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 : Respondent'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.

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RESPONDENTS' BR...

Appeal from a Judgment of the Di...
Salt Lake County, Utah
Honorable Bryant H. Croft, J...

RAYMOND W. G...
Special Asst. Att...
400 Executive B...
Salt Lake City, Ut...
Attorney for Defen...
Respondents.

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

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Case No. 11804

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for a declaratory judgment wherein the plaintiff seeks a determination that Chapter 206, Laws of Utah, 1969, (Senate Bill 205) be declared unconstitutional and that defendants be enjoined from the acts contemplated by the statute. (R. 1-9)

DISPOSITION IN LOWER COURT

The trial court held that Chapter 206, Laws of Utah, 1969, was constitutional, and the complaint of plaintiff was dismissed with prejudice and on the merits. (R. 73-78)

RELIEF SOUGHT ON APPEAL

The plaintiff-appellant seeks reversal of the trial court determination, and a declaration that Chapter 206, Laws of Utah, 1969, is unconstitutional in whole or in part; defendants-respondents urge the affirmance of the lower court decision, and a declaration that the statute is constitutional.

STATEMENT OF FACTS

The defendants-respondents do not take exception to the statement of facts of plaintiff-appellant insofar as it designates and identifies the parties to this litigation, and the constitutional provisions relating to the office of Treasurer. Exception is taken, however, to the recitation of the statutory duties of the State Treasurer, and any inference or claim that acts in pursuance of such legislation have established a practice or pattern which bears upon the scope of the constitutional functions of the Treasurer. Further exception is taken to any claim that such legislation may be a recognition of some inherent or historical functions of the Treasurer. No evidence was presented in this matter; the lower court determination was a judgment on the pleadings; any alleged acts or practices of the State Treasurer under

statutory provisions are irrelevant, and in any event not before the court. If the court considers such alleged acts and practices properly before it for consideration it is submitted that, if anything, the statutory provisions indicate the legislature has not considered the Treasurer to have any inherent authority to manage, invest or deposit state funds, but has enacted legislation covering the same.

ARGUMENT

POINT I

CHAPTER 206, LAWS OF UTAH, 1969, DOES NOT CONFLICT WITH THE CONSTITUTIONAL DUTY OF THE TREASURER AS THE CUSTODIAN OF PUBLIC MONEYS.

Chapter 206, Laws of Utah, 1969, known as the State Money Management Act, relates to the funds of the State of Utah and its political subdivisions; it provides for a system of centralized investment and management of those funds; in furtherance of this objective it creates a division of investments, an investment council, an investment officer and a financial analyst within the division, defining their various duties; the act, inter alia, provides for the qualifications of a qualified depository of public funds, and for the more prompt payment of state moneys.

The plaintiff-appellant claims that Chapter 206, Laws of Utah, 1969, contravenes the provisions of Section 17 of Article VII of the Constitution of Utah, which provides:

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

It is most apparent that the only issue raised in this case turns on the definition of "custodian of public moneys"; for if the State Money Management Act does not contravene such constitutional duty of the Treasurer, there cannot be a violation of the Constitution, for the Treasurer " * * * shall perform such other duties as may be provided by law."

Plaintiff-appellant cites no cases or authority defining the phrase, "custodian of public moneys" or "custodian", but asserts without warrant that the constitutional power of the State Treasurer " * * * includes the function of managing, investing, reinvesting and depositing the monies of the State * * * ". (Appellant's Brief, page 9) The total absence of any authority in support of this proposition is significant.

Webster's New International Dictionary, Second Edition defines "custodian" as follows: "one who has care or custody * * * ; a keeper."

The term "custody" as applied to property is defined in 25 C.J.S., Custody, p. 90, as follows:

> "The keeping of property by one who is charged with or assumes responsibility for its safety; the care and charge of property for one who retains the right to control it; the charge to keep and care for the owner, subject to his order and direction, without any interest or right therein adverse to him; such a relation toward it as would constitute possession if the person having custody had it on his own account."

See *National Fire Insurance Co. v. Davis,* (Texas) 179 S. W. 2d 316; *U. S. v. One Ox-5 American Eagle Airplane,* 38 F2d 106.

Acording to 81 C.J.S., States, p. 1191:

> " * * * The legal title to public moneys in the hands of the state treasurer or other officer entitled to custody thereof is in the state and not in such officer."

It is apparent that custody, and the role of a custodian, involve the care and charge of property for the owner, always subject to the order and direction of the owner. In the case of *Territory ex rel. City of Albuquerque v. Matson* (N. Mexico) 113 Pac. 816, the court, among other questions, had to decide whether under state law a city had the right to designate a depository of money in the hands of its treasurer. The statute in question provided that the treasurer "may be required to keep all moneys in his hands belonging to the corporation in such place of deposit as may be designated by ordinance." The statute then stated: "Provided, however, no such ordinance shall be passed by which the custody of such money shall be taken from the treasurer." Whether the foregoing statutory provisions were contradictory was analyzed by the court as follows:

> "It should be borne in mind that the money is all the time the property of the city and not of the treasurer; that his duty is to receive it for the city and with it pay claims against the city which have been duly approved. Everything else is, or should be, subsidiary to this main object. In that connection, the word "custody" must

> mean immediate charge and control under the law, and not the final absolute control of ownership. Suppose a person to be carrying on a business through a manager, and that he directs him to deposit all the money he receives in a certain bank in his own name as manager, and subject only to his checks as manager, could it be said with any show of reason that the money is not in his custody because he did not select the bank of deposit? And is a prisoner any less in the custody of the jailer because he holds him in a jail provided by the county and designated by law as the place of confinement for such a prisoner? If by the ordinance in question the city had, for instance, required the treasurer to deposit in the joint names of himself and some other officer of the city, and that payments from the deposit should be made only by checks signed by both such depositors, that obviously would have been calculated to deprive him of the custody of the money. But the mere designation of the bank in which he shall deposit, in his own name, and subject only to his own checks, as treasurer, without in the least restricting his right to pay out the money acording to law, is not depriving him of the custody of the money."

This court has recognized and upheld the right of the Utah State Land Board to make investment of certain state funds. See *State Board of Land Commissioners v. Ririe,* 56 Utah 213, 190 Pac. 59; *State Land Board v. State Finance Commission,* 12 Utah 2d 265, 365 P.2d 213. The results of these decisions are in accord with the argument advanced herein by defendants-respondents, but are contrary to that advocated by the Treasurer.

It is submitted that the position of the defendants-respondents anent the constitutional duties of the Treasurer is also in accord with legislation enacted regarding the deposit, investment, and management of public moneys. In this respect see Sections 51-5-1 to 51-5-13, U.C.A. 1953, as amended (Funds Consolidation Act); Sections 33-1-1 et seq., U.C.A. 1953, as amended (investments by the Director of Finance); Section 65-1-65, U.C.A. 1953, (investments by Utah State Land Board); Sections 51-1-1 to 51-1-11, U.C.A. 1953, (State Depository Act).

It is submitted that the Treasurer's constitutional duty as the "custodian of public moneys" does not involve the powers of managing, investing, reinvesting and depositing the moneys of the state as claimed by appellant. Clearly the definition of "custody" indicates that the Treasurer has the immediate charge to keep and care for the public moneys, subject to order and direction of the legislature, which has the absolute control. The duties and functions of the statutory officers set forth in Chapter 206, Laws of Utah, 1969, do not conflict with the custodial powers of the Treasurer, aforementioned; and the statute thus does not conflict with the Utah Constitution.

POINT II

THE OFFICES CREATED BY CHAPTER 206, LAWS OF UTAH, 1969, AND THE FUNCTIONS THEREOF DO NOT VIOLATE THE UTAH CONSTITUTION.

Plaintiff-appellant claims Chapter 206, Laws of Utah, 1969, to be unconstitutional because it provides for the creation of an investment council; an investment officer; a financial analyst; and the creation of an investment division within the office of the State Treasurer. Certain Utah Constitutional provisions are cited for support of this contention, namely: Article V, Section 1, which deals with the respective departments of government; Article VII, Section 1, which enumerates the offices in the executive department; Article VII, Section 10, which sets forth the appointive powers vested in the Governor; and Article VII, Section 17, which states that the Treasurer shall be the custodian of public moneys. The argument is that these provisions preclude the Legislature from either directly making appointments of deputies or other personnel within the office of the Treasurer, or empowering the Governor or any other executive officer to make such appointments.

This conclusion advanced is defective, for the Utah Constitution grants no power of appointment to the Treasurer, and provides for no constitutional officer under the control of the Treasurer. The office of the deputy treasurer is a creation of statute; the authority for the Treasurer to appoint a deputy is statutory. Section 67-9-1, U.C.A. 1953. Equally deficient are the cases

and authorities cited by the Treasurer, which tell us some interesting things about various matters, but which are inapplicable to the issues of the instant case.

In the case of *Ricks v. Department of State Civil Service* (La.) 8 So. 2d 49, it is stated:

> "We have been unable to find any decision of this court passing on the question of whether or not a constitutional officer has a constitutional right to select his employees. However, it has been held in other states that state officers have no such constitutional right. The theory upon which these decisions are based is to the effect that the duties of an officer are those imposed by law, and the employees who assist him are not his employees, but the employees of the state. The employees are in public service and not private service, and the state, and not the officer, employs them and pays them. In other words, the officer does not have the vested or private personal right to select his subordinates. People v. McCullough, 254 Ill. 9, 98 N.E. 156, Ann. Cas. 1913B, 995; People v. Loeffler, 175 Ill. 585, 51 N.E. 785; People v. Capp, 61 Colo. 296, 158 P. 143; Stowe v. Ryan, 135 Or. 371, 296 P. 857."

People v. Capp (Colo.) 158 P.143, involved the question of whether the Colorado civil service law restricted the constitutional appointive powers of the governor inasmuch as the law in question contemplated the certification of an eligible and prospective employee by the civil service commission. In answering the assertion that the discretion of the governor in making appointments was taken away, and he was thus deprived of his power to perform constitutional duties, the court stated:

"This proposition is sound when applied to constitutional officers, but in this case counsel have fallen into error in their conclusion because they have failed to distinguish between officers provided by the constitution and officers created by statute. There is no provision in the constitution giving the governor power to appoint the warden of the reformatory, or that requires the legislature to confer upon the governor the power to appoint that officer. The legislature was therefore free to confer that power upon some other official or board, as it might see fit, and because it originally conferred the power upon the governor is no reason why that body may not either qualify that power, or if so disposed, take it away entirely. Had the constitution created the office of warden, or had it provided that the governor should appoint the warden when the legislature created the office, it may be conceded that then the governor's discretion could not be interfered with by the legislature. Hence it is plain that the statutory provision here assailed in no sense contravenes the constitutional provision in question."

Stowe v. Ryan (Oregon) 296 P. 857, involved the right of the civil service commission to terminate a deputy county clerk, under the Oregon law which authorized such action, and whether the law violated the state constitution. The court held:

"The petitioner discusses at great length the right of the commission to interfere with the county clerk's office by removing or appointing a deputy county clerk. The office of the county clerk is a constitutional office; but that of deputy county clerk is strictly statutory. If the appointing power were expressly given to the county clerk by the Constitution, then in such case the commission

would have no right to appoint or discharge the deputy county clerk."

It is thus apparent that the legislature may create offices and provide for their manner of appointment, tenure, and other incidents, unless otherwise restricted by the constitution, and in the instant case no such restraint is indicated. The Utah Constitution does not provide for the offices in question, nor grant authority for the Treasurer to appoint to such offices. Therefore, it is submitted that the offices and organizational structure set forth in Chapter 206, Laws of Utah, 1969, do not contravene the Constitution of Utah; and it is further submitted that the duties incident to these statutory offices do not conflict with the Treasurer's constitutional duty as custodian of the public moneys. (See Point I)

POINT III

TO BE UNCONSTITUTIONAL, A STATUTE MUST CLEARLY VIOLATE A SPECIFIC CONSTITUTIONAL PROVISION AND THE VIOLATION MUST BE CLEAR, COMPLETE, AND UNMISTAKABLE; NO SUCH VIOLATION IS SHOWN HERE.

It is fundamental that the legislative body of the state has absolute control over its finances. Unless limited by constitutional provisions, the power of the state legislature is plenary and it may direct and control the disposition of all state funds. See 81 C.J.S., States, pages 1145-1146. As has been stated in the case of *State v. Mason*, 94 Utah 501, 78 P.2d 920:

> "The Legislature has every power which has not been fully granted to the Federal Government or which is not prohibited by State Constitution."

Similarly in *Lehi City v. Meiling,* 87 Utah 237, 48 P.2d 530, the court held:

> "It is a truism recognized by all the authorities that the Legislature of a state is vested with the whole of the legislative power of the state and may deal in any subject within the scope of the constitutional government except as such power is limited or directed by express provision of the Constitution or necessary implication arising therefrom. "State Constitutions are mere limitations, and not grants, of powers." Salt Lake City v. Christensen Co., 34 Utah, 38, 95 P. 523, 17 L.R.A. (N.S.) 898."

It is submitted that the power of the legislature over the appropriation and expenditure of public funds includes as an incident thereof the power over the management, investment, and deposit of such funds.

Attack having been made on the validity of Chapter 206, Laws of Utah, 1969, any analysis of the assertions of unconstitutionality can only be pursuant to the guide lines heretofore set forth by this Court. Thus in the *Lehi City* case, supra, it was stated:

> "In approaching the subject we have in mind the rule that when an act of the Legislature is attacked on grounds of unconstitutionality the question presented is not whether it is possible to condemn the act, but whether it is possible to uphold it. The presumption is always in favor of validity, and legislative enactments must be sustained unless clearly in violation of fundamental law. Wadsworth v. Santaquin City, 83 Utah, 321, 28 P.(2d) 161. Every presumption will be indulged in favor of legislation and only clear and demonstrable usurpation of power will authorize judicial

> interference with legislative action. Green v. Frazier, 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878."

The test of determining whether a statute is invalid has been delineated also in several other Utah decisions, including *Trade Commission of Utah v. Skaggs Drug Centers, Inc., et al,* 21 Utah 2d 431, 446 P.2d 958, wherein it was held:

> "An alleged violation of the Constitution must be of a specific provision of a particular article thereof. We have repeatedly held in order to be declared unconstitutional, the statute must clearly violate some constitutional provision, and further, the violation must be clear, complete and unmistakable."

See also *Gubler et al. v. Utah State Teacher's Retirement Board* et al, 113 Utah 188, 192 P.2d 580; *Snow v. Keddington,* 113 Utah 325, 195 P.2d 234.

The claim of the plaintiff-appellant that Chapter 206, Laws of Utah, 1969, is unconstitutional, hardly is supported by a showing of any violation which is clear, complete, and unmistakable. To the contrary, the legislation is clearly compatible with the provisions of the Utah Constitution.

We adopt in argument the comments of the learned Judge of the lower court, who in referring to the Utah Constitution and the issues involved in this case, concluded in part:

"Under Article VII, Section 3, the only requirements for one to qualify as State Treasurer are that he be a qualified elector and a resident citizen of the state for five years next preceding his election. It also provides that the State Treasurer shall be ineligible to election as his own successor.

Mr. Allen may well be the most competent of State Treasurers, but to support his position in this case it would require the court to hold that as "custodian of public moneys," he, and he alone, has complete and exclusive control over the investment and management of funds of the state and all of its political subdivisions to the exclusion of other public officials and the state legislature, and this even though any State Treasurer elected to the office may have absolutely no training, ability or experience in the investment and management of monetary funds and only four years to learn before he must leave office and make way for another State Treasurer. I cannot, in good conscience or judgment, believe that in using the phrase "custodian of public moneys," the framers of the constitution intended that the State Treasurer should have such exclusive powers so as to deprive the legislature of any power to legislate with respect to the wise investment and handling of millions upon millions of dollars in public moneys. Certainly, the meaning of the term "custodian" is not so clear and convincing as to impress this writer that S.B. 205 or any of its provisions, is clearly, completely and unmistakably unconstitutional." (R. 77-78)

CONCLUSION

Defandants-respondents submit that the Money Management Act, Chapter 206, Laws of Utah, 1969, is constitutional and that the decision and declaration of the lower court should be affirmed.

Respectfully submitted,

Raymond W. Gee
Special Assistant Attorney General
400 Executive Building
Salt Lake City, Utah