1969

Golden L. Allen v. Calvin L. Rampton, Governor of the State of Utah, Sherman J. Preece, State Auditor of Utah, Herbert F. Smart, Director Of Finance, W. Smoot Brimhall, Commissioner, Financial Institutions, and The Board Of Examiners of the State of Utah : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

GOLDEN L. ALLEN,
State Treasurer,
Plaintiff-Appellant,

vs.

CALVIN L. RAMPTON,
Governor of the State of Utah,
SHERMAN J. PREECE,
State Auditor of Utah,
HERBERT F. SMART,
Director of Finance,
W. SMOOT BRIMHALL,
Commissioner, Financial
Institutions, and the
BOARD OF EXAMINERS OF THE
STATE OF UTAH,
Defendants-Respondents.

Case No.
11[illegible]

APPELLANT'S BRIEF

Appeal from a Judgment of the District Court
Salt Lake County, Utah
Honorable Bryant H. Croft, Judge

A. M. FERRO
Special Asst. Attorney General
414 Walker Bank Building
Salt Lake City, Utah
Attorney for Plaintiff-Appellant

RAYMOND W. GEE
Special Asst. Attorney General
400 Executive Building
Salt Lake City, Utah
Attorney for Defendants-Respondents

INDEX

AUTHORITIES CITED
CASES

TEXTS AND STATUTES

OF THE STATE OF UTAH
IN THE SUPREME COURT

GOLDEN L. ALLEN,
State Treasurer,
Plaintiff-Appellant,

vs.

CALVIN L. RAMPTON,
Governor of the State of Utah,
SHERMAN J. PREECE,
Auditor of Utah,
HERBERT F. SMART,
Director of Finance,
W. SMOOT BRIMHALL,
Commissioner Financial
Institutions, and the
BOARD OF EXAMINERS OF THE
STATE OF UTAH,
Defendants-Respondents.

Case No.
11804

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by the plaintiff, the State Treasurer of Utah, a constitutional officer, against the defendants pursuant to the Declaratory Judgments Act (Rule 57, **Utah Rules of Civil Procedure,** and Chapter 33, Title 78, **Utah Code Annotated,** 1953).

In this proceeding, the plaintiff asks the court to declare the portions of the State Money Management Act, Chapter 206, **Laws of Utah,** 1969, (Senate Bill #205), which affect the State Treasurer to be unconstitutional and additionally requests that the defendants be enjoined from implementing said sections of the act.

DISPOSITION IN LOWER COURT

The trial court in a Memorandum decision (Record Page 73 Et. seq.) held that the State Money Management Act, Chapter 206, **Laws of Utah,** 1969 (Senate Bill 205) was constitutional and ordered that the plaintiff's complaint be dismissed with prejudice on the merits.

From this decision, the plaintiff has appealed.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the judgment of the lower court and asks the Supreme Court to determine that the State Money Management Act, Chapter 206, **Laws of Utah,** 1969 (Senate Bill 205) is unconstitutional in whole or in part, i.e., the portions thereof specifically and referred to in the Complaint of the plaintiff (Record p. 1-6).

STATEMENT OF FACTS

The plaintiff is the State Treasurer of Utah. He is a constitutional officer created under the provisions of Article VII, Section One of the Constitution of Utah and comprises a part of the executive department which consists of the Governor, the Secretary of State, State Auditor, State Treasurer and Attorney General.

The State Treasurer is an elective officer required to perform "such duties as are prescribed by this constitution and as may be prescribed by law."

Section Seventeen of Article VII of the Constitution provides that "The Treasurer shall be the custodian of public monies," and then additionally provides that he shall "perform such other duties as may be provided by law."

Those additional duties are described to a large extent in Chapter 4 of Title 67, **Utah Code Annotated,** 1953.

Under the provisions of various State statutes, the plaintiff, as State Treasurer, and his predecessor State Treasurer's have made deposits of public funds in qualified depositories designated by the State Depository Board (Chapter 1 of Title 51, **Utah Code Annotated,** 1953). Pursuant to that act, the State Treasurer determines the amount of deposits that may be made in any one depository and the amount of available cash necessary to take care of immediate cash flow needs.

In pursuance of the provisions of Sections 33-1-4 and 33-1-4.1 relating to the investment of public funds, the State Treasurer has determined what constitutes idle funds or funds not necessary for the immediate needs of any of the departments whose funds are in his hands and has determined the types of obligations of the United States in which investment would be made. The State Treasurer again determined "the cash flow needs" of the State and its respective departments in order to determine the maturities of the obligations of the United States which were purchased subject to the limitation that he not purchase any item having a maturity of more than five years from date of purchase. Similarly, under the provisions of Section 33-1-4.1, management of investments was in the hands of the State Treasurer with respect to bonds of the United States and of any municipalities, school district or water conservancy district permitted to be handled under that

section. Accordingly, the State Treasurer was required to establish methods, practices and procedures for investment, reinvestment, purchase, sale or exchange transactions regarding public funds and has been required to determine the extent to which a portion of the public funds should remain available for current expenditures.

Historically, the State Treasurer during the days that Utah was a territory and thereafter has received all money or property belonging to the territory or the State and apparently dealt with that money in such manner as would give assurance that it would be available for the expeditures of the State (**Territorial Laws of Utah,** 1851-70).

At Chapter 38, page 35, Laws of 1852, Sections 3 and 4 of the **Territorial Laws** provided as follows:

> **SECTION 3.**
> "The treasurer shall receive all monies or other property belonging to the territory that may be raised by taxation or otherwise; and shall procure suitable books in which it shall enter an account of his receipts and disbursements, to whom and on what account."
>
> **SECTION 4.**
> "The treasurer shall pay all money that may come into his hands, by virtue of his office, upon drafts and orders countersigned by the auditor of public accounts; and shall annually report to the governor on or before the first day of November, or oftenor . . . ."

The compiled **Laws of Utah,** 1876, Title IV, Sections 46 and 47 contain substantially the same language as above quoted with reference to Sections 3 and 4 of Chapter 38, **Laws of Utah,** 1852.

In the compiled **Laws of Utah,** 1876, provision was made in Title 12, Section 2068, which established a list of

crimes by officers of that State including the State Treasurer which involved revenue and property of the State. Subparagraph 3 of Section 2068 made it a crime if "he fails to keep same in his possession until disbursed or paid out by authority of law." Subparagraph 4 provided that it was a crime if he "unlawfully deposits the same or any portion thereof in any book or with any banker or other person."

The compiled **Laws of Utah,** 1888, contained similar provisions as those referred to above at Section 4603.

The Money Management Act, among other things, creates a division of investments in the Office of the State Treasurer. (Section 4, Chapter 206, **Laws of Utah,** 1969.) It creates an Investment Council within the division of investments and provides that the Investment Council shall be comprised of the State Treasurer, the Commissioner of Financial Institutions and three other members appointed by the Governor with the advice and consent of the State Treasurer and the Senate. (Section 5, Chapter 206, **Laws of Utah,** 1969)

The Act impowers the Investment Council to establish the policies of the division of investments, to advise counsel and direct the Investment officer and the financial analyst to adopt and promulgate rules and regulations pertaining to the investment of public funds and in general to perform a series of other functions relating to the administration of public funds and the qualification and control of depositories.

The Act at Section 9, provides, among other things, for the employment of a "Chief Administrative Officer of the Division of Investments and a Deputy Administrative Officer of the Division to be known as the Financial Analyst."

The Investment Officer and the Financial Analyst "shall be appointed by the State Treasurer with the approval of at least four members of the Investment Council, and their respective salaries shall be fixed by the Council in consultation with the Director of Finance and approved by the Board of Examiners."

Moreover, Section 9 provides that the Investment Officer and the Financial Analyst shall serve at the will of the Investment Council.

Section 11 of the Act describes the duties of the Investment Officer which generally stated relate to the investment and reinvestment of public funds.

ARGUMENT

Point 1

THE CONSTITUTIONAL DUTY OF THE STATE TREASURER AS "CUSTODIAN OF PUBLIC MONEY" INCLUDES THE POWERS OF DEPOSIT AND INVESTMENT DESCRIBED IN SECTIONS 7 AND 11 OF THE MONEY MANAGEMENT ACT.

As a custodian of public monies it has been held that the State Treasurer, in the absence of express authority, has power to deposit public funds in the banks in accordance with ordinary business practice and may stipulate for and receive interest thereon. (59 C.J. p. 228, "States," Par. 374)

See also C.J.S. 1191 Par. 155.

See also **U. S. Fidelity Company, etc.** v. **Taylor** Guarantee, 200 F, 44., **State** v. **McFetridge,** 54 N.W. 1 (84 Wis. 473).

In practice, the State Treasurer has in fact made deposits of funds into banks of his choosing subject to deter-

mination as to qualification of depositories by the State Depository Board (See Statutory Citation in Statement of Facts) and subject to determinations as to the required interest rate that must be paid by qualified depositories established by the State Depository Board.

In practice, too, the State Legislature has recognized the duty of the treasurer so to do but has provided limitations and controls over the qualifications of the depositories, the amount of interest they may pay and has imposed limits as to the amount that may be placed in the custody of any one depository. (Section 51-4-1, Et. seq., **Utah Code Annotated,** 1953), but determinations as to the amount of the deposits placed in any one bank has been recognized in practice as the duty of the State Treasurer.

The practice followed over many years may determine the scope of the constitutional functions of the State Treasurer or of any other constitutional officer. This was recognized by the Utah Supreme Court in **Tite** v. **State Tax Commission,** 57 P. 2d 734 p. 738.

So too both practice and state law has recognized the duty of the investment of public money within the custody of the State Treasurer in securities of the Federal Government. (Section 33-1-4, **Utah Code Annotated,** 1953).

In practice this investment in Federal bonds has been followed by State Treasurers subject to approval as to type of investment and amount of interest by the Board of Loan Commissioners.

The decision as to whether or not any of the public money within his custody should be invested in securities was made by the State Treasurer and incidental to the exercise of that duty the State Treasurer determined the maturity dates at which he would make purchases of bonds

after making a determination as to daily balances of cash needed by the various departments whose funds were in his control.

Accordingly, he made determinations as to whether or not they should be short term or long term investments as contemplated by the provisions of Section 3 of the State Money Management Act.

The State Treasurer accordingly asserts that the power to make other types of investments than those heretofore allowed by statute, and the duty to make said investments is a part of the constitutional functions of the State Treasurer.

Generally speaking, the Treasurer of a state has those consitutional duties concerning the holding of funds of the state which are usually involved in the duties of a treasurer **(Tucker, Secretary of State, et al.,** v.**State** (Indiana) 35 N.E. Rep. 2nd, 270). To hold otherwise would place a treasurer in an untenable position. It is generally held that public officers who have charge of public funds and public money are charged with the duty as trustees to disperse and expend the money for the purposes and in the manner prescribed by law and they are liable if they divert the trust funds from the governmental purposes for which they were collected. (43 Am. Jur. p. 111, Par 306, Annot, 96 ALR, 664).

It is well established, also, that one duty of a public officer entrusted with public money is to keep that money safely and this duty he performs at his peril.

> According to the weight of authority, numerically at least, a public officer in the absence of statutory provisions to the contrary is held to a much stricter liability than the fiduciaries handling private funds. He is absolutely liable as an in-

surer for the safekeeping of funds in his custody until dispersed in regular course and is therefore liable for losses which occur even without his fault. (43 Am. Jur. 113 Par. 309) (Am. Jur. cites numerous cases in footnotes 5, 6 and 7, page 113 and annotations at 18 ALR 982; 38 ALR 1512, s 96 ALR 295; 93 ALR 821, 155 ALR 437)

Tooele County v. **De La Mare,** 90 Utah 46, 59 P2nd, 1155.

This strict accountability of public treasurers has even been applied to the functions of a public treasurer in the selection of depositories.

> In most jurisdictions in the absence of statutes to the contrary, the rule is firmly established that a public officer entrusted with the custody of public monies is personally liable for their loss through the failure of the bank in which he has deposited them, however careful and prudent he may have been. It makes no difference that he believes the bank to be sound or that it has generally been so regarded and that in depositing the funds he merely followed a long prevailing custom. (ALR cites numerous cases in footnotes 3, 4 and 5 and annotation at 65 ALR for 814).

Plaintiff affirms that the State Treasurer has by constitution the custody and control of the money of the State and that said custody and control includes the function of managing, investing, reinvesting and depositing the monies of the State and that because his power is derived from the constitution, he cannot be deprived of such control by the legislature. In Re: **House Resolution 12 Colorado** 395, 21 P. 486. **Tucker, Secretary of State, et al.,** v. **State,** 35 N.E. Rep. 2nd, 270 (Indiana). **Hudson** v. **Kelly** (Ariz.) 263, P2nd, 362 **Thompson** v. **Leg. Audit. Comm.** (N.M.) 448 P2nd 799, **Wright** v. **Callahan** (Idaho) 99 P2nd, 961.

Contrary to the conclusion reached by the District Court in its Memorandum decision, the plaintiff does not assert that the Legislature has no power to legislate directives to the State Treasurer with reference to the manner of investment and the manner in which funds of the State will be managed (Record p. 78). It is the assertion, however, of the State Treasurer that the State Legislature may not in addition to exercising said controls, designate other administrators to perform the functions of managing the money and making the investments. The framers of the Constitution of the State of Utah must be deemed to have considered the term "custody of public monies" to encompass something more than a mere depository; otherwise, why the creation of an elective office deliberately insulated from powers and pressures that would arise were it an appointive office.

Custody by an elective constitutionally created officer who is hedged around with a firm obligation to protect the public monies and expend them only in a manner directed by lawful means must encompass exclusive power or obligation to dispose or handle funds such as make deposits, determine the amount of a deposit, with whom the deposit should be made and when the money should be withdrawn or mature. Custody must include the expenditure of the money, either pursuant to directives of the Legislature or to expend the money to purchase securities, i.e., bonds or stock in order to utilize idle funds. Until the Money Purchase Act was enacted, the ability to invest was limited to bonds of various kinds. But the fact remains that custody was deemed to include a determination upon the part of the State Treasurer as to which bonds would be purchased, the maturities of the bonds purchased and the interest to be derived therefrom. These powers had to do with the ability to correlate the availability of money with the "cash flow

demands" of the various departments of government whose funds were being managed. Throughout the years, this custody of the State Treasurer was subjected to legislative guidelines. The legislature limited the State Treasurer as to the types of bonds, imposed limitations as to maximum or minimum interest, maximum maturities, the types of issuer's, etc. Moreover, the Legislature during the past years, imposed the qualifications of depositiories and created a depository board which made determinations as to the qualifications of the depositories but who were required to leave the decision as to when a deposit would be made and with whom in the hands of the State Treasurer. (Title 51, Chapters 4 and 5)

It is not conceivable that "the Treasurer" is limited to the ministerial chores of a clerk, i.e., writing the voucher or check, the bookkeeping and the making of reports. It does not seem conceivable that the State Treasurer would be held accountable for the safety of the funds in his care if he was a mere clerk and had no powers with reference to the management of the funds.

If the Investment Committee and the Investment Director carried out the management functions of the money set forth in the Money Management Act, the State Treasurer would not be able to make the determinations requisite to protecting the safety of the funds in his care and custody.

The plaintiff does not assert that the Legislature could not accomplish the aims desired in the Money Management Act to more economically utilize idle funds, but he asserts that this must be done within the framework of his constitutional powers and obligations to retain custody and control of the money involved.

POINT 2

THE CREATION BY THE LEGISLATURE OF AN INVESTMENT DIVISION WITHIN THE OFFICE OF THE STATE TREASURER, THE CREATION OF THE INVESTMENT COUNCIL AND THE CREATION OF AN INVESTMENT OFFICER AND FINANCIAL ANALYST TO ADMINISTER THE FUNCTIONS OF SAID DIVISION INDEPENDENTLY OR SEMI-INDEPENDENTLY OF THE STATE TREASURER ARE UNCONSTITUTIONAL ENCROACHMENTS UPON THE POWERS AND DUTIES OF THE STATE TREASURER AS A CONSTITUTIONAL OFFICER.

The Constitution of the State of Utah follows the pattern of establishing three departments of government which are comprised of the Legislative, Executive and the Judicial and expressly prohibits encroachment by one department upon the functions and powers of the other.

> Article V, Section 1 of the **Utah Constitution** provides:
>
> "The powers of the government of the State of Utah shall be divided into three district departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any function appertaining to either of the others except in the cases herein expressly directed or permitted.

Article VII then describes the composition of the Executive Department in the following language:

> "The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, and Attorney General, each of them shall hold his office for four years beginning on the first

> Monday of January next after his election . . . They shall perform such duties as are prescribed by this constitution and as may be prescribed by law.

At Section 10 of Article VII, the Governor is given the powers of appointment of officers whose appointment or election is not otherwise provided for in the following language:

> "The Governor shall nominate, and by and with the consent of the Senate appoint all State and District Officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for . . ."

At Section 17 of Article VII, the **Utah Constitution** describes the duties of the Treasurer jointly with a description of those of the Auditor in the following language:

> "The Auditor shall be the auditor of public accounts, and the Treasurer shall be the custodian of public monies, and each shall perform such other duties as may be provided by law."

It is the contention of the plaintiff, Treasurer, that the above constitutional organizational structure does not impower the Legislature to directly make appointments of deputies and personnel within the Office of the State Treasurer nor does it grant to the Legislature the power to delegate powers to appoint personnel and deputies of the Office of the State Treasurer to the Governor or to any other administrative officer who is a part of the Executive Department of the State of Utah. The power to appoint the subordinate officers and employees through whom the laws or duties and functions are to be performed by a Constitutional Officer is a necessary incident to the power to execute the laws. If any other Executive Department were granted the

power to make appointments of administrative personnel and employees of the office of the State Treasurer it would for all practical purposes nulify the provisions of Article VII, Section 1 of the State **Constitution** which creates the several constitutional officers, including the State Treasurer, and makes them elective officers selected by the public. The power to appoint deputies and administrators in an administrative office such as that of the Treasurer is for all practical purposes the power to administer the functions of that office.

One of the most recent leading cases which deals with this problem of the separation of powers and of the effect of the power of appointment is the case of **Tucker, Secretary of State, et. al.,** v. **State,** (Indiana) 218 Ind. 614 35 N.E. Rep. 2nd, 270. That case involved the reorganization of the Executive branch of Government of the State of Indiana. That reorganization involved five separate statutes which provided for the termination of the tenure of various officers and boards, the placement of powers of appointment in the Governor and the realigning of the various duties and functions of the officers including some of their constitutional officers. The Supreme Court of Indiana, among other questions, was required to deal with the problem of appointment of officers by the Governor to the various administrative departments of government including the constitutional officers. That court had this to say:

> "At the time our Constitution was adopted, it was settled by the great weight of authority that the provision granting the Executive power and the admonition to take care that the laws are faithfully executed carried with them as a necessary and essential incident the power to appoint to office." (Page 281)

The Indiana Court in turn quoted from Chancellor Kent, page 287 of **Kent's Commentaries on American Law** as follows:

> "The appointment of the subordinate officers of government concerned in the administration of law, belongs with great propriety to the President, who is bound to see that the laws are faithfully executed and who is generally charged with the power's and responsibility of the Executive Department. The association of the Senate with the President in the exercise of this power, is an exception to the general delegation of Executive authority; and if he were not expressly invested with the exclusive right of nomination in the instances before us, the organization of this department would be very unskillful, and the government degenerate into a system of cabal favoritism and intrigue."

Incidental to commenting upon the power of appointment and the fact that it constitutes in reality power to administer the office to which the appointments are made, the court also took into consideration the power of removal from office a power which is also delegated by the legislature to the Executive council in Section 9 of the Money Management Act when the legislature provided "the investment officer and the financial analyst shall serve at the will of the Investment Council."

> Of this power, the Indiana court said at page 282, "Removal of Executive Officials from office is an executive function; the power to remove, like the power to appoint is part of the Executive power."

The Indiana Supreme Court also quoted from an earlier Indiana decision, **Hovey** v. **Noble,** 21 N.E., 248 118 Ind. 350. This was a case which involved an effort upon the part of the legislature to provide for appointments into the Judi-

cial branch of government. The Indiana court in that case said,

> "The truth is, that all independent departments have some appointing power as an incident of the principle power, for without it no department can be independent."
>
> "A department without power to select those to whom it must entrust part of its essential duties cannot be independent. If it must accept as 'ministers and assistants' as Lord Bacon calls them, persons selected for them by another department, then, it is dependent upon the department which makes the selections. To be independent the power of the Judiciary must be exclusive, and exclusive it cannot be if the legislature may deprive it of the right to choose those with whom it shall share its labors or its confidences. If one kingdom possesses the right to send into another ministers and assistants, to share with the governing power its functions and duties, the latter kingdom is in no sense independent." (Page 247 of 21 N.E.)

The concept of division of powers and a nonencroachment upon the functions of one department by another applies equally to the impropriety of permitting one constitutional officer in the administrative or Executive branch of government to encroach upon the functions and duties of another constitutional officer also within the Executive or administrative branch of government.

The legislature could not delegate to the Treasurer any of the Executive powers enjoyed by the Governor. Conversely the Governor cannot be granted by the legislature the custodial powers over public money granted to the Treasurer. Again the Indiana court in **Tucker** v. **State** dealt with this matter. It recognized that each branch of

government and each administrative office within any branch had power to appoint the officers whose duties are in incident to the function of the appointing office.

The court had this to say with relation to the various powers of appointment exercisable by the respective departments and administrative units:

> "It is equally well established by our decisions, and decisions elsewhere, that the general assembly may exercise the Executive power of appointment of officers and employees whose duties are an incident to its legislative functions; and it cannot be seriously doubted that administrative officers in the administrative department of the government or in the Judicial Department may exercise the Executive power of appointing their own deputies and employees whose duties are incidental to the carrying out of the administrative functions of the offices they occupy. Thus, the clerk of the Supreme Court may appoint deputies and assistants who are to assist him in his ministerial functions; and the Auditor, Treasurer and Secretary of State exercise like power; and if the Governor had not been broadly vested with the general executive power of the state but had been vested only with special and limited executive authority, that would carry with it the incidental executive appointing power insofar as it involved his subordinates and assistants . . . and the appointive powers of administrative and ministerial officers in any department must be limited to that which is incidental to their principle administrative or ministerial functions."

The plaintiff does not question the power of the legislature to create various kinds of offices and officers and to provide for their appointment by the department of Government granted power either by the Constitution or statute to perform the functions thereof. It is the contention of

the plaintiff, however, that the legislature does not have power to create within the office of the State Treasurer a department which may perform any of the constitutional functions of the State Treasurer and it cannot create a series of administrators within the office of the State Treasurer or council members who have power to perform the functions of the State Treasurer. Otherwise, the provisions of the State **Constitution** seeking to create an elective constitutional office could readily be defeated.

In the case at hand, the legislature by means of the State Money Management Act seeks to create a council and a director to manage the money of the State and to invest and reinvest it.

In section 3 the definition of short term funds and long terms funds implicitly required that the investment council find what amount of money must be "expected to be required to be converted into cash within the next twelve months or less."

Historically, the State Treasurer has performed this function, the State Treasurer has determined what the cash balance needs of the various departments whose funds he handles. He has determined what amounts should be deposited in readily available depository and what amounts should be invested in United States Securities upon a longer term basis. (Title 51, Chapter 405). That function would now be performed by the Investment Council.

Constitutionally, plaintiff asserts he would be held accountable if the credit standing of the State were jeopardized because of the inability upon the part of the various departments to pay claims and bills promptly when due.

Section 4 of the Act creates the division of investments and provides that it shall be comprised of an Investment Council and an Investment Director and Analyst.

The Investment Council is comprised of four individuals who are appointed by the Governor with the advice and consent of the State Treasurer and the Senate. Three of the Council constitute a quorum. Thus, it is entirely possible that the Council can direct the investment director to perform money management functions which are contrary to the judgment and decisions of the State Treasurer. (Section 5, Money Management Act)

Likewise, plaintiff asserts that the creation of the office of Investment Officer and of Financial Analyst in such manner that they are appointees of the State Treasurer but only with the approval of at least four members of the Investment Council and subject to termination at the will of the Investment Council, the legislature has effectively removed from the State Treasurer the power to manage the affairs of the Office of the State Treasurer in areas related to the investment, reinvestment and management of the public monies in his custody.

Accordingly, plaintiff asserts that the creation of these offices and the method of their appointment are unconstitutional.

Asher v. **Boatweight,** 171 S.W.2nd, 27, Ky. 120.

POINT 3

THE MONEY MANAGEMENT ACT UNCONSTITUTIONALLY DELEGATES TO THE INVESTMENT COUNCIL AND TO THE INVESTMENT DIRECTOR AND INVESTMENT ANALYST THE CONSTITUTIONAL DUTIES AND POWERS OF THE STATE TREASURER TO INVEST AND MANAGE THE MONEY OF THE STATE.

The Investment Council, under the provisions of Section 5 of the Money Management Act, is made up of four members appointed by the Governor (including the Commissioner of Financial Institutions), and only one member, i.e., the State Treasurer who is responsive directly to the State Treasurer. At Section 7, the Investment Council is given the functions of establishing the policies of the division of investments, of advising, counseling and directing the investment officer and the financial analyst in the performance of their duties and powers and of adopting and promulgating rules and regulations pertaining to the kind or nature of investment of public funds under the jurisdiction of the division of investments and other duties expressly set forth in Section 7.

The Investment Council can make these decisions without regard to the opinions or views of the State Treasurer. This arises out of the fact that three of the council members shall constitute a quorum for the transaction of busness. It follows that the act of a majority will control and thus the State Treasurer finds himself a dissenting minority member.

In defiance of the provisions of the **Constitution** creating the Office of State Treasurer, the Money Management Act has substituted a multiple member council to perform the functions of management of money which the framers of our **Constitution** had seen fit to place in the hands of a single person elected by the people.

As we have previously pointed out, the determination of the cash balances that must remain available for use by the various departments, i.e., the long term and short term funds is now the decision of the Investment Council and the previous practices followed by the State Treasurer will be terminated by the Act.

Moreover, the primary obligation of the State Treasurer has been to safeguard the funds of the State within his custody.

Subparagraph 5 of Section 7, creates guidelines relating to the depositing of public funds which are concerned with other factors such as "the need of local banks for loanable funds to support the economic growth in each area of the state" and in subparagrph (b) "for at least a biennial rotation of demand accounts of the State Treasurer among qualified depositories."

A decision by majority vote of the Investment Council could very well place the State Treasurer in a position of noncompliance with his custodial duty to safeguard the money of the State and may create an obligation under his bond to protect against any loss that may occur.

Section 9 of the Money Management Act provides that the chief administrative officer of the division of Investments shall be the Investment Officer and the deputy administrative officer of the division shall be the Financial Analyst. Although the act provides that the appointment be made by the State Treasurer, it requires him to secure the approval "of at least four members of the Investment Council." In effect, the State Treasurer has lost his constitutional ability to appoint a chief deputy in his office and so too with respect to the administrative assistant known as the Financial Analyst.

Moreover, the salaries are to be fixed by the Council in consultation with the director of Finance and approval by the State Board of Examiners. Again, effectively, the State Treasurer has lost any real power to appoint these important administrative officers within the office of the State Treasurer.

In addition, Section 9 provides that "in the discretion of the Investment Council, both positions (Investment Officer and Financial Analyst) may be filled by one person. The Investment Officer and the Financial Analyst shall serve at the will of the Investment Council."

In practical effect, these two administrative officers have no relationship to the State Treasurer. If the Investment Council desires to establish a policy which the two administrative officers find undesirable, their positions can be terminated or consolidated so as to elminiate a disident or to eliminate them both.

When we take into consideration the powers granted them by Section 11 of the Act, we must further recognize that for all practical purposes the State Treasurer has lost all voice in connection with these important functions relating to the investment and management of public funds:

> "(1) To make purchases, sales, exchanges, investments, and reinvestments in respect to public funds subject to the jurisdiction of the division of Investments pursuant to the policies, objectives, and requirements of this Act.
>
> (2) To see that public funds invested under the jurisdiction of the division of Investments are at all times handled to the best interest of the body owning or having control of such funds, after giving consideration to the needs of such body.
>
> (3) To make such reports as Investment Council may require."

Similarly, Section 12 grants powers to the Financial Analyst relating to the informational data important toward money management and investment. The results of his studies are reported to the Investment Officer and the Investment Council not to the State Treasurer. Moreover, he

is subject only to the requirements of the Investment Council as to the making of additional reports. That section reads as follows:

> "The Financial Analyst shall have the following powers and duties:
>
> (1) To collect, organize and analyze cash flow data regarding the financial systems of the State and any other body owning or having control of public funds subject to the jurisdiction of the division of Investments and to provide timely information of this to the Investment Officer and the Investment Council.
>
> (2) To develop and submit to the Investment Officer and the Investment Council programs for the timing and applications of cash within the financial systems of the State and any other body owning or having control of public funds subject to the jurisdiction of the division of Investments and to develop improvements of same.
>
> (3) To make such reports as the Investment Council may require.

At Section 17, the Act provides that the Investment Officer shall have the power to sell or otherwise dispose of securities or investments in which public funds under the jurisdiction of the division have been invested and have thereby deprived the State Treasurer of performing any act of judgment with reference to the management of the money involved. The only function left to the State Treasurer, an elective constitutional officer, is purely that of a ministerial depository.

Plaintiff submits that this is not the constitutional intent and that he has been effectively deprived of his constitutional duties and powers by the provisions of the Act complained of in his Complaint.

The constitutionality of legislative efforts to eliminate or materially reduce the functions of constitutional officers was denied in three relatively recent cases by the Supreme Courts of Idaho, New Mexico and Arizona. Each involved efforts to elminate or reduce the functions of the State Auditor or a constitutional officer in the following cases:

Wright v. **Callahan** (Idaho) 99, P2nd 961; 61 Idaho 167

Thompson v. **Leg. Audit. Comm.** (N.M.) 448 P2nd 799.

Hudson v. **Kelly** (Ariz.) 263, P2nd 362; 76 Ariz. 255.

CONCLUSION

Plaintiff respectfully urges the court to declare as unconstitutional the Sections referred to in his Complaint and that the defendants be permanently enjoined from effectuating those provisions.

Moreover, plaintiff asserts that the unconstitutionality of the sections complained of so materially affect the scope of the Money Management Act as to render all of its provisions so uncertain and meaningless as to render the Act impossible of administration and therefore unconstitutional.

The Money Management Act, Chapter 206, **Laws of Utah,** 1969, (Senate Bill #205) is unconstitutional in that it seeks to deprive the State Treasurer of his powers and duties as a constitutional officer and in particular of the powers and duties granted to him under the provisions of Article VII, Section 17, **Constitution of the State of Utah.**

Appellant submits that the judgment of the District Court is erroneous and that this Court should reverse its

decision. In its stead, it should find that the Money Management Act is unconstitutional and of no effect.

Respectfully submitted,

A. M. FERRO
Special Asst. Attorney General
414 Walker Bank Building
Salt Lake City, Utah

Attorney for Plaintiff-Appellant