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CONSTITUTIONAL LAW - ACT CHANGING PENSIONS - IMPAIRING OBLIGATION OF CONTRACTS - DUE PROCESS

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CONSTITUTIONAL LAW — ACT CHANGING PENSIONS — IMPAIRING OBLIGATION OF CONTRACTS — DUE PROCESS — An Illinois statute provided for the compulsory retirement of teachers at the age of seventy with an annuity of $1500 a year for life, and an amendment thereto granted annuities on a sliding scale from $1000 to $1500 a year to teachers voluntarily retiring between the ages of sixty-five and seventy. These provisions were changed by an act of 1935 which abolished the provisions for voluntary retirement and fixed compulsory retirement at the age of sixty-five, with annuities reduced to a flat rate of $500 annually. Plaintiffs, who either had retired or were eligible for retirement at the time the act of 1935 was passed, contended that their rights to annuities were vested rights of which they could not be deprived, and sought to enjoin the defendants from complying with the terms of the act. *Held*, that the prior act did not constitute a contract to pay a fixed amount, but merely provided for gratuities which could be altered at the will of the legislature. *Dodge v. Board of Education of the City of Chicago*, 302 U. S. 74, 58 S. Ct. 98 (1937).

A pension granted wholly in recognition of past services is a mere gratuity giving rise to no contract rights and may be altered or withdrawn at the pleasure of the legislature.[1] The concept embodied in the word pension, however, has developed far beyond the original idea of a bounty "springing from the graciousness and appreciation of sovereignty," [2] and with this development have come changed theories respecting the nature and extent of the rights and obligations arising under pension legislation. The language of the statute is necessarily of prime importance in determining whether or not contract rights are created. Isolated words in and of themselves are probably of no great significance; [3] it is rather the objective sought to be achieved, manifested by the various provisions of the act, which dictates the result reached. Thus, provisions giving an employee the right to withdraw from the fund and recover back the contributions which have been deducted from his salary,[4] or making the acceptance of benefits under the pension scheme elective on the part of the employee,[5] are held sufficient to impart to the statute characteristics of a contractual nature. The fact that teachers are not classed as public officers gives a vested interest in a retirement fund set up by one state.[6] And it is even said that when services are rendered while the pension statute is in force, the provisions of the statute become part of the contemplated compensation and so a part of the contract of employment itself.[7] But aside from any provisions importing a binding obliga-

[1] Dale v. Governor, 3 Stew. (Ala.) 387 (1831); Chalk v. Darden, 47 Tex. 438 (1877); United States v. Teller, 107 U. S. 64, 2 S. Ct. 39 (1882).

[2] Eddy v. Morgan, 216 Ill. 437 at 449, 75 N. E. 174 (1905).

[3] The Court rejected the contention of the plaintiffs in the principal case, that a distinction was to be drawn between a "pension" and an "annuity." But see Retirement Board v. McGovern, 316 Pa. 161, 174 A. 400 (1934), where "retirement pay" is distinguished from "pension."

[4] Anders v. Nicholson, 111 Fla. 849, 150 So. 639 (1933); Retirement Board v. McGovern, 316 Pa. 161, 174 A. 400 (1934). In the latter case the court says (316 Pa. 161 at 177): "The legislature, in effect, makes this offer to the employee: The state or municipality will contribute so much money to a fund and you will contribute to the same fund for a given time on the basis of service performed. Conditions or qualifications are added for the benefit of the fund and the employee. The right is given to the employee to cease payment and withdraw from the fund, recovering back his contribution, when his services end. . . . It is difficult to understand where this relation lacks the elements of an executory contract if the employee and the state have directly or indirectly made any payments on account of it."

[5] Anders v. Nicholson, 111 Fla. 849, 150 So. 639 (1933); Ball v. Board of Trustees, 71 N. J. L. 64, 58 A. 111 (1904). The view of these courts is thus expressed (71 N. J. L. 64 at 66): "The annuity is not a pension granted by the state. . . . The fund is the result of contributions by the teachers who elect to take part in the scheme, and the rights of the contributors must necessarily depend upon the agreement under which they entered into the scheme."

[6] State ex rel. O'Neil v. Belid, 188 Wis. 442, 206 N. W. 213 (1925). See also State ex rel. Dudgeon v. Levitan, 181 Wis. 326, 193 N. W. 499 (1923), and State ex rel. Stafford v. State Annuity and Investment Board, 219 Wis. 31, 261 N. W. 718 (1935).

[7] Smith v. Auditor General, 80 Mich. 205, 45 N. W. 136 (1890); Opinion of the Justices, 45 N. H. 593 (1864); O'Dea v. Cook, 176 Cal. 659, 169 P. 366

tion, where the statutory scheme creates a fund out of public moneys it is generally held that the interest of the pensioner, at least to the point where there has been compliance with all precedent conditions, is not contractual.[8] This is not changed by the fact that the fund is comprised in part of compulsory contributions of the beneficiaries thereof, deducted by the proper official from their salaries.[9] The interest which was a mere expectancy created by law becomes vested only when the statutory conditions for retirement existing at the time of application have been met, or the award has been made or as of right should have been made.[10] Rights which accrue to the pensioner at that time may not be altered against his will by subsequent legislation without violating the constitutional prohibitions against the impairment of contract obligations and the

(1917); Aitken v. Roche, 48 Cal. App. 753, 192 P. 464 (1920); Klench v. Board of Pension Fund Commrs., 79 Cal. App. 171, 249 P. 46 (1926); Casserly v. City of Oakland, 6 Cal. (2d) 64, 56 P. (2d) 237 (1936). The statements to be found in these and other California cases do not appear to have been necessary to the particular decisions, but to have been dictated by a desire to declare the statutes valid in the face of constitutional prohibitions forbidding the payment of extra compensation to public officers for past services and the expenditure of public funds for private purposes. On the validity of pension statutes in general, see DeWolf v. Bowley, 355 Ill. 530, 189 N. E. 893 (1934); State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912C 542 at 545 (1911).

[8] Pecoy v. City of Chicago, 265 Ill. 78, 106 N. E. 435 (1914); Gaffney v. Young, 200 Iowa 1030, 205 N. W. 865 (1925); Head v. Jacobs, 150 Ky. 290, 150 S. W. 349 (1912); Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075 (1914); State ex rel. King v. Board of Trustees, 192 Mo. App. 583, 184 S. W. 929 (1915); Bader v. Crone, 116 N. J. L. 329, 184 A. 346 (1936); People ex rel. Devery v. Coler, 173 N. Y. 103, 65 N. E. 956 (1903); State ex rel. Risch v. Board of Trustees, 121 Wis. 44, 98 N. W. 954 (1904); Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149 (1889).

[9] Griffith v. Rudolph, 54 App. D. C. 350, 298 F. 672 (1924); Hughes v. Traeger, 264 Ill. 612, 106 N. E. 431 (1914); Pecoy v. City of Chicago, 265 Ill. 78, 106 N. E. 435 (1914); State ex rel. King v. Board of Trustees, 192 Mo. App. 583, 184 S. W. 929 (1915); Bader v. Crone, 116 N. J. L. 329, 184 A. 346 (1936); State ex rel. Risch v. Board of Trustees, 121 Wis. 44, 98 N. W. 954 (1904); Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149 (1889). In the latter case the court says (132 U. S. 464 at 470): "Notwithstanding . . . the petitioner avers that the deceased police officer contributed out of his salary two dollars a month, pursuant to the law in question . . . the court, looking to the statute, sees that, in point of fact, no money was contributed by the police officer out of his salary. . . . Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property."

The contrary result is reached, however, under statutes which are deemed to give the employee a contractual right to a pension from the very inception of his employment. Anders v. Nicholson, 111 Fla. 849, 150 So. 639 (1933); Ball v. Board of Trustees, 71 N. J. L. 64, 58 A. 111 (1904); Retirement Board v. McGovern, 316 Pa. 161, 174 A. 400 (1934).

[10] O'Brien v. Retirement Board, 215 App. Div. 220, 213 N. Y. S. 738, affd., 244 N. Y. 530, 155 N. E. 884 (1926).

deprivation of vested rights.[11] Conceding that the interest of the pensioner becomes vested on the happening of the event upon which the right to participate in the fund is contingent, the courts are not agreed as to the extent of that interest. The view of at least one court is that it is a right to continue to receive installments in the amount fixed by statute as of the time of the event, and that any subsequent act altering the amount to the detriment of the pensioner is invalid as to him.[12] Other courts are of the opinion that while the pensioner has a right to receive *a* pension once the conditions precedent have been met, he does not have an immutable right to receive a specific amount; that future installments may be diminished by the adoption of a standard of measurement different from that existing at the time of retirement.[13] The more general rule, however, is that the pensioner has a vested interest in such amounts only as have actually fallen due, and that he does not have an absolute right to future installments.[14] Although the decision in the principal case is restricted to upholding a reduction in the annual payments, its language is such as to necessitate classification in the latter category.[15]

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[11] Kavanagh v. Police Pension Fund Commrs., 134 Cal. 50, 66 P. 36 (1901); O'Dea v. Cook, 176 Cal. 659, 169 P. 366 (1917); Casserly v. City of Oakland, 6 Cal. (2d) 64, 56 P. (2d) 237 (1936); State ex rel. Holton v. City of Tampa, 119 Fla. 556, 159 So. 292 (1935); Trotzier v. McElroy, 182 Ga. 719, 186 S. E. 817 (1936); Roddy v. Valentine, 268 N. Y. 228, 197 N. E. 260 (1935).

[12] Trotzier v. McElroy, 182 Ga. 719, 186 S. E. 817 (1936). And see Roddy v. Valentine, 268 N. Y. 228, 197 N. E. 260 (1935), where it was held that a pension could not be suspended under a statute, passed subsequent to the pensioner's retirement, which required suspension in case the pensioner accepted salaried employment in the civil service of the state or a municipality.

[13] Aitken v. Roche, 48 Cal. App. 753, 192 P. 464 (1920); Klench v. Board of Pension Fund Commrs., 79 Cal. App. 171, 249 P. 46 (1926); Casserly v. City of Oakland, 6 Cal. (2d) 64, 56 P. (2d) 237 (1936); State ex rel. Holton v. City of Tampa, 119 Fla. 556, 159 So. 292 (1935); City of Dallas v. Trammel, (Tex. 1937) 101 S. W. (2d) 1009.

[14] Griffith v. Rudolph, 54 App. D. C. 350, 298 F. 672 (1924); Beutel v. Foreman, 288 Ill. 106, 123 N. E. 270 (1919); People ex rel. Donovan v. Retirement Board, 326 Ill. 579, 158 N. E. 220 (1927); McCann v. Retirement Board, 331 Ill. 193, 162 N. E. 859 (1928); Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075 (1914); State ex rel. King v. Board of Trustees, 192 Mo. App. 583, 184 S. W. 929 (1915); Mell v. State ex rel. Fritz, 130 Ohio St. 306, 199 N. E. 72 (1935).

[15] As in the principal case, the courts adhering to this view generally speak of a pension in terms of a gratuity or expectancy. But compare the approach of the Texas court, which maintains that the same result may be reached by regarding the pension as a part of the contract of employment: "In our opinion, the contract entered into by the employee with the city is made subject to the reserved power of the Legislature to amend, modify, or repeal the law upon which the pension system is erected, and this necessarily constitutes a qualification upon the anticipated pension and a reserved right to terminate or diminish it." City of Dallas v. Trammell, (Tex. 1937) 101 S. W. (2d) 1009 at 1014.