STATE OF ILLINOIS
IN THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY

RONI QUINN, as the parent and guardian of J.L. Plaintiff, Vs. QUINCY PUBLIC SCHOOL BOARD OF EDUCATION. a body politic. Defendant.	)	Case No. 2020-MR-___

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, RONI QUINN, as the parent and guardian of her minor child, J.L, by and through her attorneys, Thomas G. DeVore, Erik D. Hyam, and DeVore Law Office, LLC., state the following as her Memorandum in Support of her Motion for a Preliminary Injunction:

INTRODUCTION

1. On July 08, 2020, the Superintendent published the District's public health mandates for the 2020-2021 school year.

2. The mandates are an attempt by the District to issue health regulations to prevent the spread of COVID-19.

3. The Mandates must be followed by Plaintiff's minor child before she will be allowed admission to the public school to exercise her right to an in-person education.

4. The legislative branch of the State of Illinois has never declared these Mandates to

be a condition precedent before a child be admitted access to a public school within this state.

5. Said another way, the legislative branch of the State of Illinois has never declared the failure of a parent to subject their minor child to these Mandates can be a basis to exclude a child from having access to a public school within this state.

6. As set forth in the Verified Complaint filed contemporaneously herewith, if left unchecked, the District's ultra vires, and otherwise unlawful mandates will result in immediate and irreparable harm to Plaintiff's minor child.

7. To be abundantly clear, this case has absolutely nothing to do with the wisdom or purpose of the Mandates expressed by the District.

8. This case is about an administrative body creating compulsory rules which are tantamount to general lawmaking in violation of the separation of powers of the branches of government.

9. What shall be general law within Illinois, and the wisdom of implementing it, is for the legislature, after proper public discourse, and is not within the purview of the District or any administrative body.

STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER

10. In considering whether to issue injunctive relief, the court must consider four factors: (1) whether the movant has a right or interest that needs to be protected, (2) whether the movant has an adequate remedy at law, (3) the threat of irreparable harm to the movant if the injunction is not granted, and (4) the reasonable likelihood of success on the merits. *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 399 (1st Dist. 2005).

11. The movant need not show an actual injury before an injunction may issue. The threat of such injury is sufficient. *Gannett Outdoor of Chicago v. Baise,* 163 Ill. App. 3d 717, 722

(1st Dist. 1987).

12. A temporary restraining order ("TRO") is an equitable remedy that is issued when necessary to preserve the status quo until the Court has ample opportunity to resolve the matter on the merits.

13. "Status quo" is defined as the last actual, peaceable, uncontested status preceding the controversy. *NW Steel & Wire Co. v. Indus. Comm'n*, 254 Ill. App. 3d 472, 476 (1st Dist. 1993).

14. Plaintiffs seek to preserve the status quo of the requirements for the minor child to have access to in-person learning within the public-school building which existed prior to the controversy at issue here, (i.e. the District's ultra vires, and otherwise unlawful, exercise of police power reserved for the legislature.)

I. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS

15. To show a likelihood of success on the merits, a party only needs to raise "a fair question about the existence of his right and that the court should preserve the status quo until the case can be decided on the merits. *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1st Dist. 2007); *see also Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 72 (1st Dist. 1992).

16. As set forth below, Plaintiffs' Verified Complaint raises more than fair questions about the existence of the rights of Plaintiffs to be free of these mandates unless the same be promulgated by the legislative branch of government.

17. This Honorable Court need only review *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81 (Ill. 1897) and its progeny to find the District has absolutely no authority to promulgate their general mandates.

18. Those Illinois Supreme Court cases are:

a) *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81 (Ill. 1897)

b) *People ex rel. LaBaugh v. Bd. of Educ. of Dist. No. 2*, 177 Ill. 572, 52 N.E. 850 (Ill. 1899)

c) *People ex rel. Jenkins v. Bd. of Educ. of City of Chicago*, 234 Ill. 422, 84 N.E. 1046 (Ill. 1908)

d) *Hagler v. Larner*, 284 Ill. 547, 120 N.E. 575 (Ill. 1918)

e) *Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922).

f) *Burroughs v. Mortenson*, 312 Ill. 163, 143 N.E. 457 (Ill. 1924)

19. For the Court's convenience, the six aforementioned cases are attached herein.

20. The right or privilege of attending a public school is given by law to every child of proper age in the state. *Potts v. Breen*, 167 Ill. 67, 73, 47 N. E. 81 (Ill. 1897)

21. Administrative bodies do not have such vast power over the rights and liberties of individual citizen as to deprive them of their rights, unless they shall submit to rules as a mere precaution against some possible future outbreak of an infectious disease. *Id.* at 74. (emphasis added)

22. Without a law mandating the restrictions, upon grounds deemed sufficient by the legislature as necessary to protect the public health, as a condition of admission to or attendance upon the schools, an administrative board has no power to make or enforce a rule or order having the force of a general law. *Id.* at 75.

23. When a rule is to be compulsorily applied, it must, like all other civil regulations, be applied in conformity to law. *Id.* at 76.

24. In *Potts v. Breen* we recognized the rule that in only in cases of emergency, when necessary or apparently necessary to prevent the spread of an infectious disease and preserve the public health, pupils may be **temporarily** excluded from the public schools. *Hagler v. Larner*, 284

Ill. 547, 550, 120 N.E. 575 (Ill. 1918).,

25. Such power is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases. *Id.* at 551.

26. This Court can clearly deduce from the statistics of Adams County that no such emergency presently exists and the District is merely attempting to create a general law to try and prevent the possible spread of an infectious disease.

27. The *Pott's* standard set current precedent that such a general rule, which is tantamount to law, is not allowable unless and until, at a minimum, it is promulgated by the legislature.

28. Our Illinois Supremt Only the legislative branch has the police power to create general law and to confer upon agencies the authority to and discretion to execute these laws. *Barmore v. Robertson*, 134 N.E. 815, 818 (Ill. 1922).

29. Health authorities cannot promulgate and enforce rules which merely have a tendency to prevent the spread of contagious and infectious disease. *Id. at* 819.

30. The health authorities cannot interfere with the liberties of a citizen until the emergency actually exists. *Id.*

31. And when they do interfere, their rules cannot be arbitrary and unreasonable. *Id.*

II. PROTECTABLE RIGHTS AND INTERESTS ARE AT STAKE

32. It should go without saying that Plaintiff's minor child has protectable rights and interests at stake.

33. As set forth in the pleadings, Plaintiffs minor child has a protectable right and interest in have access to her in-person education within a public-school building being free from the conditions precedent in the Mandates that blatantly overreach the authority of the District.

34. The District is attempting to overtake the authority of legislative branch of government.

III. IRREPARABLE HARM EXISTS FOR WHICH THERE IS NO ADEQUATE REMEDY AT LAW

35. Once a protectable interest has been established, **"irreparable injury [or harm] is presumed** if that interest is not protected." *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, ¶ 51 (*quoting Cameron v. Bartels*, 214 Ill. App. 3d 69, 73 (4th Dist. 1991)) (emphasis added).

36. Moreover, for harm that is of a continuous nature, and involves a right for which monetary compensation would be inadequate, like a deprivation of liberty, courts have considered it to be *per se* irreparable harm. *C.J. v. Dept. of Human Services*, 331 Ill. App. 3d 871, 891-92 (1st Dist. 2002).

37. Absent preliminary injunctive relief, Plaintiff faces an unnecessary Sophie's Choice: acquiesce to the mandates or lose her minor child's right to access for in-person learning within a public-school building.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin the District from invoking the mandates against Plaintiff's minor child until this Court has the opportunity to fully and finally declare the mandates a nullity.

Respectfully submitted,

RONI QUINN,
as the parent and guardian of
J.L. Plaintiff.

By: /s/ Thomas G. DeVore
One of Her Attorneys

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167 Ill. 67
47 N.E. 81

POTTS et al., School Directors,
v.
BREEN et al.

Supreme Court of Illinois.

May 10, 1897.

Appeal from appellate court, Fourth district.

Suits by Jennie Breen and another, by Michael Breen, their father and next friend, against Lawrence W. Potts and others, school directors of district No. 5, township 2 N., range 12 W., in Lawrence county, Ill. From a judgment of the appellate court (60 Ill. App. 201) affirming a judgment for plaintiffs, defendants appeal. Affirmed.

[167 Ill. 68]

[47 N.E. 82]

Gee & Barnes, for appellants.

C. J. Borden and C. F. Breen, for appellees.

CARTER, J.

These are two suits between the same parties, one a petition for a writ of mandamus to compel appellants to admit appellees to the public school of their district, and the other an action of trespass to recover damages for the exclusion of appellees from such school. The cases were tried together upon the following facts agreed upon, viz.: Jennie Breen and Jim Breen, appellees, were the children of Michael Breen, a resident and taxpayer of district No. 5, township 2, range 12, Lawrence county, Ill., of which district the appellants were directors. These directors, acting under a certain rule and order of the state board of health, made a general order, applicable to all schools in their district, requiring that all pupils should be vaccinated before being admitted to such schools. They also employed a physician to vaccinate the pupils, and instructed and ordered the teacher of the school in question to impart no instruction to appellees until they should comply with said order; and appellees were refused admission to the school on the sole ground that they had failed and refused to comply with such order, the father of appellees absolutely refusing to permit his children to be vaccinated. The directors acted in good faith, under the belief that they were performing a duty imposed upon them by law, and used no direct force upon appellees, but simply denied them admission to the school, after repeated refusals to obey the orders relating to vaccination. [167 Ill. 69]In their answer to the petition, the directors alleged that the state board of health made and promulgated the following order: 'Resolved, that, by the authority vested in this board, it is hereby ordered that on and after January 1, 1882, no pupil shall be admitted to any public school in the state without presenting satisfactory evidence of proper and successful vaccination;' and that at the January meeting, 1894, the said state board of health passed the following resolution: 'Resolved, that the power of the state board of health, under the law creating said board of health, to order the vaccination of all school children, is clear and unquestionable. The consequent duty of the board of school directors to see that such order is strictly enforced in their respective districts is equally clear, and the said order of the board of health is their sufficient authority for so doing.' These orders of the state board of health were sent to the superintendent of schools of said Lawrence county, and were by him transmitted to the appellants, with written directions of the state board of health to enforce the same; and appellants made an order that all children attending the said school in their district should be vaccinated, or should show a physician's certificate of previous vaccination, as a condition of

attendance upon the said school. The trial court rendered judgment against appellants, granting the peremptory writ of mandamus as prayed, and assessed appellees' damages in the trespass case at one cent. These judgments have been affirmed, on appeal, by the appellate court, and appellants have prosecuted this appeal to this court. So far as the record discloses, appellees had not been exposed to infection by smallpox, but were in perfect health, and there was no reason for their exclusion except that they had not been vaccinated. There was no epidemic of smallpox prevailing or apprehended in the vicinity of the school.

The record presents the question whether or not the state board of health, or the appellants,[167 Ill. 70]as such school directors, acting under its orders or otherwise, had any power to impose, as a condition of the admission of appellees to the public schools, the requirement of vaccination; and, further, if such power existed, and could be enforced as a police regulation, for the preservation of the public health, and to prevent the spread of contagious and infectious diseases, was the regulation and its enforcement, under the facts appearing in the record, a reasonable one? Section 2 of the act creating the board of health (Laws 1877, p. 208) is as follows: 'The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state. They shall have charge of all matters pertaining to quarantine, and shall have authority to make such rules and regulations, and such sanitary investigations, as they may from time to time deem necessary for the preservation or improvement of public health; and it shall be the duty of all police officers, sheriffs, constables, and all other officers and employees of the state to enforce such rules and regulations, so far as the efficiency and success of the board may depend

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upon their official co-operation.' Section 3 provides that the board of health shall have supervision over the state system of registration of births and deaths, as hereinafter provided: 'They shall make up such forms and recommend such legislation as shall be deemed necessary for the thorough registration of vital and mortuary statistics throughout the state. The secretary of the board shall be superintendent of such registration.' Section 4 makes it the duty of all physicians and accouchers to report to the county clerk 'all births and deaths which may come under their supervision, with a certificate of the cause of death, and such correlative facts as the board may require in the blank forms furnished as hereinafter provided.' Section 8 requires county clerks to render complete reports of all births, marriages, and deaths to the state board of health; and [167 Ill. 71]section 9 requires the board of health to prepare the necessary forms. Section 12 provides for an annual report by the board to the governor, 'and such report shall include so much of the proceedings of the board, and such information concerning vital statistics, and knowledge respecting diseases, and such instruction on the subject of hygiene, as may be thought useful by the board for dissemination among the people, with such suggestions as to legislative action as they may deem necessary.' By reference also to the act of the general assembly to regulate the practice of medicine in this state, which was passed at the same session of the legislature, and which makes reference to the state board of health, and provides for the examination and licensing by said board of persons desiring to practice medicine, it clearly appears that one of the most important duties of the board was to ascertain and certify to the qualifications of practicing physicians and surgeons, and to detect quacks, and to prevent them and all ignorant pretenders from imposing upon the sick and helpless. It is clear that no such power as claimed by the state board of health has been conferred upon it, unless by the broad and general language

of the first section of the act creating it. But the general terms there employed must be construed in relation to the more specific duties imposed and powers conferred by the act taken as a whole, and, when thus construed, these general terms are restricted so as to express the true intent and meaning of the legislature. Take, for example, the first sentence, viz.: 'The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state.' The scope of the language there employed is practically unlimited, and were it not held to be restricted by well-known legal principles, applicable in the interpretation and construction of statutes, it would appear to confer more power on this board than the legislature itself possessed. Plainly, it [167 Ill. 72]was not intended that any general supervisory power over the health and lives of citizens of the state should be exercised by the board otherwise than in conformity to law, and such as should be necessary, within reasonable limitations, in the performance of the administrative duties which were or should be imposed upon the board by statute. It had and could have no legislative power. Its duties were purely ministerial, and the provision of the statute authorizing the board to make such rules and regulations as it should from time to time deem necessary for the preservation or improvement of the public health cannot be held to confer that broad discretionary power contended for, to prescribe conditions upon which the citizen of the state may exercise rights and privileges guarantied to him by public law. In Huesing v. City of Rock Island, 128 Ill. 465, 21 N. E. 558, it was contended that the city had the power, under clause 78, § 1, art. 5, of the city incorporation act, to construct and maintain a city abattoir, as a sanitary measure. This clause is as follows: 'To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.' This court, however, held that, in view of the fact that the same section contained other provisions authorizing the city council to do certain specified acts for the preservation of the health of the city and the suppression of disease, the general provision did not enlarge the powers conferred by the special provisions.

As recently held by the supreme court of Wisconsin in a similar case, we are of the opinion that the powers of the board are limited to the proper enforcement of statutes, or provisions thereof, having reference to emergencies requiring action on the part of the agencies of government to preserve the public health, and to prevent the spread of contagious or infectious diseases. It will be observed that after the first section the powers and duties of the board with reference to different subjects [167 Ill. 73]are minutely specified, and it is required 'to make reports to the governor, and to include therein such information concerning vital statistics, and such knowledge respecting diseases, and such instruction on the subject of hygiene as may be thought useful by the board for dissemination among the people with such suggestions as to legislative action as they may deem necessary.' Its duty to recommend legislation is repeated more than once in the act, in connection with specifications of the powers and duties of the board; and from no point of view can we regard it as having been within the legislative intent to confer, by the first section, plenary powers upon the board in all matters pertaining to the public health, without regard to other provisions of the statute, or further action by the legislature. Section 1 of article 8 of the constitution provides that 'the general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.' And the statute provides that the directors 'shall establish and keep in operation for at least one hundred and ten days of actual teaching in each year

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* * * a sufficient number of free schools for the accommodation of all children in the district over the age of six and under twenty-one years, and shall secure to all such children the right and opportunity to an equal education in such schools.' And the statute further provides that they shall adopt and enforce all rules and regulations for the management and government of the schools, and may suspend or expel pupils who may be guilty of gross disobedience or misconduct. The statute also contains provisions of similar import relating to schools in more populous districts and cities. It is therefore seen that the right or privilege of attending the public schools is given by law to every child of proper age in the state, and there is nowhere to be found any provision of law prescribing vaccination as a condition precedent to the [167 Ill. 74]exercise of this right. Whether the legislature has the power to make such a requirement or not, it is not necessary here to consider; it is sufficient that it has not done so, and it cannot be supposed that the legislature has undertaken, and not expressly, but by mere implication from the general language used in creating the state board, to confer upon that mere administrative body such vast power over the rights and liberties of the individual citizen as to deprive him of his constitutional and statutory rights, unless he shall submit his body to be inoculated with vaccine virus, as a mere precaution against some possible future contagion of smallpox. It is doubtless true that in a large number of school districts in interior parts of the state no case of smallpox has ever existed in the history of the state, and yet, by this order of the board, no citizen who has children to educate, although compelled by law to pay taxes to support the public schools, can send his children to such schools without first having such child vaccinated, as a precaution against a disease which had never appeared, and where there was no apparent danger that it would ever appear in the vicinity.

The power to compel vaccination, or to require it as a condition precedent to the exercise of some right or privilege guarantied to the citizen by public law, can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. Without the necessity, or reasonable grounds upon which to conclude that such necessity exists, the power does not exist. As such the board of health has no more power over the public schools than over private schools or other public assemblages, and its order applying to public schools only, requiring vaccination as a prerequisite to exercise of the right to attend a public school could be justified only upon reasonable grounds appearing that the contagion of smallpox would more likely originate in or be [167 Ill. 75]disseminated from the public schools than from other assemblages. Whether it might be invested with power in this respect is a question not involved here, and not necessary to consider. While school directors and boards of education are invested with power to establish, provide for, govern, and regulate public schools, they are in these respects nowise subject to the direction or control of the state board of health, and, as before pointed out, they have no authority to exclude children from the public schools on the ground that they refuse to be vaccinated, unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. Undoubtedly, also children infected or exposed to smallpox may be temporarily excluded, or the school may be temporarily suspended; but, like the exercise of similar power in other cases, it is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases. No one would contend that a child could be permanently excluded from a public school because it had been exposed to smallpox, or that the school could be permanently closed, because of the remote fear that the disease of smallpox might appear in the neighborhood, and that, if the school should then be open

and children in attendance upon it, the public would be exposed to the contagion. And, upon the same line of reasoning, without a law making vaccination compulsory, or prescribing it, upon grounds deemed sufficient by the legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned.

We are not called upon to consider whether or not vaccination is a preventative, or the best known preventative, of smallpox. That it is so seems to be the consensus[167 Ill. 76]of opinion of a learned and honorable profession, borne out by the history of its use for a century, and we can only so regard it; but, when compulsorily applied, it must, like all other civil regulations, be applied in conformity to law. However fully satisfied, by learning and experience, a board might be that antitoxine would prevent the spread of diphtheria, no one would contend that a rule enforcing its use as a condition precedent to the admission of a child to the public schools would, as the law now is, be valid. It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be.

The same conclusion was reached by the supreme court of Wisconsin in State v. Burdge, 70 N. W. 347, in a case similar in all respects to this. In that case the court also, upon the question of the power of the legislature to delegate

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to such board the power to make a rule having the force of a general law, cited Dowling v. Insurance Co., 92 Wis. 63, 65 N. W. 738, which held that the legislature could not delegate the insurance commissioner the power, essentially legislative, to prepare, approve, and adopt a form of 'a standing fire insurance policy' for use in that state, and which use was to be enforced by penal sanction of the act. See, also, on this subject, O'Neil v. Insurance Co., 166 Pa. St. 72, 30 Atl. 943, and Anderson v. Assurance Co., 63 N. W. 241. See, also, Tugman v. City of Chicago, 78 Ill. 405. As said in State v. Young, 29 Minn. 474, 9 N. W. 737: 'It is a principle not questioned that, except where authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power,-cannot confer [167 Ill. 77]on any body or person the power to determine what shall be law. The legislature only must determine this.' Hurst v. Warner (Mich.) 60 N. W. 440. This was an act of the Michigan legislature which provided that, in certain contingencies specified in the act, the state board of health should be authorized to establish a quarantine, and to make rules for the disinfection of baggage belonging to persons coming from a country where contagious disease exists, and, through an inspector acting thereunder, to detain for disinfection beggage of passengers, passing through the state, and coming from localities where a dangerous, communicable disease exists. It was held by the court that the act did not authorize a rule subjecting the baggage of all immigrants to disinfection, whether such immigrant came from a part or locality where any dangerous, communicable disease existed or not. The case of Abeel v. Clark, 84 Cal. 226, 24 Pac. 383, was a mandamus proceeding to compel the principal of a public school to admit Abeel as a scholar, who had been refused admission because he had not complied with the vaccination act. This act provided that the school trustees and board shall 'exclude from the benefits of the common schools any child or any person who has not been vaccinated.' The act was held

constitutional. The court says: 'Vaccination, then, being the most effective method known of preventing the spread of the disease referred to (smallpox), it was for the legislature to determine whether the scholars of the public schools should be subjected to it.' The case of Duffield v. School Dist., 162 Pa. St. 476, 29 Atl. 742, was a mandamus proceeding to compel the admission of the plaintiff's minor child into the common schools of Williamsport. The facts in this case were that there was an ordinance of the city of Williamsport in force providing that no pupil 'shall be permitted to attend any public or private school in said city without a certificate of a practicing physician that such pupil has been subjected to the process of vaccination'; that smallpox was then [167 Ill. 78]existing in Williamsport, and had been epidemic in many near-by cities and towns; that the board of health and the school board, in view of the general alarm prevailing in the city over the report that a case of smallpox was in the city, had adopted a resolution in conformity with said city ordinance. The questions raised related to the power of the school board to adopt reasonable health regulations, and to the reasonableness of the particular regulation complained of, and the action of the board was sustained. But the case was unlike the one at bar in the fact that smallpox was then in the city, and was prevalent in adjoining communities. A similar conclusion was reached in Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, but the general statute of Connecticut had expressly conferred upon the school committee the power exercised by it. The cases of In re Walters (Sup.) 32 N. Y. Supp. 322, and Abeel v. Clark, 84 Cal. 226, 24 Pac. 383, involved the constitutionality of statutes requiring all children to be vaccinated before being admitted to the public schools, and such statutes were held to be constitutional. That question is not involved here, and the reasoning employed in those cases does not apply where this legislative power is exercised by an administrative board, and not by the legislature itself. Nor can the rule in question be regarded as a reasonable one where, as in this case, smallpox did not exist in the community, and where there was no cause to apprehend that it was approaching the vicinity of the school, or likely to become prevalent there. The record wholly fails to show that there were any grounds upon which the board could have any reasonable belief that the public health was in any danger whatever. Neither the board of health nor the board of directors having any power to make and enforce the order in question under the facts of this case, if follows that appellees were unlawfully excluded from the school. The powers of school officers under the statute have been considered by this court in numerous cases. [167 Ill. 79]Rulison v. Post, 79 Ill. 567;Trustees of Schools v. People, 87 Ill. 303;McCormick v. Burt, 95 Ill. 263;Chase v. Stephenson, 71 Ill. 382;People v. Board of Education, 101 Ill. 308; and other cases. But nothing said in any of those cases sustains the contention of appellants. The judgment of the appellate court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

177 Ill. 572
52 N.E. 850

PEOPLE ex rel. LABAUGH
v.
BOARD OF EDUCATION OF DIST. NO. 2.

Supreme Court of Illinois.

Feb. 17, 1899.

Error to appellate court, Second district.

Application by the people, on the relation of Maud I. Labaugh, an infant, by her next friend, for mandamus to the board of education, district No. 2, township 17 N., range 3 E., of the fourth P. M., to compel respondent to permit relator to attend the public schools. A judgment dismissing the petition was affirmed by the appellate court (66 Ill. App. 159), and relator brings error. Reversed.

[177 Ill. 572]William M. Smith and Geo. W. Shaw, for plaintiff in error.

Dunham & Foster, for defendant in error.

PHILLIPS, J.

Maud I. Labaugh, a pupil of about the age of 12 years, was expelled from the public schools at Geneseo, Ill., because she did not exhibit a certificate of vaccination done within the past year, and who had not been vaccinated, and she was forbidden to return until she should bring such certificate. She, by her next friend, applied to the circuit court of Henry county for a writ of mandamus to compel the defendant in error to admit her. The circuit court refused the writ, and the appellate court for the Second district, on appeal, affirmed the judgment of the circuit court.

It appears the petitioner resided in the district, and was of about the age stated, and entitled to the privileges[177 Ill. 573]of the public schools on the same terms and conditions as other children of the district, subject to lawful regulations. A resolution of the state board of health of November 2, 1891, required that, before being admitted into any public school, every child must present to his or her teacher a certificate, signed by a legally qualified physician, stating the name, age, residence, date of vaccination, etc.; and a subsequent resolution of the state board of health of January, 1894, reaffirmed the above, and extended it to parochial and private schools. The state board of health further resolved that its power, under the statute, to order the vaccination of children, was clear and unquestioned, The city of Geneseo, by an ordinance passed by the city council on August 11, 1891, established a board of health, and appointed its members, and by an ordinance of October 12, 1893, further provided that the board of health might, at any time, after consulting duly authorized officials, declare it necessary to the public health to suspend from school any unvaccinated student attending the Geneseo schools, public or private, until such person should be able to produce a certificate that such person had been vaccinated. The board of health of Geneseo adopted a resolution prohibiting the attendance of unvaccinated pupils.

The contention of the defendant in error is that the state board of health is a quasi public corporation, and the legislature could delegate to it the right to make rules and regulations having the force of law as to the subject-matter involved, and that the action of the state board of health, of the Geneseo board of health, and the city of Geneseo was within the scope of their respective powers, and that their rules, regulations, and ordinances are of binding force and effect as preventive law, and that the board of education had full power to pass the rules complained of. The questions presented by

this record, except so far as the ordinance of the city of Geneseo is concerned, and [177 Ill. 574]identical with the questions presented in Potts v. Breen, 167 Ill. 67, 47 N. E. 81, where it was held that a rule adopted by the state board of health compelling the vaccination of children as a prerequisite to their attending the public schools is unreasonable where smallpox does not exist in the community, and there is no reasonable cause to apprehend its appearance; that the power to compel the vaccination of children as a prerequisite to their attending public schools could only be derived from the general police power of the state, and can only be justified as a necessary means for preserving health. These questions were fully discussed in the Breen Case; and it is earnestly urged that we reconsider that case, by the brief filed by the defendant in error. We adhere to the principles announced in that case, and decline to further discuss the questions there determined. The only question in this case not presented in that is the action of the city council of the city of Geneseo; and we cannot hold that in the preservation of the public health, under the police power of the state, a municipality invested with police power may invoke such power for the purpose of invading the individual liberty of citizens of the community. Neither the city of Geneseo, nor its board of health, nor the board of health

[52 N.E. 851]

of the state of Illinois, has power to require compulsory vaccination except in the public contingency stated in the Breen Case; and it was error in the circuit court of Henry county to refuse to issue the writ, as also it was error in the appellate court for the Second district to affirm that judgment. The judgment of the appellate court for the Second district and the judgment of the circuit court of Henry county are each reversed, and the cause is remanded. Reversed and remanded.

234 Ill. 422
84 N.E. 1046

PEOPLE ex rel. JENKINS
v.
BOARD OF EDUCATION OF CITY OF CHICAGO et al.

Supreme Court of Illinois.

April 23, 1908.
Rehearing Denied June 9, 1908.

Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Petition for mandamus by the people, on relation of Louise Jenkins, against the board of education of the city of Chicago. From a judgment dismissing the petition, relator appeals. Reversed and remanded.

[234 Ill. 423]

[84 N.E. 1047]

Walter J. Watts and Stedman & Soelke, for appellant.

Emil C. Wetten, George W. Miller, and Frank Hamlin (Edward J. Brundage, Corp. Counsel), for appellees.

CARTWRIGHT, J.

Louise Jenkins, by her next friend, filed her petition in the name of the people, in the circuit court of Cook county, against the board of education of the city of Chicago, and therein alleged that she was a resident of the city, six years of age, a daughter of D. F. D. Jenkins, a resident and taxpayer of said city, and that on October 29, 1907, she applied for admission as a pupil to the John Fiske school, which she was entitled to attend, and was denied admission to the said school by the board of education because she refused to be vaccinated, and she prayed for a writ of mandamus commanding the board to admit her to the public schools. The board of education answered, making no denial of the averments of fact contained in the petition, which were therefore admitted to be true, but setting up in justification of the exclusion of the relator an ordinance of the city of Chicago and instructions by the health department to enforce such ordinance. The relator demurred to the answer, and the court overruled the demurrer. The relator elected to stand by the demurrer, and judgment was entered against her, dismissing the petition and for costs. An appeal to this court was prayed for, and the trial judge certified that the validity of the city ordinance was involved, and in his opinion public interest required that an appeal should be taken direct to this court, in pursuance of section 118 of the practice act. Laws 1907, p. 467. The appeal was allowed and perfected, and the record has been filed in this court.

[234 Ill. 424]The Constitution requires the General Assembly to provide a thorough and efficient system of free schools, whereby all children in this state may receive a good commonschool education, and the statute provides for establishing and keeping in operation such schools for the accommodation of all children over the age of 6 and under the age of 21 years. The right to attend the public school in the district where the relator resides is therefore given to her by the law, and the duty to admit her and to maintain the school rests upon the board of education. The Legislature have never made it a condition precedent to the exercise of the legal right to attend the public schools that children shall be vaccinated, and the question whether power to do that exists is not involved in this case. The petition alleges, and the answer does not deny, that the defendants denied to the relator admission to the John Fiske school, but the answer sets up as justification for the exclusion an ordinance of the city of Chicago. Not only have the Legislature never prescribed vaccination as a condition to the enjoyment of the legal right to attend public schools, but they have never

conferred upon cities the power to do so. If the city of Chicago has power to pass any ordinance on the subject, the power is derived from the authority conferred upon the city council to appoint a board of health and prescribe its powers and duties, to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease, and to pass all ordinances and rules, and to make all regulations proper or necessary to carry into effect such authority. The ordinance set out in the answer was passed on March 20, 1905, and the only section relating to exclusion from schools is section 1255, which is as follows: 'No principal or person in charge or control of any school shall admit to such school any child who shall not have been vaccinated within seven years next preceding the admission or application for admission to any such school of such child, [234 Ill. 425]nor shall any such principal or person retain in or permit to attend any such school any child who shall not have been vaccinated as provided in this article.'

The general police powers above enumerated to pass ordinances and make regulations for the promotion of health or the suppression of disease do not include the passage of such an ordinance as this, which makes vaccination a condition precedent to the right to an education. An ordinance passed by reason of such authority must be reasonable in its character, and rest upon the ground

[84 N.E. 1048]

that it is a necessary means of preserving the public health. In the case of Potts v. Breen, 167 Ill. 67, 47 N. E. 81,39 L. R. A. 152, 59 Am. St. Rep. 262, it was held that the exclusion of a child from a public school because of a refusal to be vaccinated can only be justified where such course is necessary, or reasonably appears to be necessary, in case of an existing or threatened epidemic of smallpox, and to prevent the spread of the disease. In the case of Lawbaugh v. Board of Education, 177 Ill. 572, 52 N. E. 850, the court adhered to those principles, and declined to further discuss them, although earnestly urged to reconsider the former decision. Section 1255 is null and void and affords no justification for denying relator admission to the John Fiske school, whether the denial of her legal right was at the instance of the health commissioner, the health department, or any other authority.

The only other section of the ordinance which has any relation to schools, or which purports to give any authority respecting them to the health commissioner or health department, is section 1253, and it does not purport to give any authority to exclude children from schools. It provides that the commissioner of health, or any officer of the health department designated and authorized to act by such commissioner, shall have power to enter any of certain enumerated buildings and places, among which are school-houses, under certain circumstances, and that such commissioner or officer shall have power to vaccinate any person found in such building or place whom he shall deem it necessary or [234 Ill. 426]advisable to vaccinate. It further purports to authorize the commissioner, at any time when smallpox is prevalent or an epidemic of smallpox is or appears to be imminent, to vaccinate any person in the city whom he shall deem it necessary or advisable to vaccinate, provided that such person may be vaccinated by his own physician in a manner satisfactory to the commissioner. Although this section is set out at length in the answer, it is not alleged that the commissioner was attempting to vaccinate the relator, and no justification under its provisions is attempted.

Section 1035 of the ordinance purports to give to the commissioner of health power to make such rules and regulations in relation to the sanitary condition of the city and for the prevention and suppression of disease, not inconsistent with the municipal code, as he may deem necessary or advisable, but it

provides that such rules and regulations shall not take effect and be in force until approved by the city council, except in cases of emergency. The answer does not allege that the commissioner of health made any rules or regulations or that any were approved by the city council. The section further provides that the commissioner may make rules and regulations for the preservation of the public health in case of an emergency from contagious or epidemic disease or danger from anticipated or impending contagious or epidemic disease, but such emergency rules and regulations shall, as soon as may be after the promulgating of the same, be reported to the city council for approval. Here, again it does not appear that the commissioner acted under any provision of that section, or made any rule or regulation, or reported any to the city council after promulgation.

These provisions of the ordinance are the only ones that could in any event have any relation to attendance upon the public schools, and the only one that was enforced against the relator was section 1255, which is null and void. The answer alleged, as a matter of fact, that on October 29, [234 Ill. 427]1907, the disease of smallpox was prevalent in the district in which the John Fiske school was located, within such a radius as to make it dangerous for all persons therein residing who had not been vaccinated; that the commissioner of health declared smallpox to be epidemic in said district, and instructions were given by the health department to exclude all children who had not been vaccinated in accordance with the terms of the ordinance. The terms of the ordinance are that no child shall attend the public schools who has not been vaccinated within seven years, and do not constitute a lawful exercise of any power conferred upon the city. The health commissioner is a purely ministerial officer and has no legislative powers whatever. The ordinance does not purport to give him authority to exercise such powers or to make any rules or regulations, except in cases of emergency, until they can be reported to the city council for approval or rejection. He can only be authorized to perform administrative duties in pursuance of some ordinance of the city, and there was no valid ordinance authorizing the exclusion of relator from the public school which she had a legal right to attend. There is nothing in the nature of an emergency in the occasional recurrence of the well-known disease of smallpox in a city like Chicago which may not be provided for by general rules and regulations prescribed by the legislative authority of the city. The board of education, which has charge of the public schools, has made no rule or regulation on the subject of such epidemics, and neither has the city council. The answer does not make known any ordinance, rule, or regulation for the exclusion from the schools of children not vaccinated in the event that an epidemic of smallpox exists in the vicinity of a school or is reasonably apprehended, and in our opinion the court erred in overruling the demurrer.

The judgment is reversed, and the cause is remanded to the circuit court, with directions to sustain the demurrer.

Reversed and remanded, with directions.

284 Ill. 547
120 N.E. 575

HAGLER et al.
v.
LARNER et al.

No. 12167.

Supreme Court of Illinois.

Oct. 21, 1918.

Appeal from City Court of Granite City; H. J. Browning, Judge.

Suit by Clifton Hagler and others against R. H. Larner and others. From decree dismissing the bill, complainants appeal. Affirmed.

[284 Ill. 547]

[120 N.E. 576]

A. R. Johnson, of Granite City, for appellants.

R. W. Griffith and Mrak Meyerstein, both of Granite City, for appellees.

DUNCAN, C. J.

Appellants, Clifton Hagler and 12 other infant complainants, by William Hagler, their next friend, filed a bill in the city court of Granite City, to the March term, 1918, against appellees, R. H. Larner and others, as members of [284 Ill. 548]the board of education, principals of schools, and of the local board of health of the city of Granite City. The relief sought by the bill was the enjoining of appellees from preventing appellants from attending the public schools unless they were first vaccinated, according to a resolution adopted by the local board of health. The cause was heard on the bill and stipulations, the hearing being in the nature of an oral demurrer to the bill. The court dismissed the bill for want of equity, and appellants have brought the case by appeal to this court, contending that their constitutional rights are involved.

From the bill and the stipulations it appears that appellants are actual residents of Granite City, between the ages of 6 and 21 years, and are pupils of the Granite City public schools; that the board of health on March 4, 1918, passed a resolution that all children be excluded from the public schools for a period of two weeks unless recently vaccinated, or unless they produced a certificate that they had been successfully vaccinated within the past five years or had had smallpox; that appellees are endeavoring to enforce said resolution; that appellants have refused to submit to vaccination; that they are normally healthy and have not been exposed to smallpox, so far as known; that there is no ordinance of the city requiring vaccination as a prerequisite to attending the public schools of Granite City; that the disease of smallpox is prevalent and epidemic in said city, there being about 40 cases in the city, which has a population of approximately 12,000; and that the resolution of the board of health was for the purpose of preventing the spread of the disease of smallpox and of preserving the health of the citizens of the city. It also appears from the stipulations that section 183 of chapter 9 of the revised ordinances of the city contains, among other things, the following provisions as to the duties of the local board of health:

"The board of health, or a majority of said board, shall have power, upon the appearance in epidemic form of smallpox, etc., and other contagious and [284 Ill. 549]infectious disease within the city limits, for the purpose of preventing the spread of said disease, to make such rules and regulations and such sanitary investigation as they may from time to time deem necessary for the preserving and improvement of the public health, to provide for gratuitous vaccination and disinfection, and to do all acts, make all regulations which

may be necessary or expedient for the promotion of health or the suppression of disease.'

Appellants contend that the local board of health had no legal authority to pass the aforesaid resolution, that it is void, and that the injunction should have been granted restraining the board and the school officers from enforcing the same. It is also insisted that the resolution and the enforcement of the same violate section 1 of article 8 of the Constitution of 1870, which provides:

'The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.'

The question of the right to require school children to be vaccinated as a prerequisite to their admission to the public schools has met with frequent discussion in the various jurisdictions in this country. There is a manifest lack of uniformity in the decisions of the courts. In this state the rule is firmly established that school directors and boards of education have no authority to exclude children from the public schools on the ground, simply, that they refuse to be vaccinated, unless in cases of emergency, in the exercise of the police power, it is necessary or reasonably appears to be necessary to prevent the contagion of smallpox.

[120 N.E. 577]

Potts v. Breen, 167 Ill. 67, 47 N. E. 81,39 L. R. A. 152, 59 Am. St. Rep. 262;Lawbaugh v. Board of Education, 177 Ill. 572, 52 N. E. 850;People v. Board of Education, 234 Ill. 422, 84 N. E. 1046,17 L. R. A. (N. S.) 709,14 Ann. Cas. 943. In all of the foregoing cases it appears that there was no epidemic or prevalence of smallpox and that the pupils were in a healthy condition and had not been exposed to smallpox, and this court held it to be unreasonable to require vaccination as a prerequisite to admission to the public[284 Ill. 550]schools in such cases and that there was no law of this state authorizing such action. In the instant case it appears from the stipulations that smallpox was epidemic and prevalent in Granite City, and that there actually existed a large number of cases of smallpox when the resolution was passed and enforced, and that the board of health, acting under the authority conferred by the ordinance above set out, passed the resolution for the purpose of preventing the spread of the disease and of preserving the health of the citizens.

The exact question here raised seems never to have been passed on directly by this court, but it is not a new one in other jurisdictions having similar health laws. The courts are practically a unit in holding that in the event of a present or threatened epidemic such rules and regulations as are now under consideration are reasonable and should be upheld; and such has been the rule in states where there has been no express authority requiring vaccination. Where smallpox is epidemic, it is not a necessary prerequisite to require vaccination that pupils have been personally exposed. State v. Cole, 220 Mo. 697, 119 S. W. 424,22 L. R. A. (N. S.) 986;Blue v. Beach, 155 Ind. 121, 56 N. E. 89,50 L. R. A. 64, 80 Am. St. Rep. 195. It has been held in some jurisdictions that even without specific authority from the Legislature or city council, local boards having control of schools or of the general care of the public health are justified by the existence of the emergency in making vaccination a condition for admission to the public schools. Hill v. Bickers, 171 Ky. 703, 188 S. W. 766;State v. Zimmerman, 86 Minn. 353, 90 N. W. 783,58 L. R. A. 78, 91 Am. St. Rep. 351;State v. Board of Education, 21 Utah, 401, 60 Pac. 1013. This court, in Potts v. Breen, supra, while making no direct decision upon the point, recognizes the rule that in cases of emergency, when necessary or apparently necessary to prevent the spread of smallpox and preserve the public health, pupils may be temporarily excluded from the

public schools unless they are properly vaccinated or have had smallpox. It was said in that case:

'Undoubtedly, also, children infected with or exposed to [284 Ill. 551]smallpox may be temporarily excluded or the school be temporarily suspended; but, like the exercise of similar power in other cases, such power is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases.'

The resolution of the board of health was reasonable in view of the fact that smallpox was epidemic and the disease likely to spread from the many cases then existing in the city. It is not disputed that the purpose of the board of health in passing the resolution was the prevention of the spread of the disease and preserving the health of the citizens, and there is no argument offered by appellants that that would not be its tendency or that the actual, express purpose of the board would not be accomplished by the enforcement of the board's rules. The requirement of the resolution was that such exclusion of the pupils should be temporary, or for two weeks, and then only in case they refused to be vaccinated, etc. The only objection to the resolution, in fact, is that the board had no sufficient authority to pass the same and that the school board was therefore without power to enforce it.

Clause 76 of paragraph 62, art. 5, of our Cities and Villages Act (Hurd's Rev. St. 1917, c. 24), provides, in enumerating the powers and duties of city councils, that the city council shall have power 'to appoint a board of health, and prescribe its powers and duties.' Clause 78 of the same paragraph gives the council the further power 'to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.' The foregoing clauses of the statute and the ordinance of Granite City conferred upon the board of health of said city ample authority to pass said resolution under the existing facts. The passing of the resolution by the board was the mere exercise of an administrative function and not the exercise of a legislative power, as contended by the appellants. The delegation of power to make a law would, if conferred upon the board [284 Ill. 552]of health, be a legislative power, and such a delegation would be void. However, the conferring of authority or discretion upon the board of health to execute a law or ordinance is not a delegation of legislative authority, and the rule is well established that such may be done. Blue v. Beach, supra; People v. Tait, 261 Ill. 197, 103 N. E. 750. The power conferred upon the board of health by the ordinance was merely power to make such rules and regulations and such sanitary investigations as the board might from time to time deem necessary for health upon the appearance in epidemic form health upon the appearance in epidemich form of smallpox, and is such an ordinance as was within the power of the city to adopt and such as has been frequently upheld by the authorities. The rule adopted by the board was not a permanent rule or law, but a mere temporary order set in force for a limited time as a means of stamping out smallpox and preventing the further spread thereof in said city. The rule or regulation expired at the expiration of the limit fixed for it to remain in force and cannot in any sense be said

[120 N.E. 578]

to be a legislative act. No one was compelled to be vaccinated. The simple effect of the order was that no child could enter the school unless vaccinated while the rule of the board requiring vaccination was in force. As it was the duty of the board of health to enforce such reasonable rules and regulations as would stamp out the epidemic and promote the public health and the resolution seemed well calculated to accomplish that purpose, and as a public necessity existed for such action, the board of health must be held to have acted legally in passing the resolution and the

school board in enforcing it and requiring vaccination as a condition to pupils entering the schools. The exercise of such authority by the board of health and the school board finds ample authority in the police power of the state when such a necessity arises as is shown in this case, and no constitutional rights of appellants have been violated. No child has a constitutional right to carry to others in [284 Ill. 553]school the loathsome disease of smallpox. Vaccination is now recognized as the only safe prevention of the spread of smallpox. It is approved by medical science generally and by governmental authorities throughout the civilized world. In many countries compulsory vaccination has become the settled policy of the state, and our own country has adopted it as one of the preliminary requisites to military service. A child infected with smallpox may communicate the disease to hundreds of others, and the disastrous results therefrom are incalculable. Where smallpox is epidemic and a large number of cases are actually existing in a city or community, no one can tell at what moment some person may become exposed and break out with the disease. By the teachings of the best medical authorities, a person who has been thoroughly and successfully vaccinated will be entirely immune from the disease or put in such condition that if he should contract the disease it would only be in the very mild form commonly known as varioloid, which rarely occasions scarring or fatal results. In other words, the result of vaccination, according to such authorities, is not only the arrest of the spreading of the disease, but the prevention of fatalities among those who are actually exposed to the disease and who contract it in its milder form. While, on the other hand, it is true that occasionally very disastrous results happen from the use of impure vaccine, and there are many people, for that or other reasons, who resist, and have the right to resist compulsory vaccination of their children except in cases of necessity; yet they have no right to insist on their children continuing in school and mixing in large congregations without obeying such requirements when smallpox is epidemic in the community and such children perhaps have been exposed to the same. The right to enjoy school and other privileges, recognized by our law, must be so used and enjoyed as not to expose other people unnecessarily to dangerous diseases or contagions. The police power is broad enough to protect all citizens against [284 Ill. 554]such exposure, and it is not an unreasonable requirement to prevent children from having the benefits of school unless vaccinated, etc., under such conditions as existed in Granite City when the resolution of the board of health was passed, and particularly when such exclusion was only for the period of two weeks and with the privilege to the children to remain unvaccinated by remaining out of school for such time.

The bill of complaint was without equity under the showing in this record, and the decree of the city court is affirmed.

Decree affirmed.

302 Ill. 422
134 N.E. 815

PEOPLE ex rel. BARMORE
v.
ROBERTSON et al.

No. 14123.

Supreme Court of Illinois.

Feb. 22, 1922.
Rehearing Denied April 13, 1922.

Original proceedings for a writ of habeas corpus by the People, on relation of Jennie Barmore, against Dr. John Dill Robertson and others, to procure release from custody in quarantine.

Relatrix remanded to custody.

Duncan, J., dissenting.

[134 N.E. 816]

[302 Ill. 424]Darrow, Sissman, Popham & Carlin, of Chicago, for relatrix.

Samuel A. Ettelson, Corp. Counsel, of Chicago (Berthold A. Cronson, Carl F. Lund, and John A. Bugee, all of Chicago, of counsel), for respondents.

THOMPSON, J.

Jennie Barmore filed in this court at the June term, 1921, an application for a writ of habeas corpus, stating that she was unlawfully restrained of her liberty at her home in the city of Chicago by John Dill Robertson, commissioner of health, and Herman N. Bundesen, an epidemiologist of the department of health of the city of Chicago. The writ was awarded, and respondents made due return, by which they admit that they are restraining relatrix from going about the city of Chicago and from following her usual occupation of boardinghouse keeper, for the reason that she is a carrier of typhoid bacilli; that they are restraining her by virtue of the authority given them by the statutes of the state and the ordinances of the city and the rules and regulations of the state department of health, and that her detention was necessary for the preservation of the health of the citizens of the city and the state.

The facts are stipulated by the parties to be substantially as follows: Relatrix is a citizen of Chicago, and is the owner of the house in which she resides. She kept roomers and boarders. Information came to the department of health, by letters and otherwise, that several persons who [302 Ill. 425]had previously roomed and boarded at the house of relatrix had been ill with typhoid fever. Pursuant to this information the department placed relatrix and her house under quarantine, and caused a large placard to be placed in a conspicuous place upon the house. This placard warned all persons that a typhoid carrier resided in the house, and contained the ordinary warnings and instructions found on such placards. Relatrix submitted to the department of health bowel discharges, and an examination of them revealed the presence of large numbers of typhoid bacilli. Several bacteriologists and other medical experts testified that a typhoid carrier is one who has suffered from typhoid fever, and, although having apparently recovered, still carries the typhoid bacilli, or one who has never suffered from the disease of typhoid fever, but who continually or intermittently discharges the typhoid bacilli; that the means of freeing such a person of this disability is not known to medical science, and that a typhoid carrier may discharge typhoid bacilli for a number of years, and then for a period of years the body discharges may be free from bacilli, after which the disability may recur. The uncontradicted evidence of the experts is that typhoid bacilli are present in the bowel and bladder discharges of relatrix, and that typhoid fever

may be communicated to healthy persons if these bacilli enter their bodies. Relatrix testified that she had never been sick with typhoid fever, and that no member of her family and no boarder or roomer in her household had ever been sick with typhoid fever while they lived with her, and that so far as she knew no one had contracted the disease by contact with her. There was no evidence introduced by respondents to contradict her testimony. The quarantine regulations prescribed by the respondents require relatrix to remain in her home and forbid her to prepare food for anyone but her husband, and forbid any one to come into her home, as roomers or otherwise,

[134 N.E. 817]

unless they have been immunized from typhoid fever.

[302 Ill. 426]Hemenway on Public Health (section 30) says of human disease carriers:

'It is found that many healthy individuals are a constant source of danger to the community by reason of the fact that they are producing and throwing off disease germs. This is especially true of typhoid fever. After an attack of the fever, perhaps so mild that it was not at the time recognized, many persons continue to develop and discharge the bacilli of the fever, and they are thus causing frequent infections, especially because, owing to their apparent good health, neither the carrier nor his friends are on their guard against the everpresent danger. The legal rights of such individuals, and of the community as against them, may be a matter of some considerable question and perplexity. This must be recognized, however: That a typhoid fever patient is not properly quarantined so long as his infectious discharges are permitted to escape complete sterilization, and a typhoid carrier is entitled to no consideration if he so conducts himself that others receive infection from him. In other words, it is as necessary for the discharges of a carrier to be sterilized as it is for those of a patient.'

This quotation shows at once the insidious danger of the disease with which we are dealing in this cause, and the difficult and perplexing problems its regulation presents.

The health of the people is unquestionably an economic asset and social blessing, and the science of public health is therefore of great importance. Public health measures have long been recognized and used, but the science of public health is of recent origin, and with the advance of the science methods have been greatly altered. The results to be obtained by scientific health regulations are well illustrated by the remarkable changes made in health conditions in Cuba and Panama. With the increase of population the problem of conserving the health of the people has grown, and public health officers and boards have been appointed [302 Ill. 427]for the purpose of devising and enforcing sanitary measures.

That the preservation of the public health is one of the duties devolving upon the state as a sovereign power will not be questioned. Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health. The duty to preserve the public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender. Every state has acknowledged power to pass and enforce quarantine, health, and inspection laws to prevent the introduction of disease, pestilence, and unwholesome food, and such laws must be submitted to by individuals for the good of the public. The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to

limit the subjects upon which the police power of a state may lawfully be asserted in this any more than in any other connection. 12 R. C. L. 1271; Booth v. People, 186 Ill. 43, 57 N. E. 798,50 L. R. A. 762, 78 Am. St. Rep. 229;State v. Robb, 100 Me. 180, 60 Atl. 874,4 Ann. Cas. 275;Kirk v. Wyman, 83 S. C. 372, 65 S. E. 387,23 L. R. A. (N. S.) 1188;Ayres v. State, 178 Ind. 453, 99 N. E. 730, Ann. Cas. 1915C, 549.

Generally speaking, what laws or regulations are necessary to protect public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. The exercise of the police power is a matter resting in the discretion of the Legislature or the board or tribunal to which the power is delegated, and the courts will not interfere with the exercise of this power except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable. The court has nothing to do with the wisdom or expediency of the measures adopted. People v. Weiner, 271 Ill. 74, 110 N. E. 870, L. R. A. 1916C, 775, Ann. Cas. 1917C, 1065;State v. Morse, 84 Vt. 387, 80 Atl. 189,34 L. R. A. (N. S.) 190, Ann. Cas. 1913B, 218;State v. Superior Court, 103 Wash. 409, 174 Pac. 973.

[302 Ill. 428]The Legislature may, in the exercise of the police power of the state, create ministerial boards, with power to prescribe rules and impose penalties for their violation and provide for the collection of such penalties, and the exercise of this power by the Legislature is not a delegation of legislative power. The Legislature has the authority to exercise its police powers by general law, and to confer upon boards and other agencies authority and discretion to execute these laws. People v. Tait, 261 Ill. 197, 103 N. E. 750;Klafter v. Examiners of Architects, 259 Ill. 15, 102 N. E. 193,46 L. R. A. (N. S.) 532, Ann. Cas. 1914B, 1221;City of Chicago v. Kluever, 257 Ill. 317, 100 N. E. 917. In order to secure and promote the public health the state has created a department of public health as an instrumentality or agency for that purpose, and has invested it with the power to adopt by-laws, rules, and regulations necessary to secure the objects of its organization. Similar departments, usually administered by a board of health, have been established in every state in the Union. While it is true that the character or nature of such departments or boards is administrative only, still the powers conferred upon them by the Legislature, in view of the great public interest confided to them, have always received from the courts a liberal construction, tion, and the right of the Legislature to confer upon them the power to make reasonable rules, by-laws, and regulations has long been

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recognized by the authorities. When these departments or boards duly adopt rules or by-laws by virtue of legislative authority, such rules and by-laws have the force and effect of law, and are often said to be in force by authority of the state. Blue v. Beach, 155 Ind. 121, 56 N. E. 89,50 L. R. A. 64, 80 Am. St. Rep. 195.

Section 55 of the Civil Administrative Code (Hurd's Rev. St. 1919 , c. 24 1/2) confers upon the department of public health all the rights, powers, and duties vested by law in the State Board of Health and its officers. Section 2 of the act creating the State Board of Health (Hurd's Rev. St. 1919, c. 111 1/2) gives the departme nt of public health general supervision of the interests of the health and lives of the people of the state, and gives it supreme authority in [302 Ill. 429]matters of quarantine. It is also given authority to make such rules and regulations as it shall from time to time deem necessary for the preservation and improvement of the public health, and makes it the duty of all local health and police officers to enforce these rules and regulations. The act provides a

penalty by a fine not to exceed $200, or imprisonment in the county jail not to exceed six months, or both, for a violation of any rule or regulation duly adopted by said department. Pursuant to this authority the department of public health has promulgated rules and regulations pertaining to the quarantine of typhoid fever patients and typhoid carriers. These rules and regulations provide that every physician or other person having knowledge of a known or suspected case of typhoid fever shall immediately report the same to the local health authorities, and shall give such information, including probable source of infection, as shall be available. The local health authorities are in turn required to report the case immediately to the state department of public health, and the house where the patient or carrier resides shall be immediatly placarded in accordance with the regulations, and instructions shall be given the inmates of the house. Rule 5, which relates to the quarantine, provides:

'The patient shall be confined to one well-ventilated room screened against flies and other insects and as remote as possible from other occupied rooms. The rooms should be stripped of draperies, carpets, upholstery and all furniture and articles not necessary for the comfort of the occupants. Visitors shall not be permitted to enter the sickroom or to come in contact with the attendants. Quarantine shall be raised only by the local health authorities or by the state department of public health.'

The quarantine regulations further provide that other inmates of the infected premises may go about their usual business with certain regulations and restrictions. It is further provided:

'The local health authorities or the state department of public health may require the submission of [302 Ill. 430]specimens of blood or other material from cases of typhoid fever or suspected carriers for the purpose of examination by a state or municipal laboratory.'

Rule 9 specifically governs typhoid carriers, and provides:

'Any person known to be or suspected of being a typhoid carrier, and therefore capable of spreading typhoid infection, shall be treated as a typhoid patient even though to all outward appearances such person may appear to and enforce all necessary police ordinances. governing typhoid fever cases: Provided, however, that in order to meet conditions peculiar to individual cases the state department of public health, upon its own initiative or upon recommendation of the local health authorities, may modify or relax these rules.'

By the Cities and Villages Act the city council in cities is given power 'to regulate the police of the city or village and pass and enforce all necessary police ordinances. * * * To appoint a board of health, and prescribe its powers and duties. * * * To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease, * * *' and 'to pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council * * * shall deem proper: Provided, no fine or penalty shall exceed $200 and no imprisonment shall exceed six months for one offense.' Pursuant to these powers the city of Chicago has established by ordinance an executive department of the municipal government of the city known as the department of health, which embraces the commissioner of health, the city physician, and other assistants and employees. The commissioner of health, who is required to be a physician, is made the head of the department of health, and is given the management and control of all matters and things pertaining thereto. He is appointed by the mayor, by and with the advice and consent of the city council. The commissioner is given general supervision over the sanitary [302 Ill. 431]condition of the city, and is given authority to appoint and to remove his

assistants and all other officers, inspectors, and employees in the department of health. It is made the duty of the commissioner to enforce all laws of the state and ordinances of the city and all rules and regulations pertaining to the public health, and he is given power to make such rules and regulations in relation to the sanitary condition of the city and for the prevention and suppression of disease as he may deem necessary or advisable, but such rules and regulations are not to be in force until approved by the city council, except in cases of emergency.

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The commissioner and his assistants and employees are given full police powers, and are given authority to enter any building in the city for purposes of inspection, and to quarantine and examine and remove to isolated hospitals afflicted persons, and to arrest any person who violates any of the provisions of the ordinances and any of the rules and regulations of the department. The penalty for such violation is a fine of not less than $10 and not more than $200 for each offense. The city of Chicago has no board of health.

[8] Under a general statute giving to the state department of health power to restrict and suppress contagious and infectious diseases, such department has authority to designate such diseases as are contagious and infectious, and the law is not void for this reason on the ground that it delegates legislative power. Ex parte McGee, 105 Kan. 574, 185 Pac. 14, 8 A. L. R. 831. The necessity of delegating to an administrative body the power to determine what is a contagious and infectious disease and giving the body authority to take necessary steps to restrict and suppress such disease is apparent to every one who has followed recent events. Legislatures cannot anticipate all the contagious and infectious diseases that may break out in a community, and to limit the activities of the health authorities to those diseases named by the Legislature in the act creating the administrative body would oftentimes endanger the [302 Ill. 432]health and the lives of the people. There is probably not a Legislature in the country that would have named the deadly Spanish influenza as a contagious and infectious disease prior to the epidemic of that disease that took a greater toll of lives throughout the country than any other epidemic known in this country. In emergencies of this character it is indispensable to the preservation of public health that some administrative body should be clothed with authority to make adequate rules which have the force of law, and to put these rules and regulations into effect promptly. Under these general powers the state department of health has authority to isolate persons who are throwing off disease germs and are thereby endangering the public health. Kirk v. Wyman, supra; State v. Superior Court, supra; State v. Racskowski, 86 Conn. 677, 86 Atl. 606,45 L. R. A. (N. S.) 580, Ann. Cas. 1914B, 410;Crayton v. Larabee, 220 N. Y. 493, 116 N. E. 355, L. R. A. 1918E, 432;Brown v. Manning, 103 Neb. 540, 172 N. W. 522;In re Johnson, 40 Cal. App. 242, 180 Pac. 644.

[10] While the powers given to the health authorities are broad and far-reaching they are not without their limitations. As we have said, while the courts will not pass upon the wisdom of the means adopted to restrict and suppress the spread of contagious and infectious diseases, they will interfere if the regulations are arbitrary and unreasonable. People v. Weiner, supra; Bailey v. People, 190 Ill. 28, 60 N. E. 98,54 L. R. A. 838, 83 Am. St. Rep. 116;In re Smith, 146 N. Y. 68, 40 N. E. 497, 28 L. R. A. 820, 48 Am. St. Rep. 769; Ex parte Dillon (Cal. App.) 186 Pac. 170;Ragg v. Griffin, 185 Iowa, 243, 170 N. W. 400, 2 A. L. R. 1327.

A person cannot be quarantined upon mere suspicion that he may have a contagious and infectious disease (Ex parte Shepard (Cal.

App.) 195 Pac. 1077), but the health authorities must have reliable information on which they have reasonable ground to believe that the public health will be endangered by permitting the person to be at large.

Where danger of an epidemic actually exists, health and quarantine regulations will always be sustained by the courts (People v. Board of Education, 234 Ill. 422, 84 N. E. 1046,17 L. R. A. [N. S.] 709,14 Ann. Cas. 943;[302 Ill. 433]Hagler v. Larner, 284 Ill. 547, 120 N. E. 575;Globe School District v. Board of Health, 20 Ariz. 208, 179 Pac. 55); but the health regulations are all sustained on the law of necessity, and when the necessity ceases the right to enforce the regulations ceases. Health authorities cannot promulgate and enforce rules which merely have a tendency to prevent the spread of contagious and infectious diseases, which are not founded upon an existing condition or upon a well-founded belief that a condition is threatened which will endanger the public health. The health authorities cannot interfere with the liberties of a citizen until the emergency actually exists. Potts v. Breen, 167 Ill. 67, 47 N. E. 81,39 L. R. A. 152, 59 Am. St. Rep. 262; In re Smith, supra; Rhea v. Board of Education, 41 N. D. 449, 171 N. W. 103.

Where one has been arrested and placed under quarantine on the ground that he is afflicted with a contagious disease, he has the right to have the legality of his detention inquired into by habeas corpus. Ex parte Hardcastle, 84 Tex. Cr. R. 463, 208 S. W. 531, 2 A. L. R. 1539.

It is not necessary that one be actually sick, as that term is usually applied, in order that the health authorities have the right to restrain his liberties by quarantine regulations. Quarantine is not a cure-it is a preventive. As the term is used in this opinion, quarantine is the method used to confine the disease within the person in whom it is detected, or to prevent a healthy person from contracting the infection. Disease germs do not usually travel through the air unaided, but they are carried by insects, by dumb animals, and by human beings. Effective quarantine must therefore be not so much the isolation of the person who is sick or affected with the disease as a prevention of the communication of the disease

[134 N.E. 820]

germs from the sick to the well. Thus, in the case of typhoid fever, effective quarantine must include very strict restrictions upon the movements of the attendants who in any way come in contact with the sick person or his discharges. It must include the destruction of the bacilli in the discharges of the bowels and the bladder and in the cloths used to wipe the mouth of the patient. [302 Ill. 434]Quarantine, in the very nature of the regulation, is not a definite or uniform measure, but it must vary according to the subject. One of the important elements in the administration of health and quarantine regulations is a full measure of common sense. It is not necessary for the health authorities to wait until the person affected with a contagious disease has actually caused others to become sick by contact with him before he is placed under quarantine. People v. Tait, supra; Kirk v. Wyman, supra. In the latter case a woman was affected with anaesthetic leprosy, contracted while she was engaged in missionary work in Brazil. It appeared that leprosy in this form was only slightly contagious, and that she had lived for many years in the city of Aiken, S. C., and had mingled freely with the people, and so far as could be ascertained she had not imparted the disease to any other person. The court held, however, that when the distressing nature of the malady was regarded, the board of health was well within the limits of its powers when it required the victim of it to be isolated. The disease was incurable, and the isolation would necessarily continue throughout the remainder of the patient's life.

In the case at bar the State Board of Health, or a board of health in the city of Chicago duly organized pursuant to the authority given the city council by the Legislature, undoubtedly has the right to establish reasonable quarantine regulations with respect to relatrix so long as she is discharging the germs of a contagious and infectious disease. Whether the authority exists to compel a person apparently will to submit to an examination to determine whether he is a germ carrier is not before us, for the reason that relatrix submitted to the examination which revealed that she is such a carrier. The only question presented for determination is whether she is legally and properly detained under quarantine in her home. In order to determine this question we must determine whether an authority authorized [302 Ill. 435]by the Legislature of this state to determine when a person is afflicted with a contagious or infectious disease and to quarantine against the spread of such disease has acted in establishing the quarantine over the home and person of relatrix. The Legislature has granted to cities the power to appoint a board of health and to prescribe its duties and powers. A board of health must necessarily consist of more than one person, and it generally consists of several persons. Many authorities contend that the administration of public health should be vested in an individual and that that individual should be a person trained in the science of public health. This contention is based on the ground that this form of administration of the health laws is productive of efficiency and economy. The same argument might be made in favor of an absolute monarchy, but the experience of the world has been that other forms of government, perhaps more cumbersome and less efficient, insure to the people a more reasonable and less arbitrary administration of the laws. Whatever may be best, the Legislature of Illinois has said that the public health of cities shall be regulated and guarded by a board of health, and until the Legislature grants to cities the power to supervise the sanitary and health conditions of the city by another instrumentality the cities must content themselves with the power that has been given to them. The city council had no authority to delegate to a health officer the powers and duties which the Legislature said it might delegate to a board of health. The powers given to boards of health are extraordinary, and the Legislature was evidently unwilling to leave to one person the determination of such important and drastic measures as are given to such boards. In the judgment and fidelity of a greater number acting together is the greatest security against the abuse of extraordinary power. In Taylor v. Adair County, 119 Ky. 374, 84 S. W. 299, it was held that a county board of health did not have power to delegate its duties to a health officer. In [302 Ill. 436]Commonwealth v. Yost, 197 Pa. 171, 46 Atl. 845, it was held that a board of health had no authority to delegate to its secretary power to act in a matter requiring the action of the board. In Young v. County of Blackhawk, 66 Iowa, 460, 23 N. W. 923, it was held that a board of health could not delegate its powers to a committee appointed by the board.

The health commissioner of Chicago is purely a ministerial officer, and has no legislative powers whatever. The statute gives to no such individual authority to make rules and regulations which shall have the effect of law. The city has no right to give him authority to determine when a contagious and infectious disease exists and to establish a quarantine. His authority is limited to carrying into execution proper orders of a legally constituted board of health. People v. Board of Education, supra.

The department of health of Chicago reported the case of relatrix to the state department of health, and requested that department to authorize a modified quarantine. This authority was granted. While the original quarantine was established without authority

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of a legally constituted board of health, the state department of health has, by authorizing the modified quarantine, in effect established such quarantine on the report of the department of health of the city of Chicago, and respondents are therefore restraining relatrix as agents of the state department. She is bound to respect the rules and regulations promulgated by the state department of health respecting the modified quarantine under which she is placed, and for a violation of these rules she is subject to the penalties provided by the statutes. In order that she may know what the rules and regulations are, it is necessary that she be furnished a copy of them. Relatrix is therefore remanded to the custody of respondents as agents of the state department of health.

Relatrix remanded.

DUNCAN, J., dissenting.

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BURROUGHS
v.
MORTENSON, Superintendent of Schools, et al.

No. 15848.

Supreme Court of Illinois.

April 14, 1924.

Error to Superior Court, Cook County; Joseph B. David, Judge.

Action on the case by Lester G. Burroughs, Jr., by his next friend, against Peter A. Mortenson, Superintendent of Schools, and others. Judgment for defendants on a directed verdict, and plaintiff brings error.

Reversed and remanded.

[312 Ill. 164]Bangs & Frankhauser, of Chicago, for plaintiff in error.

Frank S. Righeimer, of Chicago (Ralph W. Condee and Frank F. Trunk, both of Chicago, of counsel), for defendants in error.

[143 N.E. 458]

DUNN, J.

Lester G. Burroughs, by his next friend, brought an action on the case against Peter A. Mortenson and others in the superior court of Cook county. There was a jury trial, which resulted in a verdict of not guilty directed by the court, judgment was entered on the verdict, and the plaintiff has sued out a writ of error from this court on the ground that his constitutional right to attend school is involved, and the court also certified that the validity of a municipal ordinance was involved and that the public interest required that the writ should be prosecuted from the Supreme Court.

The plaintiff in error was a public school pupil 13 years old, and his cause of action is based upon his exclusion from the Portage Park School, a public school in the city of Chicago, from June 10 to June 23, 1920. The defendants were the superintendent of schools of the city of Chicago, an assistant superintendent, a district superintendent, and the principal of the Portage Park School. The reason given for the exclusion of the plaintiff in error was that two of the pupils of the school had smallpox, and all teachers and pupils who had not been successfully vaccinated were required to be excluded until June 23 unless they would consent to be vaccinated. The plaintiff in error declined to be vaccinated and was therefore excluded. [312 Ill. 165]The two children who were sick lived at a considerable distance from the plaintiff in error and he did not know them. They were taken sick about May 20. The physicians who attended them testified that they were suffering with chickenpox and not smallpox. A few days later the health inspector placed a chickenpox sign on the house in which they lived, and on June 5 they were taken to the isolation hospital by the city authorities. On that day the following letter, signed, 'John Dill Robertson, Commissioner of Health,' and addressed to the superintendent of schools, was received at the latter's office:

'I respectfully advise you herewith of the following cases of smallpox:

'Case No. 71, named Howard Paul, living at 5209 Cullom ave., who went to the Chicago Isolation Hospital June 5, 1920. This child attended the Portage Park School.

'Case No. 72, named Ebba Paul, living at 5209 Cullom ave., who went to the Chicago Isolation Hospital June 5, 1920. This child attended the Portage Park School.

'As this was in a highly contagious stage of the disease and the large number of exposures makes a localized epidemic of smallpox in this vicinity quite possible, I respectfully request that you ask the principal of this school to exclude from school for eighteen days from date of hospitalization all teachers and pupils who are not protected by a successful vaccination, unless they consent to be vaccinated at once.'

In compliance with the request contained in this letter, the following letter was sent by the assistant superintendent of schools to the principal of the Portage Park School:

'The department of health has reported a case of smallpox in the neighborhood of the Portgage Park School. In view of the emergency existing, they are recommending that all teachers and pupils who are not protected by a successful recent vaccination be excluded for the next eighteen days unless they consent to be vaccinated at once.

'You will therefore arrange to carry out the instructions of the health department whenever the necessary written notices are presented to the teachers or pupils by the health department.'

The direction of this letter was carried out by the exclusion of the plaintiff in error and others. During the [312 Ill. 166]13 days of his exclusion the plaintiff in error went to the school daily but was denied admission. His parents and the parents of other children called on the superintendent and the principal of the school for the purpose of getting the order of exclusion rescinded and notified them that the two children who were sick had chickenpox and not smallpox, but the period of exclusion was not shortened and the plaintiff in error was not again received as a pupil until June 23.

[1] The superintendent of schools of the city of Chicago has charge and control, subject to the approval of the board of education, of the educational department of the schools and of the discipline in and conduct of the schools. Vaccination is not a condition precedent to the right of a child to attend a public school, and cannot be made such condition either by a board of education or a board of health. Potts v. Breen, 167 Ill. 67, 47 N. E. 81,39 L. R. A. 152, 59 Am. St. Rep. 262;People v. Board of Education, 234 Ill. 422, 84 N. E. 1046,17 L. R. A. (N. S.) 709,14 Ann. Cas. 943. The superintendent or other officers may not arbitrarily exclude from the schools a child who has not been vaccinated and refuses to be vaccinated. By rules and regulations adopted by the board, the vaccination of school children may be required in case smallpox is epidemic in the vicinity of the school or danger of an epidemic may be apprehended. People v. Board of Education, supra; Hagler v. Larner, 284 Ill. 547, 120 N. E. 575. In People v. Tait, 261 Ill. 197, 103 N. E. 750, it was held that under the statute creating a board of county commissioners in counties not under township organization a board of health, and authorizing such board, upon the breaking out of any dangerous communicable disease in the county to make and enforce rules and regulations tending to check the spread of the disease, and for that purpose granting power to quarantine any house or houses or place where any infected person may be, the rules and regulations were required to be in writing and entered of record. The same may be said of rules adopted by the board

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of health or board of education for the same purpose.

[2][312 Ill. 167]By section 1 of article 5 of the Cities and Villages Act (Smith-Hurd Rev. St. 1923, c. 24, § 65), the Legislature has authorized cities and villages, in paragraph 76, to appoint a board of health and prescribe its powers and duties, and in paragraph 78 to do all acts and make all regulations which may be necessary or expedient for the

promotion of health or the suppression of disease. The city of Chicago has not, however, established a board of health, and the ordinances set out in the special pleas of the defendants in error have been held ineffectual to create a board of health or confer the authority mentioned in them upon the commissioner of health. People v. Robertson, 302 Ill. 422, 134 N. E. 815, 22 A. L. R. 835. No regulations or supposed regulations of a board of health or the board of education were introduced in evidence, or, so far as this record shows, exist. The exclusion of the plaintiff in error must therefore be regarded as the sole act of the superintendent, which finds no authority in any rule or regulation affecting his action. It was an arbitrary act because resting upon no rule of law but depending only on the discretion of the superintendent, to whom the law has granted no such discretion.

The defendant in error invoke the doctrine that a mere mistake in judgment by a public officer in a matter which he is required to determine in the performance of his duties will not subject him to an action if he acts in good faith. The doctrine has no application to the facts in this case. The plaintiff in error was entitled to admission to the school. The superintendent and his assistants had no right to exclude him except pursuant to regulations established by the board of education or board of health. There were no such regulations. There was no matter submitted to the superintendent which he was required to determine. He could act only in accordance with the established rules. Since there were no rules he could not act. The absence of rules would not justify him in taking the matter into his own hands and acting arbitrarily, without regard to any rules but his own discretion. Since there was no rule authorizing[312 Ill. 168]the commissioner of health to direct that unvaccinated pupils be excluded from the school and none authorizing the defendants in error to exclude such pupils, it follows that the plaintiff in error was arbitrarily and unlawfully prevented from exercising his right to attend school. Under such circumstances, he was entitled to maintain an action for the unlawful interference with his right. Rulison v. Post, 79 Ill. 567; Potts v. Breen, supra.

The court erred in directing the jury to find a verdict for the defendants, and its judgment will be reversed, and the cause remanded for a new trial.

Reversed and remanded.