

1962

# La Mar Peay v. Board of Education of Provo City School District et al : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

LA MAR PEAY,  
*Plaintiff and Appellant,*

— vs. —

BOARD OF EDUCATION OF  
PROVO CITY SCHOOL DIST.,  
a body corporate and politic, and  
MERRILL CHRISTOPHERSON,  
RAY MURDOCK, SHIRLEY  
PAXMAN, WILFORD E. SMITH,  
and LA MAR EMPEY,  
Members of Said Board,  
*Defendants and Respondents.*

Case  
No. 9722

FILED  
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State Supreme Court, Utah

## BRIEF OF APPELLANT

Appeal From Judgment of the Fourth District Court  
for Utah County  
HONORABLE R. L. TUCKETT, JUDGE

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*Defendants and Respondents.*

Case  
No. 9722

## BRIEF OF APPELLANT

### STATEMENT OF THE CASE

This is an action to decide the constitutionality and validity of *Section 11, Chapter 104, Laws of Utah, 1961*, cited UCA 1953, 53-7-24, and the validity of the election held in Provo City February 6, 1962, pursuant to this act.

### DISPOSITION IN LOWER COURT

This case is an appeal by the plaintiff, LaMar Peay, from a summary judgment rendered June 29, 1962, to the effect that plaintiff's complaint fails to state a claim upon which relief can be granted.

## STATEMENT OF FACTS

The Utah Legislature in 1961 passed Section 11, Chapter 104, Laws of Utah, 1961, which is also cited as UCA, 53-7-24, and is here stated in its entirety:

“53-7-24. VOTED LEEWAY PROGRAM AUTHORIZED—ELECTION REQUIREMENTS.—With the consent of a majority of the electors of the district voting at an election or elections held for that purpose in the manner set forth in Section 53-2-12, Utah Code Annotated 1953, any district may maintain a school program in excess of the cost of the program referred to in sections 53-7-22 and 53-7-23 above. Said additional program shall be known as the “voted leeway” program of the district. Said voted leeway program shall not exceed an amount equal to 20% of the basic program of the district. “Consideration of such additional program and of modification, increases or decreases thereof by such elections may be initiated by a petition signed by electors of the district equal to 10% of the number of electors who voted at a preceding election on said question or by action of the board of education. A subsequent election upon the question of modifying or increasing such an additional program shall not be deemed to constitute a reconsideration of the existing additional voted leeway program unless the proposition submitted to the electors expressly so states. Accordingly, a majority vote opposing said modification or increase shall not be deemed to deprive the district of authority to continue said existing voted leeway program. Nothing contained in this section shall be construed as terminating without an election, thereon, the authority of any school district to continue an existing voted additional program heretofore authorized by the voters.”

After the passage of this law and pursuant to its authorization the Provo City Board of Education caused an election to be held in Provo City, Utah, on the following proposition (R-23) :

“Shall the Board of Education of Provo City, State of Utah, be authorized to maintain a ‘voted leeway’ program as provided in Section 11, Chapter 104, Laws of Utah, 1961, not to exceed ten per cent (10%) of the minimum basic program provided by law.”

In this election all persons entitled to vote for general offices of the state without regard to any property qualification were allowed to vote. The result of the election was :

*For* said proposition: 2,224

*Against* said proposition: 1,829

After this election appellant brought an action to determine the constitutionality and validity of the act, the validity of the election and to enjoin the respondents from any action pursuant to the election. Respondents filed an answer and thereafter made a Motion for Summary Judgment. This Motion was granted by the lower court and judgment entered dismissing appellant’s complaint for failing to state a claim. (R-29)

## RELIEF SOUGHT ON APPEAL

The appellant contends that plaintiff’s complaint did state a cause of action and asks that the decision of the trial judge be reversed, and that UCA 1953, 53-7-24 be

declared unconstitutional and a nullity and that the election of February 6, 1962, be declared null and void.

## ARGUMENT

### POINT I.

THE STATUTE RELIED ON BY DEFENDANTS IN CALLING THE "LEEWAY" ELECTION IS SO VAGUE, INDEFINITE, AND UNCERTAIN THAT IT SHOULD BE DECLARED A NULLITY.

The "Leeway" election causing the dispute before the Court is based on Chapter 104, Section 11, Laws of Utah, 1961 (53-7-24, UCA 1953). The pertinent part of this statute reads:

"With the consent of a majority of the electors of the district voting at an election or elections held for that purpose in the manner set forth in Section 53-2-12, Utah Code Annotated 1953, any district may maintain a school program in excess of the cost of the program referred to in Sections 53-7-22 and 53-7-23 above . . ."

A problem immediately arises, because the section referred to as 53-2-12, UCA, 1953 concerns the general powers and duties of the State Board of Education, and says nothing about elections. Thus the statute, as considered (the bill as introduced contained the same reference) and enacted by the legislature, sets forth no provisions for holding a "leeway" election. The act should therefore fail on this ground. It might be said that the legislature has made an obvious mistake in referring to UCA 1953,



53-2-12, and that it must have intended reference to another section. Respondents contend that the Court should read a statute that was repealed before Section 53-7-24 was enacted and from this reading determine that the legislature intended to include a different reference in th body of Section 53-7-24. They argue that Section 53-7-24 is a replacement for Section 53-7-8, and that since 53-7-8 made reference to 53-7-12 the Court must conclude that the legislature intended to refer to 53-7-12 when it enacted 53-7-24. (Section 53-7-12 has to do with special elections called for the purpose of creating a special tax to buy and erect schoolhouses.) In support of their position, respondents cite cases where the Courts have corrected obvious legislative errors. However, it is important to note here that in this case the legislature at no time considered any reference to any section other than 53-2-12, since the bill was introduced with the same statutory reference it had when it was passed. Respondents are therefore hard pressed to argue which section the legislature intended to refer to, since reference to no other section appears in the legislative record.

Appellant calls attention to the fact that Section 53-7-24 as passed departed in several respects from the repealed Section 53-7-8, and that is impossible to determine what the legislature had on its mind in referring to 53-2-12. To cite the changes between 53-7-24 and 53-7-8: Section 53-7-24 substituted 20 per cent for 25 per cent; it also left out the reference to the basic unit of \$4,050.00 plus transportation; it also left out the first paragraph of the repealed Section 53-7-8 consisting of twenty-three

lines. Appellant submits that it is just as reasonable for the Court to speculate that the legislature intended to refer directly to the provisions governing bond elections as to speculate that it was intended to refer to a section which in turn refers to another section in order to give it meaning. In fact, this would appear to be the more reasonable interpretation, because Section 53-7-12 must itself refer to the bond elections in determining the procedure of the elections. The problem clause in Section 53-7-24 says:

“With the consent of a majority of the electors of the district voting at an election or elections held for that purpose in the *manner* set forth in Section 53-2-12.” (Emphasis added)

The word “manner” obviously means procedure in the foregoing, so if we adopt the respondents’ argument we must say that Section 53-7-24 refers election procedures to 53-7-12 which then refers election procedures to the section on issuance of bonds. A rather circuitous route for something that could have been easily spelled out by the legislature. The appellant agrees that the Court should help interpret legislation so as to preserve it, but lacking prophetic vision or psychoanalytic insight the court cannot decide what the legislature would like to do had it the power to start all over again — the court should refuse to legislate, and let the legislature clearly state its decision with corrective legislation.

The cases where the Court has corrected legislative errors are cases of obvious errors, where it was clear what the legislature had intended to include in various

enactments and through error had not reflected the true intent that was patently obvious. In this case it is not patently obvious. Furthermore, those cases correcting obvious legislative error constitute an exception of the general rule, which is stated in 50 *Am. Jur.* Section 232 at page 219:

“Courts will not, as a general rule, undertake a correction of legislative mistakes in statutes. This principle is adhered to notwithstanding the fact that the Court may be convinced by extraneous circumstances that the legislature intended to enact something very different from that which it did enact. The question is not what the general assembly intended to enact, but what is the meaning of that which it did enact.”

If, however, we assume the respondents' position for purposes of argument, i. e. that the Court should supply the statutory reference in Section 53-7-24 of Section 53-7-12, we are faced with another problem of determining what is meant by the vague and uncertain term “so far as applicable:” that is contained in Section 53-7-12. The pertinent part of Section 53-7-12 reads as follows:

“... The board of education shall give such reasonable notice of such submission as it may deem proper, and shall follow the procedure in elections for the issuance of bonds *so far as applicable.*” (Emphasis added)

Respondents maintain that if the Court inserts Section 53-7-12 in Section 53-7-24 then the procedures for the election are completely spelled out. Defendants plead in Section 7 (e) of their answer that they complied with all pro-

visions of law in calling for, conducting, and canvassing the result of the election. They also specifically refer to their compliance so far as applicable with Sections 53-10-3 to 6. Counsel probably intended to refer to Sections 53-10-7 through 53-10-12 since these are the sections which refer to bond elections, while the sections cited by the defendants refer to the creation of indebtedness otherwise than through bonding. However, the two sections (53-10-5 and 53-10-11) on qualification of voters read essentially the same. Section 53-10-11 reads as follows:

“Every registered voter residing in any municipal ward or school representative precinct in which any election is held for the purpose of determining the question of issuing bonds for a school district who shall have paid a property tax therein in the year next preceding such election shall be entitled to vote at any such election. Challenges for cause by any qualified voter shall be allowed at such election and promptly decided by the judges conducting the same.”

To adopt defendants' theory, the Court would have to read out the qualification of voters part of the section, which requires the payment of a property tax, and conclude that the only portion of the section which “is applicable” is the last sentence on challenges. This would seem to be a strained interpretation indeed, the effect of which would be to allow non-property-taxpaying voters such as college students and others to impose an additional tax on the property owners of a school district, a violation of our concept of fundamental rights and due process of law.

It is interesting and significant to note that in the chapter on creating indebtedness by school districts (the

chapter to which 53-7-12 refers) there are no less than five references made to the requirement of property tax payments in order for voters to invoke additional tax burdens on property owners. See the following sections with their pertinent parts:

53-10-1—

“... but no debt in excess of the school taxes for the current year shall be created by the board of education of any school district unless the proposition to create such debt shall have been submitted to a vote of *such qualified electors as shall have paid a property tax therein within the twelve calendar months next preceding such election.* . . .”

53-10-2—

“... such district may cause the proposition to incur and create such additional indebtedness to be submitted to a vote of *such qualified electors as shall have paid a property tax in any such school district in the year preceding such election.*”

53-10-5—

“Every registered voter . . . *who shall have paid a property tax in such district in the year next preceding such election shall be entitled to vote at any such election.* . . .”

53-10-11—

Every registered voter . . . *who shall have paid a property tax in such district in the year next preceding such election shall be entitled to vote at any such election.* . . .”

53-10-16—(which constitutes the form of the certificate that the County Clerk must sign in connection with a bond issue) :

“I certify that the within bond is issued in accordance with law, and is within the debt limit permitted by the constitution and laws of the State of Utah, *and in accordance with a vote of the taxpayers of . . .*”  
(Emphasis added)

To read out the property tax requirement of the bonding statutes would be to ignore the provision which seemed to be most important in the eyes of the legislature. It would also violate a fundamental rule of law governing taxation legislation. We quote from *Sutherland on Statutory Construction*, Volume 3, Chapter 67, Section 67-1, at page 993:

“While the power to tax, and the exercise of that power is indispensable to the effective operation of the government, the rule has become firmly established *that tax laws are to be strictly construed against the state and in favor of the taxpayer.* Therefore, where there is reasonable doubt as to the meaning of a revenue statute it should be resolved in favor of those taxed.

“... A number of theories have been put forth in sustaining the soundness of the doctrine ... that a rigid application of revenue measures is for the protection of the citizen who should be informed in unambiguous terms the amount and nature of the tax.” (Emphasis added)

Also, see *Crawford on Statutory Construction*, Section 257, page 502:

“As a general rule, and in accord with the prevailing view revenue laws, and particularly tax

laws, should be construed in favor of the taxpayer and against the government. *In fact, they are to be construed liberally in favor of the taxpayer, and any substantial doubt resolved in favor of the citizen.* Hence any tax proceedings must be in strict accord with the provisions of the statutes relating thereto.

“This view rests, so it would seem, upon the principle *that a tax cannot be imposed without the use of clear and express language. To hold otherwise would allow the courts to impose taxation, and that would clearly constitute an encroachment upon the power of the legislature.* More than that, taxation is a process which interferes with the personal and property rights of the people, although it is a necessary interference. But because it does take from the people a portion of their property, seems to be a valid reason for construing tax laws in favor of the taxpayer. It is also a destructive power. *So far as property rights are concerned it occupies an analogous position to that occupied by statutes which restrict and destroy personal rights. Accordingly, in case of doubt or of ambiguity, that construction should be adopted which opposes the imposition of the tax.*” (Emphasis added)

It is submitted that even if the Court would supply the reference to 53-7-12 in Section 53-7-24, there still remains the problem of determining the meaning of “so far as applicable.” The respondents have chosen to determine that the requirement for a property tax payment is not applicable to the leeway election. In view of the sections cited above this would seem to be entirely contrary to what the legislature would have intended. It would also seem to directly contradict the principles of



law governing revenue and taxation statutes as cited above.

## POINT II.

THE TITLE OF CHAPTER 104, LAWS OF UTAH, 1961, (MINIMUM SCHOOL PROGRAM) DOES NOT MEET THE CONSTITUTIONAL REQUIREMENTS, AND THE ACT IS THEREFORE VOID.

The title to Chapter 104, Laws of Utah, 1961, reads as follows:

### “MINIMUM SCHOOL PROGRAM”

“An Act Establishing the State-Supported Minimum School Program, Stating the Costs Thereof, Prescribing the Amount of the Contributions to Be Made by the State and the Various School Districts Toward the Payment of the Costs Thereof and the Manner in Which the Various School Districts May Qualify for Participation Therein; Enabling School Districts to Provide Additional School Services and Programs; Prescribing the Manner in Which Tax Levies by the State Shall Be Made for the Purposes of Making Said Contributions; Enabling the School Districts to Make Tax Levies; Providing for the Collection of Said Tax Levies by the Respective Counties; Providing for the Distribution of Federal Funds, and Repealing Sections 53-7-2, 53-7-5, 53-7-5a, 53-7-5b, 53-7-5c, 53-7-6, 53-7-7, and 53-7-8, Utah Code Annotated, 1953.”

Article VI, Section 23 of the *Constitution of the State of Utah* reads as follows:

“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.*”  
(Emphasis added)

A careful examination of the title reveals an obvious omission of any mention of Section Eleven of the Act, which purports to set up the “voted leeway program.” It cannot be said that the leeway program is just a part of the Minimum School Program, and that therefore it is included in the title. The leeway program is a distinct method of financing to allow individual school districts to vote on how much they wish to contribute for the support of the basic school program provided by the state. It is separate and distinct, and should be treated as such by the legislature. This is precisely the type of thing that Article VI, Section 23 of the Utah Constitution was directed toward.

While very little is required in a title to satisfy this Constitutional safeguard, we cannot find the “very little” in the present case. The law is clearly summarized in *Crawford, Statutory Construction*, Section 99, at page 141 :

“As has been previously indicated, the subject or object or an act must be expressed in its title, and by virtue of several constitutional provisions *it must be expressed clearly . . .* After all the title is in the nature of a label, or mark of identification, and is intended to give notice of the subject or object of the act.” (Emphasis added)

And in Section 96 of the same work, the author sets forth the effect of non-compliance :

“Inasmuch as the constitutional provisions with reference to the title and subject matter of an act

are mandatory, a failure to meet the constitutional requirements will invalidate the enactment in whole or in part. The precise extent of the illegality will depend on the degree of the departure from the constitutional requirement that an act shall contain but 'one subject which shall be expressed in the title.' However, if two or more distinct subjects are expressed in the title, the whole act will be invalid. *Similarly, if the statute is broader than its title, the part w/o the scope of the title will be invalid, or if the part w/o the scope of the title is so intimately connected with the part expressed in the title that the former without the latter does not leave a statute complete in itself and capable of execution, the entire act will be invalid. It may, therefore, be stated, as a general rule, since the title defines the scope of the law, that an act can be valid only as to the part expressed in the title.*" (Emphasis added)

Since Section 11 of Chapter 104, Laws of Utah, 1961, is not referred to in the title, the section should be declared void and ineffective.

### POINT III.

THE NOTICE CALLING THE ELECTION AS PUBLISHED BY THE RESPONDENTS WAS INSUFFICIENT TO APPRAISE THE VOTING PUBLIC AS TO THE ISSUES OF THE ELECTION, AND THE ELECTION WAS THEREFORE INVALID.

A general statement of the requirements for a valid notice is found at 79 C.J.S. Section 366, page 93, which reads as follows:

"... Generally, the contents of a notice must be such as clearly to inform the electors as to the

question submitted, and as to the purpose of the proposed issue of bonds . . . the bonds to be issued need not be discredited nor the purpose of the issue set forth with too great particularity, if the voter is made reasonably aware of the purpose and cost of the proposed improvement so that he may exercise an intelligent and discriminating judgment as to his own interest and public welfare." (Emphasis added)

See also the following cases which amplify the rule stated :

*Heller v. Rounkles*, 171 Kan. 323, 232 P. 2d 225

*Henson v. School District No. 92*, 150 Kan. 610, 95 P. 2d 346

*King v. Independent School Dist. Class A, No. 37*, 46 Idaho 800, 272 P. 507.

Respondents plead in their Answer (Paragraph 7e) that they have complied with the provisions of Section 53-10-3 concerning notice of the election so far as applicable. The requirements of the notice as set forth in Section 53-10-3 are as follows :

- “(1) The time and place of holding such election.
- (2) The name of the judges at each polling place to conduct such election.
- (3) The hours during which the polls shall remain open.
- (4) *The amount of indebtedness which the board proposes to incur or create and for what purpose.*” (Emphasis added)

An examination of the notice as circulated by the Respondents fails to reveal any language which would clear-

ly inform the voters as to the purpose or cost of the proposed program so as to enable them to make an intelligent and discriminating choice at the polls. In fact, the notice skillfully avoids any mention of a tax levy necessary to support the program. The notice merely makes reference to Section 11, Chapter 104, Laws of Utah, 1961, in informing the voters of the issues. (See R-23) It would be impossible from reading the notice published by respondents to determine the extent of the expenditures proposed or the extent to which the taxpayers would face a tax increase. The voters are forced to make a decision without knowing how much the tax will be.

## CONCLUSION

In conclusion, it is submitted that the leeway election should be declared to be of no force and effect, and Section 53-7-24 should be declared a nullity. It is the function of the legislature to come forward with a clear and intelligible law on matters of such impact and concern, and the voters have a right to know the cost of their actions affirming or disaffirming the proposed programs. It does not seem too much to ask the legislature that it spell out the correct procedure to be followed in raising revenue for public use, and it does not seem too great a burden that public officials follow these rules.

Respectfully Submitted,

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