

1940

J. L. Gibson v. Utah State Teachers' Retirement Board; Leroy E. Cowless; Charles H. Skidmore; Joseph Chez; Alex Jex; Milton B. Taylor; D. A. Wooton; and J. R. Smith : Brief of Defendants

Utah Supreme Court

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No. 6220

In
The Supreme Court
of the
State of Utah

J. L. GIBSON,
Plaintiff,

vs.

UTAH STATE TEACHERS' RETIRE-
MENT BOARD, LEROY E. COWLES,
CHARLES H. SKIDMORE, JOSEPH
CHEZ, ALEX JEX, MILTON B.
TAYLOR, D. A. WOOTTON, and J. R.
SMITH, Members Thereof,
Defendants.

DEFENDANTS' BRIEF

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FILED

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STATEMENT OF FACTS

The plaintiff, for the past thirty-four years, has been and is now employed as a teacher by the public schools of the State of Utah. That plaintiff has been for many years and is now Dean of the School of Arts and Sciences and Professor of Mathematics at the University of Utah.

That on or about the 1st day of November, 1923, plaintiff became the holder of a retirement

annuity contract with the Teachers' Insurance & Annuity Association of America. That from the 1st day of November, 1923, and up to the 29th day of December, 1937, the University of Utah contributed and paid one-half of the premiums (\$180.00 a year for fourteen years and two months) on said contract in the total amount of Two Thousand Five Hundred Fifty (\$2,550.00) Dollars. That the plaintiff and the University of Utah, at the request of the plaintiff, discontinued the payment of premiums on said contract after the said payment of December 29, 1937.

That the said contract of plaintiff with the Teachers' Insurance & Annuity Association of America is not subject to cancellation or forfeiture by failure of the insured to pay the premiums thereon. That the annuity under the contract is payable to the annuitant personally as long as he shall live, and at his demise to his heirs. That the policy is not assignable by the annuitant. That the plaintiff is the owner and holder of said contract and entitled to all benefits accruing thereunder notwithstanding the cessation of premium payments.

That on or about the 21st day of March, 1938, plaintiff made and filed an application with the Retirement Board for membership in the Utah State Teachers' Retirement System pursuant to the provisions of Chapter 85, Session Laws of Utah, 1937. That a hearing on said application was had on the 18th day of April, 1938. That at said hearing plaintiff appeared in person and by J. Lambert Gibson, his attorney. That the Retirement Board, being the identical persons named as defendants above, after hearing and receiving the evidence introduced by the applicant (plaintiff above), duly made in writing its Findings of Fact and Conclu-

sions of Law and Decision, whereby the said Retirement Board found and decided that the applicant (plaintiff above) was not eligible for membership in the Utah State Teachers' Retirement System.

The plaintiff, not being satisfied with the decision of the Retirement Board rejecting his application for membership, on the 19th day of April, 1939 instituted an action in the Third Judicial District Court in and for Salt Lake County, Utah, for a declaratory judgment, wherein the identical parties above named were made defendants and wherein the identical claims of the plaintiff against the defendants were tried and determined by said court, and on the 15th day of June, 1939, the said District Court made and entered its decree dismissing the petition of plaintiff. That no appeal was ever taken from said decree and ever since its rendition and entry has been and is now in full force and effect.

ARGUMENT

Plaintiff on page six of his brief says: "This is an action by the plaintiff against the defendants to force them to accept the plaintiff as a member of said system . . . " While in truth and fact it is not an action to force anybody or anything but merely a proceeding pursuant to the issuance of a Writ of Certiorari by this Court to review the record of proceedings of the Retirement Board in the matter of the application of the plaintiff for membership in the Utah State Teachers' Retirement System to determine from the face of the record whether the Retirement Board has exceeded its jurisdiction or has not proceeded according to the essential requirements of the law. The jurisdiction

of the Retirement Board and the procedure it must follow are defined in the law.

Chapter 85, Session Laws of Utah, 1937.

Section 104-67-8, R. S. 1933, relating to the Writ of Certiorari, provides:

“The review upon this writ cannot be extended further than to determine whether the inferior tribunal, Board or officer has regularly pursued the authority of such tribunal, board or officer.”

The great weight of authority in this country is to the effect that under statutes such as ours a Writ of Review will extend no farther than to determine whether the inferior court or tribunal has exceeded its jurisdiction either by want of having acquired jurisdiction of the parties or not having acquired jurisdiction of the subject matter, and does not authorize the Supreme Court to review the judgment or record for irregularities or errors committed within the jurisdiction.

Pintock v. Kimball, District Judge, 64 Utah 4; 228 P. 221.

Batley v. Ritchie, 73 Utah 320; 273 P. 969.

University of Utah v. Industrial Com., 64 Utah 273; 229 P. 1103.

Page v. Com. Nat'l Bk, 38 Utah 440; 112 P. 816.

The Utah State Teachers' Retirement System was created by Chapter 85, Session Laws of Utah, 1937, and by Section 3 is designated the “Teachers' Retirement Act.”

Section 3, (3) of the Act provides:

“‘Teacher’ shall mean any person who is serving under a legal certificate as a legally

qualified teacher in a public day or evening school or as a superintendent, or supervising executive, or educational administrator of public schools, or librarian and shall include teachers with and without a certificate who are employed by any State educational institution supported and controlled by the State, and persons with or without a certificate who are employed on the staff of the State superintendent of public instruction to render service of an educational nature. In all cases of doubt the retirement board hereinafter created shall determine whether any person is a teacher as defined in this act."

Section 3, (4):

" 'Member' shall mean any person included in the membership of the system as provided in Sections 11 and 13 of this act."

Section 8 creates the Retirement Board, and in part provides:

"The retirement system shall be managed exclusively by a retirement board hereby created, . . . Said board shall choose one of its members as president, and shall employ a secretary and consulting actuary and such clerical and other assistance as may be necessary . . .

"The Retirement Board shall have the sole power and authority to hear and determine all facts pertaining to applications for benefits under the retirement system and all matters pertaining to the administration thereof . . ."

Section 9 provides:

"The retirement board shall exercise the

powers and perform the duties conferred on it by this act, and in addition thereto:

(e) Shall determine the service rendered by members in the status requisite to membership herein to be credited toward qualification for retirement and shall fix retirement allowances . . .”

Section 10 provides:

“A fund is hereby created to be designated as the Utah State Teachers’ Retirement fund . . . The retirement board shall have exclusive control of the administration and investment of said fund . . .”

Section 11 provides:

“With the exception of those teachers who are excluded from membership by the provisions of Section 12 hereof, all teachers shall become members of the retirement system as follows:

“(a) Every teacher who is employed in the public schools of this State on July 1, 1937 shall become a teacher of the retirement system on that date.”

Section 12 provides:

The following teachers shall be excluded from membership in the retirement system:

(b) Every teacher who is the holder of a retirement annuity contract with the Teachers’ Insurance & Annuity Association of America or with any other private organization or company, in which the State of Utah, or any subdivision thereof contributes part of the premium, under said contract; provided, however, that every such teacher, upon ceasing to be a holder of such contract and being otherwise

eligible to membership in this system, shall forthwith become a member of the system."

Section 4 provides:

"An applicant for a benefit hereunder shall have the right to demand a hearing before the board and shall have the right to appear personally and be represented by counsel or by a friend. Any applicant may file an application for rehearing of any application, whether for a benefit hereunder or retirement, within thirty days after written notice of the determination by the retirement board has been sent by registered mail to the applicant or his attorney of record, upon any of the following grounds:

"(a) That the board acted without and in excess of its powers.

"(b) That the order, division or award was procured by fraud.

"(c) That the evidence does not justify the determination of the board.

"(d) That the applicant has discovered new evidence material to him which he could not, with reasonable diligence, have discovered or procured at the hearing.

"The determination of the retirement board on any application for rehearing shall be made within one hundred eighty days after the filing thereof, or said application shall be deemed denied and such determination shall be final and conclusive and it shall have no jurisdiction to entertain any sub-

sequent application regarding the same matter.”

Section 21 provides:

“ . . . For the purpose of this section, the holder of a retirement annuity contract with the Teachers’ Insurance & Annuity Association of America or with any other private organization or company, in which the State of Utah, or any subdivision thereof contributes part of the premium under said contract, shall be considered permanent separation from service in status requisite to membership herein. . . .”

Under the law there is no question as to the creation of the retirement system and the Retirement Board and the powers of the board. The only questions therefore to be considered by this Court are whether the Retirement Board acquired jurisdiction of the person of the plaintiff and had jurisdiction of the subject matter. The record of the proceedings had before the Retirement Board show that the plaintiff filed his application for membership; that the application disclosed he was a holder of a contract with the Teachers’ Insurance & Annuity Association of America; that a hearing on his application before the Retirement Board was duly set, noticed and held; that the plaintiff personally appeared at said hearing and offered evidence and was also represented by counsel; that the Retirement Board took the matter under advisement and thereafter made findings of fact and conclusions of law and rendered a decision rejecting the application of the plaintiff; and that notice of the decision was duly served on the plaintiff. The plaintiff having personally submitted to the jurisdiction of the Retirement Board and the law giving it power to determine the matter of his eligibility to membership, it is definitely and conclusively

established, it seems to us, that the Retirement Board acquired jurisdiction of the person of the plaintiff and had jurisdiction of the subject matter of the controversy.

The plaintiff takes the position that he automatically became a member of the Retirement System and that the Retirement Board had no right, power or jurisdiction to determine his eligibility for membership. A mere cursory reading of the law will convince anyone that such a position is untenable. If true, then the legislative enactment investing the Retirement Board with power to determine in all cases of doubt whether a person is a teacher as defined in the act is meaningless. By that enactment the legislature recognized the fact that there would be questions on the eligibility of some teachers requiring investigation, hearing and determination, and, therefore, gave the Retirement Board power to investigate, hear and determine those questions. By the provisions of Section 12 of the act certain teachers are excluded from membership. The question of whether or not a teacher comes within the excluded class must be determined by the Retirement Board. Any teacher claiming he is not within the excluded class must bear the burden of proving it. The plaintiff has not done so.

The plaintiff further contends that there is no provision in the act which authorizes a hearing by the Retirement Board to determine membership. When you consider that membership is the vital thing called "The life of the retirement system" and that all the benefits afforded by the benevolent provisions of the act flow only from membership, it is most eminently clear that the legislature intended that the doors to the retirement benefits could not automatically open to every teacher, and consequently was careful to provide that

“In all cases of doubt the Retirement Board shall determine whether any person is a teacher as defined in the Act.”

The word “teacher” therefore, as used in the Act, is synonymous with the word “member,” for only teachers coming within the provisions of the act are entitled to membership. Subdivision 4 of Section 3. Without any other delegation of power to the Retirement Board the absolute power given to determine whether any person is a teacher as defined in the Act unequivocally authorizes the Retirement Board to hear and decide all questions relating to eligibility for membership. But, coupled with that power are the powers given to the Retirement Board by Section 4 of the Act above quoted. Plaintiff claims that that part of Section 4 reading “An applicant for a benefit hereunder shall have the right to demand a hearing before the Board and shall have the right to appear personally and be represented by counsel or by a friend,” does not apply to an application for membership, because, he says, benefits come afterwards.

How plain this contention makes plaintiff's position, namely: “If I can slide through the gates of membership I am assured all the benefits of the act.” Without membership there can be no benefits. An application for membership therefore includes all benefits, and after membership granted it is only a matter of when a member shall receive and enjoy his benefits, and he makes that known by applying for his earned benefits. A hearing on that application is also provided for in said Section 4. We contend that the provisions of said Section 4 are not limited to applications for earned benefits arising after membership. The section in part says that “Any applicant may file an application for rehearing of *any* application, whether for a benefit *hereunder* or retirement.” Significance

must be given to the broad language: "Any application, whether for a benefit hereunder or retirement." Certainly an application for membership is an application filed pursuant to the terms of the act and is for all the benefits afforded by the act. The plaintiff says in his brief that he filed his application for membership pursuant to the provisions of the act. At any rate, the Retirement Board under its unquestioned power to determine whether any person is a teacher followed the procedure outlined in Section 4 relating to plaintiff's application for membership, and the plaintiff made no objection thereto but appeared in person and testified and offered evidence, and failed to file an application for rehearing on any of the broad grounds specified in the act, or at all.

The plaintiff further contends that the Retirement Board has no authority to hold a judicial hearing and that the Board is not a quasi-judicial body because the act does not provide for such a hearing. The express provisions of the act negative such contention. Section 3 (3) gives the Board power to determine whether any person is a teacher, and Section 8 gives the Board the sole power and authority to *hear* and *determine* all facts pertaining to applications for benefits under the retirement system and all matters pertaining to the administration thereof. A reference to these legislative powers alone would seem to establish conclusively that the contention of plaintiff is not sustainable. The word "determine" has been judicially defined to mean: "To settle by authoritative or judicial sentence;" "To ascertain or state definitely;" "To perform a judicial act;" and "To adjudge."

The term "Judicial Act" has been defined as follows:

"An act is judicial when it requires the exercise of judgment or discretion by one or more persons when acting as public officers in an official character, in a manner which seems to them just and equitable."

34 C. J. 1178, Note 33.

"An act done by a member of the judicial department of government in construing the law or applying it to a state of facts presented for the determination of the rights of the parties thereunder."

34 C. J. 1181.

Plaintiff undoubtedly is right when he says that the Retirement Board does not have power to hold a purely judicial hearing. The judicial power in its fullest extent belongs, of course, to the judicial department or the courts, not to boards or officers. But, we have in Utah a number of boards exercising quasi-judicial powers and the Teachers' Retirement Board is one of them. A quasi-judicial power is one imposed upon an officer or board involving the exercise of discretion, judicial in its nature, in connection with, and as incidental to, the administration of matters assigned to or entrusted to said officer or board.

34 C. J. 1180, Note 72.

Quasi-judicial powers involving judgment and discretion are often, and must necessarily be exercised by administrative and executive bodies and officers.

34 C. J. 1180, Note 72.

If such were not the case then the Retirement Board could not determine or render a decision as to

whether a person is a teacher and could not hear and determine all facts pertaining to applications, and consequently would be a dummy, instead of an active body determining facts and rendering decisions in accordance with and within the orbits of the powers given it and in accordance with the obligations imposed upon it and entrusted to it by the law. The Retirement Board has power to hear and determine certain matters as does the Industrial Commission of Utah. This Court has many times held that the Industrial Commission is a quasi-judicial body.

University of Utah v. Ind. Com., 64 Utah
273, 76; 229 P. 1103,

this Court, in speaking of the Industrial Commission said:

“The Industrial Commission is a *tribunal* of limited authority. Its power in any case must be found in express law or necessary inference therefrom.”

In

Industrial Commission v. Evans, 52 Utah
394, 405; 174 P. 825,

this Court, among other things, said:

“No doubt the Commission may, under certain circumstances, hear evidence and may determine the facts and apply the law to them when found . . .”

In

Utah Fuel Company v. Ind. Com., 57 Utah
246-51; 194 P. 122, this Court said:

“Every administrative body, if it is to function at all, must have some power and jurisdiction to determine for itself whether or not it may proceed in a given case, and this we think may be done without usurping the functions of the Court, so long as it

does not act arbitrarily or in excess of the express powers conferred by legislative enactment.”

In

Continental Casualty Co. v. Ind. Com., 61 Utah 16-20; 210 P. 127, this Court said:

“ The Industrial Commission of this State is an administrative body. Some of its acts, in fact many of its acts, are quasi-judicial . . . ”

In

D. & R. G. W. RR. Co. v. Ind. Com., 74 Utah 316-20; 279 P. 612, this Court said:

“When the Industrial Commission hears and determines an application for an award of compensation, it exercises quasi-judicial functions. Its awards are in effect judgments.”

The Retirement Board occupies a like status with the Industrial Commission and has power to hear controversies, find facts and apply the law to the facts in all matters coming within the express powers given to it by the legislature and those necessarily inferred therefrom. In the instant case the plaintiff made application for membership in the retirement system and therein disclosed that he was a holder of a contract with the Teachers' Insurance & Annuity Association of America. A hearing was had on that application at which the plaintiff appeared in person and by counsel and testified and offered in evidence his said contract. From the testimony and evidence the Retirement Board found as facts that the plaintiff was employed by the University of Utah; that he entered into a contract with the Teachers' Insurance & annuity Association of America; that the contract re-

quired the payment of regular monthly premiums; that the contract was not subject to forfeiture because of the failure to pay premiums, but upon failure to pay any regular monthly premium the policy would automatically become fully paid up for an annuity payable as the original annuity was payable, but for a reduced amount; that the contract could be reinstated to its original status at any time, upon payment of the delinquencies; that all premiums due under the said contract were paid by the plaintiff and the University of Utah from November 1, 1923 to December 29, 1937; that the plaintiff and the University ceased making premium payments after the payment of December 29, 1937; and that the plaintiff retained said contract so as to claim and receive the deferred annuity provided therein on the basis of the contributions made to December 29, 1937; and then the Retirement Board made conclusions of law, or applied the law, to those facts and rendered a decision denying the application of plaintiff for membership. All, we claim, within the powers and jurisdiction of the Retirement Board under the laws hereinbefore quoted and found in

Chapter 85, Session Laws of Utah 1937.

The plaintiff takes the position that the Retirement Board was without power to ascertain or construe the contents of the contract with the Teachers' Insurance & Annuity Association of America and relies upon *Continental Gas Co. v. Ind. Com.*, 61 Utah 16; 210 P. 127. A mere casual reading of the case shows conclusively that the facts are wholly dissimilar to the facts in the instant case. In that case a man lost his life as the result of an accident. An award was made by the Industrial Commission and the Continental Casualty Company questioned the power of the Commission to require it to pay the award on the

grounds that the policy issued by it insured the Elaterite Varnish & Rubber Company; that the mine in which the deceased was working was operated by one R. M. Pope under a contract with the rubber company, and that the deceased was an employee of Mr. Pope at the time of the accident. The Court said: "Such being the admitted facts, could the Industrial Commission disregard the wording of the policy that it insured employees of the rubber company and make an award for an employee of one not named in the policy?" Clearly it could not, and the the Court so held, saying: "It is not vested with power to reform a contract or make a new contract to conform with the intent of the parties. That power belongs to another forum." There is no objection on our part to that decision, but it has no application to plaintiff's case and does not act to deprive the Teachers' Retirement Board of power to apply the law to facts as found by it in cases within its jurisdiction. Answering the first point raised by the Continental Casualty Company in that case, this Court said:

"The question of dependency being admitted, the issuance and delivery of the policy also being admitted, and the accident happening within the time covered by the policy, the Industrial Commission was without authority to determine or hold that its terms were not in force and binding upon the casualty company at the time of the accident. . . . The policy was before the Commission. The Commission had no power to do otherwise than to enforce and to apply its terms as the same appear in the policy."

This ruling shows conclusively that the Commission had power to read, study and construe policies of insurance affecting employees within its

jurisdiction and to enforce the terms of those policies. That is just what the Teachers' Retirement Board did in Mr. Gibson's case. The Teachers' Retirement Act requires the Board to examine the policies issued by the Teachers' Insurance & Annuity Association of America and determine from their terms whether or not a teacher is a holder of such a policy. The Retirement Board did it, found the facts and applied the law.

TEACHERS EXCLUDED

The construction given to Section 12 of the Retirement Act by the Retirement Board, whereby certain teachers are excluded from membership is correct, we believe. Subdivision (b) creates three definite situations of exclusion, namely:

1.

Every teacher *who is the holder* of a retirement annuity contract with the Teachers' Insurance & Annuity Association of America.

2.

Or (the word "or" being an alternative and being used as a conjunction marking an alternative and not joining, uniting or connecting several words or phrases of the same class) with any other private organization or company, in which the State of Utah, or any subdivision thereof, contributes part of the premium, under said contract.

3.

Provided, however, that *every* such teacher, upon ceasing to be a holder of such contract and being otherwise eligible to membership in this sys-

tem, shall forthwith become a member of the system.

Under the first situation no one will gainsay that the plaintiff was a holder of such a contract at the time the Retirement Act took effect, namely, March 3, 1937, and that he remained a full-fledged holder by the joint payment of premiums by himself and the University of Utah until December 29, 1937, when payment of premiums were discontinued. It is absolutely certain that he was ineligible during all of that time, and when you consider the provisions of Section 21 of the act relating to termination of membership, is it not equally certain that he became permanently ineligible by being the holder of a contract with the Teachers' Insurance & Annuity Association of America after the Teachers' Retirement Act became effective? That part of Section 21 applicable here is the part heretofore quoted in this brief.

This quoted part of Section 21 means, if it means anything at all, that the holding or owning of a contract with the Teachers' Insurance & Annuity Association of America is tantamount to permanent separation from service, and certainly one separated permanently from service is not entitled to membership. It will be noted that the law does not declare that the separation from service is contingent or shall endure only while the State or some subdivision thereof contributes part of the premium, but states in unequivocal mandatory terms that the separation shall be permanent, and, therefore, the words "In which the State of Utah or any subdivision thereof contributes a part of the premium" are only descriptive of a situation or a status. The plaintiff, therefore, at the time the law took effect was in the status of those teachers permanently separated from the service, and,

under the law, was not a teacher qualified for membership. It will be here remembered that the law gives the Retirement Board power to determine in all cases of doubt whether any person is a teacher as defined in the act.

With the second situation we are not concerned unless it be determined that the words "in which the State of Utah or any subdivision thereof contributes a part of the premium, under said contract" relate back to and must be deemed a part of the first situation. We do not believe that such is the case, as the two situations are not connected with a copulative conjunction, as plaintiff contends, but with a conjunction expressing an alternative. But, for the sake of argument, assume that plaintiff's contention is correct, then it would seem that the proviso following the second situation goes right through everything preceding it and modifies both the first and second situations with all that it means. If it does not, then the first situation stands alone and is a complete bar to the contention of plaintiff. It is a rule of statutory construction that a proviso should be confined to the antecedent next preceding it unless a contrary contention clearly appears.

State v. Quale, 26 Utah 26-30; 71 P. 1060.

Under this rule the antecedent of the terms "every such teacher" found in the proviso would be limited to the teachers named in the second situation. But in

Meat Co. v. Mining Co., 36 Utah 145; 103 P. 254,

this Court laid down and applied the rule:

"That what is termed a proviso is not really such, if not restricting or modifying only what is previously said in the section.

but being intended to apply to the whole chapter, so that for the purpose of arriving at the true intention such proviso should be considered as a separate section, the mere fact of it being termed a proviso and appended to a particular section not being controlling.”

Under this rule it would seem that the term “every such teacher” was intended to apply to all of Sub-section (b) of said Section 12 of the act.

The question therefore is “when does a teacher cease to be a holder of such a contract?” The answer to that question can be found only in the contract itself. As found by the Retirement Board, the contract cannot be forfeited, cancelled or assigned. The discontinuance of payments of premiums does not forfeit or cancel the contract, but on the contrary, causes the contract to automatically become paid up for an annuity payable as the original annuity was payable, except for such reduced monthly amount as the premium thereon will purchase. Under such circumstances how can the plaintiff successfully claim that he has ceased to be the holder of the contract. He will and must receive the reduced annuity by reason of the contract. As long as a person is receiving benefits issuing from a contract, and that contract is the very foundation of those benefits, the contract is not wiped out and does not cease to exist, and he is still the holder of it. Such is fundamentally, logically and indisputably true. In

32 C. J. 1300, Section 530, it is said:

“Failure or default in the payment of premiums . . . does not, in the absence of

a contractual provision, avoid or forfeit the policy of insurance.”

That rule applies here and is a complete answer to the contention of plaintiff. The contractual provisions of the contract in question are all against avoidance, forfeiture, cancellation and assignment. Again the words “in which the State of Utah, or any subdivision thereof, contributes a part of the premium,” if they actually modify the first situation, are merely descriptive of a class of ineligible teachers and do not limit or abridge the meaning of the term “upon ceasing to be a holder of such contract.” This is true because any teacher holding a contract with the Teachers’ Insurance & Annuity Association of America to which the State of Utah, or any subdivision thereof, was not contributing or had not contributed any part of the premium would not be ineligible.

Plaintiff further contends that because the term “to which the State of Utah, or any subdivision thereof, is contributing a part of the premium” is in the present tense, that a mere discontinuance of the payment of the premiums on the contract would make him eligible. If the phrase is merely descriptive of a class of ineligible teachers, then its tense is immaterial. We must assume that the legislature in enacting this exclusion statute knew that the State of Utah had contributed out of the appropriations made by it to the University of Utah large sums of money for the special benefit of certain teachers, and that those teachers were the ones holding contracts with the Teachers’ Insurance & Annuity Association of America. We must also assume that when the legislature enacted that part of the Teachers’ Retirement Act relating to credit for prior service, Section 9 (e), it knew of the contributions made by it to teachers holding contracts with the Teachers’ Insurance &

Annuity Association of America and that it therefore excluded those teachers who were the beneficiaries of those contributions, and, because the State of Utah was then contributing and the premiums were payable monthly in advance, the language used was necessarily in the present tense. This intention is fortified when you consider that the University of Utah paid one-half of the premiums on plaintiff's policy, or One Hundred Eighty (\$180) Dollars a year for fourteen years and two months, or a total of Two Thousand Five Hundred Fifty (\$2,550) Dollars. To let such a holder of a contract where the State, through the university, has contributed such a large part of the consideration, assuring such a holder a double annuity at the expense of the State, come into the Utah State Teachers' Retirement System would be in violation of the very spirit and wording of the law, and would work a great injustice on those teachers who have not been so favored by the State, especially in those cases (such as the plaintiff's) where many years of credit for prior service follows membership. As found by the Retirement Board, under the provisions in the plaintiff's policy with the Teachers' Insurance & Annuity Association of America, the policy is subject to reinstatement at any time. It seems certain that plaintiff, after acquiring membership in the Utah State Teachers' Retirement System, would immediately reinstate his contract, and thus he would obtain indirectly that which he is prevented from having directly, namely, membership in the Utah State Teachers' Retirement System while still a holder of a policy of insurance with that association, on which the State has paid one-half of the premiums, and entitled to many years' credit for prior service toward qualification for retirement in the State association. We do not believe the legislature under the wording of the

law intended to give him both the premiums on the policy with the Teachers' Insurance & Annuity Association of America, assuring him a double annuity at the expense of the State, and the large credit for service in the State system, the legislature undoubtedly knowing and believing that the large amount paid by the university for the benefit of the insured could not be recovered back and the insured could not be deprived of the benefits thereof.

Plaintiff says in his brief that he has done everything that it is possible for him to do to dispossess himself of the contract. All he has done is to discontinue payments of premium and that does not dispossess him of it. It stands to reason that he will not dispossess himself of the benefits to be derived from that contract. He cannot do so because the annuity therein provided must be paid to the annuitant and not to his assignees. The Retirement Board found that he had discontinued premium payments but that he had retained said contract so as to claim and receive the deferred annuity provided therein.

Plaintiff states on page 14 of his brief that the amount to which he would be entitled from the Utah State Teachers' Retirement System is determined by the years of prior service and that the years of prior service are determined not by the number of years which he has been a teacher, but by the number of years which he has been a teacher and not the holder of a retirement annuity contract with the Teachers' Insurance & Annuity Association of America in which the State of Utah contributed a part of the premiums. We submit that there is no provision in the law so declaring. If the legislature so intended, then it would not have excluded the holders of those con-

tracts from membership, but would have declared that they were entitled to membership but could not have credit for the time they were holders of such contracts.

CONSTITUTIONALITY

Plaintiff devotes a good part of his brief, pages 16, 17, 18 and 19, to an attack on the constitutionality of the Teachers' Retirement Act, and this notwithstanding he is claiming membership in the Utah State Teachers' Retirement System and all the benefits issuing from it under the law. It is a universally established rule of law that a party cannot assert a right under a statute and at the same time question its constitutionality.

Leva v. Utah Fuel Co., 58 Utah 388; 199 P. 659.

Further, a petition for a Writ of Certiorari must contain an assignment of errors relied upon. Matters not assigned as errors will not be reviewed.

11 C. J. 151, Sec. 150.

Griffiths v. Justice's Court, 35 Utah 443-54; 100 P. 1064.

The soundness of the two foregoing rules is glaringly apparent. The plaintiff in his application for the writ of certiorari does not rely, naturally, upon the unconstitutionality of the Act, and there is no assignment of error relating thereto in his application. At no time has he ever presented the question except in his brief to this Court. It appears that the plaintiff suddenly determined that if he could not get what he wanted out of the retirement act he would see to it that no one else got anything. But, such a coveted malign achievement is not open to him. It is further a universal rule that every

presumption will be indulged in favor of the constitutionality of a statute.

Tintic Standard Mining Co. v. Utah
County, 80 Utah 491; 15 P. (2d) 633.

DECLARATORY JUDGMENT

The record before the Court shows that on the 19th day of April, 1939 the plaintiff petitioned the Third Judicial District Court in and for Salt Lake County, Utah, for a declaratory judgment, involving the identical questions raised and argued by him in his petition for Writ of Certiorari issued by this Court, and in his brief filed herein in support of his petition, and wherein the identical persons were defendants. After hearing the cause on the merits the Court rendered its decision dismissing the petition of plaintiff. No appeal was taken from that judgment. We contend that that judgment disposes of the very issues presented by the plaintiff in this review and is binding on the plaintiff and on this Court. The plaintiff states in his brief that the case was dismissed at the request of the defendants on the ground that the court was without jurisdiction. There is nothing in the record to so show or in the decision rendered by the court. The decision speaks for itself and shows on its face that the case was tried on its merits. Declaratory judgments have the force and effect of a final judgment or decree.

Section 104-64-1, Revised Statutes, 1933.

A judgment dismissing a complaint is final if it expressly declares or if it appears by the judgment

roll that the judgment was rendered upon the merits.

Section 104-30-7.

Plaintiff's remarks (page 20 of his brief) concerning the findings of fact and conclusions of law made and filed by the Retirement Board are not only immaterial but wholly untrue. The certified record to this Court shows the date on which they were made and filed and that record imports verity.

LACHES

In answer to defendants' charge of laches the plaintiff says on page twenty-one of his brief, in substance, that under the law he was a member of the retirement system and as such he was not required to do or cause the courts to do anything in regard to said system until he applied for benefits, which, he says, he has not done. Yet, he is the moving spirit in this attempted review, and on page six of his brief he says, in substance, that his application for the Writ of Review is an action brought by him against the defendants to force them to accept the plaintiff as a member of the retirement system and to do for him the acts required of them by the retirement act. It is plain that neither statement is true, and such expressions by the plaintiff are wholly irrelevant to the question of laches.

While Section 104-67-2 states that the Writ of Certiorari may issue at any time after judgment, still there ought to be a time when a party through his negligence or laches should be denied the writ. The judgment of the Retirement Board was render-

ed on the 4th day of May, 1938, and became final on the 7th day of June, 1938. The applicant, instead of applying to this Court or to the District Court for a Writ of Certiorari, filed an action in the Third Judicial District Court in and for Salt Lake County, Utah, against the identical defendants on the 19th day of April, 1939, for a declaratory judgment. He remained silent and inert for ten months and ten days before going to the District Court for said declaratory judgment. Having lost in that action on the 15th day of June, 1939, he remained silent and inert until the 24th day of January, 1940, when he filed his application with this Court for a Writ of Certiorari. He failed and neglected to apply to this Court for a Writ of Certiorari for one year, seven months and seventeen days after the judgment of the Retirement Board became final. In

State Ex rel Tumwater P. & W. Co. v.
Superior Court, 105 P. 815,

the Supreme Court of Washington ruled:

“While the statute fixes no time within which a Writ of Review must be applied for, we have held by analogy that the writ must be applied for within the time fixed for taking an appeal.” (Citing cases).

To the same effect is

State v. Kuykendale, 236 P. 99 (Wash.)

The Supreme Court of Idaho said, in the case of

Pullman Co. v. State Board of Equalization, 171 P. 260:

“The statute does not limit the time within which a Writ of Review may be pro-

ecuted. Under the statute an appeal to the Supreme Court must be taken within ninety days after the entry of the judgment appealed from. In the absence of a statute limiting the time within which an application for Writ of Review may be prosecuted, the rule is that it must be applied for within a reasonable time, which will be deemed to be the time within which an appeal may be taken in appealable cases."

To the same effect is

Smith v. Superior Court of Los Angeles,
32 P. 322 (Calif.)

For the reasons hereinabove expressed, and on the authorities cited in support thereof, the prayer of the defendants in their answer to plaintiff's application for the Writ of Certiorari should be granted.

Very respectfully submitted,

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Received typewritten copy of the foregoing
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