

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 : Answering Brief of Plaintiff To The Defendants' Petition For Rehearing, And Supporting Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

J. L. GIBSON,

Plaintiff,

vs.

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

Defendants.

No. 6220

Answering Brief Of Plaintiff To The Defendants' Petition For Rehearing, And Supporting Brief

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J. L. GIBSON,

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BOARD, LEROY E. COWLES,
CHARLES H. SKIDMORE, JOSEPH
CHEZ, ALEX JEX, MILTON B.
TAYLOR, D. A. WOOTTON, and J. R.
SMITH, Members Thereof,

Defendants.

No. 6220

Answering Brief Of Plaintiff To The Defendants' Petition For Rehearing, And Supporting Brief

The defendants have filed a petition for rehearing and reconsideration of the decision of this Court heretofore rendered in this case. The decision is reported in 105 P. (2d) 353.

The said petition for a rehearing sets forth the following alleged grounds: (Defendants' Brief p. 2 and 3).

"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 word '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."

All of said alleged grounds are argued under the following headings and in the following order:

"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." (Defendants' Brief p. 4).

"ASSUMING THAT THE LANGUAGE OF SECTION 12, 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.” (Defendants’ Brief p. 12).

We believe that the most satisfactory manner of answering their brief will be in the order that it is written and, we shall, therefore, do so.

The defendants on pages 4 and 5 of their brief quote from the prevailing opinion as follows:

“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 constructions and defendants contend for the latter one.”

Defendants then state on page 5, as follows:

“At the outset the defendants disclaim any intention of contending that the word ‘contributes’ should be construed as meaning ‘has contributed’.”

Such statement amounts to nothing more than quibbling. The entire theory of the defendants in this case from the outset has been that because the State of Utah at one time contributed, which means nothing more or less than has contributed, the plaintiff was ineligible to become a member of the state system. The facts have been without dispute from the beginning that at the time the plaintiff requested to be considered a member of the state system the State of Utah had ceased to contribute anything on the Teachers’ Insurance and Annuity Association contract. So, regardless of how the defendants feel at the present time, the prevailing opinion is and was correct in the statement that:

“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.”

The only purpose in using the word “is”, as we see the question, is to emphasize the fact that “contributes” is in the present tense and not the past tense. The defendants agreed with us in this matter in their first brief and were not in accord with the dissenting opinion on the question because on page 21 of their first brief they state, as follows:

“This is true because any teacher holding a contract with the Teachers’ Insurance and 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.” (Blackface ours.)

Such statement can mean only one thing, and that is, even if the plaintiff had been the **holder** of a contract with the Teachers’ Insurance and Annuity Association of America but that the State of Utah had at no time contributed part of the premium the plaintiff would then be eligible to be a member of the state system. Their statement points out clearly that their only contention was then that if the State of Utah in this case “has contributed” the plaintiff would be ineligible. At no place have they heretofore argued that at the time the plaintiff made his request to be considered a member, that the State of Utah was presently contributing as expressed in the language “contributes” or “is contributing”. The above quoted words mean exactly the same thing in plain English and it took a statute passed by the legislature of the State of Utah to include the future tense, for reasons of convenience. Said reasons are so obvious that there will be

nothing gained in attempting to point them out. The only way that the defendants could prevail in this case would be to prove that the word "contributes" means "has contributed."

The defendants state:

—"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." (Defendants' brief p. 5).

The law is as stated in 25 R. C. L.—Statutes—Section 210:

"Construction, it has been said, is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text,"—"Constructions which are in the spirit, though not within the letter of the text; while interpretation is the art of finding the true sense of any form of words. Though there may be an abstract distinction between these terms, it is doubtful whether the distinction is ever of any practical value. Certainly in common usage interpretation and construction are usually understood as having the same significance."

The statement of the defendants is incorrect if the law is strictly followed because interpretation should not be included in their statement if "interpretation is the art of finding the true sense of any form of words." The plaintiff has always contended that the law is unambiguous and certain. Apparently the defendant now take the same position but the fact remains that the plaintiff and the defendants cannot agree on what is the meaning of the "plain English" of the statute and it seems that all of the members of the Supreme Court also cannot agree. Apparently the very fact that

there is such a disagreement completely disposes of the argument of the defendants that the language of the statute is not subject to construction or interpretation.

We do not take issue with the defendants in what they claim are the holdings of their cited cases to the effect that “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.” (Defendants’ brief p. 5). We are still faced with the fact, however, that we are at issue as to what the plain English of the statute means, so there is apparently nothing that can be done, except to do as the parties and the court have done. We note that neither the interpretation of the prevailing opinion nor the interpretation of the dissenting opinion agrees with the interpretation contended for by the defendants. We will go into this matter a little more fully when we reach the proper point.

The defendants also state, “We most earnestly urge that the word ‘contributes’ may not be distorted into meaning ‘is contributing’.” (Defendants’ brief p. 8). That statement is nothing but pure nonsense. It is too bad that the attorneys for the defendants did not get a little help in English from their school teacher clients before wasting the time of the Supreme Court of this state and the plaintiff in such an argument.

We agree with the defendants that we have a statute that provides:

“Words used in the present tense include the future.” (Defendants’ brief p. 8).

At this point they seem to admit that the word “contributes” is in the present tense and is not in the past tense. They fail to point out any statute which holds that the present tense means the past tense or some space of time gone by. We submit that the only “distorting” that could be resorted to in this case would be to hold that “contributes” which is the present tense means “contributed” which is the past tense. Beginning with the bottom of page 8 of their brief the defendants are contending for an entirely new construction of the statute. In other words they have changed their theory of the case completely. At no time prior to the application for a rehearing have they contended that the plaintiff is disqualified because the word “contributes” means including as of the date the act took effect and all times thereafter.

The defendants have no right to change the theory of their case at the time of a petition for rehearing. The Court should not consider the new matters.

Harrison v. Harker et ux 142 P. 716, 44 U. 541:

“A question raised for the first time in the petition and argument for rehearing will not be considered.”

Swanson v. Sims 170 P. 774, 51 U. 485:

“A party who went to trial and permitted an appeal upon one theory and argued the cause thereon, could not, on a motion for rehearing secure consideration of a different ground.”

In re Shepherd's Estate 49 P. (2d) 444, 152 Or.

15—Modified 41 P. (2d) 444, 152 Or. 15:

“Court could not consider effect of statute first called to court's attention in supplemental brief on rehearing.”

Fink v. Weisman, 23 P. (2d) 438, 132 Cal. App. 724, aff. in part 18 P (2d) 961, 129 Cal. App. 305, 132 Cal. App. 724:

“Point, first urged on petition for rehearing, that appellant interjected certain question into case by answer, may be ignored as raised too late.”

Johnson v. International of United Brotherhood of Carpenters and Joiners of America, 18 P. (2d) 448, 54 Nev. 332, den reh 16 P. (2d) 658, 54 Nev. 332:

“Point first urged on petition for rehearing will not be considered.

Duran v. Springer, 23 P. (2d) 1083, 37 N. M. 357:

“Supreme Court would not consider objection suggested for first time on rehearing questioning presumptive effect of tax deed issued within three years after recording of tax certificate as one sufficient to invoke inherent power of intervention to correct fundamental error where, if deed was invalid, holder could apply for new one at any time. (Laws 1921, s. 133, s. 452, 455).

Paine v. Meier & Frank Co., 29 P. (2d) 531, den reh 27 P. (2d) 315: (Oregon case).

“Contentions first presented on petition for rehearing may be considered waived.”

American Digest System—Appeal and Error—Key No. 835 (2):

“In general questions or points not raised on the original hearing will not be considered on the rehearing.”

See many cases cited, including many Utah cases.

The only other question argued in the petition for rehearing is that the Court was wrong in its first decision on the statute and a rehearing of that matter has been attempted. The Court should likewise not go into this again or re-

consider it, as nothing that was not considered at the first hearing has been raised.

Edwards v. Clark 85 P. (2d) 768, 98 U. 140, denying rehearing 83 P. (2d) 1021, 96 U. 121:

“A petition for rehearing of appeal was denied on ground that petition did not contain any matters which were not considered on original hearing.”

Ward v. Ward 69 P. (2d) 963, 156 Or. 686, denied rehearing 68 P. (2d) 763, 156 Or. 686:

“Petition for rehearing will be denied where there are no propositions in petition that court did not give full and careful consideration to in opinion.”

Panagopulos v. Manning 72 P. (2d) 456, 93 U. 215, denied rehearing 69 P. (2d) 614, 93 U. 198:

“Where petition for rehearing presented only matters considered on original hearing and further examination disclosed no reason why former opinion should be disturbed petition was denied.”

A complete answer to the new arguments of the defendants is, that such meaning or meanings, (that “contributes” means including as of the date the act took effect and at all times thereafter) could not possibly have been the intention of the legislature because they would completely nullify the provisio in **Subsection “b” of Section 12** of the act. Said provisio is:

“That every such teacher upon ceasing to be a holder of such contract and being otherwise eligible to membership in this system shall forwith become a member of the system.”

The words “upon ceasing to be a holder of such contract” presuppose and show clearly that the legislature intended that every such teacher had the right to do something about “ceasing to be a holder of such contract” after the act took effect, that is, in the future.

A holding that a teacher would be forever disqualified from becoming a member of the state system if he were the “holder of such contract” on the date the act took effect and at all times thereafter would prevent every such teacher from doing exactly what the provisio in the statute permits. Apparently everyone concedes that the words “every such teacher upon ceasing to be the **holder** of such contract” refers back to the words “every teacher who is the **holder** of a retirement annuity **contract** with the Teachers’ Insurance and Annuity Association of America” etc. Our division point is, as to whether or not the word “contributes” refers back to the word “contract” which says “contract with the Teachers’ Insurance and Annuity Association of America” etc.

We agree with the defendants when they state on page 11 of their brief:

“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 plaintiff” and “that such contracts were not assignable”.

The situation is as stated by the defendants in their first brief:

“The contract cannot be forfeited, canceled or assigned.” Page 20.

In other words there is no disagreement between the parties in this case that a “teacher who is the holder of a re-

tirement contract with the Teachers' Insurance and Annuity Association of America as provided in Section 12 of the act cannot dispossess himself of it by assignment." Therefore, the words "in which the State of Utah, or any subdivision thereof, contributes part of the premium under said contract" must refer to the Teachers' Insurance and Annuity Association of America contracts, for the reason that the proviso would mean nothing if it did not. The legislature knew that the contracts could not be assigned, and so it expressly provided, that any teacher who was the holder of such contract could cause the state to cease making payments upon the premium and, therefore, "forthwith become a member of the system."

We have now answered the brief of the defendants to page 12 thereof. At the top of page 12 they set out the only other heading, which they argued in their brief:—

"ASSUMING THAT THE LANGUAGE OF SECTION 12, 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."

This matter was covered in its entirety in the first presentation of the case.

From this point on we shall answer the balance of the defendants' brief and in connection therewith present an argument, which we believe completely meets the dissenting opinion filed.

Beginning with page 13 of the defendants' brief, the defendants attempt to prove that the plaintiff by becoming a

member of the state system causes the State of Utah to lose something that it has paid into the Carnegie system. They also claim that the plaintiff will receive “double beenfits” if he is permitted to become a member of the state system. If it were not for the apparent belief of the writer of the dissenting opinion that the plaintiff would receive double benefits, we would believe that the attorneys for the defendants were willfully misrepresenting the facts. At no time has the plaintiff contended that he is entitled to credit for prior service, from and including November 1, 1923, to and including December 31, 1937, the time during which the University contributed in his behalf to the Carnegie system. In fact it is stated in the plaintiff’s first brief that he is not entitled to such credit and it was so stated in the argument before this Court. We believe, and admit, that the plaintiff is not entitled to credit for such prior service during the period stated, because of **Subsection 6 of Section 3** of the act. It is as follows:

“Prior Service’ shall mean service rendered prior to July 1, 1937, **in a status requisite for membership** in the retirement system.”

This provision can mean only one thing and that is, that the plaintiff is not entitled to credit for prior service during the period mentioned. This is the only and entire period that the State of Utah contributed part of the premium to the Teachers’ Insurance and Annuity Association of America contract.

At this point we also wish to state that it appears to us that the defendants at all times since the plaintiff attempted to be considered a member of the state system, have tried to prejudice his cause by representing that he, the plaintiff,

was dishonestly attempting to force the State of Utah to pay him double benefits. The defendant, Milton B. Taylor, at all times since the case started was and still is the executive secretary of the Utah Educational Association. He went so far as to bring this matter before the house of delegates of the Utah Educational Association with resulting newspaper publicity taking issue with the decision of this Court holding in favor of the plaintiff. There was quite an article in the daily newspapers on the subject. We can see no reason why, Milton B. Taylor and the house of delegates of the Utah Educational Association, did as they did, except for the purpose of getting the matter in the newspapers in an attempt improperly and unethically to put pressure on this Court to decide in favor of the defendants on their rehearing, which, at that time, was pending. The morals and ethics of the teaching profession are popularly supposed to be higher than those of the legal profession. Most lawyers would not think of attempting such a thing. Mr. Taylor and the defendants have smugly asked former Justice Elias Hansen, office associate of Mr. Hilton, to appear as a friend of the Court in this case, representing the Utah Educational Association, and to make it appear that the Utah Educational Association has voluntarily taken the matter up in the interests of what it thinks is right. It is our understanding that the Utah Educational Association originally hired Mr. Hilton in this case. At any rate the facts cannot be disputed that the defendant, Milton B. Taylor, as executive secretary of the Utah Educational Association, is one of the moving spirits in this matter and he is one of those vitally interested in defeating the plaintiff's contention. We do not believe that the large membership of the Utah Educational Association under-

stands this case, and apparently its house of delegates, which we understand comprises only a small part of the entire organization, merely rubber-stamped the actions of its executive secretary, Milton B. Taylor, and approved his report to it.

Upon retirement the plaintiff will obtain monthly payments from his contract with the Carnegie Association, as and for the full amount and for the period of time only, that the payments were made. There will be no loss of the state payments to this fund, either to the plaintiff or to the State of Utah, or any subdivision thereof, and it will not react to the detriment of the state or any taxpayer or other teachers, and could not be construed as an abandonment of said contract as argued in the brief of the defendants. There will not be duplication payments made by the State of Utah for the period from 1923 to 1937 or for any portion of that time because the act expressly provides against it. The representation that the plaintiff will receive double benefits is entirely untrue. The State of Utah, will lose nothing, Milton B. Taylor will lose nothing, the other defendants will lose nothing, the Utah Educational Association will lose nothing, and the taxpayers will lose less, as hereinafter stated, for that particular time.

The plaintiff is not abandoning his contract with the Teachers' Insurance and Annuity Association of America. He is only to receive benefits from it for the period from November 1, 1923, to December 31, 1937, upon retirement. He will be credited under the state system for prior service for the period before 1923, when he was a teacher.

On page 17 of the defendants' brief they state, as follows-

“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.”

This statement is incorrect. As proof that defendants know that said statement is incorrect they have quoted on page 20 of their brief the very provisions of Section 21 of the Act which shows that said statement is incorrect. The portion of said Section 21, is as follows:

“For the purpose of this section, the holder of a retirement annuity contract with the Teachers’ Insurance and 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.”

The statement made by the defendants on page 18 of their brief that “the plaintiff and other teachers similarly situated may continue to indefinitely shift their position by being entitled to membership in the state system for one month or more, and then upon a change of mind return to the Teachers’ Annuity and Insurance Association of America or some other private organization” is not true because of the provision of the law just quoted above.

We have carefully read and reread the argument advanced by the defendants on page 19 and the very top of page 20 of their brief in an attempt to determine some logic in it. We admit our total inability to do so. In the first place, part of it is based upon the false premise that a teacher who is a

holder of a Carnegie contract on the date the act takes effect is thereafter disqualified from becoming a member of the state system. We further wish to state in this connection, that a member of the state system has a right to transfer to the Carnegie system and take all of the funds with him that the State of Utah has contributed for him into the state system. Once he has done so, however, he can never return to the state system because of the provisions of Section 21 hereinabove quoted. The law permits a holder of a Carnegie contract to transfer to the state system but it, of course, cannot require him to take the money that the state has contributed to the Carnegie contract and deposit it in the state system. Hence the provision set forth in Subsection 6 of Section 3 of the act which prevents him from receiving credit for that period for prior service. Said subsection is as follows:

“Prior Service’ shall mean service rendered to July 1, 1937, in a **status requisite for membership** in the retirement system.”

On pages 20 and 21 of the defendants’ brief they attempt to show that the prevailing opinion is wrong in the construction given of Section 21. The argument is so foolish that we do not believe it necessary to attempt to set out a detailed answer. They, however, complain, because they say, the word “only” is interpolated in the section. The act itself so provides. It does not use the word “only” but it states “for the purpose of this section”. This excludes it from applying to any other sections of the act. The entire argument of defendants completely ignores the portion just quoted above of said section and is, therefore, based entirely upon a false premise, while the prevailing opinion takes this section into consideration and is entirely logical and clear.

On page 25 of the defendants' brief, they state as follows:

"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."

The defendants have spent the entire first half of their brief in arguing that the Supreme Court was entirely wrong in attempting to make a construction of and construe the language of the statute in question because, as stated by the defendants, "the language is certain and unambiguous". They have in this portion of the brief entirely changed their position and apparently ask this Court to grant a rehearing on the ground that the statute is uncertain and ambiguous. We take cognizance of the fact that the defendants in the heading of the second portion of their brief state that "Assuming that the language of Section 12, Chapter 85, Laws of Utah 1937, is so uncertain and ambiguous as to permit of or require a construction" etc. They have, however, apparently abandoned the "assuming", for the sake of argument, in making the statement just quoted above on page 25 of their brief.

On page 26 of the defendants' brief they refer 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 and Annuity Association". We wish to point out, however, that the persons mentioned are not teaching, but are merely doing experimental work on farms or experimental work at the college, and are, therefore, not teachers as defined by the act in Sec-

tion 3, Subsection 3. Consequently, they are not eligible for membership in the state system in spite of the contention of the defendants.

According to the act a member of the Teachers' Retirement System upon retirement is entitled to compensation composed of three parts. First, an annuity which shall be the actuarial equivalent of his accumulated contributions. Secondly, a pension bought by the state equal to the above annuity. Thirdly, an additional pension determined by the number of years of prior service of the teacher. The dissenting opinion seems to resolve about the amount paid under this prior service section of the statute, whether or not plaintiff will receive double benefits and whether or not the reserve funds of the Teachers' Retirement System will be put in jeopardy by great numbers of teachers from the University transferring from the Teachers' Insurance and Annuity Association of America to the State Teachers' Retirement System. These two points (two of the major points in Justice Wolfe's dissenting opinion) will be answered in the above order.

The Teachers' Retirement Act, **Section 27**, provides for the amount of retirement allowance; **Subsection (3)** declares the amount to be "an additional pension purchased by the contributions of the state, which shall be equal to one-seventieth, except as provided in the sentence next following, of his final compensation multiplied by the number of years of **prior service** credited to him"

The legislature then very carefully provided that double benefits could not be obtained by any teacher by defining "**prior service**" in **Section 3, Subsection 6** as follows:

"Prior service' shall mean service rendered

prior to July 1, 1937, in a status requisite for membership in the retirement system."

We make no claim that from November, 1923, to December, 1937, plaintiff was serving in a "status requisite for membership". We concede that for the above time plaintiff is not eligible to receive credit for prior service in his retirement allowance. Under the prior service clause—Section 27—if plaintiff had never belonged to the Teachers' Insurance and Annuity Association of America he would have received credit as prior service for the period from July 1, 1904 to July 1, 1937. This would amount to $\frac{33}{70} \times \$2500 = \1178.57 per annum. Due to the term from November 1923 to December 1937, during which the State of Utah contributed to the Teachers' Insurance and Annuity Association of America plaintiff can only hope for a prior service allowance of $\frac{19 \frac{1}{3}}{70} \times \$2500 = \$690.48$ per year. The Teachers Retirement System will pay the plaintiff in this case \$488.09 less per year than it would have been obliged to pay had not the plaintiff had a contract with the Teachers' Insurance and Annuity Association of America from November 1923 to December 1937. During the entire time covered by the "prior service" section of the statute the State of Utah contributed on behalf of plaintiff the sum of \$2475 to the Teachers' Insurance and Annuity Association of America. If plaintiff lives for 15 years after retirement the Teachers' Retirement System will save \$488.09 per annum due to the fact that he held a contract to which the State of Utah contributed for 14 years. This will amount to \$7321.35 during the 15 years. In other words if plaintiff lives 15 years after he retires the state of Utah will have saved \$7321.35 minus \$2475.00 (amount paid to the Teachers' Insurance and An-

nuity Association of America) or a total of \$4846.35. If plaintiff lives 20 years after retirement the state will have saved \$7286.80. Instead of it being a financial burden on the state for teachers in the University to have been members of the Teachers' Insurance and Annuity Association of America we see that the State of Utah realizes a great financial gain under this act due to such membership.

The only reason that a teacher who is the holder of a contract with the Teachers' Insurance and Annuity Association of America would transfer to the State Teachers' Retirement System would be to obtain credit for **prior service**. **Section 9, Subsection (e)** states in part:

“——Credit for prior service shall be granted to each member who has rendered such service as defined herein and **who enters the retirement service prior to July 1, 1938** ——”.

It is thus seen that there will be no general flow of teachers from the Teachers' Insurance and Annuity Association of America to the Teachers' Retirement System, because there is no inducement for them to transfer after July 1, 1938. As nearly as we can determine there are only 3 other teachers in the State of Utah who are eligible for prior service due to the fact that no other teachers have joined the Retirement System by having the State of Utah cease making contributions to the Teachers' Insurance and Annuity Association of America before July 1, 1938. Instead of a flow from the Teachers' Insurance and Annuity Association of America to the State Teachers' Retirement System the flow will be in the other direction as the younger teachers in the University will leave the state system as soon as possible for the Carnegie system due to the greater annual payments

per year from the Carnegie system than from the state system.

As stated before the only reason and purpose for teachers to transfer from the Carnegie system to the state system would be to obtain the benefits acquired under the "prior service" section.

If the teacher is not an elderly teacher and has not a great many years of prior service there exists no reason for changing and he will consequently not try to do so. That is the reason why only 3 other teachers have ceased making payments to the Carnegie system and have attempted to join the state system.

From the above argument it is immediately obvious that there cannot be double benefits and that the strain on the reserves of the state system can be immediately determined by the Retirement Board and will not, in any event, be of such great magnitude as to endanger these reserves.

We have carefully read the discussion in the dissenting opinion on the construction of Section 12 of the act. We believe that the opinion does not take into consideration the reason for the disqualifications stated and the result that the legislature attempted to reach. The State of Utah would not be concerned because some person was the holder of a Carnegie contract or because he was a contributing member to the Carnegie system. The state becomes interested for only one reason and that is, when and because the State of Utah contributes part of the premium. It is our opinion that the main reason that the legislature made the change in the language from the act as originally written was for the reason just stated.

This idea was inserted in Subsection "b" of Section 12, so as to disqualify holders of Carnegie contracts as long as the State of Utah was contributing. There would be no reason or justice in the state disqualifying a man just because he happened to be a holder of a contract if the State of Utah had never contributed. The defendants agree with this construction as heretofore shown in this brief. There are two other facts that we believe have not been sufficiently stressed heretofore, which tend strongly to support the view of the plaintiff as to the proper construction of the act. The portion in question is, as follows:

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

"(a) ——— .

"(b) Every teacher who is the holder of a retirement annuity contract with the Teachers' Insurance and 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."

It is to be noted that the first comma, in the sub-paragraph precedes the words "in which the state of Utah, or any subdivision thereof contributes part of the premium". The comma sets off the preceding part of the paragraph and places all of it in the same class. We also submit that if the argument in the dissenting opinion were correct then the portion "contributes part of the premium" would only refer to the word "company" and would not refer to the words "with any other private organization" because "company" is

preceded by “or” just the same as “with any other private organization” is preceded by “or”, and there is no punctuation separating the latter part of said paragraph which is “or with any other private organization or company” from the preceding part which is “that every teacher who is a holder of a contract with the Teachers’ Insurance and Annuity Association of America”.

The proviso says:

“That every such teacher, upon ceasing to be the holder of **such** contract” — “shall forthwith become a member of the system”.

“**Such** contract” refers back to the word “contract” in the second line in the subsection and is the only word to which it could refer. Without the use of the word “contract” in the second line of said subsection the portion as to private organization or company would not make sense, which shows conclusively that the contributing part of the paragraph refers back to the Carnegie provisions, as well as to the other provisions.

We also desire to specifically call the attention of the writer of the dissenting opinion to the words “**any other**” which immediately preceds “private organization or company”. The section reads “Every teacher who is the holder of a retirement annuity contract with the Teachers’ Insurance and 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”. When the words “any other” are given their proper meaning in said section and considered in light of the Carnegie provisions, the section would read:

“Every teacher who is the holder of a retirement annuity contract with the Teachers’ Insurance and Annuity Association of America or with any other” — “in which the State of Utah or any subdivision thereof contributes part of the premium under said contract.”

Do not the words “any other” definitely tie up the Carnegie provisions with the words “contributes part of the premium”?

We most sincerely urge and contend that they do. We have gone into the matter of the construction of this paragraph in great detail in our first brief. We respectfully request the Court to refer to it as a further argument in favor of our contention and as a further answer to the contention of the defendants.

The application for a rehearing should be denied.

Respectfully submitted,

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