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Yeazell v. Copins: Public Employee's Pension Plan Creates a Contractual Right Which May Not Be Impaired During His Employment

NOTES

YEAZELL v. COPINS: PUBLIC EMPLOYEE'S PENSION PLAN CREATES A CONTRACTUAL RIGHT WHICH MAY NOT BE IMPAIRED DURING HIS EMPLOYMENT

The Arizona Supreme Court in *Yeazell v. Copins*[1] ruled that a public employee has a contractual right upon retirement to have his pension determined by the terms of the plan as it existed when he entered employment rather than the plan as amended. The question of public employees' rights in statutory pension plans prior to retirement has been the subject of conflicting case discussions and decisions. After setting out the conflicts of authorities on the issue, this Note will compare *Yeazell* with other authorities which have ruled on the issue and analyze the contract theory offered to explain the *Yeazell* result.

Appellant Yeazell retired from the Tucson police force in 1962, with more than twenty years of service. By the terms of the pension plan statute when Yeazell joined the force in 1942,[2] an employee's monthly pension payment upon retirement was to equal one-half of his average monthly earnings in the *year* immediately preceding retirement. In 1952, the base for calculating retirees' pensions was changed by amendment[3] to equal one-half of an employee's average monthly earnings during the *five years* immediately preceding retirement. Under the 1952 amendment Yeazell received seven dollars and twenty-one cents less, per month, than he would have under the provisions of the plan in existence when he entered the force. He brought an action against the board for declaratory judgment, asserting his contractual right to have the pension payments calculated under the terms which existed when he joined the force. The board, relying on two prior Arizona decisions,[4] argued that a participant's rights under the plan were not vested prior to actual retirement but were subject to any reasonable changes made by the legislature.

Two Arizona cases had previously decided public employees' rights in pension plans. In *Police Pension Bd. v. Denney*[5] the court held that the employee's interest prior to retirement was a *con-*

1. 98 Ariz. 109, 402 P.2d 541 (1965).
2. Ariz. Laws 1937, ch. 40 § 9.
3. ARIZ. REV. STAT. ANN. § 9-925(A) (1956).
4. Robinson v. Police Pension Bd., 85 Ariz. 384, 339 P.2d 739 (1959); Police Pension Bd. v. Denney, 84 Ariz. 394, 330 P.2d 1 (1958).
5. 84 Ariz. 394, 330 P.2d 1 (1958).

tingent interest, in the realm of quasi-contract. Although he had bargained for and had a right to a reasonable and substantial pension, he was always subject to legislative power to make reasonable changes in the system. The *Denney* court held that an amendment which would withhold pension payments from a retiree if he were re-employed by state or local government was such a reasonable change and could validly affect all employees.

The second case, *Robinson v. Police Pension Bd.*,[6] involved the same 1952 amendment as did *Yeazell*. The change from a base of one year salary to the five years immediately preceding retirement was held to be a valid and proper change. The court said the change was related to maintaining the integrity and soundness of the fund. Therefore, it was binding as a reasonable change on all employees. Two members dissented in *Robinson*. They felt that the majority had failed to apply the test laid down in *Denney*:

> The question in each case, then, to be answered "on the record presented," is whether the change is shown to be reasonably required to preserve the integrity of the pension system, i.e., to enhance its actuarial soundness, or, as the court apparently determined in the Denney case, is a reasonable change promoting a paramount interest of the state without serious detriment to the employee.[7]

Under this test, the dissent argued, the facts required a different result: the pensioner's loss per month was a substantial one, not offset by any comparable advantage. Furthermore, there had been no showing that the fund was unsound or that it had to be amended in this "sweeping" fashion to preserve the system. Nonetheless, the *Robinson* majority had concluded, in the absence of any proof, that the amendment was reasonable.

On appeal to the Arizona Supreme Court, Yeazell's argument followed the reasoning of the dissent in *Robinson*. He argued that each employee has a right in his pension which vests upon employment, subject only to changes necessary to maintain the system's integrity. Any change would not affect his rights unless it had some material relation to operating the fund and offset any disadvantage incurred by some comparable new advantage. As applied to himself, Yeazell argued, the 1952 amendment was clearly unreasonable. The rate of deduction from salary was increased by three per cent, change in the base of calculation diminished his pension, and the interest which would be paid on his accumulated contributions should he leave service before retirement was also reduced. A detriment could clearly be shown.[8] To refute the board's contention that the fund was unsound at the time of amendment, the appellant submitted an analysis of the fund in

6. 85 Ariz. 384, 339 P.2d 739 (1959).
7. *Id.* at 392-93, 339 P.2d at 745.
8. Brief for Appellant, pp. 21-26, Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965).

an affidavit. Furthermore, it was argued that the legislature had made provision that the fund could never become unsound by requiring the city to keep it sound at the city's expense.[9] The city must pay annually the amount determined by periodic actuarial analysis to be necessary to keep the fund sound.[10] Since the fund could never become unsound, it had not been necessary to preserve the fund by amending the terms of the plan and limiting benefits to members. Yeazell recognized that his rights could be modified prior to retirement but that this was not a valid modification.[11]

In its decision, the court declined to follow Yeazell's argument. Rather, it reasoned: the pension plan gave a contractual right to Yeazell; contract rights may not be unilaterally altered; any amendment is an attempted unilateral change and may not alter Yeazell's rights. "A contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party. . . ."[12]

How will the court treat changes necessary to keep the fund from eventual collapse, *i.e.*, amendments to make the fund actuarially sound? A suggestion is found that the hard-and-fast contractual rule may be mollified under certain circumstances:

> If the pension plan was actuarially unsound when it was amended in 1952, the law governing mutual mistakes of fact is applicable in that both Tuscon and appellant labored under the mistaken assumption that there was a fund sufficient to afford appellant and the other beneficiaries of the fund the amount provided by the act. A mutual mistake of fact may apply to the existence of the subject matter of the contract, see Corbin on Contracts, § 600, ... If Tucson were to assert a modification of the contract, then it is its burden to establish appropriate grounds therefor. We do not, however, mean to imply what rights or remedies might be available to either party where it is established that a retirement plan is actuarially unsound.[13]

On the other hand, the burden of showing appropriate grounds for modification may be insuperable so long as the city is charged by

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9. *Id.* at 31-33.

10. ARIZ. REV. STAT. ANN. §§ 9-921(B), 9-923(C) (1956).

11. Brief for Appellant, pp. 19, 28, Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965).

12. 98 Ariz. at 115, 402 P.2d at 545.

13. *Id.* at 116-17, 402 P.2d at 546. Professor Corbin suggests that the usual remedy is recision and restitution when the contract is made after the subject has ceased to exist, so long as neither party contracted to assume the risk of nonexistence. See 3 CORBIN, CONTRACTS § 600 (1963). Such a standard would precipitate numerous troublesome questions if applied to a pension contract. (1) Did either party assume the risk of the fund's nonexistence? (2) Does a pension fund cease to exist when it becomes actuarially unsound, or when all its assets have been distributed? (3) Most important, what good is the remedy of recision and restitution to a pensioner who has paid a purchase price, at least in part, by his continued years of service?

statute to pay annually into the fund any amount required to restore its deficiencies.[14]

The *Yeazell* decision is against the case law of most jurisdictions. A majority of courts hold that an employee has no protected interest in his pension prior to retirement.[15] Accordingly, the provisions may be altered or revoked at any time effective against all employees not yet retired.[16] Although there is fundamental agreement on the result, diverse explanations have been offered in arriving at that result. Some courts label all pensions paid to public employees as gratuities or expectancies which are subject to change at the will of the donor.[17] This theory is satisfactory when applied to armed service veterans[18] or persons receiving public welfare assistance.[19] When, however, a public employee contributes money from salary, the pension is hardly gratuitous, at least to the extent of his contributions. A small minority of courts take the view, as in *Yeazell*, that continued service by the employee is itself consideration to bind the state to its promise of a pension. Even under contributory plans, however, many courts have ruled that the employee has no protected interest prior to retirement.[20] They reason that if participation is compulsory under the statute, as are most modern plans, an employee actually contributes nothing to the fund. The money is simply transferred from one public fund to another without regard to his consent.[21] The obvious weak-

14. ARIZ. REV. STAT. ANN. §§ 9-921(B), 9-923(C) (1956).

15. 3 MCQUILLEN, MUNICIPAL CORPORATIONS § 12.144 (3d ed. 1963); Annot., 52 A.L.R.2d 437 (1957).

16. There is a division of authority whether the employee's interest, though subject to revision during employment, becomes vested when all the conditions have been met for retirement. One line of cases holds that the employee's pension may be reduced after he has retired. *E.g.*, Dodge v. Board of Education, 302 U.S. 74 (1937) (no employee contributions to fund); MacLeod v. Fernandez, 101 F.2d 20 (1st Cir. 1938); Talbott v. Independent School Dist., 230 Iowa 949, 299 N.W. 556 (1941); Kinney v. Contributory Retirement Appeal Bd., 330 Mass. 302, 113 N.E.2d 59 (1953). Other courts take the position that one who has complied with the conditions necessary to receive a pension may not be affected by any subsequent changes. *E.g.*, Trotzier v. McElroy, 182 Ga. 719, 186 S.E. 817 (1936); McBride v. Allegheny County Retirement Bd., 330 Pa. 402, 199 Atl. 130 (1938); Driggs v. Utah State Teachers Retirement Bd., 105 Utah 417, 142 P.2d 657 (1943). A further catalogue of cases is not germane to the issue of this note, *i.e.*, what is the employee's protected interest, if any, prior to retirement. See generally, Annot., 52 A.L.R.2d 437 (1957).

17. Kinney v. Contributory Retirement Appeal Bd., *supra* note 16; Brown v. City of Highland Park, 320 Mich. 108, 30 N.W.2d 798 (1948).

18. United States v. Teller, 107 U.S. 64 (1882); Abott v. Morgenthau, 93 F.2d 242, 245 (D.C. Cir. 1937) (dictum).

19. Collins v. State Bd. of Social Welfare, 248 Iowa 369, 81 N.W.2d 4 (1957) (dictum).

20. Pennie v. Reis, 132 U.S. 464 (1889); MacLeod v. Fernandez, 101 F.2d 20 (1st Cir. 1938); Keegan v. Board of Trustees, 412 Ill. 430, 107 N.E.2d 702 (1952); Clarke v. Ireland, 122 Mont. 191, 199 P.2d 965 (1948).

21. Raines v. Board of Trustees, 365 Ill. 610, 7 N.E.2d 489 (1937), gives

ness of the argument is that such a transfer is credited to a particular employee as a deduction from salary and would not be made if he were not an employee. "Merely because the deductions are compulsory, as are deductions for income tax, and do not come into the member's actual possession, it does not follow that he has not earned the money or that it is not part of his compensation."[22] It has also been held that the grant of a pension plan is not a promise but simply a legislative policy which rests fully within the control and discretion of the legislature.[23]

The inability of the majority courts to agree in their reasoning indicates the enigmatic nature of a pension plan. In some respects it resembles a donation by the employer for humanitarian purposes. It also has elements of a contract, being consideration for the employee's continued service, or forming an annuity contract to the extent of his contributions to the fund. The uniform result reached by the majority courts does suggest a common underlying policy, *i.e.*, protecting the public treasury. An actuarially unsound fund may expose the state or municipality to huge expense in meeting eventual liabilities.[24] Many factors must be properly considered in order that the contributions by present members are sufficient to meet expected liabilities upon retirement. The general purpose of amendments is to bring present contributions and ultimate benefits

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a thorough discussion of this position. Some cases, following the argument to its conclusion, hold that where participation is voluntary, *i.e.*, optional under the statute, the employee's interest is immune from any change during employment. Barden v. Board of Trustees, 22 Ill. 2d 56, 174 N.E.2d 168 (1961); State *ex rel.* Phillip v. Public School Retirement Sys., 364 Mo. 395, 262 S.W.2d 569 (1953). *Contra*, City of Dallas v. Trammell, 129 Tex. 150, 101 S.W.2d 1009 (1937).

22. Police Pension and Relief Bd. v. McPhail, 139 Colo. 330, 340, 338 P.2d 694, 699 (1959). Talbott v. Independent School Dist., 230 Iowa 949, 959, 299 N.W. 556, 561 (1941), criticized the voluntary-compulsory distinction as "specious." Pensions, it said, are given in consideration for employment services yet there is no vested contractual right which is immune from adverse change.

23. Spina v. Consolidated Police & Firemen's Pension Comm'n, 41 N.J. 391, 197 A.2d 169 (1964). In effect, this is merely a new face on the "gratuity" theory, *supra* note 18. The court argued that it was misleading to sum up in a single word the relationship and interest which an employee has in the pension fund.

24. See Spina v. Consolidated Police & Firemen's Pension Fund Comm'n, *supra* note 23. Under the terms of the plan as it existed before amendment, the municipalities would have had to bear the expense of an unfunded deficit of over $200 million had the court found a vested contractual interest in the plan on the part of all employees participating at the time of amendment. *Cf.*, City of Dallas v. Trammel, 129 Tex. 150, 101 S.W.2d 1009 (1937), wherein the court did not consider the possibility that the city could be required to pay deficiencies in the fund beyond its limited statutory contribution. Rather, the fund would simply fail to meet its obligation. Faced with that choice, the court chose to enforce reduced benefits against all participants which was the only way to protect the interest of all those concerned. Both cases reach the same conclusion, the legislature must retain the power to amend the terms of the plan.

into proper proportion. Thus, amendments typically do one or more of several things: increase the rate of contribution, raise the age of retirement, or adjust benefits to retirees.[25] If the legislature is barred from changing the terms of the plan as to all present participants, any deficiency due to actuarial inadequacy falls on the tax revenues.[26]

The *Yeazell* court declined to follow the majority rule, reasoning that if it did not find a contract right to a pension, the entire plan would be condemned by the state constitution's prohibition against donation of public money.[27] That conclusion was not necessarily correct. A payment of money is not ipso facto a gift because the recipient does not have an enforceable right to receive it.[28] Legitimate state purposes are accomplished by that payment.[29] For example, the state thereby induces long service and can fairly discharge its superannuated servants. Thus, a pension, though gratuitous in the sense of being unenforceable, would not contravene the constitutional prohibition against gifts of public money.[30]

The minority courts have said, however, like *Yeazell*, that the only alternative to finding a contractual interest on the part of the employee is to hold the entire plan void as a gift of state money.[31] This argument, it is submitted, is only a makeweight,[32] but it sug-

25. See Ayman v. Teachers' Retirement Bd., 19 Misc.2d 355, 193 N.Y.S. 2d 2 (Sup. Ct. 1959), for a thorough discussion of the problems involved in funding pension plans.

26. Spina v. Consolidated Police & Firemen's Pension Fund Comm'n, 41 N.J. 391, 197 A.2d 169 (1964).

27. 98 Ariz. at 112, 402 P.2d at 543. See ARIZ. CONST. art. 9, § 7.

28. The New Jersey Supreme Court said, under a similar constitutional provision, "A payment is not a gift because it rests only upon legislative policy. It does not offend the Constitution to pay for services merely because the arrangement remains subject to legislative revision or recission." Spina v. Consolidated Police & Firemen's Pension Fund Comm'n, 41 N.J. 391, 403, 197 A.2d 169, 175 (1964); N.J. CONST. art. 8, § 3, part 3.

29. The holding in Fraternal Order of Firemen v. Shaw, 196 A.2d 734 (Del. 1963), is not directly in point because the court was not under a constitutional ban on donations of state money. However, the argument there raised would have force in states which do have such a ban. Even if payment of pensions was not compensation for services rendered, that payment furthered the state's interest by inducing present employees to remain on the job. If a payment of state money accomplishes a valid and desirable result it should not be termed a donation of state money.

30. Spina v. Consolidated Police & Firemen's Pension Fund Comm'n, 41 N.J. 391, 197 A.2d 169 (1964).

31. Kern v. City of Long Beach, 29 Cal. App.2d 848, 179 P.2d 799 (Sup. Ct. 1947); Bender v. Anglin, 207 Ga. 108, 60 S.E.2d 756 (1950); Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956).

32. As discussed in notes 29, 30 *supra*, and accompanying text, the pension plan is not necessarily either a contract or a gratuity. But if restricted to those alternatives, the court would not be compelled to hold it contractual simply because the gratuity theory would have patently undesirable consequences, unless the court was choosing a theory to provide the desired result.

gests the origin of the minority rule. The real interest and moving purpose in calling a pension plan a contract is to achieve fairness to the state's employees by giving them the pension they expected. "Whether it be in the field of sports or in the halls of the legislature it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game."[33]

The validity of this assertion is borne out by a closer examination of the minority's contract theory. Existence of a pension statute is said to constitute a continuing offer, a promise, to present and prospective employees that they will receive the stated pension if they complete X years of service and contribute Y per cent of earnings to the fund.[34] The first question to be asked is whether the statute can reasonably be interpreted by employees as a promise.[35] Could it not be read rather as an expression of state policy which is to continue until it is revoked by the legislature.[36] Neither interpretation is patently incorrect, but the former gives the benefit of any doubt to the employee, thus protecting his interest which otherwise might be revoked at will.

If a promise may fairly be implied in the statute, the bargain proposed presumably must be unilateral. What is requested in exchange for the pension promise is continued service and contributions from salary, not a promise of such action.[37] No one would suggest that the state could enforce such a promise even if it might be implied in the employee's action. Existence of the pension plan fairly interpreted, gives rise to an offer of a unilateral contract.

It is said that the present or prospective employee accepts that offer by remaining in, or entering service.[38] According to sound

33. Hickey v. Pittsburgh Pension Bd., 378 Pa. 300, 310, 106 A.2d 233, 238 (1954). In Kern v. City of Long Beach, 29 Cal. App.2d 848, 856, 179 P.2d 799, 803 (Sup. Ct. 1947), the same thing was said in different form. To fail to protect the employee's interest would defeat the purpose of providing pensions, which is to induce competent and continued service. "[I]t would become merely a snare and a delusion to the unwary." See also Police Pension & Relief Bd. v. Bills, 148 Colo. 383, 366 P.2d 581, 585 (1961).

34. Kern v. City of Long Beach, *supra* note 33, at 803; Retirement Bd. v. McGovern, 316 Pa. 161, 177, 174 Atl. 400, 408 (1934); *accord,* Hickey v. Pittsburgh Pension Bd., *supra* note 33; Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956) (by implication).

35. See 1 CORBIN, CONTRACTS § 15 (1963). An intention to take future action may be clearly expressed without being promissory.

36. This was the Supreme Court's interpretation of the pension statute in Dodge v. Board of Education, 302 U.S. 74, 78 (1937). *Cf.,* Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903) (tax exemption statute to encourage railroad construction held to be not promissory).

37. See Hickey v. Pittsburgh Pension Bd., 378 Pa. 300, 306, 106 A.2d 233, 236 (1954).

38. Kern v. City of Long Beach, 29 Cal. App.2d 848, 852, 179 P.2d 799, 803 (Sup. Ct. 1947); Hickey v. Pittsburgh Pension Bd., *supra* note 37 at 304, 235; Bakenhus v. City of Seattle, 48 Wash.2d 695, 701, 296 P.2d 536, 539-40 (1956). See CORBIN, *op. cit. supra* note 35, §§ 49, 52. The offer becomes irrevocable once the acts of acceptance have begun. The offeror's

contract doctrine, an offer of a unilateral contract cannot be accepted until at least some of the acts of acceptance are done with the intent to accept.[39] The courts of the minority view and the *Yeazell* court avoid the question and assume that all eligible employees must have intended to accept the offer.[40] Counsel for Yeazell adopted this line of reasoning before the court.

> There can be no question that the Appellant at the time he entered the service of the City of Tucson had knowledge of the Police Pension Act of 1937 and the fact that he continued in the employment of the City of Tucson for some twenty years thereafter certainly indicated that the pension provisions became a prominent feature of his employment contract. The fact that Appellant continued his employment with the City of Tucson for such a long period of time must be considered as the legal equivalent of first entering employment when the promise of a pension under the Police Pension Act of 1937 was part of the consideration in becoming so employed.[41]

Undoubtedly every employee knows of the existence of the plan by reason of its deductions from salary. It does not necessarily follow that his continued service is induced by the existence of the plan. Quite possibly he was induced to remain for other reasons, *e.g.*, the work was easy, the hours allowed him to "moonlight," etc. At best his intent is prima facie ambiguous. Ordinarily, intent is a crucial question of fact in the issue of contract formation. That the courts can ignore the question indicates that a pension plan is no ordinary contract. It would be most unfair to put each pensioner to the burden of proving his intent to accept the offer before he could collect under the plan.

The *Yeazell* opinion, despite its declared intent to settle all questions of pension rights under contract principles,[42] could not avoid some inconsistency. If the earlier statute was determinative of Yeazell's rights, why could he not recover the increase in contribution which he was required to pay under the 1952 amendment? If the amendment could not diminish his rights granted by the older act, surely it could not increase liabilities fixed by the same law. Nonetheless, the court abruptly dismissed the possibility, saying he was "obviously estopped" from that claim.[43] The dissent indicates

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duty of performance is conditioned on completion of the acts of acceptance. RESTATEMENT, CONTRACTS § 45 (1932).

39. RESTATEMENTS, CONTRACTS § 55 (1932).

40. 98 Ariz. at 114, 402 P.2d at 545. The court apparently takes judicial notice that the pension plan is a major inducement to public employment. See also, Hickey v. Pittsburgh Pension Bd., 378 Pa. 300, 302, 106 A.2d 233, 234 (1954); Bakenhus v. City of Seattle, 48 Wash.2d 695, 701, 296 P.2d 536, 539 (1956).

41. Brief for Appellant, p. 15, Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965).

42. 98 Ariz. at 114, 402 P.2d at 544.

43. *Id.* at 117, 402 P.2d at 546.

that majority's ruling is far from obvious; it is repugnant to any contract formed under the terms of the earlier law. Yeazell was not estopped from claiming benefits under the older act and the court said his rights arose from a contract formed under the terms of that act.[44] This inconsistency clearly illustrates the essentially equitable nature of what the minority courts call contract rights. Yeazell is "obviously estopped" in the sense that fairness and protection of his interest require only that he receive the pension he expected. Fairness does not also require that he receive a windfall refund of part of his contributions. To admit this is to concede that his "pension contract" is at least in part a child born of court construction rather than bargain between the parties.

The *Yeazell* court did not follow the minority rule in one substantial respect. Although an employee has a contractual right to his pension, yet at all times prior to retirement he is said to be subject to reasonable changes made by the legislature. This is the rule by case law in California,[45] Washington,[46] Pennsylvania,[47] Colorado,[48] and in substance was the Arizona law prior to *Yeazell*.[49]

Two explanations have been advanced as to the source of this amendatory power. According to one theory, an employee bargains not for any specific terms, but rather for a substantial or reasonable pension. Any amendment is permissible which does not diminish that expectation.[50] The other theory is that the employee bargains for specific terms but includes in the bargain an implied term that the legislature may make reasonable changes.[51] The question to be asked is whether either construction is a reasonable inference to be drawn from the mere existence of a particular pension statute. Certainly the statute establishing the plan does not create these terms; they are judicially imposed. The minority courts have never explained why either construction is a reasonable one and it stands as a matter of bald assertion. The same

44. *Id.* at 122, 402 P.2d at 550.

45. Kern v. City of Long Beach, 29 Cal. App.2d 848, 179 P.2d 799 (Sup. Ct. 1956).

46. Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956).

47. Harvey v. Allegheny County Retirement Bd., 392 Pa. 421, 141 A.2d 197 (1958).

48. Police Pension & Relief Bd. v. Bills, 148 Colo. 383, 366 P.2d 581 (1961).

49. Robinson v. Police Pension Bd., 85 Ariz. 384, 339 P.2d 730 (1959); Police Pension Bd. v. Denney, 84 Ariz. 394, 330 P.2d 1 (1958).

50. Allen v. City of Long Beach, 45 Cal. App.2d 128, 287 P.2d 765 (Sup. Ct. 1954); Police Pension & Relief Bd. v. Bills, 148 Colo. 383, 366 P.2d 581 (1961); Eisenbacher v. City of Tacoma, 53 Wash.2d 280, 333 P.2d 642 (1958); Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956).

51. This appears necessarily to be the theory of the Pennsylvania court which holds that the employee bargains for, and has a right to, the precise terms of the plan as it existed, yet he is subject to any reasonable changes made during his employment. See, Harvey v. Allegheny County Retirement Bd., 392 Pa. 421, 141 A.2d 197 (1958); Hickey v. Pittsburgh Pension Bd., 378 Pa. 300, 106 A.2d 233 (1954).

courts, however, have openly admitted the reason for the rule:

> This view, while it may not be flawless in a purely legalistic sense, gives effect to the reasonable expectations of the employee and at the same time allows the legislature the freedom necessary to improve the pension system and adapt it to changing economic conditions.[52]

In deciding the rights of the present litigants, these courts are weighing the effect their decision necessarily will have on all other participants and the fund itself. Their choice of a rule is guided by the desired result. Protection must be given to employees, but not without regard to the impact on the fund. To give employees an enforceable interest in the fund the relationship is called contractual. To protect the public treasury, power to make reasonable changes is found as an implied term of that contract. The contractual theory offered to explain the result is born of the attempt "to reconcile the competing equities of the state in favor of flexibility and the employee in favor of stability, consistent with traditional concepts of contract law."[53]

The *Yeazell* opinion said that finding a vested contract right to a pension on the terms of the statute precluded any construction allowing unilateral legislative changes:

> The holdings of Robinson and Denney that an employee does not have the right to any fixed or definite retirement benefits but only to a substantial or reasonable pension is incompatible with the concepts we have expressed. A contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party. . . .[54]

While the court was willing to follow the minority rule in finding a contract, the corollary principle allowing reasonable changes was rejected. Apparently the court believed that such a term should not be implied in the contract, although there was ample precedent for such a finding. The decision is inexplicable because Yeazell never argued for such a construction. He contended simply that this change was unreasonable.[55] But the court gratuitously declared that no change is permissible without employee consent except under conditions which, by the terms of the act,[56] can never exist.

Yeazell's interest and that of others like him could have been protected just as completely by adopting the argument he proposed; holding the 1952 amendment unreasonable and ineffective as to

52. Bakenhus v. City of Seattle, 48 Wash.2d 695, 701, 296 P.2d 536, 540 (1956).

53. Robinson v. Police Pension Bd., 85 Ariz. 384, 392 339 P.2d 739, 745 (1959) (dissenting opinion).

54. 98 Ariz. at 115, 402 P.2d at 545.

55. Brief for Appellant, p. 19, Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965).

56. See statutes cited note 10 *supra*, and accompanying text.

him.[57] Such a ruling would not have had adverse impact on the long term interest of all employees. Under the suggested rule, the legislature would have had some indication of the form necessary to make future changes applicable to current employees. Under the ruling adopted, change can affect current employees only upon their election.

The *Yeazell* court has abandoned the attempts by the minority courts to balance the competing equities of employees and the state. In doing so, it may have deliberately chosen to protect employees' interests without regard to the cost imposed on the public. If so, the long range interest of employees would dictate a ruling less likely to inhibit any future legislative improvements. The minority rule allowing reasonable changes would have given the same protection to Yeazell and others in his situation, without foreclosing the validity of any and all future amendments. On the other hand, the *Yeazell* court may have felt that the theoretical inconsistencies of the minority view were too great, and that contract principles required a different solution.

> We unqualifiedly reject any premise for this decision which does not forthrightly accept as its controlling principle that the rights and responsibilities arising out of the contract of employment are not firm and binding. Controversies as to those rights should be settled consistent with the law applicable to contracts.[58]

If the court is ruling simply for reasons of doctrinal consistency, it disregards the fact that contract theory is applied for reasons of fairness and equity. The courts of the minority consider in their decisions, not what the parties in a strict sense have bargained for, but rather the consequences for both employees and the public employer. Contract principles approximately explain the nature of the employee's interest in his pension, but, if pressed too far, the explanation becomes unreasonable if not fictional. Under the minority rule, the employee's interest is sui generis, although explained on general contract principles. The *Yeazell* court arrived at a decision simply by labeling this interest as "contractual" without due regard for the purpose of that label.

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57. See Chapin v. City Comm'n, 149 Cal. App.2d 40, 307 P.2d 657 (Ct. App. 1957), and Cochran v. City of Long Beach, 139 Cal. App.2d 282, 293 P.2d 839 (Ct. App. 1956). Both cases invalidated changes in the base of pension calculation similar to the 1952 amendment in *Yeazell*.

58. 98 Ariz. at 114, 402 P.2d at 544.