1968

# The State of Utah v. Robert Lee Dixon, Hatch & Mcrae, Weber County, A Body Corporate and Politic of the State of Utah, The State of Utah v. Dennis A. Hunter, Hatch & Mcrae, Summit County, A Body Corporate and Politic of the State of Utah : Brief of Respondent Summit County

Utah Supreme Court

# IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
*Plaintiff,*

— vs. —

ROBERT LEE DIXON,
*Defendant,*

HATCH & McRAE,
*Appellants,*

WEBER COUNTY, a body corporate and politic of the State of Utah,
*Respondent.*

Case No. 11167

THE STATE OF UTAH,
*Plaintiff,*

— vs. —

DENNIS A. HUNTER,
*Defendant,*

HATCH & McRAE,
*Appellants,*

SUMMIT COUNTY, a body corporate and politic of the State of Utah,
*Respondent.*

## Brief of Respondent Summit C

Combined Appeals From Orders of the *Hon* Cowley of the District Court of Weber Co *Honorable* Merrill C. Faux of the District C County, State of Utah, denying attorney's fe the court-appointed representation of defend in the respective court proceedings.



D. JAY WILSON, Weber Co
and
GEORGE B. HANDY, Assistant
*For Respondent Pl*
Ogden Courthouse
Ogden, Utah
ROBERT F. ORTON,
Summit County Attorney
*Attorney for Respondent*
*Summit County*
Newhouse Building
Salt Lake City, Utah 84111

HATCH & McRAE,
*Attorneys pe se and Appellants*
707 Boston Building
Salt Lake City, Utah 84111

## INDEX



## AUTHORITIES CITED

### Cases

Page

## Statutes and Rules



## Texts

# IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
*Plaintiff,*
— vs. —
ROBERT LEE DIXON,
*Defendant,*
HATCH & McRAE,
*Appellants,*
WEBER COUNTY, a body corporate and politic of the State of Utah,
*Respondent.*

Case No. 11187

THE STATE OF UTAH,
*Plaintiff,*
— vs. —
DENNIS A. HUNTER,
*Defendant,*
HATCH & McRAE,
*Appellants,*
SUMMIT COUNTY, a body corporate and politic of the State of Utah,
*Respondent.*

Case No. 11199

## Brief of Respondent Summit County

### NATURE OF CASE

Motion was made to the District Court of Summit County, State of Utah, by Appellants, in the case entitled "*State of Utah* v. *Dennis A. Hunter,*" for issuance of an order awarding them a reasonable attorney's fee in connection with their court-appointed representation of De-

fendant Dennis A. Hunter and requiring Respondent to compensate them for the fair and reasonable value of their services (R. 55). Appellants contended that Respondent was legally obligated under Chapter 64 of Title 77, Utah Code Annotated, 1953, added by Chapter Laws of 1965, to pay them for said services.

## DISPOSITION OF THE LOWER COURT

The Honorable Merrill C. Faux, Judge of the District Court of Summit County, State of Utah, denied Appellants' motion (R. 75).

## RELIEF SOUGHT ON APPEAL

Respondent submits that the decision of the District Court should be affirmed.

## STATEMENT OF FACTS

Where the word "Respondent" is used in this brief it refers to Summit County and where the word "Appellants" is used it refers to Robert M. McRae of Hatch and McRae. Where the word "Defendant" is used it will refer to Dennis A. Hunter.

Respondent agrees with the statement of facts set forth in Appellants' brief, but feels it important to add that Appellants were appointed to represent Dennis A. Hunter by the District Court of Summit County without the authorization of the Board of County Commissioners of Summit County.

## POINT I

### A COUNTY OF THE STATE OF UTAH HAS NO STATUTORY OBLIGATION TO PAY REASONABLE COMPENSATION AND EXPENSES TO COURT-APPOINTED DEFENSE COUNSEL, BUT MAY DO SO WHERE THE BOARD OF COUNTY COMMISSIONERS OF SUCH CUNTY AUTHORIZES THE COURT TO APPOINT A QUALIFIED ATTORNEY IN EACH CASE AND AWARD HIM REASONABLE COMPENSATION AND EXPENSES.

Sections 1 and 2 of Title 77, Chapter 64, Utah Code Annotated, 1953, (cited at pages 5 and 6 of Appellants' brief) declare certain "minimum standards" to be provided by each county for the defense of defendants who are financially unable to obtain an adequate defense in criminal cases. Section 2 provides:

> "Assigned counsel shall represent each indigent person who is under arrest or charged with a crime in which the penalty to be imposed could be confinement for more than six months in either jail or prison if:
>
> (1) The defendant requests it, or
>
> (2) The court, on its own motion or otherwise, so orders, and the defendant does not affirmatively reject of record the opportunity to be represented."

This Court in the case of *Ruckenbrod* v. *Mullins,* 102 Utah 548, 133 P. 2d 325, (1943) said at page 326, P. 2d:

> "The majority of jurisdictions hold that an attorney is an officer of the court with many rights and privileges, and must accept his office *cum*

*onere*. One of the burdens incident to the office, recognized by custom of the courts for many years, is the duty of the attorney to render his services gratuitously to indigent defendants at the suggestion of the court."

We concur with the statement at page 8 of Appellants' brief that "it is fundamental now that a person who has not intelligently and completely waived his rights the counsel, and requests the court for appointment of counsel, is entitled to have an attorney represent him at all stages of the proceedings against him." However, we do not concur withe Appellants' contention that there is a mandatory obligation to provide such services at county expense. Title 77, Chapter 64, Section 6, Utah Code Annotated, 1953, provides:

> "The board of county commissioners may, at county expense, either:
>
> "(1) Authorize the court to provide the services prescribed by this act by appointing a qualified attorney in each case and awarding him reasonable compensation and expenses; or
>
> "(2) Arrange to provide those services through nonprofit legal aid or other associations. If any incorporated city or town wishes to donate moneys for any of the purposes specified in this section, such action is hereby authorized."

Appellants' principal argument apparently recognizes and admits that the Board of County Commissioners of Summit County has neither authorized any Court to provide the services permitted by the act by appointing a qualified attorney in each case and awarding him reasonable compensation and expenses, nor arranged to

provide those services through nonprofit legal aid or other associations. Appellants contend, however, that the Court may, even absent any such action on the part of the Board of County Commissioners, appoint an attorney in each case and award him reasonable compensation and expenses and that it is then mandatory that said Board of County Commissioners pay such compensation and expenses.

The principal question before this Court would appear to be whether the wording of Section 6 of the act is mandatory or permissive on the question of compensation and expense reimbursement. It is fundamental law that a statute is to be construed in light of the legislative intent. See *McKesson* v. *Lowery,* 51 C. 2d 660, 335 P. 2d 662, California (1959). Before the enactment of Chapter 64 Title 77, Utah law did not authorize the counties to disburse funds to counsel appointed to represent indigent defendants in criminal cases. Title 17, Chapter 15, Section 17, Utah Code Annotated, 1953, provides that the following are county charges:

> "(1) Charges incurred against the county by virtue of any of the provisions of law.
>
> "(2) The necessary expenses of the county attorney incurred in criminal cases arising in the county, and all other expenses necessarily incurred by him in the prosecution of criminal cases.
>
> "(3) The expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail.
>
> . . . .
>
> "(9) Every other sum directed by law to be raised for any county purposes under the direc-

tion of the board of county commissioners, or declared to be a county charge."

It is clear from a reading of the foregoing statute that, even though the necessary expenses of the county attorney incurred in criminal cases arising in the county, all other expenses necessarily incurred by him in the prosecution of criminal cases and the expenses necessarily incurred in the support of person charged with or convicted of crime and committed therefor to the county jail are made proper county charges, the statute does not make reasonable compensation and expenses paid to court-appointed defense counsel a proper county charge. We recognize that upon the enactment of Section 6 of Chapter 64 of Title 77, which was added to the Utah Code by the Chapter Laws of 1965, reasonable compensation and expenses paid by the counties of the State of Utah to court-appointed defense counsel became a proper county charge. However, prior to enactment of said Section 6 such a payment of compensation and expenses was not a proper county charge and the county could not make the same under any provision of the law.

We believe that the legislature in enacting said Section 6 intended only to make it possible for counties to do that which they were not permitted by law to do before enactment of said Section as is evidenced by the use of the permissive word "may" in said Section. The language used throughout Chapter 64 of said Title 77, where county charges are discussed, is permissive in nature and nowhere therein does it appear that the legislature

intended to make it mandatory upon the counties to provide reasonable compensation and expenses to court-appointed defense counsel.

Section 5 provides:

> "The expenses of printing or typewriting briefs on appeal on behalf of a defendant as well as depositions and other transcripts are also a *proper county charge.*" (Emphasis added)

Section 7 provides:

> "All expenditures by the counties of incorporated cities and towns which are necessary and proper to carry out the purposes defined in this chapter are *hereby declared to be legitimate and proper uses of public funds* and *the counties* and incorporated areas of this state *are hereby authorized to levy and collect taxes for such purposes.*" (Emphasis added)

Section 6 provides:

> "*The board of county commissioners may,* at county expense, either: . . ." (Emphasis added)

All of the foregoing language used by the legislature is permissive in nature and not mandatory and Respondent contends that had the legislature intended the act to be mandatory on the question of payment of reasonable compensation and expenses it would have used mandatory language such as the word "shall" in place of the word "may."

Whether a statute is mandatory or directory depends upon the legislative intent. See *De Witt* v. *Board of Supervisors of the County of San Diego,* 53 C. 2d 419,

348 P. 2d 567, California (1960). The word "may" is sometimes construed as mandatory, but where a means is not provided for enforcement of the statute in which the word is used the declaration is directory and not mandatory. See *Gowanlock* v. *Turner*, 42 C. 2d 296, 267 P. 2d 310, California (1954). A direction in a statute is mandatory where consequences are attached to failure to act in accordance with the direction. See *Whitley* v. *Superior Court in and for Los Angeles County*, 113 P. 2d 449, California (1941).

Nowhere in Chapter 64 of Title 77 is a means provided for enforcement of the provisions of Section 6 and nowhere in said chapter can one find consequences attached to a failure to act in accordance with the provisions of said Section. It was the obvious intent of the legislature in enacting Chapter 64 of Title 77 to set up minimum standards to be provided by each county for the defense of indigent defendants, but to leave the means of providing such minimum standards within the sole discretion of the respective counties and to make it possible for the counties, only if in their discretion they choose to do so, to provide compensation for defense counsel.

Respondent contends that proper appointment in accordance with prescribed statutory procedure by a court having authority is a necessary prerequisite to payment of compensation to an attorney who has performed services on behalf of an indigent accused. The Supreme Court of Minnesota, in considering a statute which provided for the appointment of counsel to defend

indigent defendants and allowed reasonable compensation to defense counsel for his services, stated that it was desirable to set forth a declaration of policy as to the appointment of attorneys to assist indigent convicted persons to prosecute an appeal and held that payment for such services could be authorized only in cases where the attorney had been appointed to assist the Defendant in the trial court according to the prescribed statutory procedure. *State* v. *Dahlgren,* 259 Minn. 307, 107 N.W. 2d 299, Minnesota (1961).

In volume 18 of ALR 3d at page 1087 it is stated:

> "The New York statute with respect to the assignment of counsel for an indigent defendant provides that if the defendant appears for an arraignment without an attorney, he must be asked if he desires the aid of counsel, and if he does, the Court must assign counsel to him. Under this statute, it has been held that the validity of an order purporting to award compensation for services performed in behalf of the indigent depends upon the validity of the assignment."

Respondent contends that since the Board of County Commissioners of Summit County, prior to the appointment by the District Court of Summit County of Appellants to represent Defendant, had taken no affirmative action pursuant to the provisions of 77-64-6, UCA, 1953, compensation should not now be awarded to Appellants since they were not appointed in accordance with the prescribed statutory procedure set forth in said section.

Respondent further contends that should the Court find that the language of said Section 6 is mandatory, the

proper remedy would be a Writ of Mandamus brought to compel the Board of County Commissioners to arrange for the services provided and that this arrangement would have to be made prior to appointment of counsel by the District Court.

Respondent does not contend that the Legislature of the State of Utah does not have the power to provide compensation for services rendered by court-appointed defense counsel. What Respondent does contend, however, is that although the Legislature of the State of Utah has now made it possible for counties to provide such legal services and to compensate court-appointed counsel for indigent defendants, it has left the question of compensation within the sole discretion of the board of county commissioners of each county and until the commissioners take some affirmative action, as they are authorized to do by Section 6 of the act, the Court is not authorized to fix compensation and order its payment.

We therefore submit that the ruling of the District Court should be affirmed.

## POINT II

### THE PROCEDURE UNDERTAKEN BY APPELLANTS TO SECURE COMPENSATION WAS INAPPROPRIATE.

If, as admitted by Appellants at pages 12 and 13 of their brief, the Governmental Immunity Act does not apply in this case then they would necessarily have to look to the Counsel for Indegent Defendants Act (77-64-1

to 7) or the County Claims Act (17-15-10 to 16) for a procedural means of securing the compensation they are requesting, if they are entitled to any such compensation.

It would appear that the Counsel for Indigent Defendants Act should not apply in this case since the Board of County Commissioners of Summit County has not authorized the Court to appoint Counsel and award them reasonable compensation and expenses (R. 81, pp. 12 and 14) pursuant to the provisions of the act, and the said act makes no provision for any means of enforcement if compensation is not paid by the county, nor are there any consequences attached to a failure of the county to provide compensation or to take affirmative action in accordance with the provisions of Section 6 of the Act.

Appellants contend that the Counsel for Indigent Defendants Act is remedial in nature and that it is entitled to liberal construction in favor of the remedy provided by law or in favor of those entitled to the benefits of the statute. Though the act may be remedial in nature, still the intention of the legislature as gathered from the language used must be given full effect. In 50 Am. Jur., Statutes, Section 393, it is stated:

> "As in the case of all statutes, the primary rule of construction of remedial statutes is to ascertain, declare and give effect to the intention of the legislature, as gathered from the language used. . . ."

Respondent contends that it was the intent of the Utah State Legislature in enacting the provisions of the Counsel for Indigent Defendants Act, on the question of

compensation, only to make it possible for counties to provide funds for what was not, prior to the enactment of said act, a proper county charge. The intent of the Legislature that said act not be mandatory on the question of compensation is further supported by the fact that the Legislature did not provide any means of enforcing the provisions of the act nor attach any consequences to a failure of the counties to act in accordance with the provisions of Section 6.

No remedy being provided in the Counsel for Indigent Defendants Act, a claimant must then turn to the County Claims Act if it has a claim against the County. Appellants did, in fact, pursuant to the terms and provisions of the County Claims Act, present a written claim (R. 67) to Respondent which said claim was rejected (R. 70A). Title 17, Chapter 15, Section 12, Utah Code Annotated, 1953, provides:

> "*A claimant dissatisfied with the rejection of his claim or demand or with the amount allowed him on his account may sue the county therefor* at any time within one year after the first rejection thereof by the board, but not afterward. If in such action judgment is recovered for more than the board allowed, costs shall be taxed against the county, but if no more is recovered than the board allowed, costs shall be taxed against plaintiff. On presentation of a certified copy of the judgment the board must allow and pay the same." (Emphasis added)

If Appellants are dissatisfied with the rejection of their claim their only remedy would be to sue the county therefor within one year after the first rejection thereof

by the Board of County Commissioners. Appellants have not sued Respondent Summit County in this case and the case is not, therefore, properly before the Court.

## CONCLUSION

The District Court properly denied Appellants' motion for an order awarding them a reasonable attorney's fee in connection with their court-appointed representation of Defendant. A county of the State of Utah does not have a statutory obligation to pay reasonable compensation and expenses to court-appointed defense counsel, but may do so where the board of county commissioners of such county authorizes the Court to appoint a qualified attorney and award him reasonable compensation and expenses. The Board of County Commissioners of Summit County has not authorized the Court to appoint a qualified attorney and award him reasonable compensation and expenses. The procedure undertaken by Appellants to secure compensation was an inappropriate procedure and the case is not properly before the Court.

Respectfully submitted,

ROBERT F. ORTON
Summit County Attorney
*Attorney for Respondent*
*Summit County*
410 Newhouse Building
Salt Lake City, Utah 84111