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Constitutional Law - Spouse Act - Public Employment of Both Husband and Wife

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CONSTITUTIONAL LAW—SPOUSE ACT—PUBLIC EMPLOYMENT OF BOTH HUSBAND AND WIFE—The General Court (Legislature) of Massachusetts submitted to the Supreme Judicial Court of the state for its advisory opinion six bills relating to the employment of married persons by the state or by certain of its local subdivisions. Some of the bills referred to persons already employed by the state;[1] others were directed solely at future employment.[2] Two of the bills forbade concurrent employment of husband and wife.[3] The remaining measures related specifically to the employment of married women in the service of the state. In one form of language or another, the bills excepted from their operation those married women whose husbands were unable to support them.[4] One bill was designed to exclude from future employment any females where there is a marital status in existence regardless, apparently, of the question of support by the husband.[5]

In a sweeping opinion, the majority of the court held the bills

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Corp. v. Rhode, 122 Conn. 100, 187 Atl. 676 (1936); In re Shannahan and Wrightson Hardware Co., 118 Atl. 599 (Del. 1922); Hopkins v. Hemsley, 53 Idaho 120, 22 P. (2d) 138 (1933); First National Bank v. Ripley, 204 Iowa 590, 215 N.W. 647 (1927); Perkins v. National Bond and Inv. Co., 224 Ky. 65, 5 S.W. (2d) 475 (1928); Silver v. McDonald, 172 Minn. 458, 215 N.W. 844 (1927); National Bank of Commerce v. Morris, 114 Mo. 255, 21 S.W. 511, 19 L.R.A. 463, 35 Am. St. Rep. 754 (1893); Farmers' and Merchants' Bank v. Sutherlin, 93 Neb. 707, 141 N.W. 827, 46 L.R.A. (N.S.) 95, Am. Cas. 1914B, 1250 (1913); Hart v. Oliver Farm Equipment Sales Co., 37 N.M. 267, 21 P. (2d) 96, 87 A.L.R. 962 (1933); Wilson v. Rustad, 7 N.D. 330, 75 N.W. 260, 66 Am. St. Rep. 649 (1898); Kerfoot v. State Bank of Waterloo, 14 Okla. 104, 77 Pac. 46 (1904).

1. House Bills Nos. 292, 707, 893, 1408 and 1705 of the Gen. Ct. of Mass. cited in In re Opinion of the Justices, 22 N.E. (2d) 49, 58 (Mass. 1939).

2. House Bills Nos. 893 (§ 2) and 1408 (§ 2), cited in 22 N.E. (2d) at 54.

3. House Bill No. 556 provides that ". . . A husband and wife shall not at the same time be employed in the service of the commonwealth. . . ." 22 N.E. (2d) at 58.

House Bill No. 707 provides that ". . . those female persons . . . whose husbands are also employed by the city of Lowell . . ." shall be excluded from public employment. 22 N.E. (2d) at 58.

4. House Bill No. 292 was designed to exclude any married woman unless ". . . her husband is earning less than three thousand dollars per year or . . . she is living apart from her husband for justifiable cause . . ." 22 N.E. (2d) at 58.

House Bill No. 893 would have excluded from employment every married woman unless her spouse ". . . either through physical or mental disability is unable to support her, or, by court decree is not bound to provide her support . . ." 22 N.E. (2d) at 58.

House Bill No. 1408 and House Bill No. 1705 excluded from employment all married women ". . . whose husbands are capable of accepting permanent employment . . ." but excepted from its application married women ". . . whose husbands are permanently disabled by reason of mental or physical illness. . . ." 22 N.E. (2d) at 58.

5. House Bill No. 707. But *in case of those already employed* it would permit continued employment of those ". . . whose husbands by reason of mental or physical incapacity are unable to provide for their wives and children and who are without sufficient funds or income to support their

unconstitutional in their entirety. A minority of two justices distinguished between an enactment which sought to bar all married women from governmental employment and one which restricted such discrimination to women whose husbands were able to support them. They were of the opinion that only the former type of bill was unconstitutional. *Opinion of the Justices,* 22 N.E. (2d) 49 (Mass. 1939).

It is a settled rule that the state and its governmental agencies have broad powers over employment of persons in the public service.[6] No public employee can acquire a vested contract right denying authority of the state to terminate such employment if it is at will;[7] but if the employee has a contract with the state, the statutory abrogation of his contract would be an impairment of the obligation of contract in violation of the Fourteenth Amendment.[8]

Statutory regulation of selection of persons for public service being primarily based on qualifications for the performance of duties necessary to the office sought,[9] the state cannot by legislative enactment arbitrarily classify its citizens and favor one class to the exclusion of others in the public employment.[10] Preference to veterans in public employment has been held not to be arbitrary discrimination because such priority is deemed to promote patriotism and to be a reward for past services rendered in defense of the country.[11]

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wives aud children . . ." and those whose husbands are ". . . not engaged in a gainful occupation. . . ." 22 N.E. (2d) at 58.

6. Butler v. Pennsylvania, 51 U.S. 402, 13 L.Ed. 472 (1850); United States v. Fisher, 109 U.S. 143, 3 S.Ct. 154, 27 L.Ed. 885 (1883); Phelps v. Board of Education, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (1937); Higginbotham v. Baton Rouge, 306 U.S. 535, 59 S.Ct. 705, 83 L.Ed. 968 (1939). See also Mississippi v. Miller, 276 U.S. 174, 176, 48 S.Ct. 266, 72 L.Ed. 517 (1923).

7. Newton v. Commissioners, 100 U.S. 548, 25 L.Ed. 710 (1879); Crenshaw v. United States, 134 U.S. 99, 10 S.Ct. 431, 33 L.Ed. 825 (1890); Dodge v. Board of Education, 302 U.S. 74, 58 S.Ct. 98, 82 L.Ed. 57 (1937); Higginbotham v. Baton Rouge, 306 U.S. 535, 59 S.Ct. 705, 83 L.Ed. 968 (1939). See also Phelps v. Board of Education, 300 U.S. 319, 322, 57 S.Ct. 483, 81 L.Ed. 674 (1937).

8. Hall v. Wisconsin, 103 U.S. 5, 26 L.Ed. 302 (1880); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938).

9. Keim v. United States, 177 U.S. 290, 20 S.Ct. 574, 44 L.Ed. 774 (1900); Dever v. Humprey, 68 Kan. 759, 75 Pac. 1037, 1 Ann. Cas. 293 (1904); State v. Cocking, 66 Mont. 169, 213 Pac. 594, 28 A.L.R. 772 (1923); People v. Robb, 55 Hun. 425, 8 N.Y. Supp. 502 (1890).

10. See People v. Crane, 214 N.Y. 154, 161-163, 108 N.E. 427, 429-430 L.R.A. 1916D, 550; Ann. Cas. 1915B, 1254 (1915).

11. Shaw v. Marshalltown, 131 Iowa 128, 104 N.W. 1121, 10 L.R.A. (N.S.) 825, 9 Ann. Cas. 1039 (1905); Goodrich v. Mitchell, 68 Kan. 765, 75 Pac. 1034, 64 L.R.A. 945, 104 Am. St. Rep. 429, 1 Ann. Cas. 228 (1904); Opinion of the Justices, 166 Mass. 589, 44 N.E. 625, 34 L.R.A. 58 (1896); State v. Miller, 66 Minn. 90, 68 N.W. 732 (1896). Contra: Barthelmess v. Cukor, 231 N.Y. 435, 132 N.E. 140, 16 A.L.R. 1404 (1921).

Since women, whether married or unmarried, are citizens of the state and are entitled to the benefits of constitutional guaranties against arbitrary discrimination,[12] they cannot be excluded from employment in public service unless their exclusion would tend to promote public welfare or unless the employment of a particular class of citizens to be favored would have a direct relation to the public interest.[13] In some jurisdictions, married women as a class have been found to be disqualified as teachers in the public schools, apparently without stated reasons or on the grounds that such an exclusion promotes efficiency in the school system.[14]

The general principle that evils arising from unemployment warrant relief by legislation within constitutional limits is undoubted.[15] However, in the principal case the court indicated that the bills fell outside this area of permissable regulation, inasmuch as they failed to deal with the entire problem of unemployment among unmarried women and since the consequence of the proposed legislation would be to furnish employment to unmarried women at the expense of married women. The statutory preference, said the court, was attempted legislation "for the mere advantage of particular individuals and not for the protection of a basic interest of society."[16] The exclusion of all married women from public employment has no reasonable relation to the public health, safety and welfare.[17]

12. U.S. Const. Amend. XIV. See Minor v. Happersett, 88 U.S. 162, 165-177, 22 L.Ed. 627 (1875).

13. See People v. Crane, 214 N.Y. 154, 161-163, 108 N.E. 427, 429-430, L.R.A. 1916D, 550, Ann. Cas. 1915B, 1254 (1915).

14. McQuaid v. State, 211 Ind. 595, 6 N.E. (2d) 547 (1937); Sheldon v. School Committee, 276 Mass. 230, 177 N.E. 94 (1931); State v. Board of School Directors, 225 Wis. 444, 274 N.W. 301 (1937); Short v. Poole Corporation [1926] Ch. 66; Fennell v. East Ham Corporation [1926] Ch. 641. Contra: State v. Jefferson Parish School Board, 191 La. 102, 184 So. 555 (1938); McKay v. State, 212 Ind. 338, 7 N.E. (2d) 954 (1937); School Dist. of Wildwood v. State Board of Education, 116 N.J. L. 572, 185 Atl. 664 (1936); Knoxville v. State, 133 S.W. (2d) 465 (Tenn. 1939).

15. Carmichael v. Southern Coal Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327 (1937); Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293 (1937); Helvering v. Davis, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319 (1937).

16. In re Opinion of the Justices, 22 N.E. (2d) 49, 62 (Mass. 1939).

17. In the field of private employment, legislation regulating the employment of women has been sustained on the ground that the state has an interest in the protection of women, as women's health is a matter related to public safety, public health, public morals, and public welfare. Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann. Cas. 957 (1908); Riley v. Massachusetts, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788 (1914); Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A. 1915F, 829 (1915); Bosley v. McLaughlin, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632 (1915); Radice v. New York, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690 (1924); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

Louisiana is the only state having an act which prohibits dual employments of both spouses only when their combined salary exceeds a designated sum.[18] The Louisiana act is similar to two of the proposed Massachusetts bills which provided that husband and wife should not at the same time be employed by the state or any subdivision thereof.[19] The Massachusetts court held that such bills would discriminate against a particular class of married persons as opposed to all other persons, married or unmarried. A person married to a state employee will not likely be in less need of employment than would a single person or a person married to one not employed by the government. However, the Massachusetts bills differ in two respects from the Louisiana act: By the provisions of the Louisiana act a state employee will not be discharged unless either his salary or that of his spouse amounts to $100 a month or more;[20] also the obvious effect of the two Massachusetts bills construed in connection with the provisions of the other bills was to bar married *women,* as any man employed by the state would in all probability be deemed to be capable of supporting his wife. However, despite the dissimilarities between the Massachusetts bills and the Louisiana act, it is submitted that there is no fundamental constitutional distinction between the two statutory schemes, and that the cogent and well-reasoned conclusions of the Massachusetts high court are applicable to the Louisiana statute.[21]

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18. La. Act 15 of 1940 (E.S.).

In Tennessee by House Resolution, married women whose husbands earn $150 a month or have sufficient property to provide an independent income are barred from state employment. (House Resolution No. 18, Tenn. Pub. Acts (1935) 452.) The Texas Senate adopted the House concurrent resolution prohibiting both spouses from working for the state if their combined salaries exceeded $175 a month. Utah adopted a compromise resolution whereby in giving state employment, the state would take into consideration whether the other members of the family were employed, but the University of Utah and the Industrial Commission refused to administer it. In April 1939 the Governor of Alabama issued an order prohibiting employment by the state of both husband and wife. There have been twenty-two states in all which have contemplated such acts, but most of the bills were killed in committee, or were rejected by the Legislature. This information was obtained from an unpublished pamphlet secured from the National Federation of Business and Professional Women's Clubs, Inc., 1819 Broadway, New York, N.Y.

19. House Bills Nos. 556 and 707, § 5 cited in In re Opinion of the Justices, 22 N.E. (2d) 49, 54, 58 (1939).

20. La. Act 15 of 1940 (E.S.).

21. In Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938), it was held that the right of a permanent teacher to continued employment under the Indiana Tenure Act was contractual and that a repeal of the act in its application to certain townships was an unconstitutional impairment of the obligation of contract. Cf. Phelps v. Board of Education, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (1937); Dodge v. Board of Education, 302 U.S. 74, 58 S.Ct. 93, 82 L.Ed. 57 (1938). The Anderson decision has a very

Although there is no constitutional right to public employment, the constitutions both of the states and the United States should guarantee to every citizen the privilege of competing for any public employment, provided he or she is capable of performing the duties required. Assumption of a marital status should not disqualify one from entering into or continuing in the public service as a public employee, since such status bears no relationship whatever to ability. It would be a dangerous public policy indeed to assume that marriage renders one unfit to perform duties of a public nature, or that one's ability to serve the state or the nation is hampered by assuming marital obligations.

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definite bearing on the general applicability of La. Act 15 of 1940 (E.S.) to the Louisiana State University and Agricultural and Mechanical College in view of its policy of giving permanent tenure to professors who have served under contract for two years.

The affairs of the Louisiana State University and Agricultural and Mechanical College are placed under the administration of the Board of Supervisors by Sec. 7 of Art. XII of the Const. of 1921 and La. Act 7 of 1921 (E.S.) [Dart's Stats. (1939) §§ 2507-2511]. From the authority conferred by this act and the *constitutional provisions* the Board of Supervisors can contract and do all acts for the benefit of the University which are incident to bodies corporate. Caldwell Bros. v. Board of Supervisors, 176 La. 826, 147 So. 5 (1933). Since the tenure policy of the University was adopted by the Board of Supervisors by virtue of *constitutional authority,* it is also questionable whether any act of the legislature can modify the terms of any contracts made by the Board itself.

In the Attorney General's opinion of Feb. 27, 1940 relating to the application of La. Act 15 of 1940 (E.S.) to persons employed by the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College as members of the faculty and staff, it was stated that under the tenure policy of the University no contract was created between the University and the professors since such a contract was subject to a potestative condition (Art. 2034, La. Civil Code of 1870) and consequently null: that is, ". . . it gives the professor who has served for two years a tenure for life provided his behavior is good, but it does not obligate him to continue to serve for life. Regulations or statutes creating such tenures do not create contractual obligations, for the obligations created by them are subject to a potestative condition, since the continued execution of them is dependent on the will of the employee. . . . Therefore, the professor is not bound to continue to serve for the rest of his life, and as he is not bound to continue to serve for the rest of his life, the Board cannot be contractually bound to continue to employe him for the rest of his life." Opinion of the Att'y Gen. of La. (Feb. 27, 1940). It is submitted, however, that one of the inducements for a professor to accept a position on the University faculty is the promise of the University to employe him for life if he is acceptable at the expiration of a two years' probation period. The professor's consent to come to the University constitutes consideration for the University's promise of life tenure after the expiration of two years. If the University's promise of life tenure is thus supported by independent and adequate consideration, the fact that the professor does not bind himself to serve for life is unimportant. Conques v. Andrus, 162 La. 73, 110 So. 93 (1926); S. Gumbel Realty & Securities Co. v. Levy, 156 So. 70 (La. App. 1934).

To further support his contention, the Attorney General relies on Art. 167, La. Civil Code of 1870, which prohibits terms of employment for a longer