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Utah Supreme Court

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Huggins and Huggins; Wade M. Johnson; Attorneys for Appellants;
Samuel C. Powell; Debrah Van Dyke; Dobbs and Dobbs; Attorneys for Respondents;

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7643

IN THE

Supreme Court

OF THE STATE OF UTAH

FLORENCE HIRST NEWCOMB, a retired teacher of the Ogden City Public Schools for herself and all other retired public school teachers similarly situated,

Respondents,

vs.

OGDEN CITY PUBLIC SCHOOL TEACHERS' RETIREMENT COMMISSION, H. A. MACFARLANE, ALPHILD HENDRICKSON, T. O. SMITH, GERARD KLOMP, LLOYD I. ALVORD and ASAEL MOULTON, as members of Ogden City Public School Teachers' Retirement Commission; BOARD OF EDUCATION OF OGDEN CITY, a public corporation, H. A. MACFARLANE, for himself and all other members of Ogden City Public School Teachers' Retirement Association who voted in favor of dissolving said Association; FLORENCE B. DRAKE, for herself, and all other members of Ogden City Public School Teachers' Retirement Association who voted against dissolving said Association,

Appellants.

No. 7643

FILED
MAY 28 1951
Clerk, Supreme Court, Utah

BRIEF OF APPELLANTS

Appealed from the District Court of the Second Judicial District of the State of Utah, in and for Weber County.

Hon. CHARLES G. COWLEY, District Judge

HUGGINS and HUGGINS and WADE M. JOHNSON
Ogden, Utah
Attorneys for Appellants

SAMUEL C. POWELL and DERRAH VAN DYKE and
DOBBS and DOBBS, Ogden, Utah
Attorneys for Respondents

Filed this ..... day of ....., 1951

By ....., Clerk

..... Deputy Clerk

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IN THE

Supreme Court

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FLORENCE HIRST NEWCOMB, a retired teacher of the Ogden City Public Schools for herself and all other retired public school teachers similarly situated,

Respondents,

vs.

OGDEN CITY PUBLIC SCHOOL TEACHERS' RETIREMENT COMMISSION, H. A. MACFARLANE, ALPHILD HENDRICKSON, T. O. SMITH, GERARD KLOMP, LLOYD I. ALVORD and ASAEL MOULTON, as members of Ogden City Public School Teachers' Retirement Commission; BOARD OF EDUCATION OF OGDEN CITY, a public corporation, H. A. MACFARLANE, for himself and all other members of Ogden City Public School Teachers' Retirement Association who voted in favor of dissolving said Association; FLORENCE B. DRAKE, for herself, and all other members of Ogden City Public School Teachers' Retirement Association who voted against dissolving said Association,

Appellants.

No. 7613

APPELLANTS' BRIEF

STATEMENT OF FACTS

The facts in this case are substantially the same as the facts stated in the case of "FLORENCE HIRST NEWCOMB, a retired teacher of Ogden City Public Schools, for herself and all other retired Public School

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Teachers similarly situated, Plaintiff, v. Ogden City Public School Teachers' Retirement Commission, et al.", an action originating in this court, being numbered 7352, the facts being stated in the plaintiffs' brief and particularly the opinion of this court filed May 12, 1950, Ut. , 218 P. (2) 287, which are hereby adopted by reference. In addition, however, the Board of Education of Ogden City and H. A. Macfarlane, for himself and all other members of Ogden City Public School Teachers' Retirement Association who voted in favor of dissolving said association, and Florence B. Drake, for herself and all other members of Ogden City Public School Teachers' Retirement Association who voted against dissolving said association, are included as parties defendant. The cause was filed in the District Court of the Second Judicial District in and for Weber County. After hearing brief evidence and considering the stipulations of the parties, the cause was decided in favor of the plaintiffs and against the defendants, the Honorable District Court adjudging Chapter 91, Laws of Utah, 1949, authorizing the dissolution of teachers' retirement associations, unconstitutional (P. 053).

THE EVIDENCE

The defense is that the legislature lawfully proceeded in the adoption of Chapter 91, Laws of Utah, 1949; that the defendants lawfully proceeded in the dissolution of the association on May 24, 1949, and terminated its existence as of May 31, 1949; that the system created under Chapter 29 of Title 75, Utah Code Annotated, 1943, and prior statutes was not actuarily sound and is now insolvent; that as additional members retire, it will

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become more insolvent; that by reason of their membership therein members are penalized under the State Retirement Plan to the extent of one-seventh of the normal benefits of the state plan; that many of the members in the local association can never qualify for benefits in the local, notwithstanding the penalty imposed upon them; and that hence the purpose of the plan as announced by this Honorable Court, that is, to induce teachers to attach themselves to the teaching profession in the Ogden School Districts, has failed; that the contrary now exists. Defendants deny that the Board of Education of Ogden City as such is liable for any contributions to the association. The evidence shows that all plaintiffs except two, Mary J. Blucher and Blanch K. McKey, receive benefits from the State Retirement Association (P. 14, also defendant H. A. Exhibit 3. The red pencilled figures following each name represents the monthly benefit of each annuitant.) Each annuitant received $50.00 per month from October, 1934, to May, 1947, (P. 17). In June, 1947, annuitants received only $42.00. From July, 1947, to May, 1948, each annuitant received only $40.00 a month, the reduction resulting from lack of money in the current fund. In June, 1948, each annuitant received $100.00 to bring the annuities from July, 1948, through 1948 up to $45.00 per month. July, 1948, to January, 1949, each annuitant received $40.00 per month. February, 1949, through April, 1949, each received $45.00 per month. In May, 1949, each annuitant received $135.00, and from June, 1949, through April, 1950, each annuitant received $50.00 per month (P. 18.) No payments have been made from current contributions since May, 1949. Members of the association pay one

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per cent of their annual salary not to exceed $25.00 per annum, which is matched by the Board of Education from funds received by it from the State Treasurer (P. 20). Annuitants have contributed a total of $9,900.00 during their membership in the association and have received up to date the case was heard $100,173.60 (defendant H. A. Exhibit 2). For the past ten years contributions from members and paid-outs to annuitants are as follows:

CONTRIBUTIONS BY MEMBERS

1940-41	$4,947.62
1941-42	5,099.62
1942-43	5,830.78
1943-44	6,298.60
1944-45	6,592.42
1945-46	6,883.11
1946-47	7,912.01
1947-48	8,642.45
1948-49	9,078.38
1949-50	9,694.07

matched by the school board from state funds.

PAID-IN BENEFITS TO ANNUITANTS

1939-40	$4,002.00
1940-41	6,150.00
1941-42	8,264.28
1942-43	8,172.57
1943-44	9,333.85
1944-45	11,363.54
1945-46	16,323.33
1946-47	17,420.72
1947-48	16,225.68

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1948-49	19,290.36	
1949-50	16,402.40	for 9 months only,
12 months would total	21,869.84.	

(P. 20).

There are now eligible for retirement as follows: Age sixty-nine, three; sixty-eight, one; sixty-seven, three; sixty-six, one; sixty-five, four; sixty-four, one; sixty-three, four; sixty-two, four; sixty-one, one; sixty, five, or a total of twenty-seven now eligible for retirement and for the following ten years there will be eligible for retirement: Age fifty-nine, nine; fifty-eight, twelve; fifty-seven, twelve; fifty-six, seven; fifty-five, eight; fifty-four, six; fifty-three, twelve; fifty-two, eighteen; fifty-one, seven; fifty, sixteen, a total of one hundred seven (P. 25 and defendant H. A. Exhibit No. 4), making a total of 134 eligible for retirement, twenty-seven of whom must retire during the next ten years.

The net worth of the funds as of June 30, 1949, was $76,503.46, of which $70,284.00 was the permanent fund and $6,362.24 was in the current fund (P. 24). The cost of buying annuities of $50.00 per month for present annuitants during their life expectancy is $276,767.50 (Page 6. See also cross-complainants' Exhibit 1). There are fifteen members of the dissolved association now who can never qualify for any benefits under the local but who are penalized up to one-seventh of their normal benefits under the state system, all of whom are required to make contributions to the local fund unless dissolved (defendant H. A. Exhibit 4, the red pencilled stars representing those who cannot qualify because they will

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not have taught thirty years, one-half of which being in the Ogden City School Districts, by the time they are required to retire).

The Ogden School Board is already levying the maximum amount of taxes possible by law (P. 32). Three members have reached retirement age since the association was dissolved (P. 36). Operational expenses of the association averaged approximately $75.00 annually (P. 37). All contracts between members and the Board of Education were on an annual basis (P. 39), and the form of the annual contracts is shown in plaintiffs' Exhibit A and plaintiffs' Exhibit B. The cumulative balance of the permanent fund is shown on defendant H. A.'s Exhibit No. 5. It was stipulated by all of the defendants except Florence B. Drake and those for whom she appeared that all of the permanent fund belonged to and should be distributed to the annuitants.

SUMMARY

The evidence shows:

I

That annuities of $50.00 per month now exceed the contributions of members and the school district.

II

Fifteen members are legally disqualified to ever receive any benefit from the local fund.

III

Those members are compelled to contribute to the local fund until it is dissolved.

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IV

They are penalized to the extent of one-seventh of their normal benefits under the state fund.

V

The number of annuitants and the amount necessary to pay them an annuity of $50.00 per month is increasing and will increase rapidly.

VI

The permanent fund will be depleted (if annuities are permitted to be paid therefrom) before the great majority of members reach retirement age.

VII

More than seventy per cent of the voting membership voted to dissolve the association, precluding any possibility of a two-thirds favorable vote to increase their rate of contribution. All of them are being penalized in loss of benefits from the state fund, and most of them can expect to receive little or no benefits from the local fund when they reach retirement age because of the actuarial unsoundness of the plan.

VIII

Resulting in the local retirement system actually being a detriment rather than a benefit.

STATEMENT OF POINTS RELIED UPON

I

The complaint fails to state a claim upon which relief can be granted.

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II

The findings are insufficient to support the conclusions of law.

III

The findings and conclusions are insufficient to support the judgment and decree.

IV

The conclusions are contrary to law.

V

The judgement and decree is contrary to law.

POINTS AND AUTHORITIES

I

Chapter 91, Laws of Utah, 1949, must be held to be constitutional if it can be so held on any reasonable basis. Rowell v. State Board of Agriculture, 98 Utah 353, 99 P. (2) 6 and cases therein cited; Gubler, et al., v. Utah State Teachers' Retirement Board, et al., Utah , 192 P. (2), 580; Newcomb, et al. v. Ogden City Public School Teachers' Retirement Commission, et al, Ut. , 218 P. (2) 287; Driggs v. Utah State Teachers' Retirement Board, et al., 105 Utah, 417, 142 P. (2) 657.

II

The rights of claimants and others must be determined from the language of the act. Driggs v. Utah State Teachers' Retirement Board, et al., supra; Schofield v. Z. C. M. I., 85 Ut. 281, 39 P. (2) 346; Kern v. City of Long Beach, 179 P. (2) 799; State of Ind. ex rel

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Anderson v. Board, 303 U. S. 95, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482, cited in Driggs case, supra.

III

Chapter 91, Laws of Utah, 1949, does not impair vested rights. McLeod v. Fernandez, 101 Fed. (2) 20; Malone v. Hayden, et al., 329 Pa. 213, 197 A. 344; Cowles v. Morris and Company, 330 Ill. 11, 161 N. E., 150; Schofield v. Z. C. M. I., supra; Kern v. City of Long Beach, supra.

IV

The action of the members of the Ogden City Public School Teachers' Retirement Association on May 24, 1949, dissolved and terminated said association.

V

The Ogden City Public School Teachers' Retirement Commission is insolvent. Black's Law Dictionary, 2nd Ed., Page 638; 28 Am. Jur., Page 774, Section 2.

VI

The evidence shows that the local association tends naturally to discourage teachers from associating with the Ogden City School District instead of attracting teachers to it or holding them, contrary to the declared purposes of the act.

VII

The association already under existing law had the inherent power to dissolve and terminate under the provisions permitting increase or decrease in contributions. Section 75-20-9, U.C.A., 1943; 75-29-15, U.C.A., 1943.

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VIII

The local association is proved to be a legislative mistake, and legislators have the inherent power to correct their mistakes. Talbot v. Independent School District (Iowa, 1941), 299 N.W. 563, 134 A. L. R., 234, beginning Page 245; City of Dallas v. Trammel, 129 Tex. 150, 101 SW (2) 1001, 112 A.L.R. 997; Retirement Board v. McGovern, 316 Pa. 161, 174 A. 400; Driggs v. Utah State Teachers' Retirement Board, supra.

IX

The attorney general is interested in all actions for declaratory judgments and as such is entitled to be served with copy of the proceedings and to be heard. 104-62-11, U.C.A., 1943; Heminway and Moser Company v. Funk, 100 Ut. 72, 106 Pac. (2) 779.

ARGUMENT

I

Chapter 91, Laws of Utah, 1949, which is now known as 75-29-18A in the 1949 Cumulative Pocket Supplement, provides for dissolution of the Public School Teachers' Retirement Association, sets up the machinery to initiate a proceeding for dissolution and directs the distribution of remaining funds and assets of the association after dissolution. Upon written request of at least ten per cent of the members or upon its own motion the Retirement Commission may cause an election to be held by the members of the association to determine whether or not the association and its retirement system should be terminated. Each member of the association is entitled to written notice by mailing to his last known address at

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least ten days prior to the election of the time and place of the election. If a majority of the ballots cast by the members at such election favor termination, the association shall be terminated upon the date fixed by the members in the election. The act further provides that immediately after termination of the association the Retirement Commission shall distribute all of the remaining funds and assets of the association to its members and/or annuitants and/or claimants in such manner and order as to the commission shall seem proper or in the alternative, it shall petition the district court of the county in which the association is located for an order dissolving the association and distributing its funds and assets to such members and/or annuitants and/or claimants. It has not been suggested that the retirement commission did not regularly follow the procedure set out in the act. It had not reached the point of distributing the remaining funds and assets when the temporary writ of prohibition issued from the Supreme Court. It has made no effort since that time to distribute the said funds pending the outcome of this litigation. For aught we know the commission might have intended to petition the District Court in Weber County for an order of distribution, which order would have of necessity determined the rightful claimants of the balance of the fund and other assets.

It appears to the writer that any claimant, annuitant or member might have petitioned for such determination had the commission failed to do so, thus protecting the rights of all claimants. No one was denied his day in court under the procedure. There was no uncontrolled or unregulated delegation of power to the commission. The rights of the various claimants or classes of claimants

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are determined by law, as are the rights of claimants in a closed bank; and under Chapter 2, Title 7, U.C.A., 1943, there is delegated to the Bank Commissioner an administrative officer the authority to liquidate banks and distribute the assets thereof to the rightful claimants.

Section 7-2-12, U.C.A., 1943, the bank commissioner is given broad discretion and powers in the liquidation of banks; and when shown to have acted in good faith and in the exercise of wise and sound discretion, free from fraud, collusion or bad faith, courts will not interfere with his actions. In Re State Bank of Millard County, 84 Utah, 147, 30 P. (2) 211.

The District Court in the county where the bank maintains its principal office is given jurisdiction in the liquidation of the affairs of such institution 7-2-2, U.C.A., 1943. There, as in the instant case, all rights of claimants are within the jurisdiction of the court. Were it not for the provision giving the district court jurisdiction in such matters, there might have been an unlawful delegation of power.

This court said in Gubler, et al., v. Utah State Teachers' Retirement Board, et al., supra:

> "If there is reasonable doubt about the validity or invalidity of this act, then the duty of this court is to resolve the doubt in favor of constitutionality."

In Rowell v. State Board of Agriculture, 98 Ut. 353, 99 P. (2) 1 on Page 4:

> "But an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply."

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Justice Wolfe in his dissenting opinion tersely stated the law:

> "That legislative acts are to be held constitutional if there remains, after full analysis, a reasonable doubt. * * * To say that the statute is not void beyond a reasonable doubt is to say that it is valid."

Mr. Justice Cordozo in Mayflower Farms v. 10 Eyck, 297 U. S. 266, 56 S. Ct. 457, 80 L Ed. 675, says:

> "To doubt is to decide in favor of its constitutionality."

Judge Keller in Rohrer v. Milk Control Board, 322 Pa. 257, 186 A. 336 states:

> "The legislature is primarily the judge of the necessity of the law, and every possible presumption in favor of its validity will be indulged." State Board of Milk Control v. Newark Milk Company, 118 N. J. Eq. 504, 179 A. 116.
>
> "Courts ought not to pronounce any act of the legislature unconstitutional unless it is plainly so, so plain as to leave no doubt on the subject. To doubt is to affirm its constitutionality. There is no such theory as a doubtful constitutional statute. Every presumption is in its favor, and there is no stronger presumption known to law." Reynolds v. Milk Commission, 163 Va. 957, 179 S.E. 507, Annotation 110 A. L. R. 644.

This court recognized the announced principle in the previous case, Florence Hirst Newcomb, et al. v. Ogden City Public School Teachers' Retirement Commission, et al., Ut. , 218 P. (2) 287, in the following words:

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"We have the duty to uphold the constitutionality of the act if reasonably possible."

The Board of Education, strictly speaking, is not an interested party but is a vehicle through which the requirement that every teacher join the association is enforced by statute and through which the matching funds from the State Treasurer are channeled into the association.

> "There shall be paid semi-annually to the treasurers of the Boards of Education in the districts in which local systems are maintained an amount equal to the contributions made by said Boards of Education, as provided in Sec. 75-29-9 (2) * and there is hereby appropriated annually from the general funds of the state the amount required by this provision. The Board of Education in each district in which a local system is maintained shall certify to the state treasurer the amount paid by said Board of Education as provided in Sec. 75-29-9 (2)." 75-29-38, U.C.A., 1943.

It appears from the foregoing that it has no actual interest in the funds of the association and hence could hardly be concerned about a dissolution and distribution thereof. Teacher members were employed by the Board of Education of Ogden City on an annual basis only. There was no legal obligation to renew any contract from year to year or upon any basis. The board prepares the contracts annually in May and submits the same to members they desire to employ. It is fundamental that public employment is not held by contract as to continuance. Kern v. City of Long Beach, supra; Miller v. Kister, 68

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Cal. 142, 144 P. 813; Risley v. Board of Civil Service Commission, 60 Cal. App. (2) 32, 140 P. (2) 167; Nider v. City Commission, 36 Cal. App. (2) 14, 97 P. (2) 293; Mansfield v. Chambers, 26 Cal. App. 499, 147 P. 595.

II

The rights of claimants in this action must be determined by the language of the act itself and cannot be determined upon the basis of the Driggs case, supra. The contract from which vested interests have arisen was based not only upon the provisions of law entitling annuitants to benefits, but was limited by the provisions of Section 75-29-9, providing for contributions of one per cent of salaries not exceeding $2,500.00 as a maximum salary, and permitting the commission to increase or decrease the rate of salary deductions and limitations in case the proposed modifications have been approved by the board of education and by two-thirds of the ballots cast by the members of the association at an election called. It is also limited by the provisions of Section 75-29-15, U.C.A., 1943, providing for pro rating when funds insufficient. Those provisions were law at the inception of the contract with every annuitant and member, and they entered into the system presumably with the knowledge of those limitations. The provisions permitting increases and decreases in contributions and limitations of salaries from which contributions should be taken are general; and it may be argued, without restriction. The permission to decrease the percentage of contribution or the limit of salaries applicable thereto carried forward to its logical conclusion could dry up the funds completely. There is no provision for pro-

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rating under the state sytem. As a matter of fact the solvency of the state system is protected by an appropriation from the general fund each biennum. Section 75-29-38, U.C.A., 1943.

Rates of contribution are definitely fixed on an actuarial basis, Section 75-29-35, U.C.A., 1943, and there is no provision for increasing or decreasing rates; and hence the rights of annuitants and claimants under the local cannot be measured by the Driggs case, supra, which construed the state retirement fund.

It will further be noted that the local retirement act fixed a maximum of $600.00 per year with no minimum, 75-29-11, U.C.A., 1943, while benefits to annuitants under the state act are fixed on an actuarial basis and are definite and certain, based upon

> "(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement, and (2) a pension purchased by the contributions of the state equal to that portion of the annuity purchased by the accumulated normal contributions of the member, and (3) an additional pension purchased by the contributions of the state which shall be equal to one-seventieth, except as therein provided." 75-29-45, U.C.A., 1943.

It will be noted that under Section 75-29-21, U.C.A., 1943, under Sub-Paragraphs 18 and 19, the annuity and pension under the state system is "for life." The writer has been unable to find any such provision under the acts setting up local retirement systems.

It is recognized by appellants that plaintiffs do have

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vested interests in all of the permanent funds of the association but respectfully submit that those vested rights do not extend to the point of compelling members of the association against their will and to their detriment to continue making contributions and suffer the loss in benefits from the state system.

The Z. C. M. I. case, supra, is distinguishable from the present case in this, that the pension contract provided in Section 6 for a definite and permanent benefit as follows:

> "(6) The amount of pension to which an employee is entitled at sixty-five shall be the amount paid him when he actually does retire*",

and Section 12 requires:

> "(12) The rate of pension is to be based on salary and length of service as follows: a monthly pension of one per cent of the average monthly salary as shown by the payroll for the last ten years mutliplied by years of service."*

Thus it was only a mathematical computation as to what pension an employee would receive upon retirement under Section 12, and under Section 6 that became his guaranteed pension. Once he retired, there was reserved no power or authority for any modification. There is no such definiteness in the local retirement system. The only thing certain about it is that annuitants shall not receive more than $600.00 per year, which, considered with the reserved authority to increase or decrease contributions and the provision for pro rating among annuitants, is an express reservation for modification of

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the local system. The difference between the local annuity system and an annuity insurance policy must be very apparent, because under the annuity insurance policy premiums are fixed and based upon actuarial soundness. The company guarantees monthly annuities for life or for a definite period. A vested interest results immediately upon fulfilling the conditions of retirement, and there is no reservation for pro rating, for increasing or decreasing premium payments upon which the retirement benefits are based. The insurer, not the insured, fixes the rate of contribution, and the benefits are definitely pegged. For that same reason the instant case is distinguishable from Lynch v. U. S., 292 U. S. 571, 54 S. Ct. 480, 78 Law Ed. 1434, which involved war risk insurance.

The great majority of cases hold without dissent that the defendant, Florence B. Drake, and the other members of the Ogden City Public School Teachers' Retirement Association who voted against dissolving the same, are in no different condition or situation with respect to vested rights than are the defendants who voted for dissolution. No vested rights attach until all of the conditions precedent to retirement have been fulfilled and retirement actually effectuated. Talbot v. Independent School District, supra.

> "Until the employee has become eligible * his right to the retirement allowance is inchoate, and it may be affected by subsequent legislation." Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 151, 33 L. Ed. 430; Notzier v. McElroy, 182 Ga., 719, 86 S. E. 817; Crawford v. Teachers' Retirement Fund Association,

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164 Ore. 77, 99 P. (2) 729; Driggs v. Utah State Teachers' Retirement Board, supra, and cases therein cited; Kern v. City of Long Beach, supra.

III

The members of the Ogden City Public School Teachers' Retirement Association regularly followed the procedure set up in Chapter 91, Laws of Utah, 1949, in dissolving the association. It now stands dissolved. The only thing left to be done is distribution of the funds which are admittedly by appellants at least, the property of annuitants and could be distributed on the basis of life expectancy of annuitants or under order of the district court.

IV

The records show the association is insolvent in the sense that current contributions and interest on permanent fund are not sufficient to pay each annuitant $50.00 per month. It is further evident that as time goes on annuitants will receive less as more members retire. To say the least, it is entirely speculative that contributions will increase in any substantial amount, since the school district is already levying all the taxes permitted by statute, so that employment of additional teachers would simply reduce the salaries of all, and in view of the condition of the fund and the desire of the great majority of the members to dissolve, it is hardly likely that two-thirds of them would agree to an increase in contributions. Any change would likely be a decrease.

Insolvency does not necessarily imply bankruptcy, but insolvency is also used in a more restricted sense to

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express the inability of one to pay his debts as they become due in the ordinary course of his business. 28 Am. Jur., 744, Sec. 2; Black's Law Dictionary, 2nd Ed., Page 638. This is the sense in which insolvency is referred to herein.

V

Under the above facts and circumstances it is difficult to see wherein the annuities provided are an inducement for young teachers joining the system when it must be apparent to them that not only will they in all probability not receive any benefits from it but will actually be penalized in their benefits under the state system by joining the Ogden City School District, whereas, across an imaginary line between Ogden City and Weber County they may enjoy all of the benefits provided under the state system with none of the penalties imposed upon them under the local system with very little, if any, hope of ever obtaining any benefits from it. This court recognized in substance the above argument in McCrary v. Utah State Teachers' Retirement Board, et al., Ut. , 177 P (2) 725, wherein on Page 726 it said:

> "(1) The purpose of the Teachers' Retirement Act is to attract to and retain in the public school system qualified and experienced persons as teachers. Driggs v. Utah State Teachers' Retirement Board, 1943, 105 Utah 417, 142 P. (2) 657.
>
> "Amendments to the Teachers' Retirement Act which increase the retirement benefits clearly increase the inducement to teachers in the system to continue to serve and increase the inducement to

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qualified persons outside the system to become members thereof.

"However, increases in the benefits to teachers who have already retired do not substantially tend to attract qualified persons to the system or to induce members of the system to remain therein. Increases in benefits of persons who have previously retired do not substantially aid in the fulfillment of the purposes of the act."

VI

It appears to the writer that even under the law existing prior to the enactment of Chapter 91, Laws of Utah, 1949, the association had within itself the inherent power to dissolve and cease making contributions. Even under pension or annuity statutes which provide definite contributions and definite benefits many courts have decided that the statutes setting up pensions or annuities may be amended allowing reductions so long as the pensioner is not entirely deprived of it. Driggs v. Utah State Teachers' Retirement Board, supra; Kern v. City of Long Beach, supra.

Under the original acts for local retirement systems membership therein was entirely voluntary. Contributions were based upon only $1,200.00 of the member's salary. Later by Chapter 61, Laws of Utah, 1935, the amount of salary upon which contributions were based was increased to $2,100.00, and by Chapter 94, Laws of Utah, 1945, was again increased from $2,100.00 to $2,500.00. If the legislature could legally increase the amount of contributions to be paid by members, then

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surely conversely they had power to decrease the amount of contributions by legislative enactment after members had joined the system; and if the legislature has authority to decrease the contributions, it has the power and authority to dry them up completely. It is a matter only of amount in the increase or decrease of contributions. If it has such authority, then surely it may provide for a termination and dissolution so long as it does not take from those who are now receiving benefits their vested interests in the funds which have been accumulated.

Here, however, we have the additional features of the act setting up local retirement systems, permitting the increasing and decreasing of contributions and specifically providing for pro rating. Since the legislature has on several occasions examined the statute setting up local systems and have repealed portions and amended other portions but have continued the section relating to pro rating, it is manifest they intended that that provision should be given full force and effect. Otherwise, it, too, would have been amended or repealed. The system has always been an experiment and has long been recognized to be unsound; and when the state system was set up, provision was made for transfer of all local funds to the state fund and apparently as an inducement to transfer, the original act setting up the state system disqualified members of locals who did not transfer from joining the state system. 75-29-30 (D), U.C.A., 1943. That disqualification existed until the 1947 amendment, when Sub-Paragraph D was deleted, and Section 75-29-31, U.C.A., 1943, providing for transfer of membership was repealed.

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Section 18, Chapter 62, Laws of Utah, 1935, provided:

> "Any person desiring to become a member of the retirement association who has a membership in another retirement association, either within or without the state, may have his membership transferred upon such reasonable rules as the retirement board may prescribe, and in like manner a member of the retirement association may have his membership transferred to another retirement association."

And it will be noted that under Section 26 of that act almost the same identical procedure was set up to dissolve local associations, as is provided in Chapter 91, Laws of Utah, 1949. We quote that section in full:

> "Section 26. Manner of Dissolving Associations Heretofore Organized—Petition When Unorganized.
>
> "Whenever the teachers of a city of the first or second class in which a teachers' retirement association has been organized under the laws of this state, desire to dissolve any such retirement association and become members of the teachers' retirement association organized under the provisions of this act, they may do so in the following manner:
>
> "(1) A meeting of the members of the teachers' retirement association of any such city shall be called by the retirement commission giving ten days notice thereof by publication in one or more newspapers published in such city and stating therein the purpose of such meeting. If a majority of the members of such teachers' retirement association vote in

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favor of dissolving such retirement association and becoming members of the retirement association organized under this act then,

"(2) The retirement commission of such city shall meet with the retirement board organized under the provisions of this act and agree upon the terms under which the funds of the retirement association of such city shall be transferred to the association organized under the provisions of this act. When the funds of the teachers' retirement association of such city are transferred under the terms of such agreement to the treasurer of the Utah teachers' retirement and disability benefits association then the teachers' retirement association of such city shall thereupon be dissolved and the members thereof shall become members of the association organized under this act.

"(3) If a teachers' retirement association has not been organized in a city of the first or second class in this state, then the teachers employed in the schools of such city may become members of the teachers' retirement association organized under the provisions of this act by petition to the retirement board signed by a majority of the teachers in service of the board of education of any such city."

It will be noted that about the only difference in the procedure under that act and the 1949 act is the manner in which notice is given. Under the first act notice was published in one or more newspapers published in the city and stating therein the purpose of such meeting. Under the 1949 act the notice is more direct, that is, "in

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writing by mailing to his last known address at least ten days prior to the election of the time, place and purpose of such election." It will be noticed that in both acts the notice is given by the retirement commission. Under the 1935 act the initiative was entirely in the hands of the commission. Under the 1949 act the commission may initiate the proceeding to dissolve, but upon written request of ten per cent or more of the members it must call a meeting to vote on the question of dissolution. It is further noted under the 1935 act all of the funds of the local are to be transferred to the state association so that the legislature then recognized that the vested rights of annuitants and pensioners extended only to the fund itself and not to the system which required continuing contributions. True the 1937 act repealed the entire act of 1935, but the plan and system set forth in the 1935 act was carried forward into the 1937 act, the difference being that the 1935 act was entirely voluntary. Contributions were based upon each individual's actuarial data, which no one apparently knew how to compute, and in the 1937 act an actuarial basis was worked out upon which contributions were made and membership became compulsory except as to the members who belonged to a local, and their membership in the state association was voluntary. They were actually excluded under Section 12 (D) of the act, and provision was made for transfer from the local to the state under Section 13. That remained the law until 1947, when membership in the state system became compulsory as to all teachers. So that a substitute plan for the local system has been in existence ever since the enactment of the 1935 state act. Chapter 62, Laws of Utah, 1935.

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It was under the provisions of Section 75-29-29 (A) of the 1947 act that membership of all teachers in the state became compulsory under the state act. It seems to the writer that by that modification removing the disqualification of members in local systems from membership in the state system and actually requiring them to become members of the state system might logically be urged as evidencing an intention on the part of the legislature to provide a substitute with greater benefits to members of locals for the unsound and outdated local system. It seems from a reading of all the cases that no generalizations can be made in the rights of annuitants under pension systems; that each system must be construed from the particular statute or plans set up.

> "It is probably true that no court would question that where a particular installment of a pension has accrued there is a vested right in the pensioner to that installment. And many cases have considered that where official allowance of the pension has been made under a detailed plan complete in its scope and *containing no express reservation or one implied in law from the nature of the statute or other situation inherent in it* (*underscoring ours*) the pensioner has a right to continued payment undiminished in amount. Further than this, however, there can be no generalization, and the traditional rule would seem to apply inasmuch as it must appear positive from the nature and purpose as well as the specific language and details of the pension plan that *an intention was manifested to confer vested rights free from interference by the legislature or administra-*

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tive authorities created by it. As before stated, only a close scrutiny of the particular statute and plan evolved can fully answer questions of this kind.'' 137 A. L. R., Page 255, and cases therein cited.

Attention is called to the fact that under 75-29-15, U.C.A., 1943, the provision referring to pro rating attaches to annuitants and claimants, whereas Chapter 60, Laws of Utah, 1941, under which the Driggs case, supra, was decided, attaches the reduction in retirement allowances to members. Upon retirement a teacher ceases to be a member. See Driggs case, supra; also Z. C. M. I. case, supra.

VII

As hereinabove explained and shown by the evidence, the system of local pension systems is actuarily unsound, is a legislative blunder, is not performing the purpose for which it was created, and the legislature has the inherent power to correct its mistakes. Talbot v. Independent School District, supra; City of Dallas vs. Trammell, supra; 112 A. L. R. 997, supra; Retirement Board v. McGovern, supra; and cases cited on page 662 of the Driggs case, supra. 134 A. L. R. 234, beginning at Page 235, supra.

VIII

By the provisions of Sec. 104-64-11, U.C.A.. 1943:

''When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which

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involves the validity of * a statute o ranchise or permit alleged to be invalid, t ıey general shall be served with a copy of ceedings and be entitled to be heard."

The attorney general in this case ıot served with a copy of any of the proceedings ıntil after the case was tried, but on December 5, 1950, he acknowledged service of a copy of the complaint and waived the right to be heard thereon and consented that the action may proceed without his presence in the district court but reserved the right to be heard in the Supreme Court on appeal (P. 057).

CONCLUSION

We submit, therefore, that the judgment of the district court, declaring Chapter 91, Laws of Utah, 1949, unconstitutional, should be reversed and set aside; that the action of the members of the Ogden Public School Teachers' Retirement Association in dissolving as permitted by that act on May 24, 1949, was valid, and that the association is now dissolved, and that the Ogden City Public School Teachers' Retirement Commission be ordered to distribute the remaining funds and assets of the association as of May 31, 1949, to the lawful claimants thereof.

Respectfully submitted,

IRA A. HUGGINS

WADE M. JOHNSON

Attorneys for Appellants

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Service of the foregoing brief by receipt and retention of copies thereof acknowledged by each this ..... day of ....., 1951.

_____

_____

Attorneys for Respondents,
Florence Hirst Newcomb, et al.

_____

Attorney for Board of Education
of Ogden City

_____

Attorney for Florence B. Drake,
et al.

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