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Pensions--Impairment of Contractual Obligations--Vested Interest of Governmental Employee in Amount Provided

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3. The court should regulate the bar to protect the upright member of the bar from the wrongful practitioner.[18]

This inherent power is limited by only two things. The constitution and those legislative enactments which the court, in its discretion, has decided to follow.[19] Thus, subject to these limitations, the court acting within its sphere of inherent power, can decide a particular case according to its own dictates without reference to outside considerations. If the court wished to consider the original license as valid it had the inherent power to do so. Equally within its inherent power was the right to suspend and dictate that similar action in the future would disbar the actor.

Perhaps the court's opinion was purposely devoid of cited matter so that it would stand as a silent assertion of the court's inherent power to regulate the bar.

Gene Ashburn

PENSIONS. IMPAIRMENT OF CONTRACTUAL OBLIGATIONS—VESTED INTEREST OF GOVERNMENTAL EMPLOYEE IN AMOUNT PROVIDED

The Supreme Court of California, in the recent case of *Wallace v. City of Fresno*,[1] said:

> "The termination of all pension rights upon the conviction of a felony after retirement does not appear to have any material relation to the theory of the pension system or to its successful operation. At the time of the amendment, Wallace had obtained substantial rights by reason of his services, and the amendment in effect operated as a condition subsequent to terminate a pension which he had fully earned."

Wallace joined the Fresno Police Department in 1921. The city charter at that time provided for a pension system to be set up by ordinance for members of the police and fire departments who became disabled or superannuated in the service of the city In 1923, an ordinance was enacted which provided that after 25 years of service any member of the department who reached the age of 50 years should be entitled to retirement on a pension. The ordinance further provided that the removal of a member from the department after 25 years' service should not operate to deprive him of pension benefits, except when the dismissal was ordered for habitual drunkenness, notorious insubordination, or conviction of a felony or crime involving moral turpitude. This section was amended in 1927 The amendment provided that whenever *any* person who received any pension from the pension fund, as provided therein, should be convicted of a felony or a crime involving moral turpitude, the pension board, upon giving notice to the pensioner, could order the pension discontinued immediately and, in its discretion, could order the allowance paid to the pensioner's dependents. Wallace retired from the police force in 1949 and received a pension until June, 1952, when the pension board ordered discontinuance of the pension because Wallace had been convicted of a felony, preparing a fraudulent Federal Income Tax return. The pension was to be paid to his wife for the duration of his imprisonment and then to cease forever.

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[18] People v People's Stockyards State Bank, 344 Ill. 462, 176 N.E. 900 (1931), *In re* Morse, 98 Vt. 85, 126 A. 550 (1924).

[19] Downing, *supra* note 15 at 637

[1] 42 Cal.2d 180, 265 P.2d 884 (1954).

In examining this case in the light of California decisions, it will be helpful to keep in mind the following questions. First, what are the rights of the employee and pensioner under a governmental pension system? Second, can the rights of the pensioner be changed once they have been granted?

In considering these problems the editors of the American Law Reports Annotated stated:

> "The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation, but is a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor."[2]

This was written in 1928 and California, along with many other states, was listed as supporting this view. However, the California cases have suggested from the first that upon the happening of the contingency upon which the pension depends, a vested right in the pension accrues.[3] From 1891 through 1906 the California courts specifically stated that on the happening of the contingency the right to the pension will become vested.[4] In 1917, the court, in *O'Dea v. Cook*,[5] overruled prior decisions which held that a pension is a gratuity The court cited Article II, Section 31, of the California Constitution as authority This section provides that it is illegal to bestow gifts of public money on individuals. This court further held, contrary to a previous holding, that a pension is a contractual obligation. The court went on to say that pension statutes serving a beneficial purpose are to be liberally construed in favor of the pensioner, and that such statutes are to be prospectively rather than retrospectively construed, unless the statute provides for a retroactive construction.

In *Aitken v. Roche*,[6] the California court further weakened "the general rule," as set out in A.L.R., by declaring that the right to a pension is a vested one and that the pension enters into the contract of employment. This case overruled prior holdings that the employee had no vested right in the pension until the happening of the contingency upon which his retirement is based, and that until then the pension could be abrogated at the will of the employer. The California opinions from the *O'Dea* and *Aitken* cases up to *McCarthy v. Oakland*[7] in 1942, have been in conflict regarding the question of when the pension right vests in the employee.[8] However, the cases following the *McCarthy* case have almost uniformly held that

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[2] 54 A.L.R. 943.

[3] 80 Cal. 266, 22 Pac. 172 (1889).

[4] Burke v. Police Relief and Pen. Fund, 4 Cal.App. 235, 87 Pac. 421 (1906), Nicols v. Police Pen. Fund Com'rs, 1 Cal.App. 494, 82 Pac. 557 (1905), Kavanagh v. Bd. of Police Pen. Fund Com'rs., 134 Cal. 50, 66 Pac. 36 (1901), Clarke v. Police Health Ins. Bd., 123 Cal. 24, 55 Pac. 576 (1898), Clark v. Reis, 87 Cal. 543, 25 Pac. 759 (1891).

[5] 176 Cal. 659, 169 Pac. 366 (1917).

[6] 48 Cal.App. 753, 192 Pac. 464 (1920).

[7] 60 Cal.App.2d 546, 141 P.2d 4 (1942).

[8] Pension vests upon the retirement of the employee: Sweesy v. L.A. County Peace Officers' Ret. Bd., 17 Cal.2d 356, 110 P.2d 37 (1941), Vero v. Sacramento City Employees' Ret. System, 41 Cal.App.2d 482, 107 P.2d 82 (1940), Jordan v. Ret. Bd., 35 Cal.2d 653, 96 P.2d 973 (1939), Carr v. Fire Comm., 30 Cal.App.2d 208, 85 P.2d 959 (1938), Brooks v. Pension Bd., 30 Cal.App.2d 118, 85 P.2d 956 (1938), Richards v. Wheeler, 10 Cal.App.2d 108, 51 P.2d 436 (1935).

Pension vests upon the acceptance of employment: McCarthy v. Oakland, 60 Cal.App.2d 546, 141 P.2d 4 (1943), Murphy v. Piedmont, 17 Cal.App.2d 569, 62 P.2d 614 (1936), Dryden v. Bd. of Pen. Com'rs., 6 Cal.2d 575, 59 P.2d 104 (1936).

the right to a pension vests in the employee upon his acceptance of employment.[9]

By 1942, A.L.R. had recognized that although the "traditional view is still adhered to, the number of cases in which its application has been deemed proper has diminished in comparison with those upholding as vested, at least in a limited sense, rights of beneficiaries under various retirement pay and other plans " The change, said A.L.R., is due "to the adoption and extention of such systems to greater numbers and groups of employees in all branches of public and semi-public service."[10]

The accepted version of the law in California today regarding pensions for public employees is summed up by McQuillin in his work Municipal Corporations, to wit:

> " where services are rendered under a statute allowing pensions, the pension becomes a part of the contemplated compensation for those services and so in a sense a part of the contract of employment from which it follows that the right to a pension may not be abrogated by a subsequent change in the law The right to a pension is said to vest upon the acceptance of employment. However, even under (this) rule, an officer or employee has no vested right to a certain sum as a pension, or as to the terms and conditions governing payment of benefits."[11]

In the case before us, Wallace had served as a member of the police force for the prescribed number of years. Therefore, whether one subscribes to the view that the right to a pension vests on retirement only, or whether one follows the current view of the California courts that the employee obtains a vested right to a pension upon the acceptance of employment, the result will remain the same. Wallace had a vested right to a pension. However, this right was not a right to a specific sum of money but merely to a pension of some kind.[12] The city has the right to increase or decrease a pension as the circumstances demand.[13] As McQuillin says:

> " it seems to be the *prevailing view* that even though a right to a pension has vested, the legislature may fix the amount payable, so long as the amount determined is not fixed so unreasonably low as to justify the inference that deprivation of pension rights was the legislative object." (Emphasis added.)[14]

California seems to follow this "prevailing view "

The ordinance in question, far from merely changing the amount of the pension, would have deprived Wallace of any compensation. Furthermore, Wallace had gone to work for the police department in 1921. Under the prevailing view in California, Wallace's pension right vested on the date of his acceptance of employment.[15] The 1927 ordinance, enacted subsequent to the vesting of Wallace's rights, had to be retrospectively construed to have any effect on the rights of Wallace. This is contrary to the general rule laid down in *Odea v. Cook*,[16] and, under

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[9] Allen v City of Long Beach, 130 A.C.A. 72 .....P.2d..... (1955), Skaggs v City of Los Angles, 43 A.C. 503, ...P.2d..... (1954), Wallace v City of Fresno, 42 Cal.2d 180, 265 P.2d 884 (1954), Hunter v Sparling, 87 Cal.App.2d 711, 197 P.2d 807 (1948), Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799 (1947), Gibson v City of San Diego, 25 Cal.2d 930, 156 P.2d 737 (1945), Snyder v City of Alameda, 58 Cal.App.2d 517, 136 P.2d 857 (1943).

[10] 137 A.L.R. 249.

[11] 3 McQUILLIN, MUNICIPAL CORPORATIONS 512.

[12] Murphy v Piedmont, 17 Cal.App.2d 569, 62 P.2d 614 (1936).

[13] See note 9 *supra*.

[14] 3 McQUILLIN, MUNICIPAL CORPORATIONS 574, 575.

[15] See note 9 *supra*.

[16] 176 Cal. 659, 169 Pac. 366 (1917).

the California rule, constitutes a breach of contract on the part of the city of Fresno.

In 1947 the court in *Kern v. City of Long Beach*,[17] suggested a group of general rules which could be used as a standard for determining what would be a reasonable modification of a pension. These suggestions were used for the first time in the *Wallace* case. These rules, as set forth by the court, are: (1) modifications must be made prior to retirement of the employee; (2) modifications must be for the purpose of: (a) keeping the pension system flexible to permit adjustments in accord with changing conditions; and (b) at the same time maintain the integrity of the system and carry out its beneficient policy.[18] The court felt that the purpose of the attempted modification of the pension in the *Wallace* case was to benefit the city rather than to aid the pension system, *i.e.*, "meet the objections of the taxpayers who would be opposed to contributing funds for the maintenance of a pensioner who had been convicted of a felony."[19] The modification was therefore unreasonable as the changes did not come within the rules set forth by the court for modification of public pensions.

Two cases have been decided on this subject since the *Wallace* case. They are *Allen v. City of Long Beach* and *Skaggs v. City of Los Angeles*.[20] The latter concurs with the *Wallace* case in holding that the right to a pension vests upon the acceptance of employment. The *Allen* case follows the rules for determining what is a reasonable modification of a pension, as set forth in the *Wallace* decision.

Wallace v. City of Fresno is unique in two ways. First, it has gathered the rules suggested in several cases and has set forth "the permissible scope"[21] of modification in pensions; second, the court has decided for the first time in California that an amendment, made *before* an employee is eligible to retire, which provides for the termination of pension rights if he is convicted of a felony *after* retirement, is not within the permissible scope of modification.[22]

Summarizing the California law in the light of the cases considered above, we find that a pension under a pension statute is a vested right which vests in the employee upon the acceptance of employment. It is a contractual obligation rather than a gratuity, which forms a part of the contemplated compensation of the employment. While the right to a pension is a continuing one, it is not a right to a specific sum of money to be paid, but merely to a *substantial* pension. The California courts have held that a pension statute must be liberally construed in favor of the pensioner. Furthermore, the statute cannot be given retroactive construction unless the statute otherwise provides. Despite the restrictions on statutory construction, reasonable modifications in the pension statutes can be made. However, any reasonable change to the detriment of the pensioner must be made before the happening of the contingency on which the payment of the pension depends. Furthermore, once the pension is vested, it cannot be abolished by a subsequent change in the law.

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[17] 29 Cal.2d 848, 179 P.2d 799 (1947).

[18] Wallace v. City of Fresno, 42 Cal.2d 180, 184, 265 P.2d 884, 887 (1954).

[19] Wallace v. City of Fresno, *supra* note 18 at 185.

[20] Allen v. City of Long Beach, 130 A.C.A. 72 .....P.2d..... (1955), Skaggs v. City of Los Angeles, 43 A.C. 503, ...P.2d..... (1954).

[21] Allen v. City of Long Beach, *supra* note 20 at 77.

[22] Wallace v. City of Fresno, *supra* note 18 at 185, 265 P.2d at 887.