supreme Judicial Court in the cases of *Doliner v. Planning Board of Millis*[1] and *Doliner v. Town Clerk of Millis*.[2] The first case consisted of two appeals from action of the planning board of Millis under the subdivision control law.[3] Doliner alleged in each appeal that he as trustee owned land in Millis and that on April 8, 1959, he had applied for approval of a definitive subdivision plan. In one appeal Doliner alleged that on May 26, 1959, the planning board by letter informed him of the disapproval of the plan. In the other appeal Doliner alleged that the planning board had failed "to take any valid final action concerning 'his subdivision plan' within sixty days following submission thereof as required by" G.L., c. 41, §81U. The trial judge found that on April 8, 1959, a month after a town meeting had adopted a new zoning by-law, Doliner filed with the planning board, and on April 9 with the board of health, applications for approval of his plan. He notified the town clerk of his action. The board of health made no report on this plan within forty-five days thereafter. On May 26, 1959, the planning board notified the town clerk and Doliner that it had disapproved the plan because the lot sizes did not comply with the zoning by-law and map voted at the annual town meeting on March 9, 1959. The planning board held no public hearing prior to this disapproval.

At the annual town meeting on March 9, 1959, the town voted to adopt the proposed zoning by-law and to repeal the existing one; the new by-law would be effective only if and when approved by the Attorney General and when published.[4] The new by-law was approved by the Attorney General on June 9, 1959. The trial judge further found that Doliner's plan was filed in accordance with the zoning regulations and by-laws in existence on April 8, 1959; that no valid action was taken by the planning board within sixty days after submission; that the amended zoning by-law did not control Doliner's plan; that the failure of the board of health to report within forty-five days was deemed approval of the plan; and that the failure of the planning board to approve or disapprove the plan within sixty days was deemed approval which became final on June 8, 1959. A final decree was entered that the plan was deemed approved by the planning board and board of health by reason of their failure to act within the time prescribed in G.L., c. 41, §81U, and that the lots shown on the plan conform to the residential use requirements of the zoning by-law in effect on June 8, 1959. The planning board appealed. After setting forth various provisions of the subdivision control law, the Supreme Judicial Court stated that at the time of the filing of Doliner's plan on April 8, 1959, and on May 26, 1959, when the planning board

§18.32. [1] 1961 Mass. Adv. Sh. 1039, 175 N.E.2d 919.
[2] 1961 Mass. Adv. Sh. 1049, 175 N.E.2d 925.
[3] G.L., c. 41, §§81K-81GG.
[4] Id., c. 40, §32.

notified him of its disapproval, none of the 1960 amendments to Section 810 had taken effect.

The disapproval of the planning board operated as such despite the failure by it to hold a public hearing as contemplated by the statute. The board's action not only gave Doliner the right to appeal under Section 81BB but also prevented approval through lapse of time without action. After discussing G.L., c. 40A, §11, the Court stated that in the sense that Section 11 and the new by-law would prevent issuing a valid building permit if the new by-law eventually became effective, it was "applicable" to Doliner's subdivision plan. If the planning board were to approve such a plan its action might be seriously misleading to a purchaser of the lot from Doliner.

The Supreme Judicial Court reversed, entering a new decree annulling the decision of the planning board and remanding, directing the planning board to hold a public hearing upon Doliner's plan and to obtain the required action of the board of health, after which it is to take final action upon the plan in accordance with the applicable statutes, by-laws, and the opinion.

The case of *Doliner v. Town Clerk of Millis*[5] was a petition for a writ of mandamus to require the town clerk to expunge from the records of the town meeting held on March 9, 1959, a vote adopting the amendments of the town zoning by-law referred to in the previous case. Testimony was taken by a judge of the Superior Court, after which judgment for the respondent clerk was ordered. Upon appeal, the judgment was affirmed by the Court.

In 1958, after a survey, a zoning scheme was prepared as an amendment to the town's zoning by-law which provided for lots varying in size from 15,000 to 60,000 square feet, taking into account the location and other characteristics. After notice, a public hearing was held. After the hearing thirteen changes affecting some 4.3 percent of the total town acreage were included in the zoning plan. The principal proposal, as altered by the changes after the public hearing, was passed by the required two-thirds vote. The Court assumed that the petitioner had a standing to test the validity of the zoning by-law amendment in its application to his property.

The changes made by the planning board after the public hearing did not render the revision invalid.[6] The recorded written approval of the planning board under the circumstances was a sufficient recommendation to the town meeting.

The petitioner did not establish that the new zoning by-law was not reasonably related to the public health, morals, safety, and welfare. Moreover, every presumption was in its favor. The Court further held that, if the new zoning amendment did operate to forbid religious and educational structures in industrial districts, those provisions were clearly separable, and the possible constitutional issues would not

5 1961 Mass. Adv. Sh. 1049, 175 N.E.2d 925.

6 This aspect of the case was held to be governed by Burlington v. Dunn, 318 Mass. 216, 218-219, 61 N.E.2d 243, 245 (1945).

invalidate the entire amendments. The Court did not reach the question as to whether the petitioner had standing to claim invalidity in this respect, lacking evidence that his land was adversely affected by the supposed prohibition.

C. State Government: Legislation

§18.33. Voting rights: Registration limitations. One of the most important and far-reaching pieces of legislation enacted during the 1961 session of the General Court was Chapter 118 of the Resolves. This chapter deals with a subject that is fundamental and basic to a democracy, voting. If a 65 percent turnout occurs at the polls, it is considered a good showing. The resolve is concerned with those people who want and do try to vote but cannot because of failure to meet various registration requirements.

More specifically Chapter 118 is a resolve providing for an investigation and study by a special commission relative to protecting the eligibility of voters who have moved into or from the Commonwealth. The magnitude and importance of such legislation can only become evident when one is familiar with the requirements for voting in this state and country. The settlement and residence laws affect each prospective voter in a very real way. He may be required to reside in a state, county, and precinct a certain period of time before he can vote.

The effect of residence laws on voting can be summarized simply by saying that a person cannot vote who has not complied with the statutory and constitutional residence requirements of the state wherein he seeks to cast his ballot. Thus a person may be precluded from voting in the state elections because he has not established himself in the particular community, or precinct within the community, for the prescribed length of time. Likewise a person is precluded from voting in the national elections by reason of his failure to establish a certain length of residence in a state prior to election day, despite the fact that he may be a United States citizen in good standing.[1]

The requirement of residence as a qualification for voting has been consistently upheld as a reasonable condition, the reason given being that only in this manner can voters be identified, fraud prevented, and the community assured of its members taking an active interest in government.[2] Such regulations and requisites as the states impose have been upheld as valid by the Supreme Court of the United States as long as they do not deny or invade a right conferred by the federal Constitution. The requirement is well entrenched in American statutory law, virtually every state having made some provision for a period of residence as a prerequisite to the right to vote.[3]

§18.33. [1] U.S. Const., Art. I, §2; Art. II, §2; Amend. XVII, par. 1.
[2] 29 C.J.S., Elections §19 (1941).
[3] McCrary, Elections §52 (3d ed. 1887).

Generally, for the purposes of voting, "residence" means "domicile." [4] Thus a man will be deemed a resident if he is present in the place and has the requisite intent to remain indefinitely.[5] But mobility has long been a hallmark of America. Today our economy is geared to a mobile working force. That this is true is dramatically demonstrated by a few statistics. Since 1950, each year some five million Americans, more than 3 percent of our population, have changed residence from one state to another. By and large, egress and ingress of migrants from any particular state or community tend to cancel each other out.[6]

Get-out-the-vote enthusiasts often belabor the average citizen for his lack of interest in his greatest political privilege: the exercise of his vote. The citizen, on the other hand, having completed his fall moving, may be quite eager to cast his ballot in his new community, only to find that he must come back next year or the year after. At least five million Americans were prevented from voting in the last national elections by residence laws similar to that of Massachusetts.

The Massachusetts Constitution provides:

> Every citizen of twenty-one years of age and upwards . . . who shall have resided within the commonwealth one year, and within the town or district in which he may claim a right to vote, six calendar months next preceding any [state] election . . . shall have a right to vote in such election . . .[7]
>
> No person, otherwise qualified to vote . . . shall, by reason of change of residence . . . be disqualified from voting . . . in the city or town from which he has removed his residence, until the expiration of six calendar months from the time of such removal.[8]

The problem can become compounded when the issue is raised at registration time. To administer the laws as regards residency, towns set aside registration dates when one must qualify to vote. If a person does not register on these dates he cannot vote although he might in all other respects be eligible to vote. Another problem arises when a person is not a voting resident on the dates of registration but by the time election day arrives he would have been eligible. Can the town legally withhold his right to vote by refusing to register him? No answer has been provided by our courts to this problem, but it occurs frequently.

The trend today is for courts to give less strict construction to

4 Id. §63; Note, 34 Geo. Wash. L. Rev. 121 (1934).

5 28 C.J.S., Domicile §9 (1941). See also Holmes v. Greene, 4 Metc. 299 (Mass. 1856); Op. Atty. Gen. Mass., June 2, 1941, p. 81.

6 Goodwin, A Fluid Labor Force and Our Expanding Economy, in Residence Laws: Road Block to Human Welfare 8 (National Travelers Aid Assn. 1956).

7 Mass. Const., Amend. Art. III.

8 Id., Amend. Art. XXX.

residence requirements.[9] It is conceivable that one day the Supreme Court of the United States will hold them unconstitutional as violative of the right to move freely.[10] But until that time the individual states must themselves modernize their residency laws. The creation, by Chapter 118 of the Resolves of 1961, of a commission to study this problem represents a recognition of its seriousness by the General Court and a first step in modernizing Massachusetts law.

[9] Mandelaker, Exclusion and Removal Legislation, 1956 Wis. L. Rev. 57, 73.

[10] For an excellent discussion of the right, see Vestal, Freedom of Movement, 41 Iowa L. Rev. 6 (1955).