

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 : Petition for Rehearing, and Supporting Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Joseph Chez; Attorney General of Utah; Grover A. Giles; Asst. Attorney General of Utah; Wm. A. Hilton; Special Counsel; Elias Hansen; Appearing as Amicus Curiae and on Behalf of Utah Education Association; Attorneys for Defendants;

Recommended Citation

Petition for Rehearing, *J. L. Gibson v. Utah State Teachers' Retirement Board et al*, No. 6220 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/610

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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.

Petition for Rehearing, and Support-
ing Brief

JOSEPH CHEZ,
Attorney General of Utah.
GROVER A. GILES,
Asst. Attorney General of
Utah.

WM. A. HILTON, Special Counsel.
ELIAS HANSEN,

Appearing as Amicus Curiae
and on Behalf of Utah
Education Association.

Attorneys for Defendants.

FILED

OCT 26 1940

INDEX

Assuming Language of Sec. 12, Ch. 85, Laws Utah 1937, Uncertain and Ambiguous, Still Construction Should Exclude Plaintiff from Membership in Retirement System..	12-28
Brief in Support of Petition	4-28
Language of Statute Expressly Excludes Plaintiff, Etc.	4-11
Petition for Rehearing	1-3

TABLE OF CITATIONS

Attorney General v. Parsell, 100 Mich. 170; 58 N. W. 839.	6
Board of Education of Ogden v. Hunter, 48 Utah 373; 159 P. 1019	22
Buckle v. Ogden Furniture & Carpet Co., 61 Utah 559; 216 P. 684	22
Cerfass v. State, 42 Md. 403.	6
Coffin v. Rich, 45 Me. 507.	6
Cousins v. Sovereign Camp, (Texas), 35 S. W. (2d) 696	25

(Table Continued).

TABLE OF CITATIONS

(A Continuation)

Fitzpatrick v. Gebhart, 7 Kans. 35.	5
Forsyth v. Selma Min. Co., 58 Utah 142; 197 P. 586	22
Hanchett, et al v. Burbidge, et al, 59 Utah 127; 202 P. 377.	6
Higgins v. Rinker, 47 Tex. 393; 39 Harv. L. Rev. 122	25
Holvering v. St. Louis S. Ry. Co., 84 Fed. (2d) 857.	5
In re Schenk's Estate, 53 Utah 381; 178 P. 344.	6
Koch v. Bridge, 45 Miss. 247.	6
Lawson v. Tripp, 34 Utah 28; 95 P. 520.	22
McCluskie v. Cromwell, 11 N. Y. 601.	6
Miles v. Wells, 22 Utah 55; 65 P. 534.	6
Nash v. Clark, 27 Utah 158; 75 P. 371.	11
Nelden v. Clark, 20 Utah 382; 59 P. 524	22
People v. Commonwealth of Texas, 95 N. Y. 556.	5

TABLE OF CITATIONS

Reese v. Judges of District Court of Salt Lake County, 52 Utah 520; 175 P. 601.	6
Rio Grande Lumber Co. v. Earle, 50 Utah 114; 167 P. 241... ..	11
Roberts v. Cannon, 20 N. C. 398.....	6
Ruggels v. Ill., 108 U. S. 526....	5
R. S. U. 1933, 88-2-11,	8
R. S. U. 1933, 88-2-12,	8
R. S. U. 1933, 88-2-12, Subdivision (8)	8-9-10
Salt Lake County v. Salt Lake City, 42 Utah 548; 134 P. 560.....	11
Schultz v. Ohio County, 226 Ky. 633; 11 S. W. (2d) 702	25
Section 12, Chapter 85, Laws of Utah, 1937,	2-6-12-15
Sol. Block & Griff v. Schwartz, 27 Utah 387; 76 P. 22....	11
Spring Canyon Coal Co. v. Industrial Com. 57 Utah 208; 193 P. 821	22
State, ex rel Breeden v. Lewis, 26 Utah 120; 72 P. 338.	11

(Table Continued).

TABLE OF CITATIONS

(A Continuation)

State v. Davis, 55 Utah 54; 184 P. 161.	6
State ex rel Gallacher v. Third Judicial Dist. Ct., 36 Utah 68; 104 P. 750.	6
State v. Pay, 45 Utah 511; 146 P. 300.....	22
Statutory Construction (1940 Edition), by Crawford, Chapter XXI, Page 365.....	25
Subdivision 24, Section 1 of Chapter 85, Laws of Utah, 1937,.....	15
Tribune Reporter Pub. Co. v. Homer, 51 Utah 153; 169 P. 170.....	11
University of Utah v. Richards, 20 Utah 457; 59 P. 96	22
U. S. v. Hartwell, 6 Wall (U. S.) 395; 18 L. Ed. 830.....	5
U. S. v. Wiltberger, 5 Wheat (U. S.) 76.	5
Water Commission v. Brewster, 42 N. J. 125.	6
West Boylston Mfg. Co. v. Board of Asses- sors, 277 Mass. 180; 178 N. E. 531.....	25
West et al v. Sun Cab Co., (Md.), 154 Atl. 100	24

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.

Petition for Rehearing, and Support-
ing Brief

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF UTAH:

Come now the defendants in the above entitled cause

and respectfully petition this Court for a rehear-

ing in such cause for the following reasons and upon the following grounds:

1.

That the majority opinion is in error in holding that the defendants contended that the word "contributes" should be construed as meaning "has contributed."

2.

That the majority opinion heretofore rendered is in error by in effect holding that the language of subdivision B of Section 12 of Chapter 85, Laws of Utah, 1937, is uncertain and ambiguous and as such requires construction or interpretation.

3.

That the majority opinion is in error in holding that by the use of the word "contributes" the legislature intended to mean "is contributing."

4.

That the majority opinion heretofore rendered in this cause is in error in not giving to the word "contributes" its natural and ordinary meaning and in not giving it the same meaning that such word is given in Section 21 of Chapter 85, Laws of Utah, 1937.

5.

That the majority opinion is in error by in effect substituting in the act the words "is contributing" for the word "contributes."

6.

That the majority opinion is in error in construing the language used in subdivision "b" of Section 12, Chapter 85, Laws of Utah, 1937, to the effect that

plaintiff is not permanently excluded from membership in the Utah State Teachers' Retirement System.

Wherefore, upon the grounds hereinbefore set forth, the defendants in this proceeding pray that a rehearing and reconsideration of this cause should be had and that the decision of the majority of this Court should be revised and that this Court render a decision holding that the plaintiff herein is permanently disqualified from membership in the Utah State Teachers' Retirement System and not entitled to the benefits of an annuity contract under said system.

Respectfully submitted,

JOSEPH CHEZ,
GROVER A. GILES,
WM. A. HILTON,
Attorneys for Defendants.

Now comes Wm. A. Hilton and hereby certifies that he is attorney for the defendants in the above entitled cause. That he has thoroughly examined the opinions filed by the Justices in this cause, has considered the legal principles announced in the said opinions, and that in his opinion there is good reason to believe, and he does believe that the judgment and decision made by a majority of the members of this Court is erroneous and that the cause ought to be reexamined and reconsidered by this Court.

Dated at Salt Lake City, Utah, this 23d day of October, 1940.

WM. A. HILTON

Brief in Support of Petition for Rehearing

This brief in support of a petition for rehearing is filed on behalf of the defendants and also on behalf of the Utah Education Association which, by leave of this Court, has permitted their counsel to join herein as amicus curiae. It is the contention of the defendants and the Utah Education Association, first: That the language contained in the act here brought in question is clear and unambiguous and hence not subject to construction or interpretation, and, second: Even if it be conceded that the act is subject to construction, still under well established rules of construction the act should be construed to exclude plaintiff from membership in the Utah State Teachers' Retirement System.

THE LANGUAGE OF THE STATUTE HERE INVOLVED EXPRESSLY EXCLUDES THE PLAINTIFF FROM MEMBERSHIP IN THE TEACHERS' RETIREMENT SYSTEM AND THEREFORE THE OPINION OF A MAJORITY OF THIS COURT IS IN ERROR IN INTERPOLATING WORDS INTO THAT STATUTE.

On the bottom of page two of the typewritten opinion, Mr. Justice Larsen says:

“The argument resolves itself as to whether the expression ‘The State of Utah contributes part of the premium’ (*italics added*) is to be read as ‘is contributing’ or as ‘has contributed’ part of the premium.”

Plaintiff contends for the former construction and defendants contend for the latter one."

At the outset the defendants disclaim any intention of contending that the word "contributes" should be construed as meaning "has contributed." If there is any language in the brief heretofore filed which conveys the idea that defendants claim that the words "has contributed" should be substituted for the word "contributes," we wish to correct any such impression conveyed because in our view there is no occasion and the law does not permit the interpolation of the word "has" into the act or construe the word "contributes" as meaning "has contributed." It is a basic principle of law in this and other jurisdictions that if a statute is plain, certain and free from ambiguity, then and in such case the courts must give effect to the meaning of the language used and may not resort to interpretation or construction. Stated conversely, it is when, and only when, a statute is ambiguous and its meaning uncertain that resort may be had to rules of construction or interpretation in order to ascertain what the legislature meant. Such has been the holding of this Court and courts in other jurisdictions time and time again. A few of the many cases so holding will serve to illustrate the rule:

Holvering v. St. Louis S. Ry. Co., 84 Fed.
(2d) 857.

People v. Commonwealth of Texas, 95 N. Y.
556.

U. S. v. Hartwell, 6 Wall (U. S.) 395; 18
L. Ed. 830.

U. S. v. Wiltberger, 5 Wheat (U. S.) 76.

Ruggels v. Ill., 108 U. S. 526.

Fitzpatrick v. Gelhart, 7 Kans. 35.

McCluskie v. Cromwell, 11 N. Y. 601.

Coffin v. Rich, 45 Me. 507.

Cerfass v. State, 42 Md. 403.

Koch v. Bridge, 45 Miss. 247.

Water Commission v. Brewster, 42 N. J. 125.

Reese v. Judges of District Court of Salt Lake County, 52 Utah 520; 175 P. 601.

Hanchett, et al v. Burbidge, et al, 59 Utah 127; 202 P. 377.

State ex rel Gallacher v. Third Judicial Dist. Ct., 36 Utah 68; 104 P. 750.

In re Schenk's Estate, 53 Utah 381; 178 P. 344.

Miles v. Wells, 22 Utah 55; 65 P. 534.

State v. Davis, 55 Utah 54; 184 P. 161.

That such is the law is fundamental in our system of government. If the courts are permitted to ignore the expressed intention of the legislature, such action on the part of the courts constitutes an invasion of the provisions of the legislature and violates the tri-parted theory of our government. If that is permitted the legislature becomes a nonentity and the courts actually make the law. In order to keep the judicial branch of government from invading the province of the legislature the courts resort to construction only when it is necessary to ascertain the legislative intent, and even where a statute is ambiguous, considerable caution should be exercised by the court lest its opinion be substituted for the intention of the legislature.

Attorney General v. Parsell, 100 Mich. 170; 58 N. W. 839.

Roberts v. Cannon, 20 N. C. 398.

The language of subdivision "b" of Section 12, Chapter 85, Laws of Utah, 1937, is plain, certain and

free from ambiguity. It is there provided that "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 this system."

As we read the opinion in the light of the admitted facts, the members of this Court are all agreed that plaintiff is the holder of a retirement annuity contract with the Teachers' Insurance & Annuity Association of America. As to that being so there can be no doubt. The mere fact that plaintiff has ceased to pay premiums and that the University of Utah has, upon the request of plaintiff, ceased to pay part of the premium on plaintiff's contract, does not change the nature of the contract. Such failure to pay premiums has merely the effect of reducing the amount of annuity to which plaintiff will be entitled upon retirement. It does not alter the fact that he is the holder of a retirement contract. Plaintiff makes no claim to the contrary nor is there any controversy about the fact that the contributions made by the University of Utah as a part of the premiums on Mr. Gibson's contract was a contribution made by the State of Utah or by one

of its subdivisions. According to the prevailing opinion of this Court the word "contributes" as used in the phrase "in which the State of Utah or any subdivision thereof contributes part of the premium under said contract" is so uncertain or ambiguous as to permit of interpretation or construction, and that the word "contributes" should be construed as meaning "is contributing." We most earnestly urge that the word "contributes" may not be distorted into meaning "is contributing."

R. S. U. 1933, 88-2-11, provides that:

"Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition."

R. S. U. 1933, 88-2-12, provides that:

"In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute."

R. S. U. 1933, 88-2-12, Subdivision (8) provides:

"Words used in the present tense include the future."

When viewed in the light of the provisions of the statutes just quoted and the generally accepted rules of construction and interpretation of statutes,

the language just quoted is as clear and certain as it can be made. Mr. Gibson was the holder of a retirement annuity contract in which the University of Utah contributed part of the premiums *after the act took effect*. The act provides that it shall take effect upon approval. It was approved on March 23, 1937. The University of Utah continued to pay a part of the premiums until December of 1937. Admittedly plaintiff's status as the holder of the contract did not terminate when he ceased to make payments on his contract and requested the University to do likewise.

While the verb "contributes" is in the present tense, it, under the provisions of

R. S. U. 1933, 88-2-12, Subdivision 8, also means any contract upon which the University of Utah shall contribute a part of the premiums at any future time. That is, at any time after the act took effect. If the legislature had meant what the majority opinion indicates, it would have been very easy for it to have provided that teachers should be excluded from membership in the retirement system only during the time that the State of Utah or one of its subdivisions was contributing a part of the premium on a retirement annuity contract held by such teacher; but it did not do that. If the legislature had intended that the word "contributes" means "is contributing" it must be assumed that it would have used that language.

Moreover, if the words "is contributing" should be substituted for the word "contributes" the statute would be rendered ambiguous and uncertain. If the phrase in which the State of Utah or any subdivision thereof "is contributing" a part of the

premiums should be substituted for the language actually used, the question might then arise as to the time that is meant by the words "is contributing." It may be argued with considerable logic that the substituted words may mean at the time the act took effect, or at some future time when the State of Utah or one of its subdivisions should cease paying a part of the premiums. If the word "is contributing" are substituted in the act for the word "contributes" there may be room for interpretation or construction, but obviously a court may not by construction or interpretation create an uncertainty or ambiguity in a statute, otherwise clear and certain, and then proceed to construe the statute thus rendered ambiguous and uncertain. Under the act as it is the word "contributes" means at the present time, which under the provisions of

R. S. U. 1933, 88-2-12, Subdivision 8,

also means at any time in the future. In light of the fact, as appears without dispute, that the University of Utah did contribute a part of the premiums on Mr. Gibson's contract after the act took effect, the language used clearly excludes Mr. Gibson from the right to membership in the State retirement system. Nor does the provision 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" aid Mr. Gibson. He at all times since the act was passed and at the present time is the holder of such a contract. If the legislature had intended what the prevailing opinion in effect says it intended, it would have been a simple

matter to have provided that when a teacher ceased to pay premiums on an annuity contract such teacher becomes a member of the system. It must be assumed that the legislature was familiar with the fact that some of the teachers of Utah held contracts such as that held by the plaintiff; that such contracts were not assignable, and also that even though perchance some teachers should temporarily or permanently cease to pay premiums on their annuity contracts, the contract would still be in effect and entitle the holder thereof to an annuity. To hold otherwise is to assume that the legislature was either ignorant of the facts and circumstances surrounding the subject matter of the legislature or that it did not mean what it clearly expressed in the language used. In this connection it should be observed that this Court is not concerned with the wisdom or the lack of wisdom of the legislature in enacting the law in the form that it was enacted. That is a matter solely within the province of the law-making power, in the absence of Constitutional objections.

Sol. Block & Griff v. Schwartz, 27 Utah
387; 76 P. 22.

State, ex rel Breeden v. Lewis, 26 Utah 120;
72 P. 338.

Nash v. Clark, 27 Utah 158; 75 P. 371.

Tribune Reporter Pub. Co. v. Homer, 51
Utah 153; 169 P. 170.

Salt Lake County v. Salt Lake City, 42
Utah 548; 134 P. 560.

Rio Grande Lumber Co. v. Earle, 50 Utah
114; 167 P. 241.

ASSUMING THAT THE LANGUAGE OF SECTION 12 OF CHAPTER 85, LAWS OF UTAH, 1937, IS SO UNCERTAIN AND AMBIGUOUS AS TO PERMIT OF OR REQUIRE CONSTRUCTION, STILL A CONSTRUCTION SHOULD BE GIVEN EXCLUDING PLAINTIFF FROM MEMBERSHIP IN THE RETIREMENT SYSTEM.

We are mindful that when the language of a statute is ambiguous or uncertain the courts resort to established rules of construction for the purpose of ascertaining the legislative intent. In the quest for ascertaining such intent resort may be had not only to the language used in the act, but also to the purpose or reason why the particular law was passed by the legislature. In seeking to ascertain the legislative purpose the courts will resort to intrinsic evidence bearing on intent, that is, evidence found within the act; also to extrinsic evidence, such as evidence touching the circumstances existing at the time the law was enacted, the necessity for the law, the evils intended to be cured by it, the law prior to the enactment, and the consequences of adopting the construction urged.

In the prevailing opinion it is said that

“if defendants are correct in their interpretation any teacher who has ever, while teaching in the State of Utah, been the holder of such an annuity contract could never become a member of the retirement system. This follows of necessity since, under the terms of the contract, the holder thereof can never divest himself of the paid up deferred annuity based upon the amount he had paid, except by retirement from teaching and using it up as retirement ben-

efits, which disqualifies him for membership in the system."

It is true that the plaintiff herein under the contract which he holds may not divest himself of being the holder of that contract unless for some reason the contract becomes a nullity, or it is so changed as to make it assignable. At all events the contract held by the plaintiff is of his own choosing. However, it does not follow that the holders of other annuity contracts may not become divested of any right in such contract because of failure to comply with the contract or for other reasons that may be provided for in the contract. It will be observed that the statute covers not only such contracts as that held by the plaintiff, but by "any other private organization or company in which the State of Utah or any subdivision thereof contributes a part of the premium." But it is proper to inquire why should the plaintiff or any teacher who continues to hold an annuity contract be permitted to abandon a contract in which the State of Utah or a subdivision thereof has paid a part of the premium.

There are very good reasons why the holder of such a contract should not be permitted to abandon the same and shift over to another contract where the State is likewise required to pay part of the premiums. It is self-evident that "when in 1905 Andrew Carnegie established a trust fund of ten million dollars as a foundation for the advancement of teachers to be administered for retirement allowances to teachers in universities, colleges and technical schools" such fund was intended for and calculated as an aid to such teachers as were qualified to partake of its benefits. It is also evident that when the University of Utah consented to pay a part of the premiums on plaintiffs' policy the State

of Utah, through its University, in effect acquired an interest in that contract. That is to say, if the plaintiff is permitted to abandon that contract and shift into the State retirement system, any and all future benefits that Mr. Gibson may acquire by reason of the endowment will be lost, and the amount so lost must be borne either by Mr. Gibson or the other teachers of the State, unless perchance the legislature makes up the amount of such loss by additional appropriations.

If, as Mr. Gibson apparently believes, he will get more by becoming a member of the State system than he will by continuing to pay the premiums on his present contract, the additional amount that Mr. Gibson will receive and also the loss incurred by abandoning his present contract must be borne by either his fellow teachers or by the taxpayers of the State, or both the other teachers and the taxpayers. To conclude that the legislature of Utah by the act here brought in question intended to shift to the people of Utah, discouraging the holders of contracts from accepting the benefits that will be derived from private trust funds, such as the Carnegie Foundation Fund, on to the taxpayers of Utah is contrary to all human experience; if indeed such conclusion does not cast suspicion on the intelligence and integrity of the law-making power. Obviously, if there be a trust fund in which teachers may participate, the legislature, in the interest of the State, would be expected to do all within its power to see that the teachers take advantage of the benefits derived from such trust fund, or, if, as in the case of plaintiff, they had received some of the benefits of such a trust fund the legislature doubtless would enact such laws as will require or encourage them to continue to accept the benefits from the trust fund rather than cast additional

burdens on the people of Utah. It is self-evident that if Mr. Gibson and other teachers similarly situated shall abandon such contracts as that now held by Mr. Gibson and become members of the State Teachers' Retirement System, any benefits that such teachers will be entitled to from the Carnegie Foundation Fund will be lost to someone within the State of Utah. If not to Mr. Gibson, then to his fellow teachers or the people of the State.

In this connection it may be of aid to look at the history of this State touching the establishment of retirement funds. It will be observed from the prevailing opinion that the Carnegie Foundation Fund was not available to any teachers other than those in universities, colleges and technical schools. So far as we are advised no such private trust fund has ever been established in Utah for retirement allowances to teachers in our common and high schools. Prior to the enactment of

Chapter 85, Laws of Utah, 1937,

the Board of Education in Salt Lake, Ogden and Provo made provisions for the teachers within said cities to avail themselves of a growing demand to provide a retirement fund for such teachers. It was only in those cities where, at the time the act of 1937 was passed, the benefits of retirement contracts were available to teachers in our common and high schools. The local system defined in

Subdivision 24, Section 1 of Chapter 85,
Laws of Utah, 1937,

refers to the plan whereby the teachers in the schools of Salt Lake, Ogden and Provo could secure the benefits of a retirement allowance, annuity or pension as defined in the act. The act here brought in question was enacted primarily to enable teachers

who could not participate in any retirement plan to do so.

That the legislature attempted to make the cost of this plan to the people of Utah as low as could be, may reasonably be assumed. It is also reasonable to assume that the legislature knew that a substantial trust fund had already been created by Mr. Carnegie and that possibly other such funds would be created for a like purpose. So also is it apparent that the legislature knew that the boards of education of the cities of Salt Lake, Ogden and Provo had provided for a plan whereby the teachers of those cities could avail themselves of the retirement benefits to be paid for in part by public funds. In order to accomplish the purposes intended by the act, the legislature wishes to discourage, and, so far as possible, prohibit teachers who held contracts with the Teachers' Insurance & Annuity Association of America, and other private organizations or companies, from ceasing to carry out any contracts which they might hold where the State of Utah or any subdivisions thereof contributed; hence the exclusion provided for in subdivision "b" of Section 12 of those teachers who were participating and may continue to participate in the benefits of private trust funds.

By subdivision "d" teachers who were members of local systems were excluded from the act unless, on or before December 31, 1937, they, by a written document, elected to become members of the State retirement system. Unlike the teachers who held contracts which entitled them to participate in private endowment funds, as contemplated by subdivision "b," the teachers who fell under subdivision "d" were not participating in any private endowment fund but were, under their contracts, entitled to participate in the public funds created by boards of

education in the cities mentioned. There was thus no controlling reason why the teachers under the local system should not be permitted to shift to the State system because in either event the contributions made to their contract came from public funds.

If the teacher remained a member of the local system the school boards contributed towards the fund, whereas if they became members of the State system the State contributed to the fund. Not so however with those teachers who fell under subdivision "b" of Section 12 of the act. As to those teachers, if they abandoned their contract it resulted in shifting the burden carried by the foundation fund on to the public funds of the State of Utah. Hence the provision that so long as they remained the holder of the contract in which the State of Utah or one of its subdivisions contributes a part of the premium they may not shift to the State system. Moreover, if a teacher in the same class as the plaintiff once establishes his eligibility for membership in the Utah State Teachers' Retirement System there is no provision in the act whereby his eligibility shall terminate if he shall later decide to reinstate the contract upon which the University of Utah has paid a part of the premiums. If the construction placed upon the act by the prevailing opinion is adhered to plaintiff will receive the benefits from two retirement funds in which the State of Utah has contributed.

That the law-making power did not intend to thus bestow upon teachers the premiums paid in part with public funds on two retirement contracts, while denying the same privilege to other teachers, would seem self-evident. More as to that: If the act in question be construed as held by the majority

opinion the plaintiff and other teachers similarly situated may continue to indefinitely shift their position by being entitled to membership in the State Teachers' Retirement System for one month or more, and then upon a change of mind return to the Teachers' Annuity & Insurance Association of America or some other private organization. The language used in the act clearly indicates that the legislature intended to prevent such confusion and favoritism.

Section 13 of the act provides that "any contributing member of a local system who is excluded from membership herein by the provisions of subdivision "d" of Section 12, and who is otherwise eligible for such membership may elect to become a member of the retirement system by a written document duly executed and filed with the retirement board on or before December 31, 1937." It is not claimed that plaintiff was or is a member of any local system. The act defines a local system as "any public teachers' retirement association organized and operated for the retirement of teachers of any public school under the provisions of any laws of this State." Thus the act expressly excludes teachers from membership in the State retirement system who are contributing members of a local system; provided that they may transfer their membership to the State teachers' retirement system in the event the teacher elects to become a member of the system as by the act provided. But as to teachers who hold contracts within 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, the election is, under the plain language of the act, at all events made as a matter of law when the State or any of

its subdivisions "contribute" a part of the premium under the contract.

On page three of the typewritten prevailing opinion it is said:

"This construction is further evidenced by Section 21, dealing with 'termination of membership, — withdrawals and deposits,' and providing that a member who discontinues a status requisite to membership, except by death or retirement, may withdraw from the fund his accumulated contributions. He may again become a member with his old standing and rating upon acquiring a teaching status for membership and redepositing in the fund the amount of his withdrawals."

The language of Section 21 touching withdrawals and redeposits of necessity applies only to teachers who occupy the status requisite to membership in the State retirement system. Obviously, if plaintiff is ineligible to membership in the State retirement system because he is the holder of a contract with the Teachers' Insurance & Annuity Association of America in which the University of Utah, *after the act took effect, contributed a part of the premium*, he could not occupy the status of membership in the State retirement system. If plaintiff has not deposited any money in the State retirement fund provided for in the act there is no money for him to withdraw. That the provisions of the act with respect to withdrawals and redeposits do not and cannot apply to money paid by the plaintiff as premiums on his contract with the Teachers' Insurance & Annuity Association of America is obvious because of the fact that the act

deals only with the State fund, and the further fact that the fund in the Teachers' Insurance & Annuity Association of America is beyond the control of the legislature.

Attention is also called in the prevailing opinion to this language found in Section 21 of the act:

"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."

Commenting upon the provisions last quoted it is said in the prevailing opinion that:

"It then provides that for the purpose of Section 21 only, that is, of terminating a membership which is in existence and allowing withdrawals of accumulated contributions, the holding of a contract with a private retirement pension company, for which the State is contributing part of the premium, shall be considered terminating the status of membership. . . ."

We most earnestly submit that the construction placed upon the language last quoted from the prevailing opinion does violence to the clear meaning of the language of the act. It will be noted that the prevailing opinion *interpolates* the word "only." If the language just quoted from the act is given effect according to its clear meaning, namely, that

the holder of a contract such as that held by plaintiff is permanently separated from the State retirement system, he is precluded from membership in the State system and therefore precluded from making payments to the State fund. If no payments may be made there is nothing to withdraw and nothing to redeposit. So, likewise, if a holder of a contract such as that held by plaintiff "shall be considered permanent separation from service in the status requisite to membership in the system" as the legislature has prescribed, he, of necessity, is excluded from membership in the State retirement system as provided in subdivision "b" of Section 12 of the act. To say that a teacher shall be permanently separated from the system and at the same time be a member of that system presents an impossible situation.

It is reasonable to assume that in the light of the language found in subsection "b" of Section 12 it was not necessary to repeat the same thought in Section 21, but the legislature wished to make it clear and certain that the holder of a contract such as that held by plaintiff should be excluded from membership in the system and of the right to make payments, withdrawals and redeposits in the fund set up solely for members of the State system; and hence the provisions of Section 21 that the holders of such contracts as that held by plaintiff, shall, for the purpose of membership, payment, withdrawal and redeposits "be considered permanent separation from service in status requisite to membership in the system." If the plaintiff must, because of being a holder of the contract he holds, "be considered permanent separation" from the system, he could not withdraw his membership from a system to which he never belonged; and likewise he

may not withdraw or redeposit money from a fund to which he has not contributed.

In this connection the Court's attention is directed to the well established rule of construction that the provisions of a statute must, whenever possible, be harmonized and not be so construed that one provision is at war with another.

University of Utah v. Richards, 20 Utah 457; 59 P. 96.

Lawson v. Tripp, 34 Utah 28; 95 P. 520.

Nelden v. Clark, 20 Utah 382; 59 P. 524.

Buckle v. Ogden Furniture & Carpet Co., 61 Utah 559; 216 P. 684.

State v. Pay, 45 Utah 511; 146 P. 300.

Board of Education of Ogden v. Hunter, 48 Utah 373; 159 P. 1019.

Spring Canyon Coal Co. v. Industrial Com. 57 Utah 208; 193 P. 821.

Forsyth v. Selma Min. Co., 58 Utah 142; 197 P. 586.

It is further said in the prevailing opinion that:

"This is further made clear by the provisions with respect to teachers holding membership in local retirement systems. Such teachers can only draw from the State fund a pension or retirement benefit in proportion to what his contributions to the State fund bear to what he would have paid had he not belonged to the local system, where a subdivision of the State pays into the local fund, but such deduction shall only be made for the time such teacher was a member of both systems."

The language referred to in that part of the opinion just quoted applies only to membership in local re-

tirement systems which are under the control of the State legislature and the boards of education of the schools wherein such systems have been established. There is no private fund in the local systems. The provisions referred to cannot possibly affect the Teachers' Insurance & Annuity Association of America or any other like organization. It is thus difficult to see how the provisions with respect to local systems can be of any aid in construing the language dealing with such contracts as that held by the plaintiff herein.

It is said in the dissenting opinion of Mr. Justice Wolfe on the bottom of page four of the type-written copy that:

"I fear the ruling in the main opinion courts disaster for these reserves or at least tends towards that result."

Further on in the opinion beginning at the end of the first line of paragraph 1 on page five of the dissenting opinion, it is said:

"It may very well be that the legislature had before it the number of men connected with the University of Utah and the Agricultural College who *had* contracts with the association and had data in respect to each of such contract holders."

On page six of the dissenting opinion Mr. Justice Wolfe points out the burden that would be cast upon the State in the event there were twenty teachers in the universities in the same or a similar situation as is the plaintiff, with an average service of twenty years, it would cost Fourteen Thousand Two Hundred Eighty (\$14,280) Dollars per year to pay retirement benefits and if they live twenty years after retirement it would cost the State for such

benefits the sum of Two Hundred Eighty-five Thousand Six Hundred (\$285,600) Dollars. It is indicated that the illustration may underestimate or overestimate the real situation, but that it gives the reader some idea of what the legislature sought to avoid, etc.

While the courts are not in entire accord as to what evidence or information they may resort to in order to ascertain the legislative purpose, the better reasoned cases take the view that courts are not shut off from the discussion and sources of information that were available to the legislature that may shed light on the purpose sought to be accomplished by an enactment.

West et al v. Sun Cab Co., (Md.), 154 Atl
100.

If the facts that were available and presumably known to the legislature at the time of the passage of the law here brought in question were judicially known to this Court, the fear entertained by Mr. Justice Wolfe would be more than justified and it would be made clear that the strain on the State fund would be very much greater than the amount used in the illustration by Associate Justice Wolfe.

While there may be some doubt as to how this Court may judicially know the true state of facts that were available to the legislature at the time the act was passed, such information should, in our view, be made available to this Court before the prevailing opinion becomes the settled law in this jurisdiction. That it would be a very material aid to this Court in determining the legislative purpose and intent in passing the act here in question if it had before it the facts that were available to the legislature when the act was passed, cannot admit of doubt. That

the Court may inform itself as to such circumstances by any and all available means, finds support in the adjudicated cases.

Schultz v. Ohio County, 226 Ky. 633; 11 S. W. (2d) 702.

Cousins v. Sovereign Camp, (Texas), 35 S. W. (2d) 696

Higgins v. Rinker, 47 Tex. 393; 39 Harv. L. Rev. 122.

West Boylston Mfg. Co. v. Board of Assessors, 277 Mass. 180; 178 N. E. 531.

That evidence may be introduced when a statute is uncertain and hence requires construction for the purpose of shedding light on the legislative purpose and hence legislative intent, finds support in both textbooks and adjudicated cases. A very recent work containing a discussion of citations of authority of this matter will be found in

Statutory Construction (1940 Edition), by Crawford, Chapter XXI, beginning on Page 365.

A resort to the information available to the legislature when the act here brought in question was passed will show, among other pertinent facts, the following: That in excess of two hundred (200) teachers and agents were in the employ of the University of Utah and the Agricultural College who had contracts with the Teachers' Insurance & Annuity Association; that if these teachers and agents should become members of the State system without deduction because of their having been members of the Teachers' Insurance & Annuity Association, it would require about One Hundred Forty Thousand (\$140,000) Dollars a year, or, if they lived fifteen years after retirement, a probable total sum

of Two Million (\$2,000,000) Dollars to take care of retirement benefits. If a reduction is made because of teachers having been members of the association the cost of such retirement benefits would probably amount to Eighty-seven Thousand (\$87,000) Dollars per year, or if the teachers lived an average of fifteen years after retirement, the probable total cost would be One Million Three Hundred Ten Thousand (\$1,310,000) Dollars.

It should be observed that in referring to agents, some of the faculty of the Agricultural College who were engaged in experimental work are eligible for and do hold contracts with the Teachers' Insurance & Annuity Association. It will thus be seen that if the majority opinion is to stand it may well be the death knell of the retirement system. If this Court should conclude that the foregoing facts are a proper subject matter of inquiry in this case (and we believe them to be) we most earnestly urge that a rehearing be granted so that this Court may properly be advised with respect thereto.

An examination of the entire act here brought in question shows that while teachers in local systems may become members of the State system, they may not receive the benefits of members in both systems. No such provision is made with respect to those teachers who hold contracts with the Teachers' Insurance & Annuity Association, or other private organizations or companies to which the State system or a subdivision thereof pays a part of the premium. Membership in the State system carries with it benefits which all members thereof are entitled to participate in without any provision whatsoever for a deduction because of a teacher being or having been the holder of a contract with the Teachers' Insurance & Annuity Association. A definite

time is fixed by the act for members of a local system to become transferred to the State system. There is no such provision with respect to the holder of a contract with the Teachers Insurance & Annuity Association. All of these facts point unerringly to the conclusion that the act was intended to exclude holders of contracts with the Teachers' Insurance & Annuity Association from membership in the State system.

If the construction placed upon the act by the majority opinion is to prevail there is no language whatsoever in the act which precludes the plaintiff and other holders of similar contracts from retaining all the benefits of a contract with the Teachers' Insurance & Annuity Association and also all of the benefits of the State system. Such result offends against fair and equal dealing towards all teachers. In the light of the fact that the act was passed primarily to assist those teachers who were unable to secure the benefits of a retirement fund at the time the act was passed, it would indeed be a grave injustice to such teachers if other teachers in universities, colleges and technical schools, already taken care of by contracts to which the State has contributed a part of the premium, should be permitted to keep what they have without any deductions whatsoever and in addition thereto participate equally with other teachers who have not been so favored in a State fund, with the probable result that such fund will be destroyed, and with the certainty that it will be seriously impaired.

We earnestly urge that the language of the act clearly precludes such results and even if the language be regarded as uncertain or ambiguous the established rules for construction and interpreta-

tion of statutes require that such a result was a
is contrary to the legislative intent.

This proceeding is of vital concern to the teachers
and people generally of the State of Utah and we
earnestly urge that a rehearing should be granted
to the end that this cause be reexamined and that
the statute be held to exclude plaintiff from membership
in the State system.

Respectfully submitted,

JOSEPH CHEZ,
Attorney General of Utah.
GROVER A. GILES,
Asst. Attorney General of
Utah.

WM. A. HILTON, Special Counsel.

ELIAS HANSEN,

Appearing as Amicus Curiae
and on Behalf of Utah
Education Association.

Attorneys for Defendant