

1954

State Tax Commission of Utah v. Sherman J. Preece : Brief and Memorandum of Defendant in Support of Motion to Dismiss

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 AU-
DITOR OF THE STATE OF UTAH,

Defendant.

Case No.
8138

BRIEF AND MEMORANDUM OF DEFENDANT
IN SUPPORT OF MOTION TO DISMISS

FILED

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In the
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STATE TAX COMMISSION OF THE
STATE OF UTAH,

Plaintiff,

vs.

SHERMAN J. PREECE, STATE AU-
DITOR OF THE STATE OF UTAH,

Defendant.

} Case No.
8138

BRIEF AND MEMORANDUM OF DEFENDANT
IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF FACTS

The plaintiff, State Tax Commission, brought action against the defendant, State Auditor, to require defendant to provide plaintiff with four-cent cigarette stamps under the authority of 59-18-10 U. C. A. 1953 requiring the State Auditor to prepare stamps for use on packages and containers according to such specifications, designs and denominations as may be submitted to him by the Tax Commission. The plaintiff requisitioned said stamps under the terms of

H. B. 34, First Special Session of the 30th Legislature, amending Sec. 59-18-4 U. C. A. 1953 by providing that on all cigarettes weighing less than three pounds per thousand, two mills (4c per package) should be charged on each cigarette rather than one mill (2c per package) as previously provided.

The State Auditor under the provisions of 59-18-10 and his general powers enumerated in Ch. 3 of Title 67, U. C. A. 1953, and upon advice and opinion of the Attorney General, refused to provide stamps representing the additional tax. The sole reason for refusal was the unconstitutionality of H. B. 34 as being in violation of Art. VII, Sec. 6, Utah Constitution. On that refusal the plaintiff State Tax Commission brought action for an extraordinary writ to compel the State Auditor to prepare and deliver said stamps to plaintiff.

On November 17, 1953, the Governor of the State of Utah, by proclamation, called the Legislature into session to convene December 1, 1953, and enumerated as the purpose of his call thirteen items recommended by the Public School Survey Commission, the Legislative Council and the Governor himself, all of which items pertained to the public school system. None of the enumerated subjects dealt with taxation (Exhibit A). On December 1, 1953, the Governor delivered his opening message to the Joint Committee of all members of the House and Senate in which he again withheld the entire subject of taxation although he included items for consideration of the Legislature not called to their attention in the proclamation (Exhibit B). That same day he communicated with both houses by letter,

recommending legislation to control the internal financing of universities and colleges and recommended a provision requiring *assessment of all property for property tax purposes* to be made every five-year period (Exhibit C).

On December 3rd, additional matters were called to the attention of the Legislature by letter—none included taxation (Exhibit D).

On December 4, 1953 the Governor appeared again before the Legislature and recommended a program of school financing which, insofar as the state-supported program is concerned, paralleled that program theretofore proposed by the Legislative Council (Exhibit J, para. 6). In that same message the Governor said:

“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 as well as certain reductions in some state services” (Exhibit F, page 6, para. 5).

At paragraph 4-F, page 8, Exhibit F, the Governor stated further:

“The Legislative Council has devised a new method of establishing the uniform school levy in the districts to support the basic school program. The uniform levy under the old law was determined by the levy required in the wealthiest district to finance the basis or minimum school program in that district. The new plan proposes a ten mill local levy for a \$3450 per unit program graduated up to a 12 mill local levy for a \$4050 program. This plan provides that any tax yield in excess of the minimum program for any district would revert to the Uniform School Fund for distribution to the remaining

school districts. I recommend that the legislation to implement this plan as prepared by the Legislative Council be adopted.”

Paragraph 5-F of the same exhibit and page shows the Governor’s proposal to permit taxation above the minimum school program only upon a vote of those people to be taxed, i.e., qualified taxpaying electors. At page 9 of that exhibit, paragraph 7-F and 8-F, the Governor recommended the transfer of use of an existing income to the state from the School Lunch Fund to the Uniform School Fund. This involved an earmarking of funds only, not the resort to a new source of taxes.

Subsequent messages were given to the Legislature (Exhibits G, H, and I) in which local property taxes in various forms were dealt with (a municipal four-mill levy and a levy to secure general obligation bonds) ; but at no point was reference made to any other form of taxation or to *state* taxation.

The Governor recommended the abolition of certain schools as a means of increasing available aid to elementary and secondary education, but this can no more be said to be a “revenue” measure than can his admonition to curtail excesses in the system.

The call of the Special Session had been an upshot of demands for investigation and action to remedy “the public school problem.” In 1951 the Utah Legislature created a Public School Survey Commission (Ch. 14, Laws of 1951, 1st S. S.). The duties of the Commission were to study all ramifications of the educational program in the

State of Utah and to make recommendations. Among their duties was the study of "taxation and permanent financing of public education, including the adequacy and equity of the present tax base for the support of public schools." Sec. 3(g), Ch. 14, Laws of 1951, 1st S. S. This latter duty the Commission had not sufficient time to perform and in their final report of February, 1953, to the Governor and Legislature, at page 188, said:

"The Commission has not undertaken a detailed study of tax sources to help provide revenue for financing the state-supported minimum school program" (Exhibit J, para. 2).

Because of this circumstance the 1953 Legislature assigned that study to the Legislative Council (S. J. R. 26, Laws of 1953). Thereafter the State Tax Commission employed special research experts to assist in that study. Neither agency had reported to the Legislature at the time of the Special Session (Exhibit J, para. 3).

The Survey Commission reported to the Legislative Council on those matters not related to taxation and the latter began drafting legislation to effect the recommendations of the Survey Commission. Those bills of the Council affecting school finance constituted the program recommended by the Governor in his message of December 4th (Exhibit J, para. 4; Exhibit F, pages 7 and 8).

The Legislative Council, under its statutory duty to disseminate information to each member of the Legislature, compiled a staff report annexing thereto its proposed

legislation, and in the report explaining the bills drawn said:

“The recommendations of the Utah Legislative Council would require some adjustment upwards in the local levy for a state-supported program *and a slight reduction in the state levy to provide the required state aid*. Greater equalization of tax effort would be possible and added funds would be provided in the minimum program with additional local leeway. *The Council has not recommended any change in the present tax structure to finance the proposed legislation. The completion of the current tax study at an early date should afford a sound basis for constructive recommendations on state taxation for the next regular session*” (Emphasis added) (Exhibit J, para. 5).

While it must be admitted that the total cost of the state-supported school program became greater, it is significant that the burden of the state did not. From Exhibit K, constituting the most reliable figures available at this time as to the respective cost of a program conducted for the current fiscal year under the old and under the new laws, it appears that, considering the accruing state obligation under Teachers' Retirement, the total state obligation actually became *less* under the *new* law proposed by the Governor upon recommendation of the Legislative Council and Survey Commission. When Teachers' Retirement is added to other costs to the state, the new law totals a greater state obligation than that *actually appropriated* under the old law. However, when the legal requirement of \$1,000,000.00 *or* the actuarial estimate of \$2,000,000.00 required of the state in its contribution to the previous retirement pro-

gram (and in which the state is in default) is added to the other costs under the prior law, the state's obligation under the new law becomes less than under the old law. These new provisions (H. B.'s 27, 28 and 47 relating to school finance and S. B. 22 relating to retirement) were what the Legislature, the Legislative Council, the Public School Survey Commission, the Governor, and all interested citizens of the State of Utah had in mind when they were considering the "school problem."

STATEMENT OF POINTS†

POINT I.

THE GOVERNOR DID NOT BY EXPRESS LANGUAGE CALL SUCH LEGISLATIVE BUSINESS TO THE ATTENTION OF THE LEGISLATURE AS WOULD PERMIT IMPOSITION OF A TAX ON CIGARETTES.

1. The specification of one form of tax does not permit legislation on all forms or on the general subject of taxation.
2. The Governor, if he authorized an increased tax at the state level, authorized only a property tax.

†Note: Due to the required haste in briefing and submitting this question, the briefs, unfortunately, may not be completely responsive one to the other. This brief will attempt to meet in Points I and II, the arguments of plaintiff in its sub-points A, B and C under its Point I. As to plaintiff's Point II, the defendant will concede that there is a presumption that every Act of the Legislature is valid.

POINT II.

THE GOVERNOR PROPOSED NO LEGISLATION MANIFESTLY REQUIRING THE APPROPRIATION OF ADDITIONAL REVENUE AND DID NOT BY THAT TYPE OF IMPLICATION AUTHORIZE A TAX ON CIGARETTES (H. B. 34).

1. The Governor's authorized legislation required no additional state taxes.
2. If the Governor's message and recommended legislation implied authorization to tax cigarettes, his express words rejected that implication.

ARGUMENT

POINT I.

THE GOVERNOR DID NOT BY EXPRESS LANGUAGE CALL SUCH LEGISLATIVE BUSINESS TO THE ATTENTION OF THE LEGISLATURE AS WOULD PERMIT IMPOSITION OF A TAX ON CIGARETTES.

Art. VII, Sec. 6 of the Utah Constitution provides:

“On extraordinary occasions, the Governor may convene the Legislature by proclamation, in which shall be stated the purpose for which the Legislature is to be convened, and it shall transact no legislative business except that for which it was especially convened, or such other legislative business as the Gov-

ernor may call to its attention while in session. The Legislature, however, may provide for the expenses of the session and other matters incidental thereto. The Governor may also by proclamation convene the Senate in extraordinary session for the transaction of executive business."

This provision has been held to be mandatory (*State v. Pugh*, 31 Ariz. 317, 252 P. 1018) and any law enacted at a Special Session other than on the subject or subjects designated by the executive's call or message is without authority and void. *State v. Scott*, 105 Utah 31, 140 P. 2d 921.

This court in *State v. Tweed*, 63 Utah 176, 224 P. 443, and *State v. Scott*, 105 Utah 31, 140 P. 2d 921, has held that constitutional provision to have been intended to leave the matter of Special Sessions of the Legislature in the hands of the Governor and to the end that he may have complete control over the "legislative business" that shall be considered.

For purposes of the argument on this point only, we might concede that the Governor permitted an increase in taxes at the state level, for, as we will show, any such tax could only have been a property tax. We do not concede that fact for all purposes, for our argument in Point II hereof attempts to show by accompanying stipulated exhibits that the program recommended by the Governor, the Legislative Council, and the Public School Survey Commission was geared to less state contribution to the state supported school program, and that no state tax was authorized or needed. However, even if it be determined as a basic premise that state support was increased at the Special Session

by bills within the call of the Governor, we believe that the Governor specified only property taxation as a tax to which resort could be had for obtaining the additional funds required, and our argument under this point is designed to show that the prevailing weight and better reasoned authority is that such a tax may be specified without opening up the entire field of taxation.

1. The specification of one form of tax does not permit legislation on all forms or on the general subject of taxation.

One major purpose of provisions of this nature is that notice shall be given to the public that certain subjects are to be considered, thus warning all persons interested to be present if they so desire, so that rights and interests may not be acted upon without notice. 50 Am. Jur., p. 64, Statutes, Sec. 46. *Richmond v. Lay*, 261 Ky. 138, 87 S. W. 2d 134. In that latter case a call was issued to raise revenue for schools, a call substantially broader as pertains to the field of taxation than the call in this case, and at the Session a bill was enacted to require payment of a \$2.00 renewal fee for teachers' certificates and to permit lifetime certificates for teachers having twenty years' service. The \$2.00 fee was approved as being a revenue measure. The life certificate provision was struck down as being without the call.

In *Smith et al. v. Curran*, 268 Mich. 366, 256 N. W. 453, the Governor issued a proclamation permitting legislation to validate bonds previously voted, but having technical deficiencies otherwise. The admitted purpose of the

call was to validate an entire \$360,000,000.00 package of refunding bonds. However, of that package a portion had not been authorized by vote and the case indicates that deficiency could have been cured by the Legislature, it not being a constitutional question. The court held: Those bonds not authorized by a vote of the people were not validated. The call was sufficiently restrictive to permit validation of only voted bonds. Thus we have a situation strikingly parallel to the one here considered. Rights of individuals, i. e., those required to consent by popular vote, could not be invaded without a call sufficiently broad to apprise them of action permitted at the Special Session (Exhibit F, p. 8, para. 5, 6). The court developed in the Curran decision the theory defendants now adopt as to the meaning of the term "subject" or "legislative business". Evolving the rule of Michigan the court held:

"The 'subject' submitted in the message was wholesale validation of bonds. It covered only kinds of bonds which form a logical and natural class for validation separate and distinct from the other classes also covered by Act 31. While the Governor within the range of a 'subject' may not restrict the Legislature, he has the authority to limit the subject according to his conception of the need for legislation. *Thus a proposal for action upon a certain tax would not throw open the whole matter of taxation for legislation or a recommendation as to a crime would not include the entire realm of criminal law*" (Emphasis added).

The functioning of state government may be divided into numerous and heterogeneous subjects: Public welfare, public service, public works, public lands, schools, and tax-

ation, to name only a few. Each of these broad subjects has as many component parts as the sum of its functions, duties, powers, inhibitions, limitations and requirements for support, operation and maintenance. Thus each "subject" of government may be subdivided into molecular components, each of which is logically, distinctly separable from, though related to, all the others. None is wholly unrelated to any other, and by imaginative strain, any infinitesimal part of one subject may be made to relate to any part of almost any other subject. But just as the general subject "animal" may by the addition of qualifying limitations be reduced to the concept "man" and this down to some special race or class or group of men, the consideration of any general subject of state government may be reduced by restricted modification to one of its functions, duties, powers or requirements. *State v. Woollen*, 128 Tenn. 456, 161 S. W. 1006. Thus consideration of any function of government, such as taxation, may be logically restricted as to the field of its operation, the class to be regulated, the group to be affected, and the subject matter to be taxed. In the *Woollen* case (128 Tenn. 456, 161 S. W. 1006) it is held in a well reasoned and much cited decision that the Governor may specify the general subject of appropriations and then, by specifying the institutions to which appropriations are to be made, so restrict the call and the general subject, appropriations, as to exclude appropriation to any and all other institutions and departments.

In *Commonwealth v. Liveright*, 308 Pa. 35, 161 A. 697, an academic discussion and analysis of the cases involved treats the question of whether or not when a general sub-

ject is stated, the specification of a particular matter in connection therewith opens the door for legislation germane to the general subject, but beyond the scope of the specification. *Commonwealth v. Liveright* holds that it *does not*. The court at page 704, 161 Atl. said:

“There are some decisions which go to the extent of holding that when a general subject is mentioned the doors are thrown open to legislation on that subject. *But these authorities appear to be in the minority and are opposed to the well considered opinions of other states*” (Emphasis added).

Cited with approval are the Woollen case (128 Tenn. 456, 161 S. W. 1006) and *Denver & Rio Grande Railway Company v. Moss*, 50 Colo. 282, 115 P. 696.

The Colorado case holds that when the specification is too broad, the result is that *no* subject is constitutional for the reason that the spirit of the constitutional provision limiting the scope of legislation would be emasculated. No notice could be given to interested persons, nor could any restraint be imposed against over-legislation at the taxpayers' expense. 50 Am. Jur., p. 64, Statutes, Sec. 46. In the Liveright case at page 715 of 161 Atl., an illustration is made of the inequities stemming from the broad interpretation and application of a call upon a subject. Although writing a dissenting opinion, this Judge agrees with the majority in its holding that permission to consider a portion of one subject does not permit legislation on the entire subject. In so doing he says:

“For instance, if the Governor designated the subject of ‘taxation’ as one of those to be considered,

then any and every branch of that subject, taxation upon capital stock, taxation upon inheritances, taxation upon moneys and interest, etc. could be made the subject of legislation at the 'special session'

* * * On the other hand if the subject of the tax on capital stock was the only one designated in the proclamation, none of the other branches of the general subject of taxation could constitutionally be passed upon by the Legislature at that whole session. Up to this point also the whole court agrees."

A case almost startlingly in point is *Simms v. Weldon*, 165 Ark. 13, 263 S. W. 42. In that case the Governor issued a call to raise revenues for schools in response to a widespread public demand prompting the Governor to act. The Governor's opening message to the Legislature stated:

"The financial distress of the public schools of the state has compelled me to convene you for the purpose of considering and passing laws for relief."

The Governor included in his call taxation on income, a severance tax and matters regarding collection of gross income taxes. The session passed an act levying a tax on the sale of cigars and cigarettes. The court held the tax invalid, saying:

"The Governor specified presumably all that was in his mind at the time he issued the proclamation and we are not at liberty to go back of that call to determine what purpose the taxation was intended for. The call was to pass an income tax law and the passage of such a law, regardless of the appropriation of the revenues thus raised, would have been within the call, but any other kind of a tax, regardless of the appropriation to any given use was not

within the call. The mental attitude of the Governor as to his intention, not expressed in the proclamation, does not supply the specifications required by the Constitution. The fact that the other taxes represented in the call were earmarked for use by the schools does not broaden the scope of the call, for neither relates to a sales tax on cigarettes and cigars."

That court agreed that the Governor was required to confine legislation to particular subjects, but should not and in some instances may not specify details into which the Legislature may go in dealing with that subject, but held that the purposes of the legislation must be definitely specified either broadly or in detail in the call or the message.

This case has been cited with approval by that jurisdiction in *Hope v. Oliver*, 196 Ark. 394, 117 S. W. 2d 1072. In the *Oliver* case the call provided for the removal of toll fares on bridges. The Legislature passed an act to replace revenues lost by bridge tolls which imposed a fee for auto inspection. It was held that that fee was not within the call. The court admitted the presumption of validity of all acts passed by the Legislature and conceded the argument that the Legislature can, within the scope of the call, decide what is best for the state. It was argued in that case that to keep bridges free from tolls, revenues should be raised to supplant toll revenues. The court said that presumably the Governor considered the loss of revenues and discounted the need for remedial legislation. Otherwise, they said, he would have included the suggestion to raise a revenue to bridge that deficiency.

An Arkansas case (*McCarrell v. Clyde C. L.* 198 Ark. 896, 132 S. W. 2d 19) although holding the act there in question valid, cited the Weldon case as being established law in that state. That latter case did not weaken the holding of the Weldon case. The call was broad: to create a *fund* for tubercular treatment. No specification reduced its all-encompassing character. We agree with this holding.

In *Stocke v. Edwards*, 295 Mo. 402, 244 S. W. 802, the Governor's call recommended that assessors in cities of over 500,000 inhabitants be made elective. An act providing for that election, establishing a new Board of Tax Equalization and defining new duties for both the assessor and the new Board was held *beyond the scope of the call*. The Legislature under that call was not permitted to enact a measure covering a greater number of details and particulars relating to the authority and duties of the assessors although it was permitted to deal with assessors as to the election thereof. That case cited with approval *State ex rel Rice v. Edwards*, . . . Mo. . . ., 241 S. W. 945. There the Governor called for re-districting of cities for the election of Justices of the Peace. The act as passed dealt with both Justices of the Peace and Constables. The manner of dealing with Justices of the Peace was within the call, but the subject of constables was without and the act was voided.

In *State v. Adams*, 323 Mo. 729, 19 S. W. 2d 671, a call to restore capital punishment and fix the method of execution was held not to include the power to permit the jury to decide whether death should or should not be imposed. The court held the intent was to restore capital punishment

and fix the method of sentence and not to deal with who should choose the sentence to be imposed.

In *Wells v. Missouri Pacific Railroad Company*, 110 Mo. 286, 19 S. W. 530, a call authorized the Legislature to pass laws correcting abuses, unjust discrimination and extortion on rates of railroads. An act required safety appliances on railroad switches and abolished the defense of contributory negligence in situations arising therefrom. The court held that the Legislature was called to correct abuses by railroads, but those abuses were spelled out in the form of rates and not general abuses of railroads. Similarly, *Trenton Graded School Districts v. Board of Education*, 278 Ky. 607, 129 S. W. 143 holds that the general subject matter (in this instance schools) can be limited by specifications of what problems may be considered in regard to schools, and an act would be held invalid providing for annexation to school districts under a call to provide approved high school service for all pupils, and to deal with teachers' retirement. *Columbia & Pulaski Turnpike Company v. Hughes*, 174 S. W. 1108, 131 Tenn. 267 held that a call to enact a regulation for turnpikes did not open the session to any type of a road.

All of these cases hold that the specification of a particular, within a general, subject opens the session only for consideration of the particular, not the general, subject. The lesser cannot include the greater, and when the authority is given to deal with a subject only as it relates to revenues for a specific purpose, the original subject cannot be dealt with in a manner designed to change its entire

structure. *In Re Opinion of the Justices*, 94 Colo. 215, 29 P. 2d 705. In that case a call "to provide aid for the destitute and suffering" did not permit the enactment of an elaborate code controlling liquor although a portion of the revenue provided for in that code was earmarked for the purposes enumerated in the call. We cite this case not for its implication that elaborate regulation of smoking could not have here been enacted under the Governor's call, but cite it for its holding, as applied to this case, that the state's tax structure may not be invaded or realigned under the guise of providing some revenues for the purposes in the call.

Exhibit J affirmatively shows that the tax problem had been deferred by the Public School Survey Commission, the Legislative Council and the Governor (Exhibit J, paras. 2, 3, 4, 5 and 6). We show those exhibits not to establish lack of wisdom in the cigarette tax, but to show that it was a legitimately separate, logically distinct subject deemed by all three principals quoted in that Exhibit to be separate and apart from the "school problem" to be remedied at this session.

As said in *Commonwealth v. Liveright*, 161 Atl. at page 403:

"This constitutional provision [limiting the subject matter at special sessions] contemplates that there shall first exist in the executive's mind a definite conception of the public emergency which demands an extraordinary session. His mental attitude or intention is expressed in his proclamation, the purpose of which is to inform the members of the Legislature of subjects for legislation and to advise the public generally that objections may be

presented if desired. It is not only a guide or chart with respect to which the Legislature may act, but also a check restricting its action so that rights may not be affected without notice. The proclamation may contain many or few subjects according to the Governor's conception of the public need. *While the subjects may be stated broadly or in general terms, the special business as related to the general subject on which legislation is desired should be designated by imposing qualifying matter to reduce or restrict*" (Emphasis added).

2. The Governor, if he authorized an increased tax at the state level, authorized only a property tax.

Sec. 59-9-4, U. C. A. 1953 provides as follows:

"The commission shall then determine the minimum rate of levy on each dollar of assessed valuation of the tangible property in the state that will raise sufficient supplementary revenue to pay the state's contribution to the cost of the minimum school program for that year and any deficiency from previous years, provided that in accordance with the provisions of section 7, Article XIII, of the Constitution of the state of Utah, not more than 75% of the state's portion of the revenue necessary to finance the operation and maintenance of such minimum school program shall be raised by the state property tax levy. The commission shall take into consideration, from the best information available, and shall make allowance for, the estimated tax delinquency for the current year, and shall be conservative in its estimate of revenue to assure to the extent possible ample funds for the state's contribution to the cost of the minimum school program. The tax commission shall immediately thereafter

transmit to the county auditor of each county and to the state auditor a statement of such rate, and upon its receipt the county auditor must, in writing, notify the state tax commission of the receipt thereof."

Under that section the state's property tax levy is geared to meet the state's required contribution to the minimum school program under any such definition of that program as the Legislature may prescribe, after other revenues to the fund have been exhausted. Sec. 59-9-3¹ was amended by H. B. 28 of the Special Session to require school districts to exert greater effort locally which amounted to an automatic deduction of the state's obligation under 59-9-4. Even without the stern mandate to local districts for increased effort 59-9-4 would still have operated to provide the state's contribution to the new minimum school program and thus even if the new program proved to be more costly to the state² the Governor's call would have specified only property taxation at both the state and local levels since, of course, property taxation is the only means of revenue for school districts³.

Some states, we will concede, have a rule that the specification of a particular subject opens the entire subject for legislation. *Baldwin v. State*, 21 Tex. App. 591, 3 S. W. 109. *Martin v. Riley*, 20 Cal. 2d 28, 123 P. 2d 491 seems to follow that view but an examination of that case shows that the court quite possibly had no occasion to decide that

¹The statute requiring a certain amount of local effort by school districts participating in a supplementary state-guaranteed program.

²Which we doubt from our interpretation of Exhibit K.

³Secs. 59-9-2, 59-9-3, 53-7-8, 53-7-9, 53-7-10, 53-7-12, 53-7-13, U. C. A. 1953.

question. The dissent (page 497 of 123 P. 2d) forcibly argues that the specification within the general subject was broad enough to cover the legislation enacted and that the rule of the majority therefore was unnecessarily broad. Likewise *Blackford v. Judith Basin County*, 109 Mont. 578, 98 P. 2d 872, 162 A. L. R. 639 could have been similarly decided. If those cases do stand, however, for the rule that the designation of any part of a subject opens the entire subject for legislative action, we believe them to be in the decided minority. The California case bases its holding on the Texas case (*Baldwin v. State*, 3 S. W. 109, 21 Tex. App. 591) which has been sharply criticized in recent decisions such as *Commonwealth v. Liveright*, 161 Atl. 697 at 704, 308 Pa. 35, and is diametrically opposed by *Smith et al v. Curran*, 268 Mich. 366, 256 N. W. 453.

Extended, the Texas rule permits absolutely no executive control over the special session since one might be defied to find any subject for legislation that is not in some manner related to the subject in the call, no matter how particularly the latter is specified. Thus every call might imply a tax either for the administration, support or maintenance of the subject to be considered. Merely the call for any Special Session of the Legislature would then be notice to every citizen and every person conducting affairs in the state that his rights might be affected. The Constitution has limited the Legislature in this regard to one such general session each biennium.

POINT II.

THE GOVERNOR PROPOSED NO LEGISLATION MANIFESTLY REQUIRING THE APPROPRIATION OF ADDITIONAL REVENUE AND DID NOT BY THAT TYPE OF IMPLICATION AUTHORIZE A TAX ON CIGARETTES (H. B. 34).

1. The Governor's authorized legislation required no additional state taxes.

Plaintiff will argue that the total cost of the minimum school program was increased by the First Special Session of the 30th Legislature. This we will concede (Exhibit K). However, the minor premise upon which plaintiff builds his hypothesis that the increased program requires new and additional revenue imposed and collected at the state level we believe to be false. Plaintiff says public schools now cost more money. The state contributes to the public school system, therefore the state must collect more taxes. Except for the enactment of a novel program of shifting the burden between state and local effort, this would be valid.

The theme of H. B.'s 27 and 28 and S. B. 22 was to require greater local effort for better equalization (Exhibit J, para. 5). A comparison of the figures opposite Item 5, Exhibit K indicates as much. It is common knowledge, likewise susceptible of judicial notice, that the State of Utah has become in arrears some \$8,000,000.00 in its debt to the Teachers' Retirement Fund. The new law (S. B. 22) provides for liquidation of that debt and integrated state-social security retirement benefits at less state

obligation without doing violence to vested rights of members of the system. In adding items 3 and 4 of Exhibit K the state contribution is higher under the new law than under the old school program. However, the footnotes show that even if the state were up to date on its payments into the Teachers' Retirement Fund under prior law their obligation for this year only would nevertheless carry the state's legal obligation over its expected obligation under the new law both for Teachers' Retirement and for operation and maintenance of the minimum school program otherwise.

Approximately two and one-half years of study of the "school problem" had at the time of the session yielded no answer to the tax structure and the equitable apportionment of the burden between property and non-property revenues. The subject, therefore, had been deferred pending the outcome of a study conducted by the Legislative Council and the Tax Commission (Exhibit J. paras. 3 and 5). The Special Session was for the purpose of re-determining the classroom unit and realigning the respective property tax burden to be imposed as between the state and the local taxing authority. The question was: From where should the increased cost come? It was assumed by the School Survey Commission, the Legislative Council and the Governor that it must come from property taxation. The second question then was: At what level? It clearly appears from the schedule in Exhibit K that the lot fell to the local districts.

After two and one-half years of study by research agencies of the Legislature contrived to study and investi-

gate the "school problem" and after that study yielded only the assurance that the tax structure would be studied and recommended for action at the 1955 General Session, a spontaneous proposition to create a new and additional tax without notice, consideration or calculation appears all the more abortive and repugnant to the constitutional considerations of notice and opportunity to be represented and to the "Governor's conception of the public emergency which demands an extraordinary session." *Commonwealth v. Liveright*, supra. The Legislature chose to substitute its own judgment for that of the Governor as to what the extraordinary circumstance constituted in violation of Art. VII, Sec. 6.

It may not be said that the Governor was attempting to "dictate" to the Legislature when his recommendations were precisely those of the two research agencies⁴ of the Legislature. To say that the Governor has violated the separation of powers by dictating to the Legislature that the increased cost of the school program shall be borne by property taxation whether state or local is to say that the parents who bear children to attend schools dictate to the Legislature for the same reason; for if the definition of the minimum school program had remained the same the state's contribution to that program would have increased year by year by virtue of the provisions of 59-9-4, which requires a state contribution to guarantee the minimum school program based upon a given number of dollars for each thirty students who attend school. If the law had re-

⁴Public School Survey Commission (Ch. 14, Laws of 1951, 1st. S. S.); Legislative Council (Ch. 4, Title 36, U. C. A. 1953).

mained unchanged the state's commitment would have risen at a ratio of almost 3 to 1 over local contributions as school population increased. All this without any action by the Legislature.

2. If the Governor's message and recommended legislation implied authorization to tax cigarettes, his express words rejected that implication.

If it be said that from portions of the Governor's proclamation and messages it may be implied that he expected the Legislature to respond thereto by opening up new and additional sources of revenue, then the express language of the Governor repudiates and completely traverses any such implication. The Governor said in his message of December 4, 1953:

"I am not here to propose new or higher taxes to finance the school program."

If the Governor had said "Here is the school problem—solve it," he would have violated every purpose and spirit of Art. VII, Sec. 6. See *Denver & Rio Grande Railroad Company v. Moss*, 50 Colo. 282, 115 P. 696; *Nielson v. Chicago C. B. & O. R. R. Company* (C. C. A.) 187 Fed. 393. No act passed could have been responsive to that call. The Governor could in our opinion have specified certain subjects within which the Legislature might act and only legislation responsive to that charted program and to that notice to the public could have been constitutionally enacted. *Commonwealth v. Liveright*; *Smith v. Curran*, *supra*. By

implication he would have denied the power to act in other subjects. But by expressly prohibiting in no uncertain terms their promiscuous activity in the field of taxation he did more toward outlining the program and defining proper fields of legislation than was required of him. That express rejection of new or increased taxes dispels any implied acceptance of them. The Governor's veto message (Exhibit J, para. 6) shows his intent as it related back to his original message. While the bill would not have been valid even had he signed it⁵ the Governor's omission to argue the merits of the bill in his veto message shows clearly what his "mental attitude, intention or conception of the public need"⁶ was, since he rejected it upon the ground that he had not previously admitted it.

CONCLUSION

In conclusion and summary we urge this Court to adopt the majority view that the enumeration of items within one general subject in the Governor's proclamation for a Special Session does not open that session for consideration of any unnamed part of the general subject. Alternatively we submit that even if that rule is not adopted that the court take judicial notice of the apparent conclusion that nothing transpiring at the First Special Session of the 30th Legislature required a resort to state taxation at all, since the burden of the increased cost of the minimum school program was thrown upon local districts and the

⁵*State v. Scott*, 105 Utah 31, 140 P. 2d 929.

⁶*Commonwealth v. Liveright*, 308 Pa. 35, 161 Atl. 697, 703.

burden of teachers' retirement was appreciably shifted to Federal Social Security coverage. We respectfully urge that under no theory can it be said that the Governor proposed a program demanding new or increased taxation in any field other than local property or state-local property taxation and created no condition requiring resort to new sources.

We respectfully contend that under no theory of this case can H. B. 34 be said to have been within the scope of the Governor's proclamation or subsequent messages to the Legislature and it is therefore unconstitutional under the mandatory limitation in Art. VII, Sec. 6, Constitution of Utah.

Respectfully submitted,

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