

New Jersey Court of Errors and Appeals.

HARRIET E. BALL,

Plaintiff and Defendant

in Error,

vs.

THE BOARD OF TRUSTEES OF THE

TEACHERS' RETIREMENT FUND,

Defendant and Plaintiff

in Error.

*In Error to
the Supreme
Court.*

BRIEF OF PLAINTIFF AND DEFENDANT IN ERROR.

This cause was tried to the court without a jury on an agreed statement of facts. This statement is found on pages 16 to 23 of the case. From this it appears that the plaintiff is an applicant for an annuity in accordance with the provisions of an act entitled "A supplement to an act entitled 'An act to establish a System of Public Instruction' (revision) approved March 27, 1874." This is Chapter 32 of the act of 1896, and is found on page 58 of the laws of that year.

This act became a law on the eleventh day of March, 1896.

On the eleventh day of June in the same year the plaintiff in writing accepted the provisions of the act and elected to be bound thereby.

She had been a teacher in the public schools in the city of Newark since September, 1877, and she taught continuously therein from that time until the sixth day of March, 1900.

From the time when she accepted the provisions of the act, or "joined the fund," as it is generally stated, one per centum of her salary was deducted each month and continued so to be as long as she drew a salary.

On or about March sixth, 1900, the plaintiff retired from her occupation as teacher, being compelled to do so by catarrhal deafness brought about by an attack of scarlet fever about ten years before, which was permanent and progressive in its nature, and which, at the time she retired, had become so pronounced as completely to disable her from teaching. (See statement of physician on page 22, lines 10 to 20.)

She made her application for an annuity from the fund on the fourteenth of April following, and presented the application and certificates in the forms required by the rules of the Board of Trustees; but the board took no official action upon the application except to postpone it from time to time until this action was begun, which was in the month of February, 1903, nearly three years after the application had been filed.

At the time the application was made she tendered herself ready to pay into the fund twenty per centum of her annual salary as required by Section 3 of the act, but was informed by one of the members of the defendant board that she could not pay it in until her case was decided, and it is admitted that it is the custom and practise of the defendant not to require or accept such payment while cases are undecided before them.

There was no dispute as to the amount of her annual salary nor as to the amount she would be entitled to, if anything, and on the state of facts as found the court gave judgment for nine hundred and eighty-one dollars and ninety cents (\$981.90), which judgment was signed on the tenth day of April, 1906.

POINT I.

THE ACT OF 1896 TENDERED TO THE TEACHERS OF THIS STATE A CONTRACT GOVERNED BY THE PROVISIONS OF THAT ACT AND CONDITIONED UPON THE ACCEPTANCE OF ITS PROVISIONS.

This statement scarcely admits of argument. The legislature proposed that where the teacher agreed to the arrangement, one per centum of her salary should be taken by the Trustees of the Fund, and that the moneys thus received and other moneys to be received as the act specified should constitute a fund for the payment to the teachers who had taken advantage of the provisions of the act of annuities under certain conditions named in the act. Plaintiff having accepted the provisions of this act, was entitled to the benefits thereof, if any benefits should accrue. These conditions are found in Section 3 and are summarized as follows:

1. That she shall have taught in the public schools of this state for a period of twenty years.
2. That she shall have become incapacitated from performing the duties of a teacher.
3. That she shall have retired as a teacher.
4. That if she shall retire within five years from the passage of the act she shall have paid into the fund a sum equal to twenty per centum of her salary at the time of retirement.

There is nothing to be found in the act which gives the trustees any power or discretion to determine whether or not an applying teacher shall have an annuity. The facts necessary to bring the teacher within the provisions of the act being established a right to the annuity forthwith accrues.

This phase of the case was passed upon by the Supreme Court in 1904, and the opinion of Mr. Justice Swayze thereon will be found in 42 Vr., p. 64.

POINT II.

THE LEGISLATURE WAS POWERLESS TO CHANGE THE CONTRACT THUS CREATED WITHOUT THE CONSENT OF THE PLAINTIFF, AND SUBSEQUENT LEGISLATION MATERIALLY AFFECTING PLAINTIFF'S RIGHTS WAS VOID AS TO HER.

Before plaintiff made her application for an annuity the legislature had amended the act under which she applied. (Laws of 1899, p. 475.)

This amendment was a redrafting of the entire act, whereby Section 3 of the first act became Section 4 of the new act. The new provisions and conditions inserted in Section 4 of the new act are as follows:

First.—A provision that an incapacitated teacher shall be retired "On the approval of the aforesaid Board of Trustees."

Second.—The decision of the Board of Trustees upon any application for an annuity is made conclusive of the right of the applicant thereto.

Third.—The board is given power to suspend the payment of any annuity whenever it shall appear to the board that the annuitant is able to earn, and has the opportunity of earning a sufficient livelihood.

It is evident that these provisions materially change the contract created by the law of 1896, and the legislature, recognizing that a contract existed and could not be changed without the consent of the other contracting party, attempted to compel all those who had theretofore accepted the provisions of the act of 1896 to become bound by the act of 1899 by inserting a new provision in Section 10 as follows:

"Any teacher who has heretofore signed and delivered the notice prescribed by the Ninth Section of the supplement of which this act is an amendment, shall become bound by the provisions of this act and have its advantages and privileges without signing or delivering any other notice, and shall be deemed to have accepted the provisions of this act by receiving any sum of

money as salary from which there shall have been made a deduction under and by virtue of the provisions of the Seventh Section of this act."

By referring to the act of 1896 it will be observed, (sub-section 1, under sec. 5) that when a teacher once accepted the provisions of the act she no longer had control of the one per centum which the law required to be deducted. The Board of Education is required to deduct the one per centum and pay her only the balance. The effect of the provision in the new act, therefore, would be to compel a teacher who did not wish to accept the provisions of the new act to refuse her salary altogether, since there is no way provided by which she could get more than ninety-nine per centum of it. Furthermore, if she could refuse to accept it in its diminished form and could collect the whole amount, she would be in the position of having violated her part of the arrangement created by the act of 1896, and would thereby lose all her rights thereunder. The attempt, therefore, to secure the consent of plaintiff and those in like situation with her by making the acceptance of the diminished salary an implied consent, fails for two reasons:

First, because the act from which the consent is to be inferred is one which she had no power *not* to perform, and second, because the said act was simply carrying out the terms of her agreement. It is as if the legislature had said to her "If you keep your part of the contract, you will be in the position of having consented to entered into a new and less advantageous contract." Further comment is unnecessary.

POINT III.

THE INSERTION OF THE WORDS "AMENDED MARCH 24, 1899" IN PLAINTIFF'S APPLICATION FOR THE ANNUITY WAS NOT AN ACCEPTANCE OF THE PROVISIONS OF THE LAST NAMED ACT.

This point is raised by defendant's third reason as stated on pages 10 and 12. The application in question is given on pages 19, 20, and 21. It appears that in the heading to this application the plaintiff was made to say that she applied for the annuity under the provisions of an act of the legislature entitled "A supplement to an act entitled 'An act to establish a system of Public Instruction' (revision) approved March 27, 1874" passed March 11, 1896, *amended March 24, 1899*. Defendant's counsel strongly contends that this is tantamount to an agreement on the part of Miss Ball to abide by the provisions of the act of 1899. It seems a waste of time to state the reasons why it cannot have this effect. Nevertheless, the bare statement of them will not trespass much upon the patience of the court. They are as follows:

1st. Because the words relied upon are not in form or in effect an agreement, but a mere recital of a fact.

2nd. Nor are they in form, or in fact, an admission or waiver of any sort.

3rd. No consideration was given or received for it, even if it were, in form, a new agreement.

POINT IV.

THE DECISION OF THE BOARD OF TRUSTEES ON PLAINTIFF'S APPLICATION IS NOT A CONDITION PRECEDENT FOR THE MAINTENANCE OF THIS ACTION.

This point is presented by defendant's counsel in two forms. By the first, second and third reasons it is presented under the provisions of the act of 1899, and for the reasons given in points I and II that act has no force here. The first, second and third reasons

are sufficiently answered in points I and II. The sixth reason set out on pages 10 and 13 of the case, raises the same point and relies upon the provisions of the act of 1896 to sustain it. Counsel finds in sec. 2nd of the act of 1896 a provision that the Board of Trustees "shall have charge of and administer said fund as they shall deem most beneficial to such fund and to the beneficiaries thereof," and seems to read into this language a power to withhold the annuity from one otherwise entitled to it, if in their opinion such withholding would be beneficial to the fund or to the (other) persons entitled to it. Such withholding could scarcely be beneficial to the party from whom it was withheld, and if it were a lawful withholding, would, undoubtedly, be beneficial to the fund. It would seem, accordingly, that if this singular reasoning is sound, the power to administer the fund in their discretion is a power to withhold it from the persons entitled to it, and thereby do away with the very purpose for which the fund was organized. Of course the power to invest and conserve the fund must be lodged somewhere, and the language quoted evidently has reference solely to that side of the matter.

Unquestionably the trustees were in the same position that all trustees are in, viz: They are bound before paying over money to their *cestuis que trustent* to satisfy themselves that the facts exist which entitle the beneficiary to the money, and so is every man who makes a contract bound, or entitled, on his own behalf to ascertain whether the other contracting party has performed his part, before he pays him the money which would then become due. But it would be very strange if the other contracting party could not sue until the party who had contracted to pay decided on those facts; for in that case the party who had contracted to pay might never decide and so escape all liability. That is in fact the situation here. The trustees apparently still remain undecided, and if they can remain undecided three years

there is no reason why they cannot remain undecided thirty years. The contention is, of course, absurd. It is the province of the court to decide these facts.

As to the fourth and fifth reasons, the only thing to be said is that they are a statement of fact, and are directly contrary to the agreed-upon state of facts presented to the court. Plaintiff did become incapacitated after she had accepted the provisions of the act of 1896, and not before. It is not to be supposed that the learned counsel will condescend to quibble over the language of the fourth statement of fact as found on page 17. That her deafness incapacitated her at the time she retired is admitted. That it did not fully incapacitate her before that time is proved by the fact that up to that time she taught. The time when she became incapacitated is not directly stated in the fourth statement of fact, but the fact is stated, and the time appears by necessary inference.

POINT V.

THIS IS NOT A PROPER CASE FOR MANDAMUS.

Whether the duties of the Board of Trustees are purely ministerial or partly ministerial and partly judicial is not very material. It is evident that a question of fact is to be decided, and on that question of fact both plaintiff and the defendant were entitled to have a jury trial if they so elected. The defendants might deny the fact of incapacity, they might deny the fact of continuous service for the required time, or any of the other facts necessary to be established. Can there be the slightest doubt that they would have denied these facts and claimed a jury trial if we had applied for a writ of mandamus? If, after these facts have been determined by a judgment the trustees shall then refuse to issue their warrant, undoubtedly a writ would lie to compel them to perform what will then be their clear legal duty. Until then the Supreme Court could not say whether or not it was their duty.

It is well established that to entitle a party to a writ of mandamus two things must appear. First, that he has a légal right to have something done by the party to whom he asks to have the writ directed and which has not been done, and second, that he has no other adequate remedy.

Apgar vs. Trustees, 5 Vr., 308.

Bierman vs. Seymour, 37 Vr., 122.

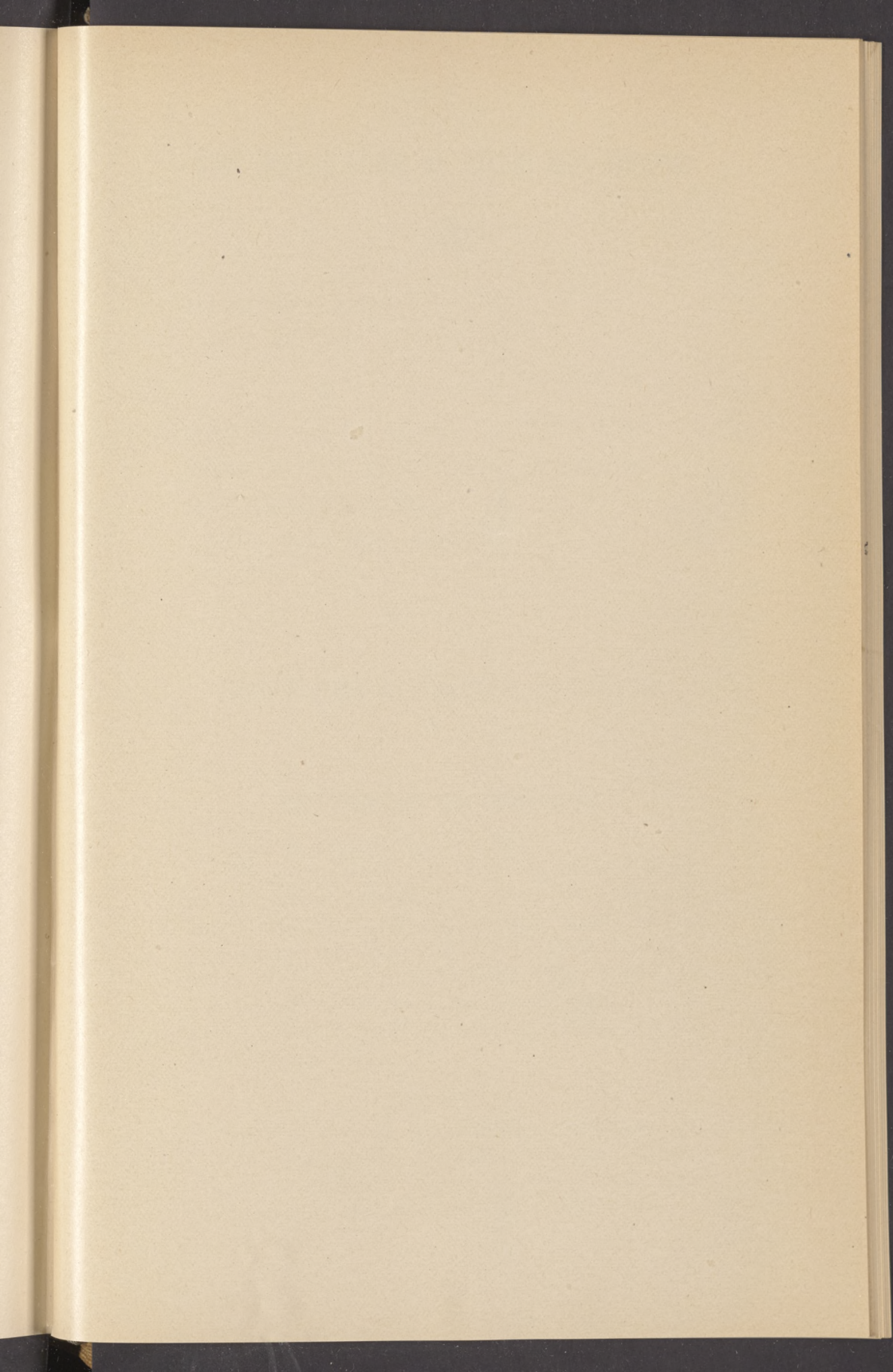
If, upon the return of the rule to show cause why a writ should not issue, *it should appear*, as we may infer from the vigor and determination and persistence with which this case has been contested on every point *it would appear*, that the facts alleged were contested, unquestionably the court would refuse the writ upon both grounds, viz: That the plaintiff's right was not clear, and that she had another remedy.

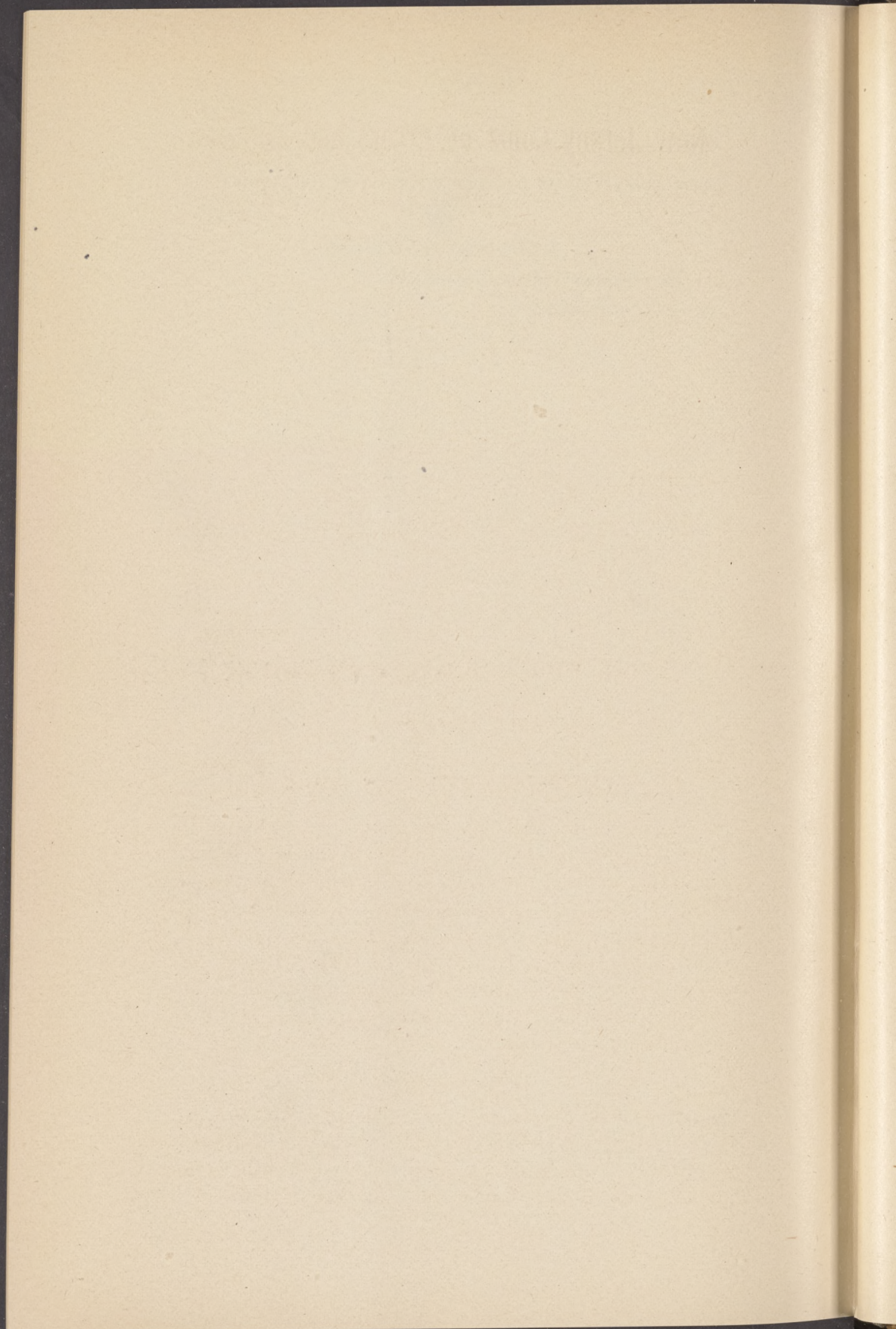
But if the court should be of the opinion that a writ of mandamus might have been granted in this case, it is immaterial now. No one has ever contended that mandamus is an exclusive remedy. We are suing the parties who have control of this fund, in an action at law, based upon contract, seeking a judgment against them in their representative capacity, and we take our chances of enforcing our judgment when we get it. Although a writ of mandamus was allowed by the Supreme Court in *Apgar vs. Trustees*, *ubi supra*, on an application by a school teacher to compel the trustees to give her a warrant for her salary, it is not intimated there that an action previously brought by her in a justice's court and from the judgment in which an appeal had been taken, could not be maintained by her; and in *Sproul vs. Smith*, 11 Vr., 314, a similar action, although the judgment below was reversed for an error in making the wrong people parties defendant, the action appears to have been regarded as perfectly proper had it been directed against the school district in its corporate capacity.

POINT VI.

THE JUDGMENT BELOW SHOULD BE AFFIRMED WITH
COSTS.

EDWIN B. GOODELL,
Of Counsel with Plaintiff and
Defendant in error.





New Jersey Court of Errors and Appeals

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Pl'ff. and Def't. in Error,

vs.

THE BOARD OF TRUS-
TEES OF THE TEACHERS'
RETIREMENT FUND.

Def't. and Pl'ff. in Error.

On Contract.

ON WRIT

10

OF ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This is an action on contract.

By a supplement to "An Act to establish a system of public instruction" (Revision), approved March twenty-seventh, one thousand eight hundred and seventy-four, passed March 11, 1896, the Legislature of New Jersey established "The Board of Trustees of the Teachers' Retirement Fund," (P. L. 1896, Chapter 32, page 58), said supplement being in the following words:—

CHAPTER 32.

A Supplement to an act entitled "An Act to establish a system of public instruction" (Revision), approved March twenty-seventh, one thousand eight hundred and seventy-four.

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BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey :*

1. The state superintendent of public schools, the members of the State Board of Education, and two representatives, to be selected annually by the public school teachers at the regular meeting of the State Teachers' Association, shall constitute a Board of Trustees that shall be known as "the Board of Trustees of the Teachers' Retirement Fund."
- 10 2. They shall organize as such board by choosing one of their number as chairman and one as secretary; the State treasurer shall be ex-officio treasurer of such fund; such Board of Trustees shall have charge of and administer said fund as they shall deem most beneficial to such fund and to the beneficiaries thereof, and order payments therefrom according to the provisions of this act; they shall report annually to the legislature the conditions of
20 such fund, and the receipts and disbursements on account of the same, with a full and complete list of the beneficiaries of said fund and the amounts paid to each of them.
3. Whenever any teacher entitled to the benefits of this act has taught in the public schools of this State for a period of twenty (20) years, and shall become incapacitated from performing the duties of a teacher, such teacher shall, at his or her request, or may, at the discretion of the Board of
30 Trustees of the Teachers' Retirement Fund, without such request, be retired as a teacher, and shall thereafter receive an annuity out of said fund of a sum equal to one half of the average annual salary received for the five (5) years immediately preceding the time of retirement; **provided**, that no annuity granted under this act shall be less than two hundred and fifty (250) dollars or more than six hundred (600) dollars, but in case any teacher should
40 be retired within five (5) years after the passage of this act, he or she must, in order to receive the

benefits thereof, pay into the fund provided for in this act a sum equal to twenty per centum of his or her annual salary at time of retirement; and **provided further**, that if at any time there shall not be sufficient money in said fund to pay the warrants drawn thereon as presented for payment, the treasurer shall register said warrants, and mark on the back of each these words: "Presented for payment this (giving day, month and year), and not paid for want of funds, Treasurer of State of New Jersey;" 10 and such warrants shall be paid in the order of registration and bear interest at five per centum per annum from date of registration.

4. Any teacher that shall have been a contributing member for five (5) years or more, who shall resign, or be otherwise honorably retired, shall, upon application within three (3) months after date of such retirement, be entitled to and shall receive one half of the total amount paid by him or her into said funds. 20

5. The public school Teachers' Retirement Fund herein provided shall consist of the following with the income and interest thereof:

(1.) The Board of Education of each municipality and the Board of Trustees in every school district or township outside of such municipalities, on the expiration of one month after the time when this act shall take effect, shall reserve monthly and pay over to the State treasurer one per centum of the salaries or annuities paid each month to the teachers who shall, prior to such date, elect to come under the provisions of this act; 30

(2.) All moneys and property received by donation, legacy, gift, bequest or otherwise, for or on account of said fund;

(3.) All other methods of increment as may be duly and legally devised for the increase of said fund.

6. In addition to the powers hereinbefore 40

granted to said board, it shall have the further power, first, to subpoena and compel witnesses to attend and testify before it in all matters relating to the operations of this act, and any member of said board may administer an oath or affirmation to such witness, in the form prescribed in courts of justice; second, to provide for the payment out of said fund of all needful expenses, but the members of said board, as such, shall serve without
10 compensation.

7. This act shall be binding only upon public school teachers who, after the passage of this act, shall sign and deliver to the Board of Education of the municipality, district or township in which they are employed, a notice in substantially the following form:

—————1895.

20 To the Board of Education (or Trustees, as the case may be) of —————: You are hereby notified that I agree to be bound by, and desire to avail myself of, the provisions of the act of the Legislature of New Jersey, approved —————, eighteen hundred and ninety ———, entitled “An act to amend an act entitled “An act to establish a System of Public Instruction in State of New Jersey.””

—————.
Public School Teacher.

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And no teacher employed in the public schools of this State at the time of the passage of this act, failing to give such notice within three months, shall be entitled to any benefits under this act or subject to any of its burdens; and no teacher employed after the passage of this act, who, within one year after such employment, fails to give such notice, shall share the benefits of or be subject to the burdens of this act; such notices shall be delivered to
40 the local Board of Education, and, at the same

time, a duplicate copy of the same shall be sent to the Board of Trustees of Teachers' Retirement Fund, and preserved as a record for their information.

8. All acts or parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, and this act shall take effect immediately.

Passed March 11, 1896.

The following is a brief statement of the facts in the case.

On May 19, 1896, there was filed with the Board of Trustees of the Teachers' Retirement Fund, a notice of which the following is a copy:

May 18, 1896.

To Board of Trustees of Teachers' Retirement Fund:

You are hereby notified that I desire to avail myself of, and that I agree to be bound by the provisions of the Act of the Legislature of New Jersey passed March 11, 1896, entitled, "An Act to Amend an Act entitled 'An Act to Establish a System of Public Instruction in the State of New Jersey.'"

HATTIE E. BALL,

18th Avenue School,

Newark, N. J.

Public School Teacher.

At the time of giving the aforesaid notice, the said Harriet E. Ball was a public school teacher, and had been a teacher in the public school in the City of Newark since the year 1877. She taught continuously therein until March 6, 1900 (p. 17, l. 3). Her salary from and including the year 1895 to the date of her retirement had been Six Hundred and Fifty Dollars annually.

Beginning in the month of October, 1896, the Board of Education of the City of Newark made the

deduction of one per centum of the salary of the plaintiff due and payable to her monthly and sent the same to the treasurer of the State of New Jersey. This deduction continued to be made until the plaintiff resigned her position as a public school teacher March 6, 1900 (p. 17, l. 18.)

Said Harriet E. Ball voluntarily resigned her position as such teacher on March 6, 1900, and retired from her occupation of teaching, "because of
10 chronic middle ear catarrh in both ears, (caused by an attack of scarlet fever ten years or more prior to April 14, 1900), which was permanent in its nature and immediately resulted in permanent deafness, such permanent deafness having steadily progressed from the time of such attack of scarlet fever as aforesaid, thereby incapacitating her from performing the duties of a teacher." (p. 17, l. 25.)

Subsequently the plaintiff below made application to the Board of Trustees of the Teachers' Retirement Fund for Retirement with annuity, which
20 application was verified by the oath of the plaintiff before James J. Gibb, a Master in Chancery of New Jersey, on April 14, 1900, and contained *inter alia* the following:

"I, Harriet E. Ball, of the City of Newark, in the County of Essex, do hereby apply to the Board of Trustees of the Teachers' Retirement Fund to be retired as a teacher and have an annuity from said fund, pursuant to the provisions of an Act of the
30 Legislature entitled, "A Supplement to an Act entitled, 'An Act to Establish a System of Public Instruction, (revision), approved March 27th, 1874,' passed March 11th, 1896, amended March 24, 1899."

Said application was filed with the secretary of the Board of Trustees of the Teachers' Retirement Fund on May 2, 1900, and presented to the said Board of Trustees on June 23, 1900, and said application was discussed at subsequent meetings of the Board of Trustees of the Teachers' Retirement
40 Fund and finally referred to a committee consist-

ing of Mrs. Crater and Mr. Howell and referred to Dr. Edward Hill Baldwin of Newark, New Jersey, as a physician for the Board to examine the plaintiff. Dr. Baldwin examined plaintiff September 13, 1900, and his report was filed with the Board of Trustees of the Teachers' Retirement Fund sometime in October, 1900, so that said application was discussed at a meeting of the Board of Trustees of the Teachers' Retirement Fund, October 12, 1900.

There was subsequently considerable correspondence 10
between plaintiff below and her attorney on the one side, and the Board of Trustees of the Teachers' Retirement Fund, on the other.

No decision of the Board of Trustees of said fund upon the application of the plaintiff below has ever been made.

The summons in this case was tested January 30, 1903, and returnable February 14, 1903.

To the declaration of the plaintiff below the defendant below pleaded, first, general issue; and second, 20
non-performance of the conditions precedent on the part of the plaintiff to be performed before becoming entitled to receive said annuity.

The plaintiff below joined issue upon the first and second pleas of the defendant below.

Plaintiff below claims that her right to the annuity mentioned in the declaration is independent of any decision of the Board of Trustees of the Teachers' Retirement Fund because the act which expressly made the decision of the Board of Trustees 30
of the Teachers' Retirement Fund necessary had never been accepted or assented to by her, and has no application to nor any effect upon her right to receive the annuity mentioned in the declaration and that the facts stated in the declaration constituted a contract between her and the defendant below by virtue of the supplement approved March 11, 1896, (P. L. 1896, page 58), which contract remains unaffected by subsequent legislation not acquiesced in by both parties to the contract. 40

BRIEF OF THE ARGUMENT.

1. The declaration does not set forth a cause of action.

2. The action should be mandamus and not an action upon contract.

3. The relation between the plaintiff below and defendant below was one of quasi contract.

4. The plaintiff below is not entitled to an annuity until her application therefor has been passed upon and a decision thereon reached by the defendant below.

5. It is contended on behalf of the defendant below that under the language of the act approved March 11, 1896 (P. L. 1896, p. 58) "such board of trustees shall have charge of and administer said fund as they shall deem most beneficial to such fund and to the beneficiaries thereof" the plaintiff below cannot recover in her present action, until the defendant below has reached a decision upon her application. Further, that in administering said fund said board of trustees have discretion to allow retirements and grant annuities as they shall deem most beneficial to the fund—to withhold all annuities, for instance, until such time as the income therefrom will provide annuitants with the amounts allowed by the act.

6. The contract between the parties could be changed by mutual consent upon consideration.

7. The plaintiff below became bound by the provisions of the act approved March 24, 1899 (P. L. 1899, p. 478), and entitled to its advantages and privileges. There was sufficient consideration to support whatever change was made in the contractual relation of the parties by the last mentioned act, even if the act approved March 11, 1896 (P. L. 1896, p. 58) did make an irrevocable contract between the parties.

8. It is also contended, on behalf of the defendant below, that, conceding the contractual relation

between the parties to the suit under the act approved March 11, 1896 (P. L. 1896, p. 58), plaintiff below is, nevertheless, estopped by her own act from denying that she did not accept the advantages and become bound by the provisions, of the act approved March 24, 1899 (P. L. 1899, p. 478.)

9. The incapacity plaintiff below suffers from arose many years prior to the date of the approval of the act of March 11, 1896, and before said plaintiff below became a member of said retirement fund. 10
The language of the act of 1896 is, "and shall become incapacitated," clearly indicating some incapacity to arise and occur after becoming a member of the fund. So the plaintiff below is not entitled to recover.

10. The corporate powers conferred upon the defendant below by the Legislature in the act approved March 11, 1896 (P. L. 1896, p. 58) are subject to repeal or alteration at the will of the Legislature. Any grant of privileges by the State is 20
subject to the right of the State to prescribe the conditions upon which those privileges are to be enjoyed whether expressly reserved or not.

POINT 1.

Under this head we propose to present our argument to sustain paragraphs 1, 2, 3, 4 and 5 as stated in the brief of the argument. 30

There is no express or implied promise on the part of the defendant below to "pay" to plaintiff below an annuity. The count of the declaration is founded upon a promise to pay. The defendant below could only draw a warrant upon the State Treasurer—a purely ministerial duty, is the contention made on behalf of the plaintiff below.

The statute does not in express terms declare 40

with whom rests the duty of deciding whether or not an applicant is incapacitated from performing the duties of a teacher, but it is obvious that, in the absence of other provisions for that purpose, of necessity it is within that body which must act upon it, viz., the Board of Trustees of the Teachers' Retirement fund.

Kirchgessner v. Board of Health, 53 N. J. L. 594, at p 598

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In performing this duty, such Board exercises a quasi-judicial function. A writ of mandamus can compel it to act, but cannot control its decision.

Niles v. Orange Training School, 63, N. J. L. 528, at p. 530

At some point, somewhere, somehow, it must, under the act of March 11, 1896, be shown and decided that an applicant for an annuity has "become incapacitated from performing the duties of a teacher," before such applicant is entitled to the annuity provided by the act, and before it becomes the duty of the defendant "to order payments therefrom according to the provisions of" said act. If the defendant had no other duty, save that of drawing orders upon the State Treasurer, then mandamus would issue to compel it to perform a ministerial duty so plain and clear that no discretion is left as to the precise mode of performance. It is the contention of the plaintiff below that the defendant below had no other duty or power; that, upon an application being presented by a teacher upon whom the act had become binding, it "became and was bound to pay to said plaintiff," to use the language of the declaration, "an annuity equal to said one-half of the average annual salary received by the plaintiff," etc. If this contention is correct, mandamus would be the proper action.

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But we assert that the defendant below was not

limited solely to the work of drawing orders on the State Treasurer to pay every applicant the annuity applied for. Its duty was to examine every application and ascertain and determine the fact of applicant's capacity or incapacity to perform the duties of a teacher. And we respectfully submit that as to all acts or duties depending upon a jurisdiction to ascertain matters of fact on the part of the body at whose hands their performance is required, mandamus will not lie. As a corollary to the latter clause, it may be added that, as the writ will not issue to dictate in advance how discretion shall be exercised and matters of fact decided, neither will it be allowed to disturb or override such determination already reached. 10

Mooney v. Edwards, 51 N. J. L. 479, at p. 481;
Benedict v. Howell, 39 N. J. L. 221 at 224.

If, then, as we contend, the duty and power of hearing and determining the fact of an applicant's incapacity is vested in the defendant below by the terms, and under a proper construction of the words of the act, until such duty and power has been performed and exercised, and a decision reached, the plaintiff below cannot maintain the present action. 20

We further submit, with respect to the duty and power of the defendant below to decide upon incapacity of applicants, that the entire act should be searched for evidence of its meaning and in order to arrive at a proper construction thereof. 30 When we reach section six we find that it provides, "in addition to the powers hereinbefore granted to said board, it shall have the further power, first, to subpoena and compel witnesses to attend and testify before it in all matters relating to the operations of this act, * * * **second**, to provide for the payment out of said fund of all needful expenses.

Under the act, it is apparent that witnesses 40

would be necessary, in cases of doubt, to ascertain whether or not (1) an applicant had taught the prescribed period; (2) had become incapacitated from performing the duties of a teacher; (3) had given the prescribed notice and become a member of the fund; (4) the average annual salary for the five years immediately preceding retirement; (5) and the facts required by section four.

It is difficult to conceive any other contemplated necessity for the production of witnesses.

The above power is "in addition to the powers hereinbefore granted." Now what are the "powers hereinbefore granted?" To "have charge of and administer said fund as they shall deem most beneficial to such fund and to the beneficiaries thereof, and order payments therefrom according to the provisions of this act." Nothing else is therein contained which could be construed into a power. Now, section six of the act adds to those powers that of compelling witnesses to attend and testify in all matters relating to the operation of the act. When witnesses testify, it is presumed there is some person or tribunal to hear the testimony, and if testimony is given and heard, the logical inference is that some decision upon such testimony is to follow. Surely, then, the contention of defendant below of a right to make a decision upon the application of plaintiff below for retirement and annuity, should be upheld, and plaintiff below is not entitled to maintain her present action until such decision is made.

POINT 2.

The parties to a contract may change or alter it to suit their own convenience at will. (Paragraph 6 of the brief of the argument.

Without going very deeply into the question of what is a contract, we can, by discussing one phase of the question arrive at a satisfactory con-

clusion as to whether or not plaintiff below was bound by the provisions of the act of March 24, 1899, and entitled to its advantages and benefits.

Did the plaintiff below assent to the change, if any, made in her contract by the passage of the act of March 24, 1899?

Did she change her relation and did she accept its advantages and become bound by its provisions?

We say she did.

We say that she was compelled to take notice of all Acts of the Legislature of this State at her peril. Having notice and knowledge of the passage of the act aforesaid, she was not compelled to accept salary from which deductions had been made, unless she intended to assent thereto and was willing and intended to enjoy its advantages and become bound by its provisions.

It requires no citation of authorities in support of the proposition that the parties to a contract may change their contract in any particular decided upon by them.

A contract made by a benevolent corporation with a member cannot be enlarged or changed **except by consent of both contracting parties.**

American Legion of Honor v. Smith, 45 N. J. Eq. 466

Certainly, the converse is true. Where parties consent, contracts may be changed in any and all particulars.

We contend that the plaintiff below accepted the advantages and privileges, and became bound by the provisions, of the Act of March 24, 1899, when she received sums of money as salary from which there had been made deductions under and by virtue of the seventh section of said act.

It may be asserted that teachers who had become members of the Teachers' Retirement Fund prior to the passage of the Act of March 24, 1899, had no option and were compelled to accept and re-

ceive sums of money as salary from which deductions had been made under and by virtue of section five, paragraph one, of the Act of March 11, 1896. In fact, the plaintiff asserts this to be true.

This is not the case. Section four of the Act of March 11, 1896, provides as follows:

“4. Any teacher that shall have been a contributing member for five (5) years or more, who shall resign, or be otherwise honorably retired, shall,
10 upon application within three (3) months after the date of such retirement, be entitled to and shall receive one-half of the total amount paid by him or her into said fund.”

And the foregoing section, substantially, was re-enacted in the Act of March 24, 1899, in section six thereof, which reads as follows:

“6. Any teacher upon whom this act has become binding by its terms, who shall have contributed to the fund hereinafter mentioned for five
20 years or more, and who shall resign his or her position as teacher, or be otherwise honorably retired from such position, except as hereinbefore provided, shall, upon application within three months after the date of such resignation or retirement, be entitled to receive and shall receive one half of the total amount paid by him or her into said fund, without interest.”

Without animadverting to the loose, careless and ineffectual manner in which the Act of March
30 11, 1896, was drafted we call attention particularly to section four thereof above quoted. It is not clear from said section whether the teacher “shall resign or be retired,” as a teacher, or as a member of the Retirement Fund. No one reading the act can tell which is meant. In either case, after the passage of the Act of March 24, 1899, teachers had an option. They could continue members of the fund and accept salary from which deduction had been made, thereby assenting to and accepting
40 the aforesaid act and becoming bound by its pro-

visions, or they could withdraw from the fund and receive back one-half of the amount paid in. We suggest that the case is analogous to that of a member of a fraternal insurance society who is bound by the changes which may be made in the by-laws of the society. He may have a contract calling for the payment of a certain sum monthly or annually, and it has never been successfully denied that the order or society may change the amount its members are to pay. The decision of a majority of the members adopting the by-laws changing the amount to be paid is binding upon those opposed and dissenting thereto. If the members of the Teachers' Retirement Fund had not decided to accept the provisions of the Act of March 24, 1899, they could all have withdrawn and the fund would have ceased. We confidently assert that all the teachers who accepted salary from which deductions had been made after the passage of the aforesaid act thereby became bound by its provisions. 20

The attention of the Court is called to one very curious ambiguity of the act passed March 11, 1896. Section five thereof reads as follows:

"5. The public school Teachers' Retirement Fund herein provided shall consist of the following with the income and interest thereof:

(1) The Board of Education of each municipality and the Board of Trustees in their school district or township outside of such municipalities on the expiration of **one month** after the time when this act shall take effect, shall reserve monthly and pay over to the State Treasurer, one per centum of the salaries or annuities paid each month to the teachers who shall, **prior to such date**, elect to come under the provisions of this act." 30

Section eight of the Act provided that the same should take effect immediately.

It is to be observed from section five, above quoted, that the Board of Education of each municipality, was authorized at the expiration of **one** 40

month, to reserve and pay over one per centum of the teachers' salaries, **only of such teachers** as should "**prior to such date**, elect to come under the provision of this act."

Section seven provides that no teacher employed in the public schools at the time of the passage of this act failing to give the notice required by the act within **three months** shall be entitled to its benefits.

- 10 The question arises at once, by what authority any Board of Education could make deductions from the salaries of teachers who failed to give the notice within one month after the passage of the act.

Plaintiff below filed the notice required by the Act of March 11, 1896, on May 19, 1896, more than two months after the passage of the act. It may easily be held that she never became a member of the Teachers' Retirement Fund, according to the provisions of said act.

- 20 If, under the provisions of the Act of March 11, 1896, by failing to elect to come in under its provisions, the plaintiff below could not become a member of the Retirement Fund, she has no standing in this action unless it is based upon her assent to and acceptance of the Act of March 24, 1899, which would make her a member of said Fund, validate her standing under the act of March 11, 1896, and give her a right of action, the notice she had given being sufficient for that purpose.

- 30 We have above intimated that the contract sub judice is one similar to that existing between fraternal benevolent associations and its members. Courts can only interpret and enforce such contracts according to their terms, and cannot correct them if their necessary construction does injustice.

Golden Star Fraternity vs. Martin, 59 N.J.L., 207.

- 40 We have asserted and now insist that the contract, if any, between parties could be changed by the act of the parties. We have endeavored to

show that it was actually and necessarily so changed (by the passage of the Act of March 24, 1899, and the assent of the defendant below thereto).

If the wisdom of such change can be considered, which we do not assert, we do contend that it was a wise and beneficent change. To vest in the Board of Trustees power to conclusively determine the right of any applicant for annuity was a just and wise provision, and for the equal protection of all the members of the fund. If such a right and power was not lodged somewhere, the object of the entire provision might easily be defeated. Suppose there were one hundred members, all entitled to annuities, and all applying therefor at the same time plaintiff did, it is very well known that the fund was and is wholly inadequate to provide for such a demand. 10

We think, at most, the act of March 24, 1899, only altered the mode of procedure in enforcing the contract, if any, between the parties. And in regard to the unconstitutionality of the act aforesaid, we contend that the State (legislature) may alter modes of procedure which do not affect the substantial rights of parties under a contract without bringing such act within the constitutional inhibition not to impair the obligation of contracts. 20

State Board of Assessors v. M. & E. R. R. Co. 49 N. J. L., 193.

United Companies v. Weldon. 47 N. L., 59. 30

POINT 3.

There was sufficient consideration to support whatever change was made in the contractual relations between the parties by the act approved March 24, 1899. (Paragraph 7 of the brief of the argument.

A consideration sufficient to support a contract may be either a benefit accruing to the promisor, or 40

a loss or disadvantage sustained by the promisee. A very slight advantage to one party, or a trifling inconvenience to the other, will constitute a sufficient consideration to support a contract in a case free from fraud, imposition or mistake.

Traphagen v. Voorhees, 44 N. J. Eq. 21.

Conover v. Stilwell 34 N. J. L. 54.

Now, let us examine what changes, if any, were made in the contract between parties as its terms were fixed by the act of March 11, 1896, if it is decided her admission in the application filed by her evidenced her consent to such changes as were made by the act of March 24, 1899. Did any benefit accrue to the plaintiff below? Was any loss or disadvantage sustained by the promisee? Was there a slight advantage to one party, or a trifling inconvenience to the other.

In the first place, the later enactment provided for a change in the **personnel** of the Board of Trustees of the Teachers' Retirement Fund. By the first enactment said Board was composed of (1) the State Superintendent of public schools, (2) the members of the State Board of Education, and (3) two representatives to be selected annually by the public school teachers at the regular meeting of the State Teachers' Association. The State Board of Education was composed of two members from each congressional district in the State (P. L. 1894, p. 462) and in 1896 consisted of sixteen members, appointed by the Governor, so that the Board of Trustees had, at the time it was constituted, nineteen members, and plaintiff below had to do with the selection of only two of the nineteen. The duties and powers of this Board have already been sufficiently, we trust, enumerated. The act of March 24, 1899, provided that the said Board of Trustees, to be constituted, should be composed of such members as the legislature should from time to time prescribe, and, until changed, consist of (1) the State Super-

intendent of public instruction, (2) three members of the State Board of Education chosen by that body, and (3) three members of the New Jersey State Teachers' Association upon whom said act had become binding by its terms, said last-named three members to be selected at the annual meeting of the New Jersey State Teachers' Association by the members eligible to election under said act. The Board of Trustees so constituted would be composed of only seven members, and plaintiff below had a 10 choice in the selection of three of said seven. We respectfully suggest that, in certain contingences, this would be a very valuable right, and that it alone would be a sufficient consideration.

Further, in passing, we say that, notwithstanding the inability of the legislature to impair the obligation of plaintiff's contract by passing the act of March 24, 1899, the act was passed, and it did repeal the act of March 11, 1896. For certain purposes it was entirely valid. For instance, it did 20 abolish the Board of Trustees constituted by the act of March 11, 1896, and put a new and different Board in charge of said fund; it did apply to all teachers who elected to take advantage of its provisions subsequent to the date of its taking effect, and as to all such teachers its provisions were and are binding and operative.

Under the act of March 11, 1896, if the contention of plaintiff below is sustained, the Board of Trustees had no power except that of paying money to all applicants for annuities. Unless said Board 30 had some discretion in administering said fund, "as they shall deem most beneficial to such fund and to the beneficiaries thereof," to use the exact language of the statute, and unless such discretion of necessity included the power of ascertaining and determining the incapacity of applicants and the validity of their claims, the contention of plaintiff is correct. The narrower the power of the Board is cir- 40

cumscribed by such contention, the greater the consideration in the broadening of the powers of the Board under the terms of the act of March 24, 1899.

Then, again, it cannot be disputed that the teachers who elected to come in and become members of said fund subsequent to the passage of the act of March 24, 1899, became bound by its provisions and entitled to its advantages. And it is to
 10 be observed that they are members of the same fund created by the act of March 11, 1896. They have certain rights to said fund and its administration as defined by the act under which they became members, and their rights and interests are effected by whatever acts may be done by the Board in administering said fund. They, certainly, are also vitally interested in any admission or declaration made by members who came in prior to the passage of the act by which they are bound. For
 20 they are members solely and only by virtue of the later enactment.

It thus appears that we have two classes of members. In one we have those who came in prior to March 24, 1899; in the other, all who came in subsequent to said date.

There is only one common fund. All deductions from salaries or annuities went to said fund. It thereby became a common fund. Shall we say that the rights of the latter class are subject to and
 30 burdened with certain rights of the former class? In justice we cannot without affecting the rights of the latter class. Does the exigencies of the case sub judice demand it? We think not.

Although there is no provision in the statute for so doing, it may be suggested in support of the contention of the plaintiff below, that the fund ought to be divided into two parts, and in the first keep separate all amounts received from the teachers who had elected to come in under the act of
 40 March 11, 1896, and in the second all amounts re-

ceived from those who came in after the passage of the act of March 24, 1899. But this has not been done, and there is no provision for so doing. Indeed, under the strict limitation of power of the Board of Trustees constituted by the act of March 11, 1896, according to plaintiff's contention, the Board had no power except to order payments from the fund. And it is to be observed that under said act all deductions from salaries of teachers who had elected to come in was paid to the State Treasurer. 10

But, again, under the act of March 24, 1899, the Board is empowered to invest the fund in certain securities therein specified. There was no such power under the act of March 11, 1896, if plaintiff's contention is correct and well founded. Given such investments, there necessarily follows an increase in said fund from its earnings. If plaintiff below did not accept the advantages of said act and become bound by its provisions, she clearly was not entitled to the benefit of such earnings. 20

It may be asked how and in what manner she could share such benefits. The answer is readily found. The act of March 11, 1896, provided that "if at any time there shall not be sufficient money in said fund to pay the warrants drawn thereon as presented for payment, the treasurer shall register said warrants and mark on the back of each these words * * * * and such warrants shall be paid in the order of registration and bear interest at five per centum per annum from date of registration." It might easily be that the Treasurer would have no money to pay applicant upon presentation of the warrant in case said fund had been divided, as above suggested. We can not assume that the fund received from those teachers who came in under the act of March 11, 1896, would always be sufficient to meet the warrants issued to applicants. The presumption is it would not, because provision is made for that very happening. Then, too, the number of teachers who could come in under the 40

act of March 11, 1896, is limited to only those who did actually so elect prior to March 24, 1899. The receipts of the deductions made from their salaries would be practically stable. The demands upon the fund by warrants to annuitants would constantly increase as time went on. So that it could easily happen that the fund would be wholly insufficient.

Now, those teachers who had elected to come in under the act of March 11, 1896, by accepting
 10 the advantages and becoming bound by the provisions of the act of March 24, 1899, would be in a much better condition. For instance they would not be entitled to any share of a legacy, gift, bequest, donation or devise made after March 24, 1896, unless they accepted the provisions of said act, nor to any increase in said fund from any source other than what had been deducted from their own salaries. They would not be entitled to
 20 the pro rata payments of warrants provided for in the act last mentioned. (Section 5 P. L. 1899, page 478).

And, lastly, on this point, it seems quite clear that, if plaintiff's contention prevails, the present Board of Trustees, the defendant herein, will be compelled to keep separate the deduction of salaries received from teachers who elected to come in prior to March 24, 1899, from such sums received from those who came in since said date, because the
 30 charge, control, administration, application and disbursement thereof is governed by entirely different and divergent enactments.

POINT 4.

Plaintiff below is estopped from denying that she did not accept the advantages and become bound by the provisions of the act approved March 24, 1899 (Paragraph 8 of the brief of the argument.

40 Plaintiff below applied "to be retired as a

teacher and for an annuity from said fund, pursuant to the provisions of an act of the Legislature entitled * * * Amended March 24, 1899," and "as such applicant," makes certain statements and declarations, and swears "that the statements and declarations contained" in said application are true. The plaintiff below is bound by such statements and declarations. They amount to an admission and she is, therefore, subject to the changes in her contract made by the amendatory act.

Such a statement was an admission of her prior acceptance of the provisions of such amendatory act. It, together with the acceptance of salary from which deductions had been made as therein provided, evidenced the consent of plaintiff to any change made in her contract thereby, and she is now estopped from asserting that she did not accept the advantages and become bound by the provisions of the act of March 24, 1899. A party to a suit is bound by an admission made by him upon oath in open Court. We see no difference between an oath in open Court and one outside. Both are oaths.

Potter v. Hollister 45. N. J. Eq. 508 at p. 519
Stickle v. Stickle 48. N. J. Eq. 336

When one states a thing to another with a view to the other altering his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts as imported by the statement.

Conrow q. Little, 115 N. Y. 377

It must appear, **first**, that he has done some act or made some admission inconsistent with his claim; **secondly**, that the other party has acted on such conduct or admission; **thirdly**, that such party will be injured by allowing such conduct or admission to be withdrawn.

Ruckelschaus v. Oehme, 48 N. J. Eq 436 at p. 449.

The purpose of the application was to acquaint the defendant with plaintiff's desire to be retired and receive an annuity, and to furnish defendant with facts justifying such retirement and granting of an annuity. On a trial of the issue to which it relates it becomes evidence, as an admission, against the plaintiff and as such is proper for the consideration of the jury.

Lee v Heath, 61 N. J. L. 250 at p. 252

10 *McBlain v. Edgar*, 65 N. J. L. 634, at p. 638

POINT 5.

The incapacity of plaintiff below arose before she became a member of the Fund. (Paragraph 9 of the brief of the argument).

The act approved March 11, 1896, (P. L. 1896, p. 59, section 3) says: "whenever any teacher en-
 20 tited to the benefits of this act has taught in the public school of this State for a period of twenty (20) years, **and shall become incapacitated** from performing the duties of a teacher," etc. The incapacity relied upon by plaintiff below is "permanent deafness, caused by catarrh of the middle ear, succeeding scarlet fever" (Declaration 9, of application). The nature of such disease or complaint is "chronic middle ear catarrh" and its duration has been "ten years or more" prior to April 14, 1900.
 30 (Physician's Certificate to application in answer to questions 3 and 4.) Plaintiff below became a member of the Fund, it is claimed by her, on June 11, 1896. At that time, according to the evidence presented by her to defendant below, she was then incapacitated from performing the duties of a teacher, (at least as much so as at the time when she applied for an annuity) and had been so incapacitated for almost six years. It seems that a proper construction of the act requires the incapacity re-
 40 lied upon to have occurred and arisen after the said

period of twenty years' service, and after becoming a member of the Fund. It is to be remembered that defendant below had no power or control over the membership roll. The membership of the Fund was made up of such teachers as voluntarily accepted the advantages and became bound by the provisions of the act as therein prescribed (P. L. 1896, pages 60 and 61, section 7). By inference, it is clear, only teachers capable of performing the duties of a teacher were eligible to membership in the Fund. There were at least two conditions precedent to entitle members to the annuity provided by the act, viz: (1) teaching for a period of twenty years in the State public schools; (3) becoming incapacitated from performing the duties of a teacher. It is quite clear from the pleadings in the case that plaintiff below did not become incapacitated from performing the duties of a teacher after the date when she became a member of the Fund.

20

POINT 6.

The act approved March 11, 1896, was subject to repeal or alteration at the will of the Legislature. (Paragraph 10 of the brief of the argument).

This case raises another very interesting question. Did the act of March 11, 1896, confer certain corporate powers upon the Board of Trustees of the Teachers' Retirement Fund? Certainly, it was attempted, by Section 6 thereof, to confer the power of subpoenaing and compelling witnesses to attend and testify before the Board, and to give power to the members of the Board to administer oaths, and there is no limit to the life of the Board. If it did confer such powers, and they are corporate powers, they are all subject to repeal or alteration at the will of the legislature, under the constitution,

40

and the act of March 24, 1899, was, therefore, valid and constitutional.

The Legislature shall pass general laws, providing for the cases enumerated in this paragraph, and for all other cases which in its judgment, may be provided for by general laws. **The Legislature shall**
 10 **pass no special act conferring corporate powers, but**
they shall pass general laws under which corpora-
tions may be organized and corporate powers of
every nature obtained, subject, nevertheless, to re-
peal or alteration at the will of the Legislature.

Constitution, Article 4, Section 7, Placitum 11.

All grants of privileges by the State are made subject to the right of the State to prescribe the conditions upon which those privileges shall be en-
 20 joyed. The State possesses this power, whether it is expressly reserved or not.

Constitution, Article 4, Section 7, Placitum 11.

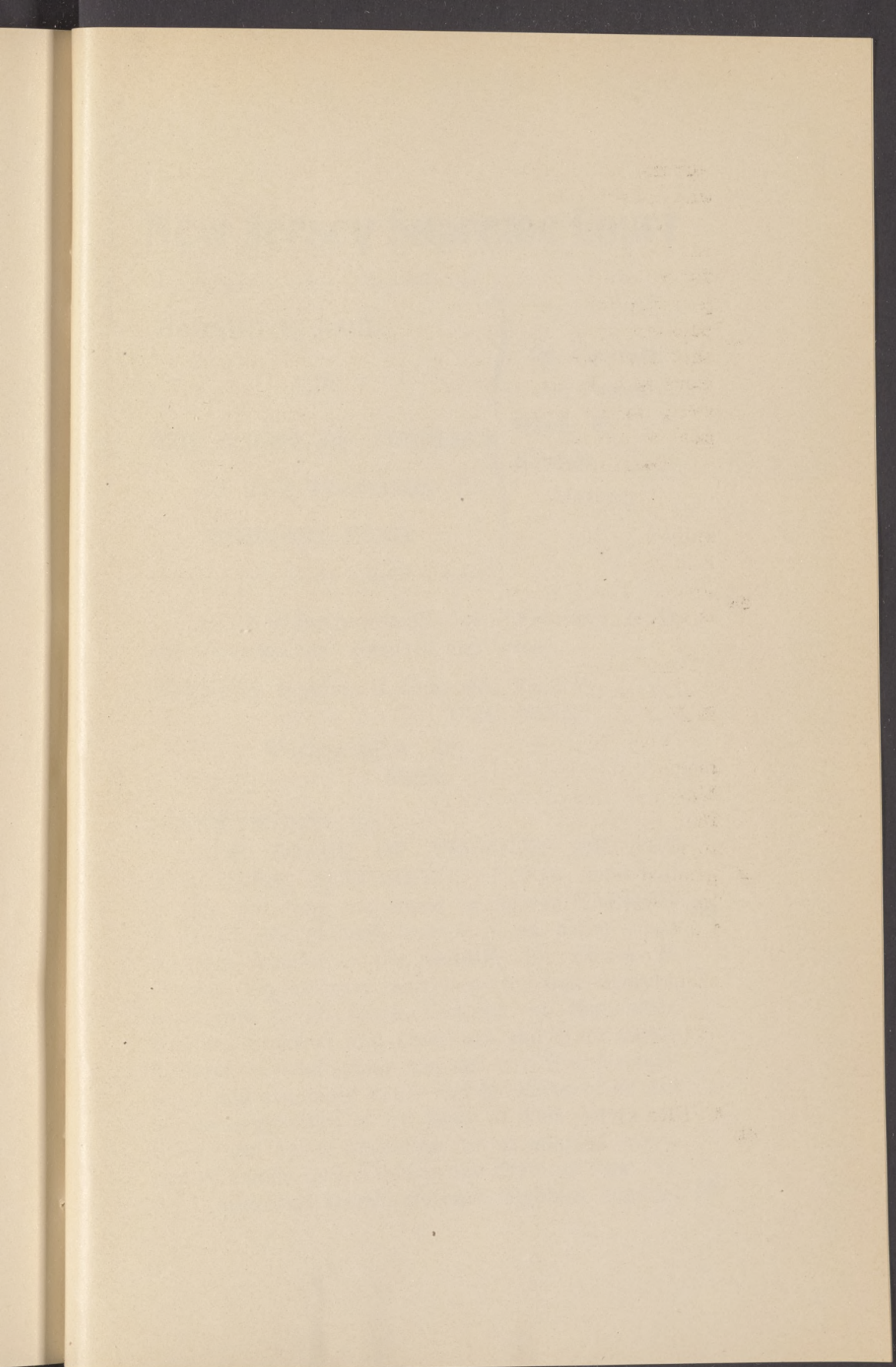
D. L. & W. R. R. Co. vs. Central Stock Yard Co.
 43 *N. J. Eq.* 71.

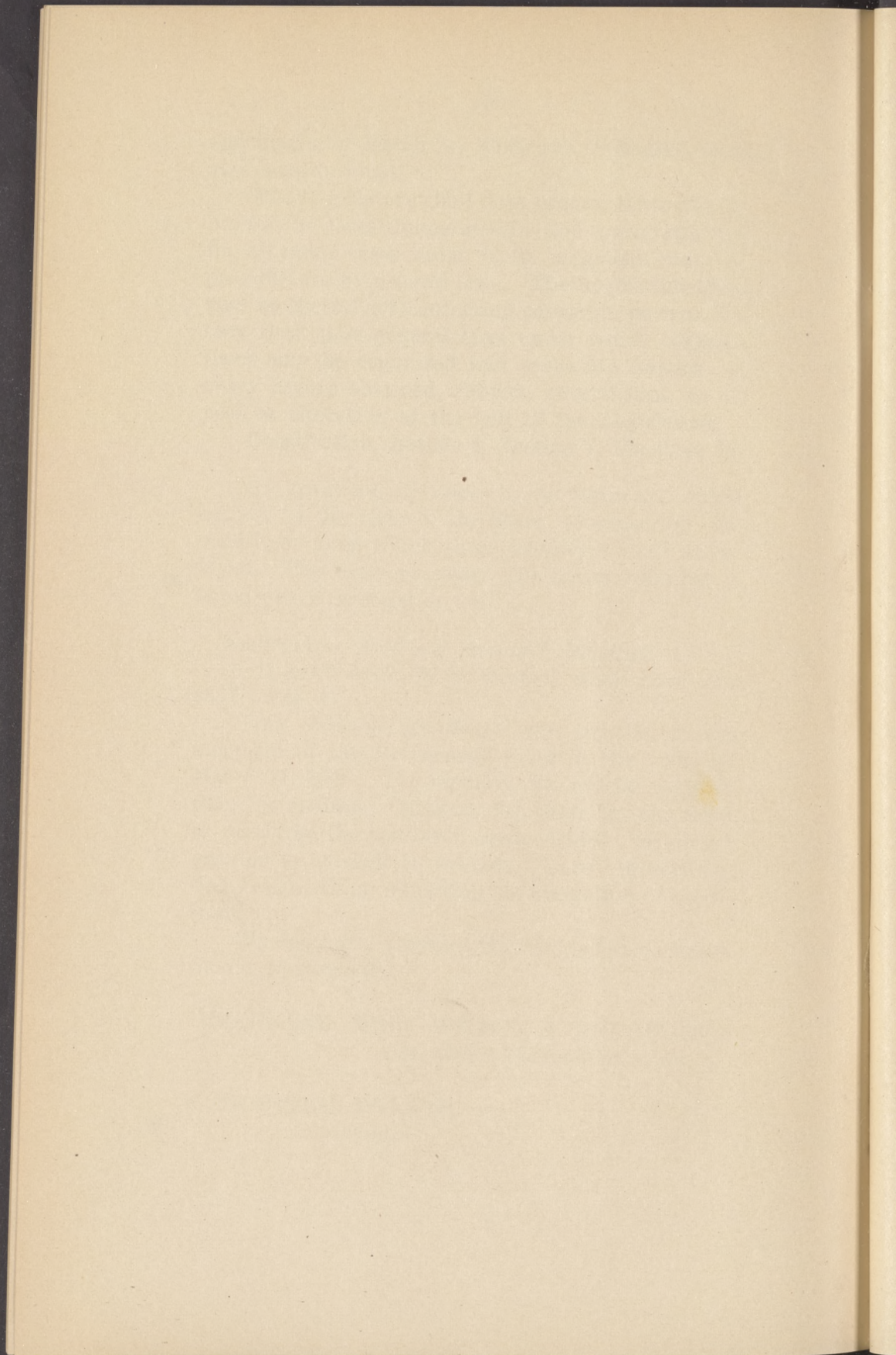
Very valuable privileges were granted to the members of the Retirement Fund by the act of March 11, 1896. The creature can not be greater than the creator. Certainly the State has the right to prescribe the condition upon which privileges
 30 granted by it shall be enjoyed. In so prescribing there was nothing impairing the obligation of a contract.

We respectfully submit that the judgment below should be reversed.

VREELAND, KING, WILSON & LINDABURY,
 Attorneys of Defendant below.

C. FRANKLIN WILSON,
 40 of Counsel.





New Jersey Supreme Court

HARRIET E. BALL,

vs.

THE BOARD OF TRUSTEES
OF THE TEACHERS' RE-
TIREMENT FUND.

On Contract.

On Postea

Edwin B.

Goodell,

Attorney.

As yet of the fourteenth day of February, A. D.
one thousand nine hundred and three.

WITNESS, William S. Gummere, Esquire,
Chief Justice.

William Riker, Jr.,
Clerk.

ESSEX COUNTY, ss:—

THE BOARD OF TRUSTEES OF THE
TEACHERS' RETIREMENT FUND, defendant
in this suit, was summoned to answer HARRIET
E. BALL, the plaintiff therein, in an action upon
contract, whereupon the plaintiff, by Edwin B.
Goodell, her attorney, complains for that whereas,
heretofore, to wit: on the first day of September,
eighteen hundred and ninety-six and from thence
hitherto, the defendant was and is a Board consti-
tuted and organized under and by virtue of an Act
of the Legislature of the State of New Jersey en-
titled "An Act to amend an Act to establish a sys-
tem of public instruction in the State of New Jer-
sey," approved March, eleventh, eighteen hundred

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40

and ninety-six, and the several Acts supplementary thereto and amendatory thereof, and was, in and by said act, and still is vested with the charge, control, administration and disbursement of a certain fund in and by and by said act created for the benefit of such persons as should, in and by the terms of said Act become entitled thereto, and known and there-in designated as the Public School Teachers' Retirement Fund whereby it became and was and still re-

10 mains the duty of said Board to administer and pay and disburse the said fund as in and by the said Act directed; that the plaintiff was at the time of the approval of said Act of the Legislature a public school teacher in the State of New Jersey, and had been such for a long time theretofore, to wit: from the month of September, eighteen hundred and seventy-seven, and that thereafter and upon the eleventh day of June, eighteen hundred and ninety-

20 Education in the City of Newark in said State, which was the municipality in which the plaintiff was employed, a notice that the plaintiff agreed to be bound by and desired to avail herself of the provisions of the said Act entitled "An Act to Amend an Act entitled 'An act to establish a system of public instruction in the State of New Jersey,' " in manner and form as provided in said Act, and thereby became bound by and entitled to the benefits of the said Act, that subsequently and while so

30 bound and entitled, and after having taught in the public schools of this State for a period of twenty years, to wit; on the sixth day of March, nineteen hundred, plaintiff became incapacitated by reason of physical infirmity, from performing the duties of a teacher and thereupon resigned her position as such public school teacher and at her own request became and was thereupon retired as a teacher, and the plaintiff avers that she received a salary of six hundred and fifty dollars per annum during the five

40 years immediately preceding her retirement as

aforesaid, which said sum was her annual average salary for said period, and that the plaintiff thereby became entitled to receive an annuity out of said fund, and the said defendant became and was bound to pay to the plaintiff an annuity equal to said one-half of the average annual salary received by the plaintiff for the five years immediately preceding the time of retirement, to wit; the sum of three hundred and seventy five dollars per annum, which the said defendant then and there promised to pay. 10
 And the said plaintiff avers that she has performed all the conditions required on her part to be performed to entitle her to receive the said annuity from the said defendant, except the payment to the said fund of a sum equal to twenty per centum of her annual salary at the time of her said retirement, but the plaintiff avers that she has tendered herself ready and willing to pay said sum unto said fund and is now ready and willing so to do, and that the defendant refused to receive the same and expressly 20
 waived the payment thereof as a condition precedent to the right to receive said annuity; and the plaintiff is entitled to receive the same, but that the said defendant has not paid to the said plaintiff the said annuity nor any part thereof, but contrary to the said statute and disregarding its said promises hath hitherto refused and still does neglect and refuse so to do, to wit; at Newark aforesaid, to the damage of the plaintiff two thousand dollars, and therefore she brings her suit, etc., 30

And for that whereas, the defendant heretofore, to wit, on the first day of January, nineteen hundred and three, at Newark, in the said County was indebted to the plaintiff in the sum of two thousand dollars, for goods sold and delivered by the plaintiff to the defendant at its request; and in the like sum for work done and materials furnished by the plaintiff for the defendant at its request; and in the like sum for money lent by the plaintiff to the defendant at its request; and in the like sum 40

for money paid by the plaintiff for the use of the defendant at its request; and in the like sum for money received by the defendant for the use of the plaintiffs; and in the like sum for interest for the forbearance by the plaintiff at the defendant's request of money due and owing from the defendant to the plaintiff; and in the like sum for money due from the defendant to the plaintiff on an account stated between them; and being so indebted, the defendant in consideration thereof, then and there promised the plaintiff to pay her the said several sums of money on request. Yet the defendant has disregarded its said several promises and has not paid the said several sums of money, nor any of them or any part thereof, although often requested so to do, but to do so has hitherto wholly refused, and still does refuse, to the damage of the plaintiff in the sum of two thousand dollars, and therefore she brings her suit. &c.,

20 And the said defendant, the Board of Trustees of The Teachers' Retirement Fund, by Vreeland, King, Wilson & Lindabury, its attorneys, comes and defends the wrong and injury, when, etc., and says that it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country &c..

30 And the said defendant, The Board of Trustees of The Teachers' Retirement Fund, for a further plea in this behalf, by leave of the Court, here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain her aforesaid action thereof against it, because it says that the said plaintiff is not incapacitated by reason of physical infirmity from performing the duties of a teacher, and has not performed all of the duties required on her part to be performed to entitle her to receive the said
40 annuity from the said defendant, and has not paid

in to The Teachers' Retirement Fund the sum required by the statute in such case made and provided to be paid, and has not tendered herself ready and willing to pay said sum into the said Fund, and did not tender or offer to pay it, the said defendant, the sum equal to twenty per centum of the annual salary of the said plaintiff, at the time of her said retirement, and that the said defendant did not refuse to receive the same and expressly waived the payment thereof as a condition precedent to the right of said plaintiff to receive said annuity, in manner and form as the said plaintiff has above, in her said declaration in that behalf, alleged, and of this, the said defendant puts itself upon the country &c., 10

And the said plaintiff, by Edwin B. Goodell, her attorney, as to the pleas of the above named defendant, firstly and secondly above pleaded, whereof it has put itself upon the country, doth the like.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court, to be holden at Newark, in and for the County of Essex on the first Tuesday of April, in the year of our Lord one thousand nine hundred and six, by whom etc., and the same day is given to the parties aforesaid there etc., 20

And now at this day, to wit; the tenth day of April, A. D. nineteen hundred and six, before our said Supreme Court at Trenton, comes the said plaintiff by her attorney aforesaid and the Justice before whom etc., having first sent hither his record had before him in these words, to wit; 30

And afterwards, to wit, at a Circuit Court holden at Newark, in and for the County of Essex, before his Honor, William S. Gummere, Chief Justice of the Supreme Court, on the fourth day of April, in the year of our Lord one thousand nine hundred and six, according to the form of the statute in such case made and provided, comes as well the said 40

plaintiff as the said defendant, by their respective attorneys within mentioned, and a jury having been waived, the Court finds and adjudges that the defendant, the Board of Trustees of the Teachers' Retirement Fund did undertake and promise in manner and form as the said plaintiff, Harriet E. Ball, in her said declaration alleged, and does assess the damages of the said plaintiff by reason of the non-performing of the said promises and undertaking, over and above the costs and charges by her about her suit in this behalf expended, at the sum of nine hundred and forty five dollars and ninety-one cents, and for those costs and charges &c.,

Therefore it is considered that the said plaintiff do recover against the said defendant her said damages by the Court in form aforesaid found to nine hundred and forty five dollars and ninety-one cents and also thirty five dollars and ninety-one cents for her costs and charges aforesaid, by the Court now here adjudged to the said plaintiff and with her assent, which said damages, costs and charges in the whole amount to the sum of nine hundred and eighty one dollars and ninety cents.

Judgment signed the tenth day of April, A. D. one thousand nine hundred and six.

WM. S. GUMMERE, C. J.

I, WILLIAM RIKER, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this twenty-second day of June, A. D. nineteen hundred and six.

(Seal)

WM. RIKER, Jr.,
Clerk.

NEW JERSEY, ss:

The State of New Jersey to the
Chief Justice and other Jus-
tices of our Supreme Court
(Seal) of Judicature, GREETING:

Forasmuch as in the record and proceedings,
and also in the giving of judgment in a certain
plaint, which was in our said Supreme Court of Ju-
dicature, before you, between Harriet E. Ball, plain- 10
tiff, and The Board of Trustees of the Teachers' Re-
tirement Fund, defendant, in an action upon con-
tract, manifest error hath intervyned, to the great
damage of the said defendant, as it is said; we be-
ing willing that the error, if any there be, should,
in due manner, be corrected, and full and speedy
justice done to the parties aforesaid in this behalf,
do command you, that if judgment be thereupon
given and affirmed, then you distinctly and openly
send, under your seal, the record and proceedings 20
aforesaid, with all things touching the same, to our
Judges of our Court of Errors and Appeals in the
last resort in all causes, at Trenton, on the twenty-
third day of June, inst., together with this writ, that
the record and proceedings aforesaid being inspect-
ed, we may cause to be further done thereupon, for
correcting that error, what of right and according to
the law and custom of the State of New Jersey
ought to be done.

30

WITNESS, WILLIAM J. MAGIE, Esquire,
our Chancellor and President Judge of our said
Court of Errors and Appeals, at Trenton aforesaid,
the eleventh day of June, in the year of Our Lord
one thousand nine hundred and six.

S. D. DICKINSON, Clerk.

Vreeland, King, Wilson & Lindabury,

Attorneys.

40

Filed June 25, 1906.

S. D. DICKINSON, Clerk

10 The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, (L. S.)
C. J.

New Jersey Court of Errors and Appeals.

20 HARRIET E. BALL,

Pl'ff and Def't in Error,

vs.

THE BOARD OF TRUSTEES
OF THE TEACHERS' RE-
TIREMENT FUND.

Def't and Pl'ff in Error.

In Error.
Assignment of
Errors.

30

Afterwards, that is to say, on the twenty-third day of June, in the year of Our Lord one thousand nine hundred and six, in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, at Trenton, comes the said The Board of Trustees of the Teachers' Retirement Fund, by Vreeland, King, Wilson & Lindabury, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and
40 contained in the said bill of exceptions, and also in

giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

For that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Harriet E. Ball to have and maintain her aforesaid action against the said The Board of Trustees of the Teachers' Retirement Fund.

There is also error in this, to wit, for that in giving the judgment aforesaid, it appears that the judgment in form aforesaid was given for the said Harriet E. Ball against the said The Board of Trustees of the Teachers' Retirement Fund, whereas by the law of the land judgment ought to have been given for the said The Board of Trustees of the Teachers' Retirement Fund against the said Harriet E. Ball. 10

There is also error in this, to wit, for that the Chief Justice of the Supreme Court, before whom the trial of the issues aforesaid was had, and upon the trial of said issues so joined between the parties aforesaid, over-ruled the motion of the counsel of the defendant for a judgment of non-suit against the plaintiff. 20

There is also error in this, to wit, for that said Chief Justice, at the trial aforesaid, over-ruled the motion and request of the counsel of the defendant for a direction of a verdict in favor of the defendant.

There is also error in this, to wit, for that the said Chief Justice, at the trial aforesaid, erred in denying a motion made on behalf of the defendant to non-suit the plaintiff upon the following reasons and each of them: 30

FIRST:—Because the application of plaintiff for retirement and annuity is still pending before the Board of Trustees of the Teachers' Retirement Fund, undetermined and undecided, and under and by virtue of the act of the Legislature approved March 24, 1899, (P. L. 1899, p. 475), it is therein provided that the decision of the Board of Trustees of said fund upon any application for such annuity, 40

shall conclusively determine the right of the applicant thereto; so that until a decision by said board in favor of the said application, such applicant has no right of action therefor.

SECOND:—Because it does not appear that the retirement of said plaintiff as a teacher has ever been approved by the aforesaid Board of Trustees, as required by said act approved March 24, 1899, (P. L. 1899, p. 475).

- 10 THIRD:—Because the plaintiff having made her application for an annuity pursuant to the provisions of the act passed March 11, 1896, amended March 24th, 1899, is bound by the provisions of the said act of March 24th, 1899, and is estopped from denying that she is so bound; and the provisions of said act require the approval of said Board of Trustees of the application of plaintiff for retirement and annuity, and its decision thereon, before plaintiff can become entitled to an annuity, and there is
- 20 no evidence of the approval of plaintiff's application by said Board, and its decision that she is entitled to receive an annuity.

- FOURTH:—Because the act of the Legislature of the State of New Jersey establishing said Board, the defendant herein, and defining its duties, passed March 11, 1896, (P. L., 1896, p. 58, &c.), provided, "That whenever any teacher entitled to the benefits of this act has taught in the public schools of this state for a period of twenty years, and shall
- 30 become incapacitated from performing the duties of a teacher, such teacher shall * * * be retired as a teacher, and shall thereafter receive an annuity:" and it appears from the evidence that the plaintiff did not become incapacitated after teaching for twenty years, as in said act provided.

FIFTH:—Because it appears from the evidence that the incapacity relied upon by the plaintiff existed at the time she became a member of the Teachers' Retirement Fund.

- 40 SIXTH:—Because under the act passed March

11, 1896, (P. L. 1896, p. 58, &c.), establishing the Teachers' Retirement Fund, and the Board of Trustees thereof, it is provided that "such Board shall have charge of and administer said fund as they shall deem most beneficial to such fund, and to the beneficiaries thereof;" whereby it became the duty and power of said Board, the defendant herein, to pass upon all applications for retirement and annuity, and to decide whether or not to pay an annuity to any applicant until such time as said Board 10
deem it most beneficial to such fund and to the beneficiaries thereof, and pending such decision by said Board no action such as the present one can lie, and there being no evidence in this case of such decision the plaintiff cannot recover.

SEVENTH:—Because the duty of ordering payment from said fund, by said Board of Trustees, the defendant herein, is purely ministerial, under the act passed March 11, 1896, heretofore referred to, and mandamus is the proper remedy of plaintiff, 20
and not an action on contract. The declaration herein alleges that, upon plaintiff presenting to the defendant her application for retirement and annuity, said defendant "became and was bound to pay to said plaintiff an annuity equal to one-half of the average annual salary received by the plaintiff;" whereas the duty imposed upon defendant by said act is to order payment from said fund, if at the time there shall be sufficient money in said fund to pay the warrants drawn thereon as presented for 30
payment, and mandamus is the only remedy the plaintiff has to compel the defendant to draw such warrants.

EIGHTH:—Because there is no evidence showing that there is sufficient money in said fund to pay the warrants thereon as presented for payment.

There is also error in this, to wit, for that the said Chief Justice, at the trial aforesaid, erred in denying the request made on behalf of the defendant for a direction of a verdict in favor of the de- 40

fendant, upon the following reasons and each of them:

FIRST:—Because the application of plaintiff for retirement and annuity is still pending before the Board of Trustees of the Teachers' Retirement Fund, undetermined and undecided, and under and by virtue of the act of the Legislature approved March 24, 1899, (P. L. 1899, p. 475), it is therein provided that the decision of the Board of Trustees
 10 of said fund upon any application for such annuity, shall conclusively determine the right of the applicant thereto; so that until a decision by said board in favor of the said application, such applicant has no right of action therefor.

SECOND:—Because it does not appear that the retirement of said plaintiff as a teacher has ever been approved by the aforesaid Board of Trustees, as required by said act approved March 24, 1899, (P. L. 1899, p. 475).

THIRD:—Because the plaintiff having made
 20 her application for an annuity pursuant to the provisions of the act passed March 11, 1896, amended March 24th, 1899, is bound by the provisions of the said act of March 24th, 1899, and is estopped from denying that she is so bound; and the provisions of said act require the approval of said Board of Trustees of the application of plaintiff for retirement and annuity, and its decision thereon, before plaintiff can become entitled to an annuity, and there is no evidence of the approval of plaintiff's application by said Board, and its decision
 30 that she is entitled to receive an annuity.

FOURTH:—Because the act of the Legislature of the State of New Jersey establishing said Board, the defendant herein, and defining its duties, passed March 11, 1896, (P. L. 1896, p. 58, &c.), provided, "That whenever any teacher entitled to the benefits of this act has taught in the public schools of this state for a period of twenty years, and shall become incapacitated from performing the duties of a teacher, such teacher shall * * * be retired
 40 as a teacher, and shall thereafter receive an an-

nuity;" and it appears from the evidence that the plaintiff did not become incapacitated after teaching for twenty years, as in said act provided.

FIFTH:—Because it appears from the evidence that the incapacity relied upon by the plaintiff existed at the time she became a member of the Teachers' Retirement Fund.

SIXTH:—Because under the act passed March 11, 1896, (P. L. 1896, p. 58, &c.), establishing the Teachers' Retirement Fund, and the Board of Trustees thereof, it is provided that "such Board shall have charge of and administer said fund as they shall deem most beneficial to such fund, and to the beneficiaries thereof;" whereby it became the duty and power of said Board, the defendant herein, to pass upon all applications for retirement and annuity, and to decide whether or not to pay an annuity to any applicant until such time as said Board deem it most beneficial to such fund and to the beneficiaries thereof, and pending such decision by said Board no action such as the present one can lie, and there being no evidence in this case of such decision the plaintiff cannot recover. 10 20

SEVENTH:—Because the duty of ordering payment from said fund, by said Board of Trustees, the defendant herein, is purely ministerial, under the act passed March 11, 1896, heretofore referred to, and mandamus is the proper remedy of plaintiff, and not an action on contract. The declaration herein alleges that, upon plaintiff presenting to the defendant her application for retirement and annuity, said defendant "became and was bound to pay to said plaintiff an annuity equal to one-half of the average annual salary received by the plaintiff;" whereas the duty imposed upon defendant by said act is to order payments from said fund, if at the time there shall be sufficient money in said fund to pay the warrants drawn thereon as presented for payment, and mandamus is the only remedy the plaintiff has to compel the defendant to draw such warrant. 30 40

EIGHTH:—Because there is no evidence showing that there is sufficient money in said fund to pay the warrants drawn thereon as presented for payment.

There is also error in this, to wit, for that the said Chief Justice, at the trial aforesaid, refused to non-suit the plaintiff for the reasons last hereinabove set forth.

There is also error in this, to wit, for that the
10 said Chief Justice, at the trial aforesaid, refused to direct a verdict in favor of the defendant for the reasons last hereinabove set forth.

There is also error in this, to wit, for that the said Chief Justice, at the trial aforesaid, did not, after hearing the plaintiff's evidence order the plaintiff to be called, and did not then and there order judgment of non-suit to be entered against the said plaintiff accordingly, the evidence given being
20 insufficient both in law and in fact to maintain her action.

There is also error in this, to wit, for that the said Chief Justice, at the trial aforesaid, did not, after hearing the the plaintiff's evidence, order and direct a verdict for the defendant, and did not then and there order and direct and give judgment for the defendant to be entered against said plaintiff accordingly, the evidence given being insufficient both in law and in fact to maintain the action of said plaintiff.

30 Therefore, the said The Board of Trustees of the Teachers' Retirement Fund prays that the judgment aforesaid, by reason of the aforesaid errors, and of other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said The Board of Trustees of the Teachers' Retirement Fund may be restored to all things it has lost on occasion of the said judgment, etc.

40 VREELAND, KING, WILSON & LINDABURY,
Attorneys for and of Counsel with Plaintiff in Error.

New Jersey Court of Errors and Appeals.

HARRIET E. BALL,

Pl'ff and Def't in Error,

vs.

THE BOARD OF TRUSTEES

OF THE TEACHERS' RE-

TIREMENT FUND.

Def't and Pl'ff in Error.

In Error.

Joinder

in Error.

10

And hereupon, afterwards, to wit, on the third Tuesday of November, in the year of Our Lord one thousand nine hundred and six, &c., the said Harriet E. Ball, by Edwin B. Goodell, her attorney, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and she prays here that the Court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c. 20

EDWIN B. GOODELL,

Attorney for and of Counsel with Plaintiff and Defendant in Error. 30

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New Jersey Supreme Court.

10	HARRIET E. BALL, vs. THE BOARD OF TRUSTEES OF THE TEACHERS' RE- TIREMENT FUND.	} Contract
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Transcript of shorthand notes of proceedings in the above stated cause, upon the trial thereof, at the courthouse, Newark, N. J., April 4, 1906.

Before Hon. William S. Gummere, Chief Justice, without a jury (by consent).

Edwin B. Goodell for plaintiff.

Vreeland, King, Wilson & Lindabury for defendant.

20 A state of facts agreed upon by counsel is read, as follows:

New Jersey Supreme Court

30	HARRIET E. BALL, vs. THE BOARD OF TRUSTEES OF THE TEACHERS' RE- TIREMENT FUND.	} Upon Contract. Admission Of Facts.
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It is hereby admitted and agreed that the following is a true statement of the facts pertinent to the issue in the above entitled cause, and it is stipulated that this statement may be used upon the trial of the action as admissions, other proof there-
 40 of being hereby waived. But this stipulation is not

an admission that any of the facts herein stated are material to the issue.

FIRST:—The plaintiff, Harriet E. Ball, began to teach in the public schools of the City of Newark in September 1877, and taught continuously in the public schools of said City until the Sixth day of March 1900.

SECOND:—That on the Eleventh day of June, 1896, pursuant to the provisions of an act entitled “A Supplement to an act entitled ‘An act to establish a system of public instruction’ (Revision) Approved March 27, 1874,” which supplement was approved March 11, 1896, she signed and delivered to the Board of Education of the City of Newark a notice, substantially in the form prescribed in section 7 of the said Act, for the purpose of availing herself of the provisions thereof. 10

THIRD:—That from and after October 1, 1896, which was the date when her first salary payment became due thereafter, and so long as she continued to teach, 1 per cent. of her salary was deducted each month and paid over to the State Treasurer in accordance with the provisions of sub-section 1 of Section 5 of the said Act. 20

FOURTH:—That on or about the sixth day of March, 1900, the plaintiff voluntarily resigned her position as a teacher, and retired from her occupation of teaching, because of chronic middle ear catarrh in both ears, (caused by an attack of scarlet fever ten years or more prior to April 14, 1901), which was permanent in its nature and immediately resulted in permanent deafness, such permanent deafness having steadily progressed from the time of such attack of scarlet fever as aforesaid, thereby incapacitating her from performing the duties of a teacher. 30

FIFTH:—That thereafter she made her application to the defendants for an annuity in accordance with the provisions of said act, which application was in writing upon a blank form provided by 40

the defendants, and that a true copy of the said application, with the verification and several certificates annexed thereto and endorsements thereon is contained on pages 15, 16 and 17 and 18 of the printed case on demurrer in the above entitled cause, which pages of said printed case are to be used on the trial of this action and admitted in evidence in lieu of the original.

10 SIXTH:—That the plaintiff was informed by one of the members of the defendant Board that she could not pay in to the Fund 20 per cent. of her annual salary as required by Section 3 of the said Act, until it should be decided whether or not she was entitled to an annuity; that in the said application the said Harriet E. Ball tendered herself ready to pay in the said sum, and that the defendants have never decided that she was entitled to the said annuity.

20 SEVENTH:—That it is the custom and the practice of the defendant, in cases where the granting of said annuity is dependent upon the payment of a certain sum by the applicant, not to require or accept the payment of said sum until the Board has determined whether or not the application is to be granted, and in cases where it is granted to deduct the said payment from the annuity.

30 EIGHTH:—That the average annual salary of the plaintiff during the last five years of her teaching was \$650, and that this action was commenced by the issuance of a summons on the thirtieth day of January 1903. That 20 per cent. of the plaintiff's annual salary is \$130.

NINTH:—That the aforesaid application of said Harriet E. Ball is still pending before the Board of Trustees of the Teachers' Retirement Fund, the defendant herein, undetermined and undecided.

40 TENTH:—That the defendant had no notice or knowledge of plaintiff's physical condition at the time she filed the notice of June eleventh, one thou-

sand eight hundred and ninety-six, nor until receiving her application for annuity on May second, nineteen hundred.

EDWIN B. GOODELL,
Attorney of Plaintiff.

VREELAND, KING, WILSON & LINDABURY,
Attorneys of Defendant.

10

Plaintiff's counsel offers in evidence the following document:

(Copy of the application of Harriet E. Ball, the plaintiff in the above entitled cause, referred to in the foregoing pleas.)

20

**NEW JERSEY TEACHERS' RETIREMENT
FUND.**

Teacher's Application for Retirement with Annuity.

I, Harriet E. Ball, of the city of Newark, in the county of Essex, do hereby apply to the Board of Trustees of the Teachers' Retirement Fund to be retired as a teacher and for an annuity from said fund, pursuant to the provisions of an act of the Legislature entitled, "A supplement to an act entitled, 'An act to establish a system of public instruction' (Revision), approved March 27th, 1874," passed March 11th, 1896, amended March 24, 1899.

30

As such applicant I do make the following declarations:

1. My annual salary at the present time is \$650, and I am ready to pay into the fund 20 per 40

cent. of such salary, according to the provisions of section 3 of said act.

2. I have taught in the public schools of this state for the full period of twenty-two years, six months.

10 3. My annual salary for the last five years of my teaching has been: 1895, \$650; 1896, \$650; 1897, \$650; 1898, \$650; 1899 and 1900, \$650.

4. I am and have been a contributing member of the Teachers' Retirement Fund since its incorporation, September, 1896.

5. My age is forty-one years. (Last birthday).

6. I am single.

7. I began teaching in New Jersey in the public schools in the city of Newark, county of Essex, in the year 1877.

20 8. I have since been engaged as a teacher in New Jersey at the following times and places:

I have taught twenty-two years and six months in the Eighteenth avenue public school of Newark, New Jersey.

30 9. I wish to retire from teaching by reason of ill health and disability. Such ill health and disability is of such a nature and extent as to prevent my continuing to earn a livelihood by teaching (Here state cause and nature in full). I am unable to teach because of permanent deafness, caused by catarrh of the middle ear, succeeding scarlet fever.

10. My family physician has been since July, 1896, Dr. Sarah R. Mead, (address) 16 James St., Newark, N. J.; I also refer to Dr. Theron Y. Sutphen, (specialist), (address) 999 Broad St., Newark, N. J.

State of New Jersey, }
County of Essex. } ss.

Harriet E. Ball, being duly sworn according to law, on her oath saith that the statements and declarations contained in the foregoing application are true.

HARRIET E. BALL, Teacher.

10

Sworn and subscribed at Newark,
N. J., this 14th day of April,
1900, before me,

JAMES J. GIBB,
Master in Chancery of New Jersey.

I hereby certify that the term of service of Harriet E. Ball, in the school district of Newark, county of Essex, State of New Jersey, has been teaching 22 years and 6 months, and that her position and salary have been as stated in the foregoing application. 20

(Seal)

R. D. ARGUE,
Secretary Board of Education.

I hereby certify to the best of my knowledge and belief that the term of service of Harriet E. Ball, in the schools of New Jersey not under my supervision has been _____ year and _____ months. 30
Superintendent.

PHYSICIAN'S CERTIFICATE.

I, Theron Y. Sutphen, M. D., a regular practicing physician in the city of Newark, county of Essex, and State of New Jersey, make the following report and certificate respecting the sickness and disability, of Harriet E. Ball, the teacher mentioned in the foregoing application for retirement and annuity:

40

1. How long have you known applicant? Nine years. How long have you been her physician? Nine years.
2. What has been the condition of her health during this period? General health good.
3. What is the nature of her disease or complaint? Chronic middle ear catarrh.
4. What has been its duration? Ten years or more.
- 10 5. Is it temporary or permanent? It is permanent.
6. What is the extent of the disability arising therefrom? Completely unfits her for teaching.
7. What is the nature and extent of her incapacity to teach, caused by said disease? Complete disability.
8. When did you last examine applicant? April 14th, 1900.
9. Give full and detailed account of applicant's physical condition? This is answered by the
- 20 above statement.

(Signed) THERON Y. SUTPHEN, M. D..

Sworn and subscribed at Newark,
N. J., this 14th day of April,
1900, before me,

JAMES J. GIBB,
Master in Chancery of New Jersey.

30 (Endorsement.)

Application for retirement and annuity of
Harriet E. Ball, (address) 246 S. 8th street, New-
ark, New Jersey.

Filed with secretary, May 2, 1900.

Presented to Board of Trustees, June 23, 1900.

Discussed, October 12, 1900.

Referred to Mrs. Crater and Mr. Howell, com-
mittee.

40 Examining physician, Theron Y. Sutphen, M. D.

Dr. Edward Hill Baldwin, Newark, N. J., for board.

Annuity granted.....

Amount, \$325 per year.....

Commencing.....

MR. WILSON. I move for a non-suit.

THE COURT. There can be no question of non-suit in this case, as both sides have agreed upon a state of facts.

10

MR. WILSON. I want to make a motion for non-suit on reasons stated, if your Honor will permit me.

I think the verdict should be no cause of action, first, because the application of plaintiff for retirement and annuity is still pending before the Board of Trustees of the Teachers' Retirement Fund, undetermined and undecided, and under and by virtue of the act of the Legislature approved March 24, 1899, (P. L. 1899, p. 475), it is therein provided that the decision of the Board of Trustees of said fund upon any application for such annuity, shall conclusively determine the right of the applicant thereto; so that until a decision by said board in favor of the said application, such applicant has no right of action therefor.

20

Second, because it does not appear that the retirement of said plaintiff as a teacher has ever been approved by the aforesaid Board of Trustees, as required by said act approved March 24, 1899, (P. L. 1899, p. 475).

30

Third, because the plaintiff having made her application for an annuity pursuant to the provisions of the act passed March 11, 1896, amended March 24th, 1899, is bound by the provisions of the said act of March 24th, 1899, and is estopped from denying that she is so bound; and the provisions of said act require the approval of said Board of Trustees of the application of plaintiff for retirement and annuity, and its decision thereon, before plaintiff

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can become entitled to an annuity, and there is no evidence of the approval of plaintiff's application by said board, and its decision that she is entitled to receive an annuity.

Fourth, because the act of the Legislature of the State of New Jersey establishing said Board, the defendant herein, and defining its duties, passed March 11, 1896, (P. L., 1896, p. 58, &c.,) provided, "That whenever any teacher entitled to the benefits of this act has taught in the public schools of this State for a period of twenty years, and shall become incapacitated from performing the duties of a teacher, such teacher shall * * * be retired as a teacher, and shall thereafter receive an annuity;" and it appears from the evidence that the plaintiff did not become incapacitated after teaching for twenty years, as in said act provided.

Fifth, because it appears from the evidence that the incapacity relied upon by the plaintiff existed at the time she became a member of the Teachers' Retirement Fund.

Sixth, because under the act passed March 11, 1896, (P. L. 1896, p. 58, &c.,) establishing the Teachers' Retirement Fund, and the Board of Trustees thereof, it is provided that "such Board shall have charge of and administer said fund as they shall deem most beneficial to such fund, and to the beneficiaries thereof;" whereby it became the duty and power of said Board, the defendant herein, to pass upon all applications for retirement and annuity, and to decide whether or not to pay an annuity to any applicant until such time as said Board deem it most beneficial to such fund and to the beneficiaries thereof, and pending such decision by said Board no action such as the present one can lie, and there being no evidence in this case of such decision the plaintiff cannot recover.

Seventh, because the duty of ordering payment from said fund, by said Board of Trustees, the defendant herein, is purely ministerial, under the act

passed March 11, 1896, heretofore referred to, and mandamus is the proper remedy of plaintiff, and not an action on contract. The declaration herein alleges that, upon plaintiff presenting to the defendant her application for retirement and annuity, said defendant "became and was bound to pay to said plaintiff an annuity equal to one-half of the average annual salary received by the plaintiff;" whereas the duty imposed upon defendant by said act is to order payment from said fund, if at the time there shall be sufficient money in said fund to pay the warrants drawn thereon as presented for payment, and mandamus is the only remedy the plaintiff has to compel the defendant to draw such warrant. 10

Eighth, because there is no evidence showing that there is sufficient money in said fund to pay the warrants drawn thereon as presented for payment.

Motion overruled. 20

Defendant's counsel prays exception to the ruling of the Court refusing nonsuit, and the same is allowed, and signed and sealed accordingly.

WM. S. GUMMERE, C. J. (L. S.)

MR. WILSON. I now ask for a direction of a verdict in favor of the defendant for the reasons stated. 30

Motion overruled.

Defendant's counsel prays exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

WM. S. GUMMERE, C. J. (L. S.)

THE COURT. According to the views ex- 40

pressed by the Supreme Court, the plaintiff is entitled to recover in this case upon the facts agreed upon, and I shall find in favor of the plaintiff for the amount of the annuity she is entitled to have, the sum to be paid calculated from the time the application was made down to the time the suit was begun.

10 The statute says "Any teacher * * * who shall resign, or be otherwise honorably retired, shall, upon application within three months after date of such retirement be entitled to and shall receive one-half of the total amount paid by him or her into said fund." That is, a person who comes within the purview of the statute is entitled to have the annuity date from the time of the application, with interest calculated down to the entering of the judgment.

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