

1960

# H. J. Cornell & Ambrose Black dba Country Club Foods v. State Tax Commission of the State of Utah : Brief of Respondent State Tax Commission of Utah

Utah Supreme Court

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Walter L. Budge; Norman S. Johnson; Attorneys for Respondents;

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## Recommended Citation

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

H. J. CORNELL and AMBROSE  
BLACK, d/b/a Country Club  
Foods, a Partnership,  
*Petitioners and Appellants.*

vs.

STATE TAX COMMISSION OF  
THE STATE OF UTAH,  
*Respondent.*

**FILED**

2619

no Court, Utah

Case No.

9272

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BRIEF OF RESPONDENT  
STATE TAX COMMISSION OF UTAH

---

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H. J. CORNELL and AMBROSE  
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STATE TAX COMMISSION OF  
THE STATE OF UTAH,  
*Respondent.*

Case No.

9272

---

BRIEF OF RESPONDENT  
STATE TAX COMMISSION OF UTAH

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STATEMENT OF FACTS

In the interest of clarity, the Tax Commission will herein take the liberty of amplifying the statement of facts set out by taxpayer.

In the course of the audit referred to by petitioner, the Tax Commission examined sales tickets, sales journals, stamps on hand, any oleomargarine on

hand and purchase records in the possession of Country Club Foods and allowed credit for any inventories, stamp purchases and exempt sales. The balance was set up as taxable. The Tax Commission also found it necessary to examine the sales records of Ray and Whitney Brokerage Co., Salt Lake City, Utah, brokers for Best Foods products as the purchase records of Country Club Foods for the period of August 31, 1956 to December of that year were not available for inspection, and the oleomargarine purchased by Country Club Foods for that period of time was purchased from said brokerage company. The Tax Commission did not find as a fact that the assessment in question was completely based upon the sales records of a third party, nor did it find as fact that the tax was not assessed upon the presence of any oleomargarine packages or containers in petitioner's possession or place of business.

## CONCLUSIONS OF LAW MADE BY THE TAX COMMISSION

1. Section 59-18-4, Utah Code Annotated, 1953, imposed a tax upon the sale of oleomargarine in the state of Utah at the rate of 5c per pound if not artificially colored and 10c per pound if artificially colored.

2. Under Section 59-18-5, Utah Code Annotated, 1953, it was provided that certain oleomarga-

rine taxes were to be paid by affixing stamps previously purchased from the Tax Commission, within 72 hours after the oleomargarine is received by any wholesaler, retailer or distributor within this state, provided, however, that any such oleomargarine had to be stamped before it was sold within this state.

3. That under the same statute, the presence of any package or container in the place of business of any person required by the provisions of this chapter to stamp the same would be prima facie evidence that they were intended for sale and subject to tax under this chapter.

4. Section 59-18-14, Utah Code Annotated, 1953, gave the Utah State Tax Commission the power and duty to enter upon the premises of any taxpayer and to examine or cause to be examined by any agent or representative designated for that purpose any books, papers and memoranda bearing upon the taxes payable and to secure any other information directly or indirectly concerned in the enforcement of this chapter.

5. That the statutes hereinabove referred to are wholly applicable to the issues in controversy.

6. That the petitioner was required by the provisions of the aforementioned statutes to stamp oleomargarine in its possession.

7. That through investigation by the Tax Commission, it was discovered that certain oleomargarine in the possession of petitioner had not been so stamped. The petitioner failed to show that such oleomargarine was not intended for sale and thus not subject to tax under the aforementioned statutes.

8. That the petitioner is liable to the State Tax Commission under the laws of the state of Utah for the tax deficiency itemized in paragraphs 2 and 3 of the findings of fact hereinabove set forth.

## HISTORY OF OLEOMARGARINE LEGISLATION

Oleomargarine is a food product commonly used as a butter substitute and is made from animal and vegetable oils or from vegetable oils alone. The elements which make up this product are essentially the same as those in butter; modern authorities, however, recognize that there is often a difference in vitamin content. In its natural state oleomargarine generally has a white color. In view of a public preference for a yellow color and also in some cases actually to deceive the public, it has been common practice to color oleomargarine yellow artificially. It is also common to add artificial coloring to butter to enhance its yellow color during those seasons when butter is naturally pale (Rocky Mtn. L. Rev. 18:79-96, Fe. '46).

Oleomargarine first become part of American commerce in the 1870's (33 Va. L. Rev. 631-41). In the early days of the manufacture and sale of oleomargarine and other butter substitutes, many fraudulent schemes to increase sales were perpetrated on the public, and for this reason there arose a real need for public regulation. There was a prevalence of adulteration and deception of consumers by "palming off" the product as butter. Manufacture often took place under unsanitary conditions. The dairymen to protect their products and the public to protect themselves began to petition their legislatures to pass laws necessary to remove the chances of fraud. There was a real need for government regulation. So closely did the substitutes presented to the public resemble actual butter that the fraudulent sale of oleomargarine as butter became easy and common. False or misleading advertising, especially misleading implications that oleomargarine was a dairy product, was common (10 Montana L. Rev. 46-63 Spring '49).

The state legislation in this field is of three types: fiscal, prohibitory and regulatory, or combinations of the three. Utah's act is fiscal in nature, and has had at least up to the time of the passage of the statutes in question herein, regulatory features. Statutes similar in nature to Utah's are in effect in Idaho, Iowa, North Dakota, South Dakota and Wisconsin.

The first Utah legislation dealing with oleomar-



garine was passed in 1929 (Chapter 91). That act provided for a tax of 5c per pound on the sale of uncolored and 10c per pound on the sale of colored oleomargarine. It also required that a dealer in either product must purchase a license permit, and a fee of \$5.00 was deposited in the general fund of the local government issuing the permit. Each separate purchase of oleomargarine was to bear a stamp, prepared by the State Auditor and issued by him to the State Treasurer on requisition. The Treasurer was responsible for collection of the tax.

This act was amended by Chapter 6, Laws of Utah, 1930, to provide that the dealers' licenses were to be issued to the State Treasurer, and that the fees were to go to the general fund of the state.

In 1933 the legislature, in the Second Special Session, combined the oleomargarine statute (Chapter 6, Laws of Utah, 1930, Title 66, revised statutes of 1933) and the tobacco statute (Chapter 5, Laws of Utah, 1930, Chapter 1, Title 93, revised statutes of 1933) into one chapter, Chapter 17. The revision was probably motivated by the similarities in the two laws. Both provided for licensing of dealers. Both imposed an excise tax. Both effected collection of that tax in the same manner: through the use of stamps; and both provided penalties for violations.

In 1947 (Chapter 138) 93-1-1 was amended by deleting the provision requiring dealers' licenses for

the sale of oleomargarine. The legislature, in 1953, placed combined oleomargarine and tobacco statutes with Chapter 18 of Title 59, which is the present revenue and taxation title of the Code.

The Utah state legislature has also seen fit to pass regulatory measures related to imitations of butter in Title 4, Sections 27 and 28, U. C. A., 1953, under the Dairy Section of the Code.

## STATEMENT OF POINTS

I. THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, IS PRESUMPTIVELY CONSTITUTIONAL.

II. THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, DOES NOT VIOLATE ARTICLE VI, SECTION 23, OF THE UTAH CONSTITUTION.

III. NEITHER THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, NOR THE ADMINISTRATION THEREOF BY THE STATE TAX COMMISSION IN THIS CASE, VIOLATES THE DUE PROCESS REQUIREMENTS OF

## THE UNITED STATES OR UTAH STATE CONSTITUTIONS.

IV. THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, DOES NOT VIOLATE ARTICLE I, SECTION 24, OF THE UTAH CONSTITUTION.

V. FEDERAL AND STATE CASE LAW UNIFORMLY SUPPORTS THE POSITION TAKEN BY THE UTAH STATE TAX COMMISSION, AS SET FORTH IN THIS BRIEF.

VI. LEGISLATIVE INTENT CAN BE CLEARLY DISCERNED FROM THE PROVISIONS OF THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, AND THOSE PROVISIONS CAN BE HARMONIZED SO AS TO GIVE EACH ONE MEANING, AND SUPPORT THE CONSTITUTIONALITY OF THE ACT.

VII. THE RULE OF STRICT CONSTRUCTION OF TAXING STATUTES IS NOT APPLICABLE TO THIS CASE.

## ARGUMENT

I. THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18,

## UTAH CODE ANNOTATED, 1953, IS PRESUMPTIVELY CONSTITUTIONAL.

The taxpayers have attacked the constitutionality of the legislative act herein involved. In doing so, they shoulder a difficult burden. Utah law is replete with cases announcing and reaffirming the doctrine that the court is reluctant to interfere with the enactments of the legislature; that "All doubts should be resolved in favor of the constitutionality of a statute, and no act should be declared unconstitutional unless it is clearly and palpably so." and that the court must hold legislation constitutional if there is any reasonable basis to sustain it. *Newcomb v. Ogden City Public School Teachers' Retirement Comm.*, 121 Ut. 503, 243 P. 2d 941 (1952); *State v. Packard*, 122 Ut. 369, 250 P. 2d 561 (1952); *G. E. Co. v. Thrifty Sales, Inc.*, 5 Ut. 2d 326, 301 P. 2d 741 (1956); *Denver and R. G. R. Co. v. Central Weber Sewer Imp. Dist.*, 4 Ut. 2d 105, 287 P. 2d 884 (1955); *Thomas v. Daughters of Utah Pioneers*, 114 Ut. 108, 197 P. 2d 477 (1948).

If there are two alternatives to interpretation of a statute, one of which would make it constitutionally doubtful and the other which would render it constitutional, the latter will prevail. *State Water Pollution Control Board v. Salt Lake City*, 6 Ut. 2d 247, 311 P. 2d 370 (1957).

II. THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, DOES NOT VIOLATE ARTICLE VI, SECTION 23, OF THE UTAH CONSTITUTION.

Taxpayers assert that the Oleomargarine License Act as set forth in Title 18, Utah Code Annotated, 1953, is a violation of Article VI, Section 23 of the Constitution of Utah, which states that:

“Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.”

It should be made clear that the title of an act need not be an index to all that the act provides. *State v. Twitchell*, 8 Utah 2d 314, 333 P. 2d 1075 (1959). The fact, then, that the title to this Act does not completely list its contents is not fatal.

“All that is required is that the subject matter of the Act be reasonably related to the title \* \* \*.” *State v. Twitchell*, 8 Ut. 2d 314, 333 P. 2d 1075 (1959).

The title of the Act in question informs the reader that there are sections contained therein relating to oleomargarine and tobacco. The placement of the Act in the revenue and taxation title of the Code makes it clear that a tax of some type is imposed on

both products. It is true the title would lead one to erroneously believe that licenses were required to deal in both products, when a license is in fact required only for dealers in tobacco. However, though this highlights legislative oversight, it does so in a manner not fatal to the Act. The title and the act should be surveyed in the light of the purpose of the constitutional provision, which is to guard against surreptitious or inadvertent inclusion of matters in the legislation of which the legislators and the public are not aware. A liberal view should be taken both of the act and the constitutional provision so as not to hamper the law making power. *Kent Club v. Toronto*, 6 Ut. 2d 67, 305 P. 2d 870 (1957). All doubts must be resolved in favor of the law. *Utah State Fair Ass'n, et al. v. Green, et al.*, 68 Ut. 251, 249 P. 1016 (1926). In this case, then the sin is of commission not omission, so it does not violate the spirit and purpose of the act. *State v. Kallas, et al.*, 97 Ut. 492, 94 P. 2d 414 (1939). The title can be properly broader than the act. *Cooley Taxation* 4th E. (1924), Vol. I, Section 499.

“The constitutional requirement that an act contain but one subject clearly expressed in the title is not a technical restriction on the legislature but is for the practical purpose of informing the legislature and the public of the legislation proposed and a title which will lead into inquiry in the body of the act \* \* \* is sufficient.” *Thomas v. Daughters of Utah*

*Pioneers*, 114 Utah 108, 197 P. 2d 477 (1948).

The title of an act is sufficient if it is not productive of surprise and fraud and calculated to mislead the legislature or the people, but fairly apprises the legislators and public of the subject matter of the legislation and puts anyone having an interest therein on inquiry. *Martineau v. Crabbe*, 46 Ut. 327, 150 P. 304 (1915).

It is true that the provisions contained under an act should be germane. However, the fact that the provisions differ in some respects does not render the act unconstitutional. *State v. Twitchell*, 8 Utah 2d 314, 333 P. 2d 1075 (1959).

Taxpayers admit on page 11 of their brief that the imposition of excise taxes on the sale of oleomargarine and tobacco and the provisions deriving revenue therefrom are probably cognate. It is respectfully contended by the Tax Commission that these provisions are indeed cognate and that in addition, the provisions for the use of stamps, the collection procedures, and the provision giving the Tax Commission the job of administering both the regulatory and taxing provision of the Act are also cognate. (59-18-14, Utah Code Ann. 1953.) In fact, then, the Act imposes taxation and regulation on both products in a like manner. The deletion by the legislature of the licensing requirements for oleomargarine dealers merely estab-



lished one dissimilarity, but as aforementioned, the fact that the provisions differ in some respects does not render the Act unconstitutional. *State v. Twitchell*, 8 Utah 2d 314, 333 P. 2d 1075 (1959). Nor need the connection or relationship be logical. *Martineaux v. Crabbe*, 46 Utah 327, 150 P. 304 (1915) though the Tax Commission contends that in this instance the connection and relationship is logical.

The *Carter v. State Tax Commission* case which taxpayers cite on page 11 of their brief to give support to their attack is readily distinguishable in that the title of that Act gave no hint of revenue provisions contained therein. The statute was under the Motor Vehicle Act, and the legislature did not in fact intend that the statute should be a revenue act. The court, however, held that in spite of legislative intent the provision was in fact a revenue position. There was no way the reader could be apprised of a tax contained and imposed therein.

In the *Martineaux* case, it is stated that

“\* \* \* if \* \* \* by any reasonable construction, the title of the act can be made to conform to the constitutional requirements, it is the duty of the Courts to adopt this construction rather than another, which will defeat the act. \* \* \* In case of doubt it must be assumed that the legislature understood and applied the title so as to comply with the constitutional provision, and not contrary thereto.”



III. NEITHER THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, NOR THE ADMINISTRATION THEREOF BY THE STATE TAX COMMISSION IN THIS CASE, VIOLATES THE DUE PROCESS REQUIREMENTS OF THE UNITED STATES OR UTAH STATE CONSTITUTIONS.

Taxpayers contend in Point III of their brief that the oleomargarine tax violates Amendment V and Amendment XIV, Section I of the Constitution of the United States and Article I, Section 7 of the Constitution of Utah which provide that

“No person shall be deprived of life, liberty or property without due process of law.” They also allege in their argument that the procedure which the Tax Commission followed in assessing the tax and arriving at a determination that the assessment was valid was violative of those same Due Process provisions.

The Fifth Amendment to the United States Constitution is not applicable to state legislation. *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644. It is a limitation upon the powers of Congress. *Ibid*.

The Fourteenth Amendment is admittedly ap-

plicable to state legislation, *Ibid.* and due process objections are generally treated the same for purposes of the Fourteenth Amendment and the state clauses, *Untermeyer v. State Tax Comm.*, 102 Ut. 214, 129 P. 2d 881 (1941). We will consider them jointly for the purposes of this brief.

Due Process Clauses are applied as a limitation upon the taxing power of the states only in rare and special instances. *Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 (1934); *Garrett Freight Lines v. State Tax Comm.*, 103 Utah 390, 135 P. 2d 523, 146 A. L. R. 1003 (1943). A particular tax law \* \* \* will not be struck down as a violation of due process unless the state's action is palpably arbitrary or grossly unequal in its application to the persons concerned. *Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 (1934) and see 11 Am. Jur. Sec. 91. In nearly every case \* \* \* except those cases where notice and hearing are involved, the United States Supreme Court has rejected such a contention without discussion. *Cooley, Taxation*, 4 on E., (1924) Vol. I, Sec. 143.

Property taken in the lawful sense of the taxing power is not taken without due process of law, regardless of the amount of that tax. *Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 (1934). A tax does not violate the due process clause because it operates unjustly, even to the extent of destroying a lawful business. *Ibid.*

If the tax is for private instead of a public purpose, the due process clause is violated. This is also true where a tax is upon part only of those belonging to the same class. Cooley Taxation, 4th E., (1924), Volume I, Section 143. Taxes can be for a public purpose although imposed other than for purposes of revenue, such as tariff duties for the encouragement of manufacturers or license fees upon certain obligations with a view to regulation. Cooley Taxation, 4th E. (1924), Volume I, Section 182. The determination as to what is and what is not a public purpose belongs in the first instance to the legislative department. *State ex rel. Douglas County v. Cornell*, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513, 38 Am. St. Rep. 629. The presumption is that a tax is valid;—that the motives of legislature were public;—that the legislature acted honestly and with fair purpose;—that it moved with deliberate judgment. Cooley Taxation, 4th E. (1924), Volume I, Section 188. To justify the court in arresting the proceedings and in declaring the tax void, the absence of all public interest in the purpose for which the funds are raised must be clear and palpable. *Brodhead v. Milwaukee*, 19 Wis. 624; see Cooley, Taxation 4th E. (1924), Vol. I, Section 189. Taxes to upbuild or improve the agricultural resources of the state have been upheld as not being violative of due process. Cooley, Taxation, 4th E. (1924), Volume I, Sec. 205. Taxation in aid of private industry has been held proper if the industry to be benefited should be one of such magnitude in that

its property constitutes a substantial element of the public welfare, or it should be of a character which renders it important to the public. Cooley, Taxation, 4th E. (1924), Volume I, Section 205.

Administrative process of the customary sort is as much due process of law as judicial process. *Jenkins v. Ballantyne*, 8 U. 245, 249, 30 P. 760, 16 L. R. A. 689 (1892). In depriving a person of life or liberty, or property, the essentials of due process are: (a) the existence of a competent person, body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made. In the absence of statute laying down other or more specific requirements, the above conditions meet the demands of due process. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314 (1945).

The Tax Commission has accepted the facts substantially as they were set out by taxpayers, but contends that the fact stipulated to by both parties, that the tax was assessed against "all quantities of oleomargarine that were sent to and received by them" neces-

sarily implies that the oleomargarine involved was, for a time at least, in taxpayers' possession. The Tax Commission found it necessary to examine the sales records of a third party who dealt with the taxpayers, due to the incomplete nature of their records, and taxpayers made no attempt to introduce facts that would refute the finding of fact that the oleomargarine was in fact received by them.

“\* \* \* The presence of any package or container in the place of business of any person required by the provisions of this chapter to stamp the same shall be prima facie evidence that they are intended for sale and subject to tax under this chapter.” 59-18-5, Utah Code Annotated, 1953.

There was, then, a prima facie case before the Tax Commission that the oleomargarine in question was intended for sale and subject to tax under the oleomargarine tax statute. As a result, it is not necessary, under our statute, to find that the taxpayers did in fact sell the oleomargarine. It is not necessary to find as fact that they possessed it longer than 72 hours. Taxpayers must overturn the prima facie case before the Tax Commission, and their flat, unsupported denial that the oleomargarine was not held for sale or in their possession for less than 72 hours, was not sufficient to overturn that case.

The Tax Commission agents did not act improperly in making their assessment based on records of

deliveries. That was a practical and reasonable mode of audit.

As to the prima facie case set up by statute in 59-18-5(2), which the Tax Commission relied on, and justifiably so, as the Tax Commission has no business questioning the validity or constitutionality of legislative enactments. *Shea v. State Tax Comm.*, 101 Utah 209, 120 P. 2d 274 (1941). Thus, that body was duty bound to follow statutory mandates and procedures.

“\* \* \* it is competent for a legislative body to provide by statute \* \* \* that certain facts shall be prima facie or presumptive evidence of other facts, if there is a natural relationship between the facts proved and those presumed. Such clauses do not violate federal or state due process requirements. (86 A. L. R. 180 and collected cases.) It is only invalid when the presumption is arbitrary, and there is no rational connection, or the law operates to deny a fair opportunity to repel it.”  
*Ibid.*

This is but the enactment of a rule of evidence, and it quite within the general power of the government; the law of evidence is full of presumptions, either of fact or law. There must only be a connection between them in reason or experience and a fair opportunity of rebuttal. *State v. Porello*, 40 Utah 56, 119 Pac. 1023 (1911); *State v. Converse*, 40 Utah 72, 119 Pac. 1030 (1911).



The taxpayers were properly audited and given the opportunity of a hearing before the Utah State Tax Commission. In that hearing they were given full opportunity to present their version of the law and the facts through counsel, and the Tax Commission properly followed the mandate of the statute under which it operates. Taxpayers were given procedural due process in all particulars.

#### IV. THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, DOES NOT VIOLATE ARTICLE I, SECTION 24, OF THE UTAH CONSTITUTION.

Under Point II, taxpayers contend that the oleomargarine act as set forth in Title 59, Chapter 18, Utah Code Annotated, 1953, is a violation of Article I, Section 24, of the Utah Constitution, which states that:

“all laws of a general nature shall have uniform operation.”

They point to the split-tax provisions of the Utah law, which tax the sale of colored oleomargarine at a higher rate than the sale of uncolored oleomargarine and allege that such provisions are unjustly discriminatory and thus unconstitutional. They, then, in the closing sentence of Point II, incidentally refer to

the fact that colored oleomargarine is also classified differently than butter and other foodstuffs.

Classifications in an enactment will not be held invalid merely because they may create hypothetical or theoretical discriminations, such discriminations having no effect upon the actual parties to the litigation in which the validity of the legislation is challenged. *Roberts and S. Co. v. Emerson*, 271 U. S. 50, 70 L. Ed. 827, 46 S. Ct. 375, 45 A. L. R. 1495; see 51, Am. Jur., Sec. 181 and collected cases. There is no showing by taxpayers that the split-tax provisions of the Utah Act are arbitrary and discriminatory in their application to them. A person seeking to raise the question of the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute and where the class which includes the party complaining is in no manner prejudiced, *First Nat. Bank v. Louisiana State Tax Commission*, 289 U. S. 60, 77 L. Ed. 1030, 53 S. Ct. 511, 87 A. L. R. 840; See 11 Am. Jur. Sec. 114 and collected cases, it is immaterial whether a law discriminates against other classes or denies other persons equal protection of the law. See 11 Am. Jur. Sec. 113 and collected cases; *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. Ed. 1141, 54 S. Ct. 575. The court will not pass upon a constitutional question unless it is absolutely necessary in deciding a case. *Crowell v. Benson*, 285 U. S. 22, 76



L. Ed. 598, 52 S. Ct. 285; see 11 Am. Jur. Sec. 93 and collected cases.

Taxpayers show no evidence of the tax having a confiscatory or destructive effect on their business. They only contend that the tax is higher than that of other foodstuffs. It should be pointed out that

“their is no imperative requirement that taxes shall be absolutely equal. This would stop the operation of government.” Cooley, *Taxation*, 4th E., (1924), Volume I, Section 259.

“Rates may be fixed differently for different classes, provided the classification is not purely arbitrary.” *Com. v. Merchants’ and Manufacturers’ Nat. Bank*, 168 Pa. St. 309, 31 Stl. 1065; Cooley, *Taxation*, 4th E., (1924), Volume I, Section 292.

Uniformity requirements of a State Constitution do not prohibit the making of classifications nor of sub-classifications in state legislation relating to taxation, *Featherstone v. Norman*, 170 Ga. 370, 153 S. E. 58, 70 A. L. R. 449; See 51 Am. Jur. 179 and collected cases; and the state legislators have the right to select the differences upon which such classifications should be based. *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2; see 51 Am. Jur. Sec. 173 and collected cases. The power of the legislature to classify is very broad in the field of taxation. It is broader than in some other exercises of legislation in that the grounds for classification for purposes of tax-

ation need not be stated. *Garrett Freight Lines v. State Tax Comm.*, 103 Utah 390, 135 P. 2d 523, 146 A. L. R. 1003 (1943). Such classifications may be justified even though the burdened activity may be in fact discouraged. The court in the *Alaska Fishing and Salting and By-Products v. Smith* (1921), 255 U. S. 44, 41 S. Ct. 219, 65 L. Ed. 489, case faced with a tax which discriminated against a particular type of fishing industry stated that,

“Even if \* \* \* [the] tax should destroy a business, it would not be made invalid \* \* \* on that ground alone. Those who enter upon a business take that risk.”

It also stated that protective tariffs do not contravene our constitution.

*Quong Wing v. Kirkendall*, 233 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350, adopted the rationale of *McCray v. U. S.* in upholding a tax statute through which a particular type of laundry business was destroyed. The justification may be on the basis of a public policy which sees an advantage to the general discouragement of others. *Miles v. Dept. of Treasury*, welfare in the encouragement of one activity and the 209 Ind. 172, 199 N. E. 372, 97 A. L. R. 1474, 101 A. L. R. 1359, appeal dismissed in 298 U. S. 640, 80 L. Ed. 1372, 56 S. Ct. 750. The court said in *Heiser v. Thomas Colliery Co.*, 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237, that a statute which taxed anthracite

coal and exempted bituminous coal was valid in that discriminations are often necessary in government in the best interests of society, as the purpose of the legislature may be only to remove obstacles to a greater public welfare.

There is case law to the effect that the following bases of classification, discrimination, and distinction are valid and permissible:

- (a) Ability to bear the burden of the tax. *Garret Freight Lines v. State Tax Comm.*, 103 Utah 390, 135 P. 2d 523, 146 A. L. R. 1003 (1943).
- (b) The promotion of fair competitive conditions. *Great Atlantic and P. Tea Co. v. Grosjean*, 301 U. S. 412, 81 L. Ed. 1193, 57 S. Ct. 3, 112 A. L. R. 293.
- (c) The equalization of economic advantage. *Ibid.*
- (d) The encouragement of particular industries from a consideration of public policy. *Miles v. Dept. of Treasury*, 209 Ind. 172, 199 N. E. 372, 97 A. L. R. 1474, 101 A. L. R. 1359, appeal dismissed in 298 U. S. 640, 80 L. Ed. 1372, 56 S. Ct. 750.

The differences for purposes of classification need not

be great or conspicuous, *State Tax Commissioners v. Jackson*, 283 U. S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536, and the classification need not be related to the purposes for which the tax proceeds are to be spent. *Ibid.* Legislative classifications are presumed valid and the legislature is presumed to have acted in accordance with sound public policy. *Madden v. Kentucky*, 309 U. S. 83, 84 L. Ed. 590, 60 S. Ct. 406, 125 A. L. R. 1383. The litigant attacking such a classification has the burden of overturning these presumptions. *Ibid.*

The split-tax is probably justifiable under the theory that people are more likely to believe they are purchasing something equivalent to or as nourishing as butter because of the color of the oleomargarine, so that the competitive effect of colored oleomargarine is more damaging than that of the uncolored product.

*McCray v. United States*, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904), lends this theory some support as it held that there is such a distinction between natural butter and oleomargarine which is artificially colored so as to cause it to look like butter that the taxing of the latter and not the former cannot be avoided as an arbitrary exertion of the taxing power without any basis of classification.

In the early days of state and federal legislation the position was often taken, not without some merit,

that oleomargarine was not a wholesome food. However, in recent years the advocates of restrictive legislation have dropped this argument to a great extent, and the courts now take judicial notice of the fact that oleomargarine is or has become a healthy and wholesome product. 33 Va. L. Rev. 631-41 (At 633). Today, it is believed that the main purpose of such laws is the reconciling of conflicting interests, and that the legislature in passing such laws is merely weighing various public interests and deciding to what extent they shall receive legal protection, as well as to keep the business free from fraudulent practices and unsanitary conditions. *Ibid.*

The dairy producers probably pay as much taxes per pound of butter as is directed against oleomargarine, due to their heavy property tax burden, so that the high excise tax levied on the sale of oleomargarine well may be in part a method of equalizing the tax burden of competitive businesses. We cannot afford suddenly to drop the protection from an industry. If all taxes and hampering restrictions were removed, there would undoubtedly be a rapid increase in the production of oleomargarine and the resulting collapse of butter prices with devastating effects on the dairy industry, especially the small producer. The dairy industry is carried on by many small producers, while there are relatively few oleomargarine manufacturers and their operations are sizeable. *Fortune*, Nov. 1944, P. 193.

“The public would feel these effects not only in adiminishing supply of butter but of the enormous quantity of food, milk, cheese and ice cream which are needed to sustain their high level of nutrition. Without our highly developed dairy industry, we would have been seriously handicapped in times of national emergency. The small farm is the backbone of American agriculture, even of the whole American way of life. There are too many values involved to sacrifice if there is any escape. Whatever may be the sins of the dairy lobby, they do not justify the destruction or crippling of the industry \* \* \*.” Rocky Mountain L. Rev. 18:79-96. Fe. 146.

It is important at this juncture to note that,

“\* \* \* the growth of the industry (oleomargarine) has not been checked and it promises to grow even more rapidly \* \* \*.”

and

“\* \* \* a prosperous and extensive dairy industry has been built up under the shelter of what amounts to a protective tariff.”

The regulatory taxation statutes and the police acts passed in relation to oleomargarine has achieved production of a sanitary product, reduced the problem of fraud and preserved a healthy, strong dairy industry. *Ibid.*

As pointed out, if there is a possible basis in rea-

son for a classification made by the legislature, the reviewing court must presume that the legislature acted with such a reasonable basis in mind. The court will not attribute to the lawmakers a purpose to disregard sound public policy except upon the most cogent evidence. *Rowley v. P. S. C.*, 112 Ut. 116, 185 P. 2d 514 (1947). The motives that influence the members of a legislative body raise questions between them and their constituents alone. Cooley, *Taxation*, 4th Ed. (1924), Volume I, Section 67. The court should hesitate to act in a manner that might destroy the delicate balance of legislation. It is not the function of the court to overturn an act because that court disagrees with the reason or believes there are better ways of achieving the legislative goal. *Masich v. U. S. Smelting, Refining and Mining Co.*, 113 Utah 101, 191 P. 2d 612 (1948), even if to the judicial mind, it seems unjust or oppressive. Cooley, *Taxation* 4th Ed. (1924), Volume I, Section 67.

Oleomargarine is not a dairy product, and the purpose of the legislature in Utah may well be to foster and encourage the dairy industry for the general good of the public and to do so by equalizing the overall tax burdens placed upon the two industries. The U. S. Supreme Court has recognized the social importance of the dairy industry (see *Nebbia v. People of the state of New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1934)) and



that we do not operate under a complete laissez faire system.

It is not unreasonable for a legislature to impose a tax on the sale of oleomargarine that it does not impose on the sale of butter for those reasons. Further, it is logical in the light of the above mentioned legislative purpose to impose a higher tax on oleomargarine which is colored so as to more closely imitate butter and as a result to constitute more of a threat to the dairy industry. The courts generally refuse to pass on the wisdom of the legislature in protecting the dairy industry. The balancing of conflicting commercial and industrial interests for the ultimate public good is exclusively a legislative task under the principle of separation of powers.

## V. FEDERAL AND STATE CASE LAW UNIFORMLY SUPPORTS THE POSITION TAKEN BY THE UTAH STATE TAX COMMISSION, AS SET FORTH IN THIS BRIEF.

At the present time imitation butter is taxed and/or regulated in 14 states and by the Federal Government. (Colorado, Georgia, Idaho, Kansas, Minnesota, Montana, Nebraska, New York, North Dakota, Pennsylvania, South Carolina, Utah and Vermont.) Eight of the states impose a poundage tax, such as that imposed by Utah, on the sale of oleomargarine. (Col-

orado, Georgia, Idaho, Minnesota, North Dakota, South Carolina, Wisconsin and Utah.) Three of those states, including Utah, impose a split-tax (Idaho, North Dakota and Utah); that is, uncolored oleomargarine is taxed at a lower rate than oleomargarine which is colored to resemble butter. Four of them completely exempt oleomargarine composed of certain substances produced domestically. (Colorado, Georgia, Minnesota and South Carolina.) All of the states have regulatory features written into their statutes, such as licensing and fee requirements, the use of stamps, and penalties for violation of the Act. Some of them make it a misdemeanor to violate the provisions of their Oleomargarine Acts. (Georgia, Montana, North Dakota, South Carolina and Wisconsin.)

The United States Supreme Court has in a number of cases determined the constitutionality of taxes on imitation butter and has held such taxation valid, despite the high rates, and the common inclusion of extensive regulatory features.

In *McCray v. United States*, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78, (1904), a case that upheld the Georgia State Law taxing the sale of colored oleomargarine at the rate of 10c a pound and taxing the sale of uncolored oleomargarine at the rate of  $\frac{1}{4}$  cent a pound, the Court said that the Fifth Amendment did not prohibit the imposition of an oleomargarine tax which would destroy a legitimate business. It

stated that the court would refuse to look into the motives or purpose of the legislature when it was acting under the scope of its taxing power; that the legislature must have had in mind the difference between butter and oleomargarine as to content, spreadability, etc. This case has been followed in later decisions, *Cliff v. United States*, 195 U. S. 159, 25 S. Ct. 1, 49 L. Ed. 139 (1904), and is now the settled law on the subject. *Carolene Products Co. v. United States*, 323 U. S. 18, 65 S. Ct. 1, 89 L. Ed. 15 (1945).

In *Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 399, 78 L. Ed. 1109 (1934), the court answered the question as to whether a tax of 15c per pound on the sale of all oleomargarine within the state of Washington was violative of the Fourteenth Amendment. It was held that the difference between butter and oleomargarine was sufficient to warrant a separate classification for tax purposes and that the tax did not violate the Due Process Clause even though its application would result in the destruction of the oleomargarine business (Citing with approval *McCray v. United States*, 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1940)).

The cases that have struck down oleomargarine statutes have generally done so because they were improper exercises of the police power. *Flynn v. Horst*, (1947) 365 Pa. 20, 51 Atl. 2d 54. Utah's Act is primarily a revenue measure, and though it has regula-

tory features, this is not improper nor is it inconsistent. (Cooley Taxation 4th E., (1924) Volume 1, S 27.)

In *Hammond Packing Co. v. Montana*, 233 U. S. 331, 34 S. Ct. 596, 58 L. Ed. 985, a Montana poundage tax was tested by the United States Supreme Court and attacked on the ground that the distinction between butter and oleomargarine is not such as to justify separate classification. The Court stated that there was enough difference between oleomargarine and butter to justify separate classifications, and said:

“\* \* \* a state may restrict the manufacture of oleomargarine in a way which does not hamper that of butter \* \* \* it may even forbid the manufacture of oleomargarine altogether \* \* \* it may express and carry out its policy as well in a revenue act as in a police law.” (Citing the *Mangano Co. v. Hamilton* case with approval.)

*Best Foods v. Welch*, decided in a federal district court, 1929, 34 F. 2d 682, upheld the Idaho oleomargarine statute, and in doing so stated:

“An act is not objectionable because oleomargarine is placed in a classification by itself \* \* \*.”

“Such legislation has reduced the chances of fraud.” 53 Harvard Law Review 1281 (1940); “Fortune”, November 1944, pg. 193, Column 2.

The court said in sustaining the Idaho Act as a revenue measure that:

“\* \* \* a court cannot consider the reasonableness of the amount \* \* \* the exercise of acknowledged power may not be scrutinized by the court. The responsibility rests upon the legislature and if unreasonably exercised redress rests with the people \* \* \* The act is not objectionable because oleomargarine is placed in a class by itself \* \* \*.”

The Idaho Act provided for a license fee on wholesalers and retailers. There was no provision in the Act for supervision or regulation of dealers. There was a penalty provided for violations. The fees and taxes collected went into the general fund. Appellant attacked the act as a regulatory measure, but the District Court held it to be a revenue act.

State courts have tended, more than the United States Supreme Court, to declare entire oleomargarine statutes invalid as a violation of either the Federal Constitution or the State Constitution. However, a state statute imposing a tax on all oleomargarine was held valid by the Supreme Court of South Dakota in *Schmitt v. Nord*, 27 N. W. 2d 910 (1947). The court followed the *Magnano* decision refusing to look behind the revenue designation of the law. A similar tax was held to violate the Kentucky Constitution in *Field Packing Co. v. Glenn*, 5 Fed. Supp. 4 (W. D. Kentucky 1933, Modified 290 U. S. 177, 54 S. Ct.

138, 78 L. Ed. 252, 1933). Here the Constitution specifically prohibited the destruction of a legitimate business by taxation. Of course, no showing of such destruction is before this court. On the contrary, the court could take notice of the continued existence of the oleomargarine business in the State of Utah.

There are many federal and state cases dealing with oleomargarine regulations under the police power but which are not relevant in this case. Typical decisions illustrate that the courts have refused to pass on the motives of the legislature, recognizing the separation of powers as essential to our system of government.

It has been determined by the highest court of Georgia (*Coy v. Linder*, 183 Ga. 583, 189 S. E. 26) and a Federal Court of Appeals in Wisconsin (*State of Wisc. v. Segal Produce Co.*, Circuit Court, Outagamie County, Nov. 22, 1957, March 2, 1938) that the oleomargarine laws invoked in those states were constitutional. Nebraska's Supreme Court held that their excise tax on the sale of oleomargarine violated that section of the State Constitution which required uniformity of classification in that it discriminated against imported oleomargarine without any reasonable basis (*Thorin v. Burke*, 146 Neb. 94, 18 N. W. 2d 644). The Vermont Supreme Court held that its oleomargarine fees were unconstitutional as they were not in proportion to the cost of the regulation required

(*Flynn, et al. v. Horst, et al.*, ('47), 356 Pa. 696, 51 A. 2d 54). However, the Nebraska and Vermont cases are obviously distinguishable from the case before this court.

VI. LEGISLATIVE INTENT CAN BE CLEARLY DISCERNED FROM THE PROVISIONS OF THE OLEOMARGARINE ACT, AS SET FORTH IN TITLE 59, CHAPTER 18, UTAH CODE ANNOTATED, 1953, AND THOSE PROVISIONS CAN BE HARMONIZED SO AS TO GIVE EACH ONE MEANING, AND SUPPORT THE CONSTITUTIONALITY OF THE ACT.

Section 59-18-1, Utah Code Annotated, 1953, admittedly makes no reference to oleomargarine dealers, but only requires that a license be obtained by dealers in cigarettes and cigarette papers. There is no provision in any section of the statute for licensing oleomargarine dealers.

59-18-4, Utah Code Annotated, 1953, imposes a *tax* upon the sale of tobacco and oleomargarine. 59-18-4, Utah Code Annotated, 1953, provides that:

“The *taxes imposed by this chapter* shall be paid by affixing stamps in the manner and at the time herein set forth unless otherwise required by regulation of the State Tax Commission.” (Emphasis supplied.)



Thus, the Act requires the payment of taxes through the affixation of stamps on *both* products.

59-18-5(2), Utah Code Annotated, 1953, provides that in the case of *oleomargarine* the *stamps* shall be securely affixed at the time and in the manner which the Tax Commission may by regulation require. (Emphasis supplied.) That subsection goes on to state that:

“such stamps shall be affixed \* \* \* within seventy-two hours afetr any of the above commodities are received by any wholesaler, distributor or retailer within this state, provided, however, that all such commodities must be stamped before being sold within the state.”

It is true that the section states at a later juncture that:

“It is the intent and purpose of this chapter to require all \* \* \* distributors and retail dealers \* \* \* to affix the stamps provided for in this section to the packages or containers of products referred to in Section 59-18-1 \* \* \*.”

and that as staed hereinabove 59-18-1 makes no mention of *oleomargarine*. However, 59-18-4 and 59-18-5 imposes a tax on the sale of *oleomargarine* and requires that stamps be affixed to containers and packages of *oleomargarine*. The conflicting clause can be reconciled only if it is recognized that the intent of the legislature was to refer back to 59-18-4 or, that the leg-

islature through oversight omitted the mention of oleomargarine in 59-18-1, or more probably that when the legislature deleted the oleomargarine license provision in 1947 and amended what was then 93-1-1, and which for purposs of this brief is known as 59-18-1, it neglected to peruse the rest of the statutory sections and to bring them into harmony with the amended section. To construe this statute in any other manner is to render it meaningless.

Further on in 59-18-5, Utah Code Annotated, 1953, it is provided that,

“The presence of any package or container in the place of business of any person *required by the provisions of this chapter to stamp the same* shall be prima facie evidence that they are intended for sale and subject to tax under this chapter.” (Emphasis supplied.)

Since we have quoted provisions of the chapter in question that require oleomargarine to be stamped, this clause must of necessity also apply to oleomargarine and oleomargarine dealers.

59-18-1, Utah Code Annotated, 1953, empowers the State Tax Commission to provide

“the methods of affixing and cancelling *stamp* that shall be employed by persons engaged in the sale of any of the products *subject to the tax imposed by this chapter* \* \* \*.” (Emphasis supplied.)

The chapter, of course, provides for a tax on the sale of oleomargarine and the provision just quoted makes mandatory the affixing of and cancelling stamps by persons engaged in the sale of oleomargarine.

59-18-10, Utah Code Annotated, 1953, gives the State Auditor the authority to have stamps prepared for use on packages and containers of "any of the products *enumerated in 59-18-1*, the sale of which is subject to tax under this chapter." (Emphasis supplied.) This cannot reasonably be construed to deny him authority to prepare stamps for use on oleomargarine packages but was quite evidently an oversight due to the obvious error previously mentioned of the legislatur's failure to harmonize the provisions of the statute upon amending a portion of it.

This section goes on to say that

"when any articles, *the sale of which is taxable under this chapter* \* \* \* and upon which such taxes have been paid are sold and shipped to a regular dealer in such articles in another state, the seller in this state shall be entitled to a refund \* \* \* upon condition t h a t \* \* \* he shall furnish from the purchaser a written acknowledgment that he has received such goods and the amount of stamps thereon \* \* \* ." (Emphasis supplied.)

"The taxes shall be refunded in the manner provided above for the redemption of unused stamps."

We have previously established that oleomargarine is taxed under the provision of this Act.

At another point in 59-18-10, it is provided that

“The State Tax Commission shall sell the stamps herein provided for only to persons holding licenses as provided in this chapter.”

This is quite evidently in conflict with the aforementioned sections of the statute and can only be reconciled by acknowledging that the legislature in amending 59-18-1 and withdrawing the requirement of oleomargarine licenses neglected to consider the effect of such an amendment on the other sections of the statute and to bring them into a harmonious relationship with other portions of the statute.

Legislative oversight is further highlighted by the title of this Act which was “Oleomargarine and Tobacco Licenses.” This was not changed, even though the provision for licensing oleomargarine dealers had been deleted.

The Tax Commission contends that the intent of the legislature was that the above mentioned statutory clauses should relate to oleomargarine as well as to tobacco.

The court will give effect to all the sections of an act, if possible. (*Western Auto Transport v. Reese*, 104 Ut. 393, 140 P. 2d 348 (1943).

That interpretation which will give effect to each statutory provision and harmonize them with each other so that on one of them will be meaningless must be adopted if possible, since it is not to be presumed that the legislature would enact a meaningless statute. (*Smith v. American Packing and Provision Co.*, 102 Ut. 351, 130 P. 2d 951 (19\_\_\_\_); each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole. (*Rowley v. P. S. C.*, 112 Ut. 116, 185 P. 2d 514 (1947).

“Where the Legislature’s intent is ascertainable from the context of a statute, notwithstanding the omission of words by inadvertance or clerical error, the court will insert the words necessary to carry out such intent, and the act will not be declared invalid for uncertainty, where reason demands the insertion of words therein.” (*Norville v. State Tax Commission*, 98 Utah 170, 97 P. 2d 937 (1940), 126 A. L. R. 1318.)

Where a literal interpretation of a statute gives an absurd result, the court may search the enactment for further indications of legislative intent by examination of the wording of the act. (*Rowley v. P. S. C.*, 112 Ut. 116, 185 P. 2d 514 (1947). The construction urged by the Tax Commission would harmonize all of the provisions of this statute and give them effect and significance. It would support the validity of the statute and carry out the intent of the legislature. For

these reasons the Tax Commission contends that the court should accept that construction.

## VII. THE RULE OF STRICT CONSTRUCTION OF TAXING STATUTES IS NOT APPLICABLE TO THIS CASE.

Taxpayers, in the concluding paragraph of their brief, allege without supporting authority that the oleomargarine law in question should be strictly construed if not deemed unconstitutional. However, the rule of strict construction of taxing statutes is not applicable in this case. The rule that tax statutes are to be liberally construed in favor of the taxpayer is only imposed in case there is doubt as to the intention of the legislature or as to the authority of the Commission. *Norville v. State Tax Commission*, 98 Ut. 170, *Moss v. Board of Commissioners*, 4 Ut. 2d 60. In the present case there is absolutely no doubt as to the intention of the legislature to tax the sale of oleomargarine or as to the authority of the Commission to enforce the mandate of the legislature. This is in accordance with a notable authority on taxation, e. g., Cooley, *Taxation*, Volume II, Section 505, Pages 1125, wherein it is stated:

“Without regard as to whether tax statutes should receive a strict or liberal construction, it is elementary that they should receive a fair construction to effect the end for which they were intended. This does not mean such a construc-

tion as to defeat the intention of the legislature. Where there is really no ambiguity the rule that the ambiguity must be resolved in favor of the taxpayer does not, of course, apply."

In addition, we point out at this juncture that the construction given a statute by those given the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. *McKendrick v. State Tax Commission*, 9 Ut. 2d 418, 347 P. 2d 177 (1959).

## CONCLUSION

It is respectfully submitted that the oleomargarine act, as set forth in Title 59, Chapter 18, Utah Code Annotated, 1953, should be upheld as constitutional. All presumptions are in favor of its validity. The classifications contained therein are reasonable in the light of its purposes. It does not violate the requirements of due process of law, either procedurally or substantively. Its contents are germane to one another and to its title, and its provisions, when considered together, can be reasonably construed so as to effectuate the intention of the legislature.

Respectfully submitted,

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