

1954

State Tax Commission of Utah v. Sherman J. Preece : Plaintiff's Brief in Support of Extraordinary Writ

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE TAX COMMISSION
OF THE STATE OF UTAH,
Plaintiff,

— vs. —

SHERMAN J. PREECE,
*State Auditor of the
State of Utah,*
Defendant.

Case No. 8138

PLAINTIFF'S BRIEF IN SUPPORT OF EXTRAORDINARY WRIT

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I N D E X

	Page
STATEMENT OF FACTS	1
ARGUMENT AND AUTHORITY	3

POINT I

IN HIS CALL, CONVENING A SPECIAL SESSION OF THE UTAH STATE LEGISLATURE PURSUANT TO ARTICLE VII, SECTION 4, OF THE UTAH CONSTITUTION, AND IN HIS SUBSEQUENT COMMUNICATIONS TO THE LEGISLATURE, THE GOVERNOR PLACED ON THE AGENDA THE GENERAL SUBJECT OF FINANCE AND TAXATION	3
---	---

A. The Governor in His Several Communications to the Legislature Expressly Authorized and Included Within the Scope of the First Special Session of the 1953 Legislature the Contents and Substance of House Bill No. 34	3
--	---

B. The Governor Expressly Conceded that His Proposals Might Necessitate an Increase in the Property Tax Levy and by Proposing One Tax the General Subject of Taxation was Thus Presented to the Legislative Session	7
---	---

C. The Governor Placed on the Agenda the Subjects of Teacher's Retirement and the Minimum School Program and These Subjects Required the Consideration of Revenue and Taxation. Therefore Related Implementing Legislation to Promote and Promulgate the Said Subject Matter and Make the Same Effectual by Providing for Increased Revenue From an Increased Cigarette Tax to be Specifically Placed in the Uniform School Fund Must be Deemed to be Included in the Agenda	10
--	----

POINT II

ANY DOUBT AS TO THE VALIDITY OF HOUSE BILL 34 MUST BE RESOLVED FAVORING THE CONSTITUTIONALITY THEREOF	13
---	----

SUMMARY	16
---------------	----

CASES CITED

Anneberg v. Roberts, 333 Pa. 203, 2d 612 (1938)	11, 12
Baldwin v. State, 21 Tex. App. 591, 3 S.W. 109 (1886)	5
Blackford v. Judith Basin Co., 109 Mont. 578, 98 P. 2d 872, 126 ALR 639 (1940)	15
Board of Regents of the Univ. of Arizona v. Sullivan, 45 Ariz. 245, 42 P. 2d 619	14, 15
Commonwealth v. Liveright, 308 Pa. 35, 161 A. 697 (1932)	5

INDEX (Cont.)

	Page
Devereaux v. City of Brownsville, C.C. Tenn., 29 Fed. 742 (1887)	11, 12
Loiza Sugar Co. v. Puerto Rico, 57 Rd. 2d 705 (1932)	6, 15
Long v. State, 58 Tex. Crim. 209, 127 S.W. 208 (1910)	14
McCarroll v. Clyde Collins Liquors, 198 Ark. 896, 132 S.W. 2d 19 (1939)	10, 12
Pope v. Oliver, 196 Ark. 394, 117 S.W. 2d 1072	11, 12
Richmond, et al v. Lay, 87 S.W. 2d 134 (1935)	4
Simms v. Weldon, 165 Ark. 13, 263 S.W. 42	10
Smith v. Curran, 268 Mich. 366, 256 N.W. 453 (1934)	4, 16
Smith v. Refunding Bd. of Ark., 83 S.W. 2d 76 (1935)	15
State ex rel. Conway v. Versluis, 58 Ariz. 368, 120 P. 2d 410 (1941)	11, 12
State ex rel. Nat. Conservation Exposition Co. v. Woolen, 128 Tenn. 456, 161 S.W. 1006	4, 14, 16
State v. Scott, 105 Utah 31, 140 P. 2d 921	9
Timmer v. Talbot, et al., 13 Rd. Supp. 666 (1935)	3, 6, 14

TEXTS CITED

59 Corpus Juris 526, Sec. 20	14
82 Corpus Juris Secundum, Statutes, Sec. 10 P. 29-31	14
Sutherland, Statutory Construction V. (3 Ed.) Vol. 1	6, 9, 14, 16

IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendant.

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STATEMENT OF FACTS

The First Special Session of the 1953 Utah State Legislature passed House Bill No. 34, which amended titles 59-18-4 and 59-18-10, Utah Code Annotated, (1953) and, *inter alia*, raised the excise tax on cigarettes and allocated the revenue derived therefrom to the Uniform School Fund. It is the alleged unconstitutionality of this law which gives rise to the filing of Plaintiff's Petition for Writ of Mandamus.

House Bill No. 34 was introduced by Representative Wayne C. Durham of Salt Lake County and after debate

and amendment the bill passed both houses and was sent to the Honorable J. Bracken Lee, Governor, on December 17, 1953, for his signature. On December 19, 1953, Governor Lee vetoed House Bill No. 34. On the same day (December 19) the House of Representatives and the Senate overrode the Governor's veto by a vote in excess of the requisite two-thirds of each body. On December 19, 1953, the President of the Senate, the Speaker of the House and the Clerks of both houses transmitted the said bill to Secretary of State, Lamont F. Toronto, and it thereupon became a valid and duly-enacted statute of this state.

In his veto message, and subsequent press release, the Honorable J. Bracken Lee publicly expressed his opinion that the law, as enacted, was in excess of the powers of the special session, and hence, was unconstitutional. On the 21st day of December, 1953, Governor Lee requested an opinion on the legality of the statute from Attorney General E. R. Callister, Jr.

The State Tax Commission of the State of Utah is charged with the responsibility of collecting all taxes and enforcing all tax laws of the state. In 1953 the State Tax Commission distributed some 13,675,200 cigarette excise stamps. This was an average monthly number in excess of 1,000,000. The effective date of House Bill 34 is sixty days after adjournment of the session, or February 19, 1954. Thus, the State Tax Commission deemed it advisable to requisition at once at least one month's supply of the new cigarette excise stamps in the 4¢ denomination.

On December 29, 1953 the Commission Chairman, Patrick Healy, Jr., for the Utah State Tax Commission

filed with and delivered to the Defendant, Sherman J. Preece, State Auditor, two requisitions for 1,000,000 stamps of the new 4¢ denomination. On this date the said Defendant, Sherman J. Preece, wilfully refused to comply with the Plaintiff's requisitions.

ARGUMENT AND AUTHORITY

I

IN HIS CALL, CONVENING A SPECIAL SESSION OF THE UTAH STATE LEGISLATURE PURSUANT TO ARTICLE VII, SECTION 4, OF THE UTAH CONSTITUTION AND IN HIS SUBSEQUENT COMMUNICATIONS TO THE LEGISLATURE, THE GOVERNOR PLACED ON THE AGENDA THE GENERAL SUBJECT OF FINANCE AND TAXATION.

A. The Governor in His Several Communications to the Legislature *Expressly* Authorized and Included Within the Scope of the First Special Session of the 1953 Legislature the Contents and Substance of House Bill No. 34.

1. The Governor Opened the Special Session to the General Subject of Taxation and School Finance and, thus, Authorized the Cigarette Tax Increase.

(a) Once a general subject area is presented to a special session by the executive, the legislature is thereafter empowered to pass any legislation falling within the general subject or subjects enumerated.

In the case of *Timmer v. Talbot, et al.*, 13 Fd. Supp. 666 (1935), a special session was called to deal with past

debts of the State. *Held*, any act governing future indebtedness was constitutional. The Federal Court said at page 666, citing with approval, *Smith v. Curran*:

“While the legislature must confine itself to the matters submitted, it need not follow the views of the governor or legislate in any particular way. Within the special business or designated subjects submitted, the legislature cannot be restricted or dictated to by the governor,” and “the reasonable deduction from the authorities, however, is that, while the governor may control the subject matter of legislation to be enacted at the special session, he may not restrict boundaries within the natural range of that subject or dictate methods of dealing with it or limit the class of those to be benefited.” (Emphasis added).

In the case of *Richmond, et al. v. Lay*, 87 S. W. 2d 134 (1935) a special session was called to “enact such measures as will provide sufficient revenue to carry on all proper functions of the state government including common schools.” *Held*, a statute authorizing extension of teacher’s certificates was properly within the call. The rationale of this case was that the mention of “common schools” opened to the special session such related areas as teacher’s certificates.

In the case of *Smith v. Curran*, 268 Mich. 366, 256 N.W. 453 (1934), the Michigan Court quoted with approval (at page 372) from *State ex rel. National Conservation Exposition Company v. Woolen*, 128 Tenn. 456, 161 S.W. 1006,

“* * * The governor cannot restrict the legislature to the consideration of a particular bill. Within the subject submitted the legislature has freedom

of action.” (Emphasis added).

In the case of *Commonwealth v. Liveright*, 308 Pa. 35, 161 A. 697 (1932) the Pennsylvania Court said:

“While the legislature must confine itself to matters submitted in the call of the special session, it need not follow the views of the governor or legislature in any particular manner * * *. The legislature is not bound in manner, method or means of accomplishment of the object stated in the subject.

(Emphasis added).

The session was called to provide for “unemployed.” Held, an act providing a general welfare act was upheld. The rationale: All subjects “related” to those in the call are expressly authorized.

In the interesting old (1886) case of *Baldwin v. State*, 21 Tex. App. 591; 3 S.W. 109, the governor of Texas called a special session pursuant to a constitutional provision similar to our own “to reduce taxes.” Held, statutes enacted by the Special Session increasing taxes were authorized as being within the call.

These cases are, we feel, representative of the holdings of many state courts that once a general subject is presented to a Special session, the legislature has power to choose its own method and course of dealing with the problem presented.

(b) The Governor’s language clearly opens to the Legislature the subject of finance and revenue.

Exhibit F, p. 7: “The *financing proposal* I shall make offers to school districts the same state-sup-

ported program as recommended by the Legislative Council with ample leeway over and above that.”

Exhibit F, p. 10: “The foregoing constitute my recommendations for the retirement system and *the financing of our schools.*”

Exhibit F, p. 6: “I am not here to propose new or higher taxes to finance the school program, but I *do intend to propose changes in our present school financing law * * *.*”

Exhibit F, p. 10: “* * * The only way the increased levy on property can be postponed or avoided is by *providing more money to the Uniform School Fund from other sources.*” (Emphasis added).

(1) If it is conceded, *arguendo*, that the Governor’s language is ambiguous, it nevertheless provides more than sufficient basis for applying the rule of construction quoted *infra*, (Plaintiff’s Pt. III) (Sutherland, Statutory Construction, (3rd Ed.) Vol. 1, Chap. 5, Section 507, Page 118), that *any reasonable doubt* must be resolved in favor of the constitutionality of the act.

(2) The expression of the Governor’s intent not to proposed “new or higher” taxes does not proscribe the Legislature in its discretion, once the Governor has opened the subject of taxation to their consideration. *Loiza Sugar Co. v. Puerto Rico*, 57 Fd. 2d 705; *Timmer v. Talbot et al*, 13 Fd. Supp. 666 at 668.

B. The Governor Expressly Conceded that his Proposals Might Necessitate an Increase in the Property Tax Levy and by Proposing One Tax the General Subject of Taxation was thus Presented to the Legislative Session.

The Governor in his several communications made general reference to the recommendations contained in the report of the Public School Survey Commission and to the recommendations of the Legislative Council. The Public School Survey Commission was to have dealt with "taxation and permanent financing of public education including the adequacy of the present tax base." However, the Commission acknowledged, and the Governor recognized, that the Commission had not undertaken a "detailed study" of tax sources to help provide for financing the state-supported minimum program and as the Governor noted "this failure was serious for it meant that the property tax would have to bear the brunt of the recommended increase in funds." The Governor conceded that under the present act "any increase in the minimum school program would be borne by a state levy on real property exclusively." (See Exhibit B, p. 1).

It seems clear from a general reading of the Governor's original address that his main concern was that the recommendations of the Public School Survey Commission and the Legislative Council be considered "as a whole" for he stated: "The main point is that *all of the major recommendations, not just those providing more money*, should be adopted if the objective of a better school system is to be reached." (See Exhibit B, p. 5). (Emphasis added).

He also stated in the same message "it has seemed to

me, therefore, that it would be proper to devote first attention to the seemingly forgotten items of the survey before *getting involved in finance*. Consequently, I am not putting *school financing or related matters*, including teacher's retirement, on the agenda at this time. Later in the session I shall ask your indulgence to permit me to deliver a special message to you on these subjects."

On December 3, 1953, the Governor sent a communication to the Senate and to the House stating that he would deliver a personal message to the Legislature on the subject of *Teacher Retirement and School Finance* on December 4th. (See Exhibit D). Pursuant to these communications the Governor delivered a message to a Joint Session of the Legislature on December 4, 1953. In it he placed the following items on the agenda for consideration of the Legislature:

1-F. *Current School Financing*. The purpose of this subject matter was to eliminate the inconsistency of basing the current year costs on the previous year's enrollment in a given school in the state system. The Legislative Council staff calculated the cost of this item to be an additional \$912,000. (See Exhibit 5, p. 7).

2-F and 3-F. *Teacher's Retirement*. This agenda item included: (1) The consideration of increased cost to the state to provide additional funds for teacher's retirement (the act passed by the Legislature increased the cost to the state from the uniform school fund in the sum of \$1,474,000—see Exhibit K) and, (2) provision for retiring a debt presently equaling 13.6 million. (See Governor's recommendation, Exhibit F, page 7).

4-F. *Proposed Increased Local Levy*.

5-F. *Local Taxing Leeway.*

6-F. *Minimum School Program.* This subject matter was to review the present minimum school program to see if the same was adequate under the changed conditions arising since the enactment of the prior law in 1947. Under the programs presented by either the Governor or the Legislative Council additional revenue was a must.

The Governor recognized that increasing the minimum school program under the present act would result in a proportionate increase in ad valorem property taxes, as he stated expressly “* * * the only way the increased levy on property can be postponed or avoided is by *providing more money in the uniform school fund from other sources.*” (See Exhibit 4, p. 10).

(1) Clearly, the *raison d’etre* of our constitutional provision, Article VII, Section 4, is that of giving the interested public notice of proposed legislation in order to allow an expression of their will in the matter. *State v. Scott*, 105 Utah at page 31, 140 Pac. 2d at page 921, and *Sutherland*, Sec. 508, p. 120:

“* * * the test [of the constitutionality of an act of a special session] is whether or not the public was reasonably put on notice that legislation of the sort enacted would be considered.”

There can be no question that the Governor recognized that the Special Session was seeking new tax fields and was considering revenue measures, (See Exhibit 1, page 2) and this Court may take judicial notice of the fact that a very great deal of publicity was given the subject of

revenue and additional taxes for many months prior to the call of this special session. (Title 78-25-1, Utah Code Annotated, (1953)).

C. The Governor Placed on the Agenda the Subjects of Teacher's Retirement and the Minimum School Program and These Subjects required the Consideration of Revenue and Taxation. Therefore Related Implementing Legislation to Promote and Promulgate the Said Subject Matter and Make the Same Effectual by Providing for Increased Revenue From an Increased Cigarette Tax to be Specifically Placed in the Uniform School Fund Must be Deemed to be Included in the Agenda.

(1) The Governor, by necessary implication, may authorize the enactment of related legislation which the legislature in its discretion determines to be appropriate to the implementation of the Governor's proposals. Defendant relies heavily on the case of *Simms v. Weldon*, 165 Ark. 13, 263 S.W. 42. (Def. Brief p. 8). Defendant cites (Def. Brief, p. 10) the later case of *McCarroll v. Clyde Collins Liquor Co.*, 198 Ark. 896, 132 S.W. 2d 19 (1939) from the same jurisdiction, as not having weakened the holding of the *Weldon* case. Plaintiff submits that even a cursory comparison of the two cases reveals that the *McCarroll* case did not *weaken* the earlier holding in the *Simms* case upon which defendant places so much reliance—it *completely overruled* it.

In the *McCarroll* case the Governor of Arkansas called a Special Session of the Legislature to provide for better treatment of tuberculosis. It was held that a liquor license revenue measure was a valid implementation of the Governor's recommendation, inasmuch as the original proposal

for better tuberculosis treatment clearly required additional revenue. (See, also, *Pope v. Oliver*, 196 Ark. 394, 1177 S.W. 2d 1072 from same jurisdiction, and also subsequent to the *Simms* case).

In the case of *State ex rel. Conway v. Versluis*, 58 Ariz. 368, 120 Pac. 2d 410 (1941) the Governor called a Special Session to deal with the problem of disposal of state lands. *Held*, the legislature was impliedly authorized to deal with the disposition of the revenue derived from the sale of such lands. Rationale: the specific subject of the statute need not be mentioned in the call when the general object is announced which required implementation—the latter being left to the discretion of the legislature.

In the case of *Anneberg v. Roberts*, 333 Pa. 203, 2 A. 2d 612 (1938) a Special Session was called to outlaw certain gambling devices. *Held*, legislation creating a committee to study gambling was upheld as “implied” in the Governor’s general call.

In the case of *Devereaux v. City of Brownsville*, C.C. enn, 29 Fed. 742 (1887), a special session was called “to enable taxing districts to compromise old debts.” *Held*, Legislation *repealing* former powers of districts to compromise old debts upheld as impliedly authorized by the Governor’s call.

In the instant case, defendants concede, (Def. Brief, p. 13) as they must, that the total cost of the minimum school program would necessarily be increased by enactment of the proposals submitted by the Governor. (Exhibit F, p. 8). This fact was clearly recognized by Governor Lee but he recommended that the increase be borne

by shifting the burden to the local districts. (Exhibit K).

Since the program as submitted by the Governor admittedly required additional revenue, the questions of source and imposition of additional taxes were thus opened to the Special Session. *McCarroll v. Clyde Collins Liquors*, 1998 Ark. 896, 132 S.W. 2d 19 (1939); *Pope v. Oliver*, 196 Ark. 394, 117 S.W. 2d 1072; *State ex rel Conway v. Versluis*, 58 Ariz. 368, 120 P. 2d 410 (1941); *Anneberg v. Roberts*, 333 Pa. 203, 2 A. 2d 612 (1938); *Devereaux v. City of Brownsville*, C. C. Tenn., 29 Fed. 742 (1887).

It should be borne in mind that the expression of Governor Lee's personal opinion or personal recommendations is suggestive only, and when acting within the scope of the general subjects placed on the agenda (viz., finance and taxation) the legislature is in no wise limited thereby.

Defendant's counsel has suggested that the cost to the state of Utah under the newly-enacted school and teacher retirement programs is less than the cost to the state of the programs repealed by these new acts. However, if we may draw the court's attention to Exhibit K for a moment, we are certain that this point can be readily cleared up. The Uniform School Fund, under the repealed act for the fiscal year 1953-1954, necessitated a contribution by the state in the amount of \$18,784,317. If the provisions of the newly-enacted legislation were applied to the same fiscal year—a year in which the basis for the computation is nearly certain—the cost to the state for support of the Uniform School Program would be \$17,753,412, as set forth in said Exhibit exclusive of the Teacher's Retirement cost. In addition thereto must

be added \$1,474,000 for Teachers retirement — which makes a total state contribution for the said fiscal year in the sum of \$19,227,412. An increase is thus effected in cost to *the state of Utah*, as distinguished from cost to the local districts, of nearly a half-million dollars. We wish also to call the court's attention to the fact that the Research Director of the Utah Education Association has estimated that the cost, rather than being a half-million dollars more to the state, would be nearly one and one-half million dollars more for the said fiscal year. These estimates and facts must surely have been before the legislature as a whole when House Bill 34 was passed over the Governor's veto and it seems more than a coincidence that the \$1,000,000 to be provided by House Bill 34 for the Uniform School Fund closely approximates one-half of the difference between the Legislative Council's estimate and the UEA's estimate of the increased cost to the state of the Uniform School and Teacher's Retirement programs. (See Exhibit K).

II

ANY DOUBT AS TO THE VALIDITY OF HOUSE BILL 34 MUST BE RESOLVED FAVORING THE CONSTITUTIONALITY THEREOF.

This general principle of law that legislation is presumed constitutional is so well established as to be almost axiomatic. Defendant has conceded the general proposition. (Def. Brief, p. 4, note). It is, however, worthy of this Court's attention to discuss its application to Special Sessions. Therefore, the following is respectfully submitted.

Sutherland, in his exhaustive work, devotes an entire

chapter (Chapter 5, Vol. 1, Sutherland on Statutory Construction, (3rd Ed.) to Special Sessions, and he concludes:

“ * * the constitutional provisions [relating to the calling of special sessions] should be strictly construed in favor of the legislative power,”* citing *Devereaux v. Brownsville*, 29 Fed. 742, (C.C. Tenn. 1887), *Timmer v. Talbot*, 13 F. Supp. 666, (W.D. Mich., 1935); *State v. Woolan*, 128 Tenn. 456, 161 S.W. 1006 (1913); *Long v. State*, 58 Tex. Crim. 209, 127 S.W. 208 (1910), *“and a statute enacted during an extraordinary session should be presumed to be constitutional.”* (Citing cases) (Emphasis added).

Even the most cursory examination of the plethora of case material on the construction to be accorded enactments of a special legislative session clearly demonstrates the absence of a prevailing or majority rule. (See cases collected at 82 *Corpus Juris Secundum*, Statutes, Sec. 10, p. 29-31, and particularly footnotes 23 and 26). However divergent the results may appear, plaintiff has been unable to find any substantial authority in conflict with the rule enunciated by Sutherland (quoted *supra*) and phrased well by the Arizona Supreme Court in the 1935 case of *Board of Regents of the University of Arizona v. Sullivan*, 45 Ariz. 245, 42 Pac. 2d. 619 at 622:

“The governor’s call or message need not state the details of the legislation to be considered as such matters are within the discretion of the legislature and beyond the control of the governor except for his power of veto. Where a general object is described, the legislature is free to determine in what manner such object shall be carried into effect.” (Quoted from 59 C.J. 526, Sec. 20) (Em-

phasis added).

In the case of *Smith v. Refunding Board of Arkansas*, (1935), 83 S.W. 2d 76, the Arkansas Legislature was called into special session for the purpose of refunding future obligations. The Court in upholding the act said, at page 80:

“* * * The lawmakers, when convened in extraordinary sessions, may act freely within the call and legislate upon all and any of the subjects specified or upon any part of the subjects; and *every presumption will be made in favor of the regularity of its action.*” (Emphasis added).

In the case of *Loiza Sugar Co. v. People of Puerto Rico*, 57 F. 2d 705, (1932), the Court said at page 706:

“Any enactment during the special session, not clearly foreign to the purpose for which it was called together, should be held valid,” and, quoting with approval language of *In Re Governor’s Proclamation*, 19 Colo. 33, 35 p. 530, 5331, “The legislature cannot go beyond the limits of the business specially named in the proclamation, * * * but within the limits of such business it may act freely, in whole or in part, or not at all, as may be deemed expedient, according to its own judgment.” (Emphasis added).

Referring to the power of the governor to limit the scope of a special session, Sutherland says:

“The governor is not a part of the law-making body and therefore he will not be permitted to control the discretion of the legislature in acting upon a particular subject,” Sutherland, *op. cit.*, sec. 505, p. 115, citing cases including, *Board of Regents v. Sullivan*, 45 Ariz. 245, 42 P. 2d 619; and, *Blackford v. Judith Basin County*, 109 Mont.

578, 98 P. 2d 872, 126 ALR 639 (1940); and “The governor’s call should be given a liberal interpretation in favor of broad legislative action,” at p. 112, Sec. 503, and citing cases.

It is interesting to note that the Michigan Court in the *Smith case* (*Smith v. Curran*, 268 Mich, 366, 256 N.W. 453 (1934 which is quoted in the Attorney General’s opinion to the defendant in the instant case (Opinion number 53,258, Dec. 29, 1953) also said, at p. 372, quoting from *State v. Woolen*, 128 Tenn. 456, 487, 161 S.W. 1006) that:

“It is agreed, so far as any of the cases speak on the matter, and this view is undoubtedly sound, that *the presumption is always in favor of the constitutionality of an act*, and that any piece of legislation so under consideration *should be held within the call, if it can be done by any reasonable construction.*” (Emphasis added). (See also Sutherland, Op. Cit. Sec. 507, P. 118).

SUMMARY

The question, stripped of its unessentials, now before this court is simply this: Did any of the communications from the Governor to the Special Session of the Thirtieth Legislature authorize, by any reasonable construction, either expressly or by necessary implication, the enactment of a specific revenue measure—increasing the tax on cigarettes—designed to provide the State’s portion of the funds necessary to support the amended Uniform School Program and the amended Teacher’s Retirement cost?

We agree completely with this Court as it spoke in the *Scott* and the *Tweed* cases, cited by defendant, but we

respectfully submit that no precedent is therein contained which would serve as an aid under the facts present here and direct the court to an examination of the exhibits appended hereto and submitted herewith, containing all of the communications from the Governor to the said Special Session. They reveal any number of express authorizations bringing the subject matter of a specific revenue measure within the scope of the agenda. It must further be conceded that additional revenue had to be provided to give effect to the amendments made in basic and supplemental uniform school program and the increased cost of the teacher's retirement program. It is elementary that these increases in cost to the state of Utah—and to the local school districts—could only be provided for by *increased specific revenue measures* and included therein would be the increase in the *specific tax on cigarettes*.

May we also point out to the court that historically, our government, both state and federal, is and was founded upon the basic principle of *separation of powers*—the separation of the law-making unit (the legislative branch) from the executive and judicial—the separation of the executive from the legislative and the judicial—the separation of the judicial from the executive and legislative—with “checks and balances” upon each main branch. It has never before been seriously contended, when dicta has been placed in proper context, that the executive branch of the government has “complete control over the legislative business.” Any such doctrine is completely repugnant to the basic guidepost of our free government—our constitution—and application thereof would result in government, not by law as delegated to the duly elected representatives of the people, but by the executive and

eventually the tyrant—a doctrine, the yoke of which, was thrown off by our forefathers one hundred and seventy-five years ago. Such atavistic principles should not conscientiously be again argued here or entertained by any court.

We respectfully submit, therefore, that House Bill Number 34 has been lawfully enacted over the Governor's veto by the Thirtieth Legislature lawfully convened in its First Special Session, and that this Honorable Court should make permanent its Extraordinary Writ commanding the State Auditor to have prepared and delivered to the State Tax Commission of the State of Utah the stamps as requested in said Commission's requisition.

Respectfully submitted,

STATE TAX COMMISSION

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