

No. 17

TEACHERS' RETIREMENT ACT—CONSTITUTION

- Held: 1. The Teachers' Retirement System Act (Chapter 87, Laws of 1937, as amended by Chapter 202, Laws of 1939) is not in conflict with any provision of the Constitution of the State of Montana.
2. The Legislative Assembly may constitutionally enact an appropriation measure whereby the State contributes to the pension accumulation fund, established under the Teachers' Retirement System, in a lump sum by way of appropriation to such fund, and a further appropriation in a lump sum for the administration of the Act.

February 5, 1941.

Honorable Members of the House
Committee on Appropriations
House of Representatives
State of Montana
Helena, Montana

Gentlemen:

On January 31, 1941, your honorable body requested my opinion on the following questions:

"Is the Teachers' Retirement System Act (Chapter 87, Laws, 1937, as amended by Chapter 202, Laws, 1939) in conflict with any provision of the constitution of the State of Montana?"

"May the Legislative Assembly constitutionally enact an appropriation measure whereby the state contributes to the pension accumulation fund, established under the Teachers' Retirement System, a lump sum by way of contribution to such fund, and a further appropriation in a lump sum for administration of the Act?"

Taking up now your first question, it should be observed that at least thirty-two states have Teachers' Retirement System Acts. These Acts are based on joint annuity plans with the teachers in the state sharing the cost in varying degrees, with the exception of New Mexico and Rhode Island, whose plans are entirely supported by the State with no teachers' contributions. Colorado has a retirement plan effective in first-class districts only and supported by those districts. The basic pattern of all the state-aided systems is the same. Some have made changes in requirements for retirement and use set amounts of retirement salary. A few states combine an insurance feature which makes possible a cash payment of sometimes one-half a year's salary or an entire year's salary payable to the beneficiaries if the teacher dies in service.

Teacher Retirement legislation in Montana is not new. In 1915 our Legislature set up a Teachers' Retirement Act whose principle is substantially the same as the present Act, known as Chapter 87, Laws of 1937, as amended by Chapter 202, Laws of 1939. (Sections 1113-1132, Revised Codes of Montana, 1935.) In substance, the provisions of the Teachers' Retirement Act passed in 1915 are:

Sec. 1. Creating the public school teachers' retirement salary fund and the public school teachers' permanent fund, the latter made up of "contributions made by teachers as hereinafter provided," income and interest, donations, legacies and "appropriations made by the state legislature from time to time to carry into effect the purposes of this Act."

Sec. 2. The retirement salary fund shall be made up of monies transferred from the permanent fund.

Sec. 4. There shall be deducted from the salary of every teacher, subject to the provisions of the Act, one dollar (\$1.00) from each month's compensation to be placed in said permanent fund.

Sec. 5. "No person shall be eligible to receive the benefits of this Act who shall not have paid . . . an amount equal to \$12.00 for each year of service, up to and including twenty-five years . . ."

Sec. 13. Every teacher of twenty-five years service, the last ten of which shall be in this State, is entitled to retirement and to receive during life an annual retirement salary of six hundred dollars (\$600.00) in quarterly installments.

Sec. 14. Any teacher who shall have served as such or a school officer for fifteen years and who, by infirmity, shall become incapacitated, may be retired or may, by proper authority, be compelled to retire, and shall receive an annual retirement salary in proportion to length of service.

Sec. 15. The authority shall determine what constitutes a school year.

Sec. 16. The Act is binding upon such teachers employed in the public schools of this State at the time of the approval of the Act, as shall on or before January 1, 1916, signify and (Section 17) upon all teachers elected or appointed after the approval of the Act.

Sec. 18. If any retired teacher shall be reemployed in the schools, her retirement salary shall be suspended during such period of re-employment. If any teacher retired for disability who has less than twenty-five years of service returns to service and later qualifies for retirement, the retirement salary on such second retirement shall be reduced so as to cover the amounts paid on the first retirement.

Chapter 87, Laws of 1937, as amended by Chapter 202, Laws of 1939, is the same in principle, as I have heretofore stated, as the Retirement Act passed in 1915. In substance, the provisions which are pertinent here as contained in the present Teachers' Retirement Act are:

Sec. 2. A Teachers' Retirement System is established for the teachers of the State of Montana, and placed under the management of a Retirement Board for the payment of retirement allowances and other benefits under the provisions of the Act. The retirement system created has such powers and privileges of a corporation as may be necessary to carry into effect the provisions of the Act. The Retirement System so created shall begin operations as of the first day of September, 1937, except that the State's contribution to the pension accumulation fund shall begin with the fiscal year, July 1, 1937, and such system shall be known as "The Teachers' Retirement System of the State of Montana" and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held in trust for the purpose for which received.

Sec. 4, subd. a. The membership of the Retirement System consists of all persons who are teachers in the public schools of the State during the school year 1936 and 1937, and who continue to be teachers. They shall become members as of the date of establishment, except that any such teachers may notify the Board on or before the 30th day of November, 1937, in such form as the Board may prescribe, that he does not desire to become a member and in such case, the Board shall exclude him from the membership.

Sec. 4, subd. b. All persons who become teachers or reenter the teaching service on or after the first day of September, 1937, shall become members of the Retirement System by virtue of their appointment as teachers.

Sec. 6, subdv. (1) (a). Any member in service who has completed fifteen years of credible service, the last ten years of which shall have been in this State and who has attained the age of sixty, may retire from the service, if he files with the Retirement Board his written application setting forth at what date, not less than thirty nor more

than ninety days subsequent to the filing thereof, he desires such retirement and notwithstanding that during such period of notification, he may have separated from the service.

Sec. 6, subd. b. After the first day of September, 1942, any member in service who has attained the age of seventy years shall be retired forthwith or on the first day of the calendar month next succeeding that in which the said member shall have attained the age of seventy years.

After providing for contributions to be made by the teachers, the Act provides that the State shall contribute to the Teachers' Retirement Fund by appropriation and that the Teachers' Retirement Act passed in 1915 (Sections 1113-1132, Revised Codes of Montana, 1935) shall be discontinued. However, the present Retirement Act provides for adjustments under the Act passed in 1915; and thus, in reality, the benefits under the Teachers' Retirement Act of 1915 are continued under the present Act, as governed by the adjustments therein set forth. It is obvious, from a study of the Teachers' Retirement Act which we are discussing here, that it is based on a joint annuity plan, with the teachers in the State sharing the cost in varying degrees—and thus corresponds with the majority of Teachers' Retirement Acts throughout the United States. We should observe that the Act of 1915 provided for an appropriation to the State and that our Legislature has heretofore appropriated funds as provided for in the present Act.

It is elementary that "where a statute is assailed as unconstitutional, the question presented is not whether it is possible to condemn it but whether it is possible to uphold it; and it will not be declared invalid unless its conflict with the Constitution is placed beyond a questionable doubt."

Mills vs. Stewart, 76 Mont. 429, 247 Pac. 332.

It should also be observed in determining whether a "purpose for which an appropriation is made is public, courts must be governed largely by the course and usage of government, the objects for which appropriations have been made through an extended course of legislative action, and what objects and purposes have been considered necessary for the support and for the proper use of government. Whatever lawfully pertains to them and is sanctioned by time and the acquiescence of the people will be held to belong to the public use."

Mills v. Stewart, cited *supra*.

Under our Constitution, it is the duty of our legislature to establish and maintain a general, common, uniform and thorough system of public schools and to provide adequate facilities and means for the education of all children.

Article XI, Constitution of Montana;

Grant et al v. Michaels et al, 94 Mont. 452, 464, 23 Pac. (2nd) 266.

It is evident from the foregoing that the legislature has the right to pass reasonable laws relating to public school teachers in order to carry out the purpose and object of our Constitution relating to our public school system.

In view of our Constitution and in view of the rules of statutory interpretation herein set forth, there can be no doubt as to the legislative purpose in establishing the Teachers' Retirement Act of 1915 and of the present Teachers' Retirement Act. Education is a paramount molding force in a democracy whose unwavering object is that of enriching this nation's life with minds of maturity, integrity of character and social sympathy. In fact, it is the teaching profession which has laid the very foundation of our civilization and has enabled that civilization to survive. While it is elementary that the teaching profession is affected by the

public interest, we might well say that the public interest is affected by the quality and permanency of that profession. Legislatures, knowing of the vital importance of the teaching profession to the welfare of our citizens, have undoubtedly passed acts such as the present Teachers' Retirement Act, which are beneficial to the teachers in order to "increase the efficiency of the teachers themselves and to aid and encourage them to devote their lives to a profession which, though essential to our civilization, has been but poorly encouraged and has too often been looked upon merely as a stepping stone to other employments."

State v. Hauge (N. D.), 164 N. W. 289.

It may be contended that the present Teachers' Retirement Act violates the State Constitution (Sections 3, 27, Article III; Sections 26, 29, Article V; Section 11, Article XII and Section 1, Article XIII) as well as the Fifth and Fourteenth Amendments to the National Constitution. In substance, Sections 3 and 27, Article III, Section 26, Article V, and Section 11, Article XII, as well as the Fifth and Fourteenth Amendments to the National Constitution thus invoked, are:

"The declaration that all persons possess the inalienable right of acquiring, possessing and protecting property; the guaranties that no person shall be deprived of life, liberty or property without due process of law, or be denied the equal protection of the laws; the prohibition against the passage of local or special laws for the management of the common schools; the requirement that taxes shall be uniform and laid by general laws for public purposes."

Trumper et al v. School District No. 55, 55 Mont. 90, 93, 173 Pac. 946.

Our Court has held that the Teachers' Retirement Act of 1915 did not violate the sections of the articles of our Constitution last specified, and our Court also held that the said Act of 1915 did not violate the Fifth and Fourteenth Amendments to the National Constitution. In upholding the constitutionality of the Teachers' Retirement Act passed in 1915, our Court states in part:

"There is no question of taxation involved. The legal relation of the State through its several Boards of School Trustees with the teachers employed by it is one of contract. It has the right to say upon what terms it will hire or authorize the hiring of persons to teach in its schools. It may, if it sees fit to do so, discriminate in the terms of its contract upon any basis it chooses to adopt or upon no basis at all. Here it has said to all teachers employed after the approval of the Act: 'Your contract shall have read into it the provisions of this Act; the salary you receive shall in all cases be one dollar per month less than the amount expressed in your contract, that dollar to go into the teachers' pension fund for your benefit when you become entitled to it; you may engage or not upon these terms, just as you like.'

"When the teacher engages, it is an acceptance of the terms and all discussion based upon the theory of taxation, having in mind that taxes are in invitum, is irrelevant.

"Neither, assuming the appellants can raise the question, is there any taking of property from the teachers, with or without due process of law, or any invasion of their right to acquire, possess, and protect property. The effect of the Act being as above stated, it results that the salary to be paid is a net amount after the 'contributions' or 'deductions' prescribed. It is not a gross amount, and thus in fact there is no taking. As declared by the supreme court of Wisconsin on a slightly different but essentially similar occasion: '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 * * * over it as always accompanies ownership of property. Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated, * * * the right to the specific sum promised became invested in the officer or his representative.'

"The Act is said to involve a denial of the equal protection of the laws, 'in that payment is made by consent with some teachers and is compulsory with others.' This is not correct. The deductions are by consent or contract in all cases, the mode of assent only being different as between teachers having contracts when the Act went into effect and those who contract after the approval of the Act and in contemplation of its terms. This distinction is as it should be. It certainly affords no ground of complaint . . .

"The prohibition against local or special laws cannot be invoked. A 'special' or 'private' Act is a statute operating only on particular persons and private concerns; a 'local Act' is an Act applicable only to a particular part of the legislative jurisdiction. The law in question here operates throughout the State and uniformly upon all who are subject to its provisions. It is thus not local or special, but a general law."

Trumper et al. v. School Dist. No. 55, 55 Mont. 90, 93, 94, 173 Pac. 946.

It is obvious that the present Teachers' Retirement Act does not violate the sections of the articles of our State Constitution last referred to, nor does it violate the Fifth and Fourteenth Amendments to the National Constitution, since it is, as I have said, the same in principle as the Teachers' Act passed in 1915, whose constitutionality as to said sections of the said articles or our State Constitution and as to said amendments to the National Constitution was upheld by the Montana case—Trumper et al v. School District No. 55, just cited. We now will examine Section 1 of Article XIII and Section 29 of Article V of our State Constitution with the view of determining whether or not the present Act violates those provisions.

"XIII, Section 1: Neither the State, nor any county, city, town, municipality, nor other subdivision of the State shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or joint owner with any person, company or corporation, except as to such ownership as may accrue to the State by operation or provision of law."

"V, Section 29: No bill shall be passed giving any extra compensation to any public officer, servant or employee, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim made against the State without previous authority of law, except as may be otherwise provided herein."

We should bear in mind at all times that the present Act, like the Teachers' Retirement Act of 1915, operates in futuro with the benefits computed with reference to the service of the teachers during a period before enactment of the law, as well as a period thereafter. In other words, as pointed out in the case of Trumper et al v. School District No. 55, supra, neither the present Act—nor did the Act passed in 1915—apply to past services only with the view of giving extra compensation. It cannot be contended that the Act is as though the State said to the teachers, "You have not been paid enough for your services, and we will now pay you what you deserve." Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered.

Mahon v. Board of Education, 63 N. E. 1107.

A careful examination of the Act shows it specifically requires that the considerations, therein contained for the teachers, have no application to cases where the teachers were not in service at the time the Retirement System was established or in force. Were this not so, then, of course, we might say that the grant of a pension was a mere gratuity (*Mahon v. Board of Education of City of New York*, cited *supra*).

The Act would seem to be legally justified on the ground that it is just simply compensating teachers for their services. It was held, in a state having similar constitutional provisions as the one we are now discussing, "that the Trustees of an Agricultural College and Mechanical College could accept the resignation of its president and re-elect him as president emeritus and give him a sabbatical leave for one year at a salary of \$5,000.00, with such duties as the Board might designate." It was held by the Court, in such case, that such an election and grant was not in violation of the letter or spirit of the Constitution or Statutes, and that they did not constitute a gift or gratuity and were for a public purpose—and thus sustainable on the ground of their beneficial effect upon the public service. The Court said in part:

"They do not constitute a gratuity or donation, but are for ground of their beneficial effect upon the public purpose, and are sustainable on the ground of their beneficial effect upon the public service. *State ex rel. Morris v. Handlin*, 38 S. D. 550, 162 N. W. 379; *Mackey v. Reeves*, 44 S. D. 153, 182 N. W. 700; *Nancolas v. Jones*, 47 S. D. 157, 196 N. W. 749; *Mills v. Stewart*, 76 Mont. 429, 247 P. 332, 47 A. L. R. 424."

Johnson v. Jones (S. D.), 216 N. W. 584.

Retirement pay has been spoken of simply as in the nature of an added salary allowance.

State v. Hauge, 164 N. W. 289.

In a State which had a constitutional provision similar to Section 29 of Article V of our Constitution, the Court ordered the State Treasurer to pay a sum of money to the plaintiff, the widow of a retired teacher who elected to take a lump sum in lieu of an annuity, one of the features of that State's Pension Act. This Court upheld the constitutionality of the Act and gave as its authorities, among others, that of our case of *Trumper et al v. School District No. 55*, cited *supra*.

See also the cases of:

Retirement Board v. McGovern (Pa.), 174 Atl. 400;

State v. Levitan (Wis.), 193 N. W. 499;

Fellows, Atty. Gen. v. Connolly, et al. (Mich.), 160 N. W. 581;

De Wolf v. Bowley (Ill.), 189 N. E. 893;

The Court of North Dakota, a State which has a constitutional provision substantially the same as Section 1 of Article XIII of our Constitution, upheld the Teachers' Retirement Fund as being constitutional. The Court said in holding that the measure did not violate the North Dakota Constitutional provisions:

"It is merely in the nature of an added salary allowance to public servants. If all of the people of the State may be taxed to pay the salaries of the state superintendent of public instruction and the state high school inspector, whose duties are largely to supervise the schools and their teachers, if they may be taxed to support the normal schools and the state universities which train teachers, they may certainly also be taxed in order to provide a fund which shall increase the efficiency of the teachers themselves and aid and encourage them to devote their lives to a profession, which, though essential to our civilization, has been but poorly encouraged, and has too often been looked upon merely as a stepping stone to other employments."

State v. Hauge (N. D.), 164 N. W. 289.

It has also been held that payment of pensions to municipal employees is constitutional and does not constitute extra compensation or a gift or gratuity under constitutional provisions substantially the same as the Montana Constitutional provisions we are now discussing.

Hammitt v. Gaynor (N. Y.), 144 N. Y. S. 123;

See also *Wright v. Craig* (N. Y.), 195 N. Y. S. 391.

In 1875 the people of the State of New York adopted amendments to that State's Constitution, known as Section 10 of Article VIII and Section 28 of Article III. Section 10 of Article VIII provided that:

"No county, city, town or village, shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation."

Section 28 of Article III provided:

"The Legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent, or contractor."

It is apparent that Section 10 of Article VIII of the New York Constitution was substantially the same as Section I of Article XIII of our Constitution, and that Section 28 of Article III of the New York Constitution was substantially the same as Section 29 of Article V of our Constitution. In a New York case, citing specifically the New York Constitutional provisions just referred to, it was pointed out that the State could provide a system of pensions to be given for services performed by school teachers, based upon the same principle as in our present Teachers' Retirement Act.

Mahon v. Board of Education of City of New York, 63 N. E. 1107, 1108.

In the State of New York, we find that it has substantially the same type of Teachers' Retirement Act as we now have in Montana (Book 16, Article 43-A, Consolidated Laws of N. Y. [1938].) Under the New York Constitutional provisions just mentioned, the New York Court held that Act to be constitutional and with almost the same reasoning as contained in the Montana case of *Trumper v. School District No. 55*, cited *supra*, said:

"We are of the opinion that there is no Constitutional question involved. The funds were public funds (*Matter of Board of Education*, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810), subject to some equitable considerations on the part of the members of the local association, perhaps, and they are to be paid out to existing annuitants in exact accord with their existing arrangements, while as to the future only those are to share in the fund who have contributed a certain portion of the annuity and who have conformed to the requirements of the general act."

In re Bristol et al. v. State Teachers' Retirement Fund Board, 160 N. Y. S. 410, 412.

I wish to point out that our Court has held that a pension act for soldiers of the World War, passed after the war had ended, violated Article XIII, Section 1 of the Montana Constitution (*State ex rel Mills v. Dickson*, 66 Mont. 76, 213 Pac. 227).

The case just mentioned is easily distinguishable from the cases herein cited, upholding the constitutionality of such Acts as our Teachers' Retirement Act, since the services involved in the Mills case had already been rendered. Furthermore the services had been rendered to the United States Government primarily. Such an Act as involved in the Mills case could not be sustained on the ground on which Teachers' Retirement

schemes are sustained, namely, that retirement provisions persuade competent people to remain in the services of the State. The Court in the Mills case expressly distinguished between services already rendered from those being rendered, as outlined in the cases of *Campbell v. Stewart*, 54 Mont. 504, 171 Pac. 755; and *Casteel v. State Board of Examiners*, 56 Mont. 621.

Our Court has held that the meaning of Section 29 of Article V is perfectly clear in that "it is beyond the power of the legislature to award extra compensation for the services of any officer, agent, servant or employee of the State after the services have been performed . . . , or, after contract has been awarded, to allow extra compensation to the contractor for the work contemplated by his contract."

Mills v. Stewart, 76 Mont. 429, 247 Pac. 332.

Our Court has also explained Section 1 of Article XIII as follows:

"The power to appropriate public funds and the power to levy and collect taxes are identical . . . In other words, the legislature has authority to appropriate public money for any purpose for which taxes may be levied and collected, and for no other purpose. But a reference to the history of half a century ago discloses that aid extended to railroads and other like business enterprises was frequently held to be for a public purpose . . . and it is made reasonably apparent that the object of the limitations in Section 1, Article XIII, and in Section 38, Article V, of our State Constitution, was to prevent either the legislature or the courts of this State, including aid extended to such business enterprises within the meaning of the term 'public purpose,' and this is the view heretofore expressed by this court . . . Our Constitution having thus restricted the meaning of the term 'public purpose,' it is apparent at once that if a particular appropriation is made for a public purpose, it is not a donation, and conversely, if it constitutes a donation it is not for a public purpose."

Mills v. Stewart, cited supra.

The Court, in the decision last cited, held that an appropriation of the legislature for the payment of a student injured while acting as agent for the state university was valid although the state could not be sued for it. The court held that, under such circumstances, the money was levied for a public purpose, and that there was in fact a legal obligation on the part of the State—although the State could not be sued.

We have already noted the language in the *Montana* case of *Trumper et al v. School District No. 55*, cited supra, as well as the cases herein cited which go to show beyond any question of doubt in my mind that the Teachers' Retirement System Act (Chapter 87, Laws of 1937, as amended by Chapter 202, Laws of 1939) is not in conflict with any provision of the Constitution of the State of Montana; and, hence, I answer your first question in the negative.

In answering your second question, it should be noted that the original Act provides for the amount to be payable by the State to the pension accumulation fund (Subdiv. 1 of Section 11 of Chapter 87, Laws of 1937), authorizing an appropriation of the ear-marked net receipts of the Liquor Control Board. In addition, the Act provides for an amount to be added to the expense fund by the State (c. of Subdiv. 5 of Section 8, Chapter 87, Laws of 1937).

In answering this question, we must determine if the proposed appropriation bill violates Section 23 of Article V of our State Constitution, which provides:

"Section 23. No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which

shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

Since I have held the Act itself constitutional and since appropriations by the Legislative Assembly are necessary for the functioning of the Act as provided for therein, it would appear that the proposed appropriation measure which you attached to your request for this opinion deals with only one subject, to-wit: The Teachers' Retirement System Act. In this connection, we find that our Supreme Court has held:

"Where all of the different parts of a statute have a natural connection and relate directly or indirectly to one legitimate subject of legislation, the Act is not invalid as containing more than one subject."

Merchants' Nat'l Bank v. Dawson County, 93 Mont. 310, 333, 19 Pac. (2nd) 892.

Our Court has also said in reference to the purpose of the constitutional provision under consideration:

"... the unity required by this Section is served notwithstanding the existence of many provisions in an Act where such provisions are germane to the general subject expressed."

Miller Insurance Agency v. Porter, 93 Mont. 567, 572, 573, 20 Pac. (2nd) 643.

"'Germane' means in close relationship; appropriate; relevant; pertinent."

State ex rel Nagle v. The Leader Co., 97 Mont. 586, 591, 592, 37 Pac. (2nd) 561.

In light of the foregoing decisions, it is my opinion that the appropriations under consideration are germane to the Act. It is elementary that the legislature may pass general laws, provided they are not, of course, repugnant to the provisions of our Constitution.

In fact, our Court has held:

"The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is entrusted with general authority to make laws at discretion."

Mills v. Porter et al., 69 Mont. 325, 329, 330, 222 Pac. 428.

In view of the constitutional provision referred to and in view of the authorities which I have herein cited with reference thereto, it is my opinion that the Legislative Assembly may constitutionally enact an appropriation measure whereby the state contributes to the pension accumulation fund, established under the Teachers' Retirement System, a lump sum by way of contribution to such fund, and a further appropriation in a lump sum for administration of the Act.

Respectfully yours,

JOHN W. BONNER
Attorney General