

1979

Gerald E. Hulbert v. State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

-----:-----
GERALD E. HULBERT, :
Plaintiff and Respondent, :
-vs- : Case No.
THE STATE OF UTAH, : 16197
Defendant and Appellant. :

-----:-----
BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This action was brought by the respondent Gerald E. Hulbert to recover attorneys fees in the amount of \$77,275.00 and court costs in the amount of \$540.65 from the appellant State of Utah pursuant to Sections 63-30a-1, 2 and 3, Utah Code Annotated 1953, as enacted by Chapter 245 of the Laws of Utah, 1977, which became effective May 10, 1977.

DISPOSITION IN THE LOWER COURT

Following a non-jury trial the lower court granted judgment for the plaintiff-respondent in the amount of \$62,384.99.

RELEIF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the lower court on the grounds that it had no jurisdiction to entertain the action, the judgment is not supported by the evidence and the statute upon which the judgment is based is invalid as private, special or retroactive legislation under the United State and Utah Constitutions.

STATEMENT OF THE FACTS

With some marked exceptions, there is competent evidence in this case which would support the Findings of Fact of the court below. Those findings of fact, with the exceptions noted, are as follows:

1. In 1975, a series of indictments were issued by a Utah State Grand Jury against Gerald Hulbert, the plaintiff-respondent, containing twelve counts in all which were issued in connection with and arose out of certain claimed acts and/or omissions of Mr. Hulbert during the performance of his duties and within the scope of his employment as Chairman and Director of the Utah State Liquor Control Commission.

2. Ultimately, each of the indictments were disposed of by a verdict of "not guilty" after trial, by an acquittal or by a dismissal of the action by the court.

3. Mr. Hulbert retained the services of Wayne L. Black and John L. Black and their law firm of Rawlings, Roberts and Black to defend himself against the charges contained in the indictments.

4. Wayne L. Black and John L. Black were lifelong friends of Mr. Hulbert and no fee arrangement was made between the parties at the outset of their work on his behalf. (It should here be noted that such services commenced in January of 1974 and included appearances by John L. Black as Mr. Hulbert's counsel at hearings conducted by the Salt Lake County Attorney and the Utah Advisory Council on Liquor Control in October and November of that year. R. 138-141, 188-192.)

5. After the first group of indictments were issued in May, 1975, a \$5,000 retainer was paid to the Black firm by Mr. Hulbert and an additional fee of \$5,000 was estimated for trial of the matter, if necessary, and \$2,000 for an appeal. (It should be noted that the retainer, trial fee and appeal fee, if necessary, were agreed upon by the parties at that time. See Mr. Hulbert's

testimony at R. 143-144, and Wayne L. Black's testimony at R. 199-200. It should also be noted that the first group of indictments included 4 indictments with 7 counts of perjury, false and material statements and embezzlement of whiskey. See Mr. Wayne L. Black's testimony describing same at R. 196.)

6. A second and third set of indictments were handed down in July and August of 1975, and the Blacks continued to represent Mr. Hulbert thereon.

7. The matter was vigorously prosecuted by special attorneys general appointed by the State and Salt Lake County Attorney's office, and the defense was protracted, complicated, time consuming and difficult.

8. Attendant publicity contributed to the task of defense counsel.

9. Mr. Hulbert's mental and physical health deteriorated during the protracted litigation and any discussion of fees was deferred, but he finally insisted on a billing because of his strong sense of personal and moral obligation to pay for the services rendered and to know where he stood vis-a-vis the fee obligation.

10. In response to Mr. Hulbert's request, Wayne L. Black wrote a letter in September of 1976,

offering to consider \$18,500 the total fee, taking into account \$8,500 paid prior to that date by Hulbert who, though unemployed and ill, informed Mr. Black that the fee suggested in the September letter was token in nature and unacceptable to him.

(Exhibit 4-P is the letter from Mr. Black to Mr. Hulbert and clearly sets forth the total fee for all services to be performed on all the indictments of \$18,500. It is not an "offer" or "suggestion" in any sense of the word. Exhibit 5-P is a note from Hulbert to the Blacks in response to the billing in which he acknowledges the fee as "very, very minimal" and states his only concern "is making prompt payment to you." Nothing in the written documents indicates any non-acceptance or repudiation of the stated fee by either party.)

11. Subsequently, Mr. Hulbert and counsel agreed orally that Hulbert would pay the law firm a reasonable and fair fee "if and when" he became able to do so.

[The evidence will not support such an agreement. Hulbert testified that he subsequently told Mr. Black "I would make it right with him if I could find it in my means at any time." (R. 153.) Wayne Black's testimony

on the matter was that Hulbert told him "I don't know when or how I am going to be able to do it, but I'm not going to rest until I pay you something that is reasonable and that more nearly represents what you have done for me and my family," to which Black responded "Well, Gerry, let's just kind of let it go and see what happens, and if you are able ever to do that, or to pay an additional amount, that would be fine with me, and I will kind of leave it up to you." (R. 217-218). On cross examination Mr. Black testified as follows:

"Q. And wasn't it your intent in writing the letter that is an exhibit here, that I think is dated September the 3rd, that you were going to satisfy him by setting an amount beyond which you would not assert any legal claim against him?

A. That's right." (R.322.)

And he further testified as to the subsequent oral discussion as follows:

"MR. HANSEN: I'm simply asking if there has been anything that's happened since September 3rd upon which Mr. Black feels that he could assert a claim for an additional amount than what is in the letter and except as it applies based upon that statute.

A. Well, I think--

Q. In other words, absent the legislature doing anything, now that you have had a chance because Mr. Hulbert is not in an emotional state to look at it perhaps under less friendship duress, to say that you do have a claim against him?

A. Well, I think that the thing that happened on September 3rd and the days that followed was not really a thing that rose to the level of a new contract, or any contract at all. I advised in my letter Mr. Hulbert of an amount of money that would satisfy me, having in mind all of the problems and travails that he was undergoing at that time. And when he came back after receiving that letter and after writing a little note that he wrote to me and talked to me about this, he was saying, and did say to me, I won't accept that amount of money as being a discharge of the obligation for what you have done for me, and I don't know when or how I will be able to do it, but I'm going to make this right with you, Mr. Black, and I'm going to do what is right, you know. Gerry never called me "Mr. Black", that wasn't the words. And I in turn said, well, whatever you are able to do, or can do, I will be satisfied with. If that's interpreted as a new agreement, the agreement was that he was going to pay me what was reasonable and right regardless of the content of my letter, and I was willing to accept his analysis of what was reasonable and right as a discharge of that obligation. Now, that's the way I looked at that." (R.324-326).

The fact of the matter is that at the time of trial Mr. Hulbert had only paid only \$11,500 plus two small checks

amounting to \$564.99 for court reporters and transcripts, of which sum \$1,500 was paid for representation on tax matters not involved in this action. (R. 153-154, 177-178, emphasis added.))

12. No accounting or itemization of specific services was prepared by the law firm at that time. An itemized record of services was prepared by the law firm in 1977 for use in support of Mr. Hulbert's claim which he thereafter submitted to the Utah State Board of Examiners.

13. Mr. Hulbert intended his obligations to be one for reasonable fees at a then undetermined level, and his counsel intended that the obligation would be contingent upon Hulbert's future ability to pay.

(As pointed out above the only obligation Hulbert incurred was the billing set forth in Exhibit 4-P for \$18,500 and his ability to pay has never reached that level as his total payments on that fee at the time of trial was only \$10,000.)

14. In 1977, the Utah State Legislature adopted Section 63-30a-2, Utah Code Annotated, (1953), which reads as follows:

"If a state grand jury indicts an officer or employee, in connection with or arising out of any act or omission of that officer or employee during the

performance of his duties, within the scope of his employment or under color of his authority, and that indictment is quashed or dismissed or results in a judgment of acquittal, unless the indictment is quashed or dismissed upon application or motion of the prosecuting attorney, that officer or employee shall be entitled to recover from the state reasonable attorney's fees and court costs necessarily incurred in the defense of that indictment."

15. The indictments handed down against Hulbert were connected with the performance of his public duties within the meaning of the statute.

16. The efforts of defense counsel in suppressing illegal or inadmissible evidence were totally responsible for the dismissal of two counts in the indictments (by the prosecution) and the defense of those two counts was such an integral part of the entire defense that they cannot be excluded from this lawsuit.

17. Hulbert incurred attorneys fees and court costs and agreed and promised to pay Rawlings, Roberts and Black for the fair value of their services.

(This finding of fact is contrary to the actual obligation between the parties as represented by Exhibits 4-P and 5-P and no subsequent agreement was ever entered into between the parties as hereinabove set forth.)

18. Mr. Hulbert and his counsel agreed that Hulbert would pay reasonable attorneys fees if and when he obtained the means.

[The evidence does not support any such agreement between the parties, and the foregoing finding is totally refuted by respondent's letter dated September 9, 1977 (Exhibit 1-D) to his attorneys in which he confirmed and stated his prior approval of the agreement to pay \$18,500 for his attorneys' services.]

19. The passage of Section 63-30a-2, Utah Code Annotated, 1953, by the Utah Legislature was, in fact, the occurrence of the condition precedent, or contingency, upon which Hulbert's obligation hinged, and he is now obligated by his own promise to pay a reasonable fee for services rendered, and he has "incurred" such a fee within the meaning of the statute.

(This finding of fact is a conclusion of law by the lower court and the means by which the lower court transferred the factually non-existent ability of Hulbert to pay not only the attorneys' fees he was obligated to pay as evidenced by Exhibits 4-P and 5-P but also such additional fees as he would like to have paid to his life-long friends, the Blacks, onto the shoulders of the beleaguered taxpayers of the State of Utah whose unlimited ability to pay is hereby conveniently substituted for that of the

respondent Hulbert. The pertinent facts are that Hulbert conceived of the idea of a state reimbursement statute, obtained a draft of the bill through the assistance of his attorney Wayne L. Black, secured its sponsorship in the legislature and successfully lobbied it to enactment.

(R. 156-158). As to the latter Mr. Hulbert testified at R. 158:

"Q. And was the bill there ultimately enacted into law?

A. Yes, sir, it was. I must confess that I lobbied many, many days up there with people that I thought I knew, and it was a personal effort that I feel succeeded in getting it passed."

The bill as enacted was made retroactive for two years so as to cover the indictments in Hulbert's own case. See Section 63-30a-2, Utah Code Annotated 1953, as enacted by Chapter 245 of the Laws of Utah 1977.)

20. Hulbert's exposure was great and the State hired well-known and experienced outside counsel to prosecute the charges against him, which they did in an effective and aggressive fashion, and Hulbert was justified in his decision to seek not only "adequate" counsel but the most effective counsel he could.

(This finding of fact as to the effectiveness of the prosecution would clearly be suspect in light of the failure of the prosecution to secure a single conviction out

of twelve felony counts in the several indictments. This is a conclusion of the lower court that is unwarranted under the evidence in the case.)

21. The determination of a reasonable fee must include the many factors ordinarily used by an attorney in setting a fee himself. These include the following: (1) The time spent on the matter; (2) The complexity of the case and difficulty of representation of the client; (3) The skill, competence and experience of counsel; (4) The ability of the client to pay; (5) The personal relationship between client and attorney; (6) The actual outcome of the case in view of the results possible at the outset.

22. Counsel for Mr. Hulbert spent 525 hours on this case and made 65 court appearances. Two trials and two appeals were successfully prosecuted and Hulbert was eventually exonerated on all twelve counts in question herein, each of which involved felony charges and which could have resulted in substantial prison terms.

23. The hourly fees of \$75.00 per hour charged by counsel for Hulbert and the additional fees charged for court appearances, trials and appeals were within the range of reasonable fees for the services rendered, and the total fee, together with costs, claimed here by Hulbert of \$77,275.00 is within the reasonable range.

[In addition to the hourly charges, the total fee

trial from October 14-21, 1975, \$7,500 for a non-jury trial from December 2-5, 1975, and \$200 for court appearances other than trials and appeals (R. 30.) There is no evidence in the record of this case that Mr. Black ever "charged" Hulbert \$75 per hour in addition to the claimed trial fees and court appearance fees for his services. The only fee ever asserted or claimed by the Blacks against Hulbert is the \$18,500 as set forth in Exhibit 4-P. As to whether he ever discussed hourly fees with his counsel, Hulbert testified that he did not and "that was the least of my concerns." (R. 169-170.))

24. Though \$77,275.00 is within the "reasonable" range, some adjustment is appropriate because Hulbert enjoyed a close personal relationship with counsel, and some of the services provided were rendered with no expectation of payment because of that relationship. Further, it is possible that, in the absence of that high degree of personal regard for Hulbert, more of the research and support services might have been provided by law clerks and junior members of the firm, at a lower cost. Finally, Hulbert's ability to pay in this case is limited and dependent upon access to reimbursement by the State. Those additional factors presented by defendant result in a reasonable discount of 20 percent of the attorney's fees to the sum of \$61,820.00, which is also within the "reasonable" range.

(This finding that Hulbert's ability to pay is limited and dependent upon access to reimbursement by the State is a finding of fact.)

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State is clearly supportive of the fact, as before noted, that the legal fees "necessarily incurred" by Hulbert in this case, as measured by the basic ingredient of his ability to pay and not the ability of the State of Utah to pay such fees, is established by the fee set by his attorneys in Exhibit 4-P and Hulbert's incomplete payment thereof.)

25. Hulbert necessarily incurred costs of court in the amount of \$564.99 in the defense of the Grand Jury Indictments.

26. The intent of the legislature as determined by the recording of legislative debate at the time of the passage of Section 63-20a-2, Utah Code Annotated, 1953, was that such "reasonable attorney's fees . . . necessarily incurred" are to be paid by the State of Utah out of the General Fund after such amount is determined by a Court of competent jurisdiction.

In addition to the foregoing facts as found by the lower court and to which appellant has noted its exceptions from the record in this case, it should be pointed out that Mr. Hulbert himself testified that he may have stated to members of the legislative analyst's office who were trying to determine the financial impact of Hulbert's legislation in the 1977 Legislature that he was obligated to pay \$32,000 to his attorneys for legal services reimbursable thereunder. (R. 346-348.) This was substantiated by Douglas A. McDonald,

a fiscal economist with the legislative fiscal analyst, who testified that he met with Mr. Hulbert during the 1977 legislative session at the State Capitol to determine the fiscal impact of Mr. Hulbert's bill-- Senate Bill No. 247--and Mr. Hulbert estimated his attorneys' fees thereunder to be "around \$30,000" and that legal fees under the bill could run from \$10,000 to \$40,000 per indictment. (R. 348-352).

ARGUMENT

POINT I

THE LOWER COURT WAS WITHOUT JURISDICTION TO HEAR THIS MATTER WHICH JURISDICTION WAS VESTED EXCLUSIVELY IN THE BOARD OF EXAMINERS OF THE STATE OF UTAH.

The respondent sought recovery of \$77,815.65 for attorneys fees and costs allegedly incurred in the defense of nine grand jury indictments issued in 1975 in connection with the performance of his duties as chairman and director of the Utah State Liquor Control Commission. The sole basis for the complaint was the enactment of Senate Bill No. 247 contained in Chapter 245 of the Laws of Utah 1977, now included in Sections 63-30a-1, 2 and 3, Utah Code Annotated 1953, as amended. Section 63-30a-2 thereof provides as follows:

"If a state grand jury indicts an officer or employee, in connection with or arising out of any act of omission of that officer or employee during the performance of his duties, within the scope of his employment or under color of his authority, and that indictment is quashed or dismissed or results in a judgment of acquittal, unless the indictment is quashed or dismissed upon application or motion of the prosecuting attorney, that officer or employee shall be entitled to recover from the state the reasonable attorneys' fees and court costs necessarily incurred in the defense of that indictment."

The foregoing enactment by the 1977 Utah Legislature did not provide funding for the payment of claims thereunder and the Legislature has made no appropriations for that purpose. The respondent's complaint does not allege that any such appropriation was ever made by the legislature. Under these circumstances the respondent's claim is controlled by Article VII, Section 13, and Article V, Section 1, of the Utah Constitution, and Sections 63-6-1 and 63-6-10, Utah Code Annotated 1953, as amended, pertaining to the powers of the Board of Examiners of the State of Utah and the separation of powers between the legislative, executive and judicial branches of state government. Article VII, Section 13 of the Utah Constitution provides as follows:

***They [the Governor, Secretary of State and Attorney General] shall, also, constitute a Board of Examiners, with power to examine all claims against the state except salaries or compensation of officers fixed by law, and perform

such other duties or may be prescribed by law; and no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners." (Emphasis added.)

It is well established that the foregoing constitutional provision grants broad powers to the Board of Examiners in examining into and determining the merits of claims asserted against the state. The Supreme Court of the State of Utah so held in Wood v. Budge, 13 U.2d 359, 374 P.2d 516 (1962) and explained the purpose therefor as follows, at page 519 of Pacific Reporter:

"Although the privilege is not ours to pass upon the wisdom of legislative action, we think it is not amiss to point out that due to the extent of its powers as to such claims, the Legislature should regard its responsibility as correspondingly grave; and should bear in mind these facts: That the duty of examining into claims against the State was undoubtedly given to the Board of Examiners because the officers comprising it can be assured to be acquainted with the fiscal affairs of the State and to have a high sense of responsibility therefor; that the Board has better facilities at its command for investigation and inquiry into such matters than has the Legislature, including the fact that the Attorney General as the States' legal advisor was made a member of the Board purposely so that he and his staff could be of help in determining whether an asserted 'claim' against the State has any valid foundation, or whether it is simply a request for a gift or some other meritless attempt to obtain public funds, masquerading under the guise of such a 'claim'.

"For these reasons it is unquestionable that this function of the Board of Examiners was intended to be regarded as an important one; and that it is the legislative duty to give serious consideration to its recommendations to the end that such claims be acted upon with prudence and wisdom to best serve the interests of the whole State and avoid making grants in cases where the State should assume no responsibility."

In the case of unliquidated claims, as is involved in the case at bar, the Supreme Court of Utah has emphatically stated that the constitutional powers of the Board of Examiners include the right to investigate and act as a fact finder and advisor to the legislature, and that even as to liquidated claims its powers extend beyond mere auditing. See Bateman v. Board of Examiners, 7 U.2d 221, 322 P.2d 381, 382, (1953), and prior cases therein quoted with approval. In that case the court, with direct reference to the constitutional provision hereinabove set forth, stated as follows at Page 384 of the Pacific Reporter:

"The question of importance is the extent of the authority conferred by the language, '***with power to examine all claims against the state.' This phraseology has given rise to much concern over the reciprocal powers and interrelationships of the departments of our state government. In the first place we think that the word 'claim' was used in its broadest connotation and we recognize that it is susceptible of a variety of meanings: ranging from a normal claim; or the seeking of legislative largesse; or asserting a privilege; to asserting rights to compensation for property or materials furnished, or salary for services rendered, to the state."

With respect to the power of the Board of Examiners to examine and approve claims for which the legislature had already provided recourse the court in the Bateman case cited and quoted with approval from the case of State ex rel. Davis v. Edwards, 33 U. 243, 93 P. 720 (1908) as follows at Page 386 of 322 P.2d Reporter:

"This case (referring to Marioneaux v. Cutler, 32 U. 475, 91 P. 355) was followed by State ex rel. Davis v. Edwards wherein a court reporter sought to compel the State Auditor to allow his claim for mileage which the District Judge had certified as correct. The statute stated that upon such certification by the judge and presentation of the certificate to the Auditor a warrant should be drawn for payment. In spite of this statute the Auditor refused, relying on Sec. 18, Ch. 35, L. 1896 which required approval of Examiners before he could draw the warrant. The court held that the claim must be presented to Examiners for approval as required by statute and used some very pointed language pertinent to the instant problem:

'The powers conferred upon the Board of Examiners, with regard to claims against the state, by the constitutional provision quoted above, are general and sweeping. The power would include all claims against the state, were it not for the exception which excludes salaries or compensation of officers fixed by law. An exception of this character may not be enlarged nor extended by implication. An exception which specifies the things that are excepted from a general provision strengthens the force of the general provisions of the law.' (Emphasis added.)"

The court in the Bateman case cited another case apropos to the powers of the Board of Examiners with respect to claims for liquidated claims in which the legislature had authorized the bounty to be paid for killing coyotes, as follows, at Pages 386-387 of 322 P.2d Reporter:

"The landmark case on this subject is that of Uintah State Bank v. Ajax. (77 U. 455, 297 P. 434). Action was brought to compel the State auditor to issue warrants to pay bounty certificates for killing predatory animals (coyotes). The plaintiff contended that inasmuch as the statute fixed the amount to be paid for each animal killed and directed the Auditor to issue the warrant upon the certificate of the County Clerk, and further that nothing in the act required submission of the claims to Examiners, the Auditor must issue the warrant upon presentation of the certificate. The bank argued that the amount having been thus 'fixed by law,' there was nothing but the ministerial duty of paying the claim and hence it was unnecessary to present it to Examiners. The contention was rejected by the court, saying:

'The claims here are not fixed by law in the sense that the legislature has made an appropriation of an amount certain to a definite named person.'

and further,

'all claims are subject to action by the Board of Examiners except only claims for "salaries and compensation of officers fixed by law."'

"It refused to agree that Examiners should examine only 'unliquidated' claims against the state, using the following language:

'If we should adopt petitioner's view, it would follow that the legislature might designate any officer other than the Board of Examiners as authorized in behalf of the state to settle, fix, or liquidate claims and agree upon the amount to be paid thereon, and thereby exclude the Board of Examiners from its duty ***. We cannot agree to any such construction of the constitutional language, nor may we by construction interpolate the word "unliquidated" into the Constitution [which] *** has vested in the Board of Examiners the power to examine and pass on all claims except those exempted, and the Legislature is without authority to delegate such power to any other board of officer.'

The court went on to state:

'If the view is taken that the Legislature intended to make this claim payable by the Auditor without presentation to the Board of Examiners, then the Legislature attempted to do that which it had no authority to effectuate, and in this question the language in the case of State ex rel. Davis v. Edwards is not only appropriate but decisive.'

The court then concluded in Bateman that, in the absence of any capricious or arbitrary actions, the Board of Examiners and its administrative arm, the Commission of Finance, have authority to examine and approve or disapprove of proposed expenditures, to adopt regulations pertaining generally to salary schedules and personnel in accordance with the statutes conferring such power upon them, and that the Superintendent of Public Instruction and the Board of Education are subject thereto in a similar manner to other

It has long been the established law in this state that Article VII, Section 13, of the Utah Constitution is an inhibition upon the maintenance of an action directly against the state. Thus in holding that the district court did not have jurisdiction to entertain an action for alleged damages to land and crops resulting from the breaking of an irrigation canal, the court in Wilkinson v. State, 42 U. 483, 134 P. 626, reasoned as follows as to the organic power of the Board of Examiners:

****In a very recent case the Supreme Court of Idaho has again considered the question and in our judgment has settled it under a constitutional provision like ours. The court there holds that although expressly authorized to entertain actions against the state, yet the court cannot do so until the claim has been submitted to and passed upon by the Board of Examiners. Thomas et al. v. State, 16 Idaho 81, 100 Pac. 761. The reasoning of both the Nevada and Idaho Supreme Courts seems reasonable and logical. It is pointed out by those courts that the Board of Examiners is a creature of the Constitution, and that the courts are no more than that. It is also suggested that neither can exercise powers that are withheld by the instrument. The people of this state, who are responsible for the Constitution and its terms, had the right to confer or withhold power as to them seemed proper. If, therefore, they erected a tribunal and conferred powers upon it to hear and determine the justness of all claims not specifically otherwise provided for, the will of the people must be obeyed by the courts as well as by all others. As we have seen, even the Legislature is prevented from passing upon any claim until the same has been passed on by the State Board of Examiners. The conditions

upon which a claimant may have his claim considered and passed on by the Legislature of this state are provided for in Comp. Laws 1907, § 945. In the same compilation, Sections 929 to 949 x 1, inclusive, the duties of the Board of Examiners and the procedure to be followed in presenting and disposing of claims are fully set forth. A constitutional tribunal is therefore provided for in this state in which any claimant may be heard and from whose decision he may appeal to the only power which can provide funds for the payment of his claim if found just and if it be allowed. This is all any claimant can reasonably ask."

In addition to the Constitution and cases above cited, the legislature has clearly recognized the power of the Board of Examiners to examine and act upon all claims against the state for which funds have not been provided for payment. Thus Section 63-6-1, Utah Code Annotated 1953, as amended, provides as follows:

"The governor, the secretary of state and the attorney general shall constitute a Board of Examiners, with power to examine all claims against the state for which funds have not been provided for the payment thereof, except salaries or compensation of officers fixed by law. No claim against the state for which funds have not been provided, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without having been considered and acted upon by the Board of Examiners.***." (Underlined portions added by amendment in 1963.)

And in cases such as the one here involved, Section 63-6-10, Utah Code Annotated 1953, provides:

"If no appropriation has been made for the payment of any claim presented to the board, the settlement of which is provided for by law, or if an appropriation made has been exhausted, the board must audit the claim, and, if it is approved, must transmit it to the legislature with a statement of the reasons for the approval."

The following Section 63-6-11 mandates the filing of such claims with the Board of Examiners:

"Any person having a claim against the state for which funds have not been provided for the payment thereof, or the settlement of which is not otherwise provided for by law, must present the same to the board of examiners, accompanied by a statement showing the facts constituting the claim."

The broad power and discretion of the Board of Examiners in dealing with claims against the state is found in Section 63-6-13, Utah Code Annotated 1953, as amended:

"The board must at the time designated proceed to examine and adjust all such claims referred to in section [63-6-11] of this act, and may hear evidence in support of or against them, and shall report to the legislature such facts and recommendations concerning them as it may think proper. In making its recommendations the board may state and use any official or personal knowledge which any member of the board may have touching such claims. The board shall not pass upon or send to the legislature any claim for which the state would not otherwise be liable were it not for its sovereign immunity. But all claims wherein the state would be liable, were it not for its sovereign immunity, whether recommended by the board for approval or disapproval, shall be reported by the board to the legislature with appropriate findings and recommendations as above provided."

Thus, the Board of Examiners is directed not to transmit claims

to the legislature where no liability exists on the part of the

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state disregarding sovereign immunity but it must report all other claims to the legislature with its findings and recommendation as to approval or disapproval.

The respondent in this case has circumvented both the organic law and legislature pronouncements by the submission of his claim for attorneys' fees to the district court rather than the Board of Examiners of the State of Utah. Such claim is an unliquidated claim for which there has been no legislative appropriation for payment. In such cases the law of the State of Utah as determined by its Constitution, its legislature and its highest court has clearly established that the district court is without jurisdiction to hear the matter and the Board of Examiners of the State of Utah has the exclusive right to examine and determine the validity of such claim and, if appropriate, to report its findings and recommendations thereon to the state legislature for final resolution of the matter.

The respondent will undoubtedly assert, as he did in the court below, that the Supreme Court of Utah, in the case of Campbell Bldg. Co. v. State Road Commission, 95 U. 242, 70 P.2d 857 (1937), has determined that claimants with unliquidated claims against the State of Utah may proceed to have those claims liquidated in court notwithstanding the constitutional powers of the Board of Examiners and the Legislature to examine such claims and appropriate money to satisfy the same.

The plaintiff acknowledges that any judgment so obtained in this court would necessarily have to be submitted to the Board of Examiners and thence to the Legislature which would grant or deny the same. Under that reasoning the plaintiff is asking the court system to engage in a time-consuming and useless effort. The judiciary should not be imposed upon to perform an idle function any more than individuals should not be required to perform useless acts. See Leger Construction, Inc. v. Roberts, Inc., 550 P.2d 212 (Utah, 1976) and Ericksen v. Poulsen, 15 U.2d 190, 389 P.2d 739. Thus courts will ordinarily decline to decide purely abstract questions or issues. 20 Am.Jur.2d, Courts, § 81. It has also been held that a court may not exercise jurisdiction if it is without power to enforce its adjudication. In Bankers Trust Co. v. Greims, 110 Conn. 36, 147 A. 290, 66 A.L.R. 726, an action in which a Connecticut statute providing that a surviving spouse be entitled to the use for life of one-third in value of all the property owned by decedent was sought to be made applicable to real property in other states, the court held as follows at pp. 730-731 of the A.L.R. Reporter:

"The answer to this situation, counsel urge, is that the fact that the court could not enforce its decree would constitute no adequate reason for not carrying out the mandate of the statute, and enforcing it as far as it was able to.

Such a decree would be a mere gesture of power. We ought not to conclude that the legislature intended so futile a result unless the compulsion of that construction is inescapable. It is a fundamental principle that courts will not adjudicate when they cannot enforce."
(Emphasis added.)

Also holding that a court will not adjudicate where it cannot enforce the adjudication are In re De Ford, 226 N.C. 189, 37 S.E.2d 516, and State v. Hyde, 88 Ore. 1, 169 P. 757.

In view of the foregoing and the extensive consideration given by our Supreme Court to the powers of the Board of Examiners and the Legislature to examine and consider unliquidated claims against the State of Utah, as hereinabove pointed out, it is clear that the decision of our Supreme Court in the Campbell case has not become settled law which, in effect, permits a sterile court proceeding as a prelude to the exercise of constitutional and statutory powers by the Board of Examiners and the State Legislature. The Supreme Court of Utah in Bateman v. Board of Examiners, 7 U. 2d 221, 322 P.2d 381, long after the Campbell case, recognized the broad power of the Board of Examiners to investigate claims and act as a fact finder and advisor to the legislature with respect to unliquidated claims. It also recognized that the function of the Board of Examiners was not merely to audit, even in the case of liquidated claims. Thus, this court has most recently reaffirmed the constitutional

status of the Board of Examiners in much the same manner as did the court in Wilkinson v. State, 42 U. 483, 143 P. 626, which the plaintiff asserts has been replaced as controlling law by the Campbell decision. It is clear that the plaintiff has not carefully analyzed the holding in the Bateman case nor the prior cases cited therein that the legislature has no power to circumvent the right of the Board of Examiners to exercise its constitutional power to act upon all claims (in the broadest sense) by permitting others to settle, fix or liquidate such claims. Such holding would have equal application to the district courts and reaffirms the principal established in the Wilkinson decision that avoids the futility of time-consuming and meaningless litigation with respect to such claims.

The decision in Bateman was again reaffirmed in the case of Toronto v. Clyde, 15 U.2d 403, 393 P.2d 795 (1964), in which the court declared invalid legislation permitting the department of finance to "examine and pass upon all proposed expenditures" of state agencies and precluding meaningful fiscal control by the Board of Examiners. In that case the court stated as follows at page 796 and 798 of the P.2d Reporter:

"The extent of the power conferred upon Examiners by the language, '*** with power to examine all claims against the state***,' has been before this court on a number of occasions since statehood.

In the case of Bateman v. Board of Examiners, we gave extensive consideration of this problem and reviewed the Utah decisions dealing with it. Upon the basis of the constitutional language, its background and history, including the decisional law of the state, we concluded that the framers intended to vest in the constitutional officers--the governor, the secretary of state and the attorney general, who are elected by and are thus directly responsible to the people--more than a mere auditing function, that is, power to examine into the advisability and necessity of any disbursement or proposed obligation of the state;***"

" * * *

"As we have heretofore stated, from the endowment of Examiners with the 'power to examine all claims' it is only reasonable to assume that it was intended that they should perform that duty. However, as aptly observed by Judge Ellett, who tried the case below, 'This does not preclude Examiners from establishing reasonable rules and procedures concerning its method of examining claims.' This could include the Department of Finance or other agencies to determine facts and certify claims so long as under the procedure adopted the ultimate authority and the duty of passing upon claims remains with the Board of Examiners."
(Emphasis added.)

It is abundantly clear from the foregoing that the Board of Examiners, not the courts, has the right to determine the methods and procedures by which it exercises its constitutional powers and that it has the ultimate authority and duty to pass upon all claims such as the one here presented to the Third District Court. Any court proceeding to ascertain facts and conclusions of law with respect to such claims would be outside the scope of legislative authorization as well as

being superfluous, meaningless and incapable of enforcement. Such an unconstitutional act of futility on the part of the lower court should have been wisely and judiciously avoided by dismissing the complaint as prayed for by the appellant, and the lower court clearly erred in failing to do so.

The respondent and lower court apparently rely upon the Governmental Immunity Act (Chapter 30 of Title 63, Utah Code Annotated 1953, as amended) as the basis for seeking recovery in the courts rather than pursuing the route prescribed by the Utah Constitution and statutes as above set forth. The only basis for such contention is Section 63-30a-3, Utah Code Annotated 1953, as enacted by Chapter 245 of the Laws of Utah, 1977, which provides as follows:

"This act shall apply to claims arising prior to the effective date of this act so long as those claims are filed in the manner provided in the Utah Governmental Immunity Act and within two years after the cause of action arises."

The purpose of the foregoing portion of the statute, as part of the act permitting recovery of attorneys' fees for dismissal or acquittal of grand jury indictments against public officers or employees, was solely to grant retroactive effect to the legislation so as to have application to the respondent's claim which arose in 1975. In so doing the legislature merely provided the manner by which such prior claims were to be filed. It did not extend application of the Governmental

Immunity Act in any manner whatsoever to claims arising subsequent to the effective date of the Act and only provided that the manner of filing claims arising within the two years preceding such effective date should be as prescribed in the Governmental Immunity Act. The legislature did not extend the applicability of the Governmental Immunity Act to such claims other than in the very narrow area above noted and to imply that an action could be commenced thereunder against the State of Utah would be contrary to the constitutional and decisional law as hereinabove discussed and the express provision of Section 63-6-12, Utah Code Annotated 1953, as amended, which provides the time within which the Board of Examiners must act upon claims presented to it. That section provides as follows:

"At least sixty days preceding the meeting of each legislature the board must hold a session for the purpose of examining the claims referred to in the last preceding section, and may adjourn from time to time until the work is completed. The board must cause notice of such meeting or meetings to be published in some newspaper at the seat of government and such other newspaper as may be determined by the board for such time as the board may prescribe."

The manner of filing claims against the State of Utah under the Governmental Immunity Act is set forth under Section 63-30-12 thereof which provides:

"A claim against the state or any agency thereof as defined herein shall be forever barred unless notice thereof is filed with the attorney general of the state of Utah and the agency concerned within one year after the cause of action arises."

In view of the constitutional powers of the Board of Examiners as hereinabove set forth it follows that compliance with the foregoing statute would not preclude the Board of Examiners from the exercise of its powers, and any additional application of the Governmental Immunity Act contrary to the exercise of that power must fail. Thus in construing the applicability of Section 63-30a-3 to the facts of the present case, it is clear that the legislature intended its application to be in harmony with constitutional requirements. Thus the filing requirement of Section 63-30a-3 merely requires that a notice of retroactive claims thereunder be given by filing the same with the Attorney General and the state agency concerned. It does not purport to supplant the constitutional jurisdiction of the Board of Examiners by an action to be commenced in district court and, indeed, any such construction would itself be unconstitutional. It is well established law in this jurisdiction that where there are two alternatives as to the interpretation of a statute, one of which would make it constitutionally

the latter will prevail. See Wagner v. Salt Lake City Corp., 29 U.2d 42, 504 P.2d 1007 (1972) and State Water Pollution Control Board v. Salt Lake City Corp., 6 U.2d 247, 311 P.2d 370. It therefore follows that the filing and notice requirements of the foregoing statutes must be construed in harmony with the jurisdictional power of the Baord of Examiners in this case which would preclude the district court from exercising jurisdiction other than to dismiss the complaint herein.

The respondent will undoubtedly argue that the provision of Section 63-30-23 of the Governmental Immunity Act contemplates court actions directly against the State of Utah after which the judgment therein obtained may be presented to the Board of Examiners and the legislature pursuant to statutory and constitutional provisions. It provides as follows:

"Any claim approved by the state as defined herein or any final judgment obtained against the state shall be presented to the office, agency, institution or other instrumentality involved for payment if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law then said judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in section 63-6-10, Utah Code Annotated, 1953."

Any such construction of the foregoing statute or the entire Governmental Immunity Act as granting to the district courts

the power to reduce unliquidated claims against the state to liquidated judgments for satisfaction by the Board of Examiners and the legislature must fail for several reasons:

1. The constitutional and statutory powers of the Board of Examiners would thereby be reduced to a mere auditing function which the legislature and the Supreme Court have soundly denounced.

2. The constitutional power of the legislature to make appropriations of public funds would be usurped by the courts.

3. This action for recovery of attorneys' fees pursuant to Section 63-30a-2, Utah Code Annotated 1953, as enacted in 1977, is not included within the classes of actions to which the Governmental Immunity Act has application.

4. The only application that the Governmental Immunity Act has to the plaintiff's claim is the notice requirement thereof as adopted by Section 63-30a-3, Utah Code Annotated 1953, enacted in 1977.

POINT II

THE EVIDENCE IN THIS CASE FAILS TO SUPPORT THE DECREE AND JUDGMENT OF THE LOWER COURT AND THE SUBSEQUENT "AGREEMENT" BETWEEN RESPONDENT AND HIS ATTORNEYS, IF ANY, AS FOUND BY THE LOWER COURT, WOULD BE INVALID.

The evidence in this case admits of only one conclusion with respect to the legal fees "necessarily incurred" by the respondent as required under Section 63-30a-2, Utah Code Annotated 1953, enacted in 1977: that the only enforceable claim that respondent's attorneys could ever assert for legal fees arising from the defense of the grand jury indictments issued against him in 1975 is that set forth in the letter dated September 3, 1976, from Wayne L. Black, on behalf of himself, his brother John and his law firm, to the respondent at his request, in which the total fee for all such services is set at \$18,500 as follows in Exhibit 4-P:

Mr. Gerald E. Hulbert
4964 Waimea Way
Salt Lake City, Utah 84117

Dear Jerry:

In a way I hate to write this letter because it is always unpleasant to bill a client who is a close friend and I had frankly decided that I would not bill you until the final case was disposed of, and, hopefully, disposed of in a favorable way. However, it does appear that there is a likelihood of considerable delay in the disposition of the final case, and, consequently, I thought I would write you a letter analyzing the fee situation.

You will recall that on May 22, 1975, I wrote you a letter outlining the fee situation. At that time only the one indictment had been presented and none of us had any way of knowing that the other indictments would be forthcoming. On the basis of the first indictment the agreement

was that you would pay a \$5,000 retainer, that if the case was tried one or more times an additional \$5,000 fee would be charged, and that in the event the case was appealed an additional \$2,000 fee would be charged.

Of course, the case was tried and in addition we have had two appeals to the Supreme Court with one involving the first indictment and one involving the later indictments. In addition, as you know, we have had another trial and arguments on innumerable motions. The possibility still exists of the necessity of trying the last remaining case.

John and I have given this matter very considerable thought. You have paid up to date \$8,500. Under the existing contract, on the first case, the remainder of the fee for said case, which is owing, is \$3,500. We will consider the entire fee, including whatever procedures, whether it be a trial or something less than a trial, and also including a possible appeal, if you paid an additional \$10,000, to constitute the total fee. This \$10,000 would, of course, include the \$3,500 owed on the first case. (Emphasis added.)

We will keep you advised of further developments in the remaining case.

With warmest personal regards, I am.

Yours sincerely,

RAWLINGS, ROBERTS & BLACK

WAYNE L. BLACK

With respect to the foregoing letter, Wayne L. Black testified that, in writing the foregoing letter, it was his intent to set an amount for legal services beyond which he would not assert any legal claim against Mr.

Hulbert. That testimony was as follows:

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Q. And wasn't it your intent in writing the letter that is an exhibit here, that I think is dated September the 3rd, that you were going to satisfy him by setting an amount beyond which you would not assert any legal claim against him?

A. That's right. (R. 322.)

In response to said letter, the respondent left a note at his attorney's offices dated September 10, 1976, (Exhibit 5-P) indicating his concern as to making a prompt payment of the bill and expressing his gratefulness for all they had done for a very minimal charge, and by subsequent letter dated September 9, 1977, (Exhibit 1-D) confirmed the foregoing fee agreement and his prior approval thereof.

Would this court, or any court for that matter, given the foregoing undisputed facts, ever lend its office to the recovery of a fee of \$61,820 in an action by Mr. Black against Mr. Hulbert personally? The answer is so patently obvious as to defy reason otherwise. Yet by the legerdemain of an underlying desire of the respondent to pay his attorneys more than he had the ability to do personally with a legislative program conceived and brought to fruition by the respondent the lower court has imposed a burden upon the citizens of this state which it never would have imposed upon the respondent himself. In doing so, the court has clearly evidenced its disdain for the protection of the public purse and indicated the ease with which public servants may spend the hard-earned taxes of the body politic. Furthermore, it is permitted to stand, such a

raid on the state treasury would induce every person charged under grand jury indictments hereafter to arrange a dual-fee arrangement with his attorney--one fee based upon his own ability to pay in the event he is convicted and another sky-is-the-limit fee in the event he is exonerated. The legislature never intended Section 63-30a-2 to be a lawyer's sweepstakes enrichment act. That section requires absolutely that the legal fees recoverable from the State thereunder must have been "necessarily incurred" in the successful defense of grand jury indictments. The legal fees necessarily incurred in such cases should not vary by hundreds of percent depending upon guilt or innocence.

Let us assume, for the sake of argument, that Mr. Hulbert had been found guilty of the charges against him. Is there any conceivable basis upon which it could then be asserted that he "necessarily incurred" a fee greater than the \$18,500 evidenced by Exhibit 4-P? Surely, the legislature did not intend such term to have a different meaning when applied to the State's obligation under the statute than it has when applied to the individual's own circumstances. The statute, in effect, renders the obligation of the individual to be that of the State--no more, no less. In this sense the transfer or substitution of liability should be similar to that of a principal for the acts of his agent, in which it is well established that the principal is only liable to the extent that the agent is liable.

Under such circumstances, the legal fees "necessarily incurred" by the respondent are fixed by the billing contained in Exhibit 4-P and the liability of the State of Utah should be limited to that amount.

The error of the lower court is evident in its own findings of fact. It necessarily had to find as a matter of fact that an important factor in determining a reasonable attorney's fee is the client's ability to pay. (Finding of Fact No. 21, R. 112.) The evidence in the case is undisputed that the respondent's ability to pay has been limited to an amount less than his attorneys billed him in Exhibit 4-P. Thus, at the time of trial in this case in October, 1978, he had paid his attorneys the total sum of \$10,000 for legal fees incurred in the subject grand jury indictments (R. 178) notwithstanding his assurance on September 10, 1976, (Exhibit 5-P) that he would be as prompt in the payment of what he considered to be a very minimal bill as he could be. And certainly his most qualified trial counsel must have taken that factor into consideration in rendering his bill for legal services set forth in Exhibit 4-P, albeit it is seemingly high in light of the actual circumstances of the respondent. Mr. Hulbert also testified that he told Mr. Black, after receiving the \$18,500 bill, that "I would make it right with him if I could find it in my means at any time." (R. 153.) Apparently,

exceeded his ability to do so as his total payment of \$10,000 thereon clearly indicates.

In overcoming this seemingly insurmountable obstacle, the lower court had to admit that the "plaintiff's ability to pay in this case is limited and dependant upon access to reimbursement by the State." (Finding of Fact No. 24, R.113.) In light of this and other factors, the total claim of the plaintiff below was reduced by 20% to \$61,820. In doing so, the court clearly did not go far enough and substituted the State's ability to pay for that of the respondent Hulbert. There simply is no evidence in the record to sustain the ability of the respondent to pay \$60 per hour (\$75 less 20%) for 621 hours plus \$8,000 (\$10,000 less 20%) for one jury trial, \$6,000 (\$7,500 less 20%) for one non-jury trial, and \$170 (\$200 less 20%) for each of 66 court appearances other than trial and appeals. And it is submitted that such fees would fall within the capability of extremely few individuals, regardless of the "reasonableness" thereof as determined by the court, based on the expert testimony of attorney witnesses in the case. The crucial element of ability to pay together with the other elements considered in determining a reasonable attorney's fee in this specific case were merged in the letter from Wayne L. Black to his client on September 3, 1976, and no amount of verbal gymnastics or rhetoric in the record can make valid the lower court's conjured contract thereafter on the basis of Finding of Fact No. 113 (R. 111) which reads:

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13. The plaintiff intended his obligation to be one for reasonable fees at a then under-terminated level, and his counsel intended that the obligation would be contingent upon plaintiff's future ability to pay. (Emphasis added.)

The uncertainty and "iffiness" of any contract founded on such a factual basis is so apparent as to require no further elucidation. Add to this the further contingency of the passage of subsequent legislation and we have the ultimate in contractual uncertainty. Thus Findings of Fact Nos. 18 and 19 (R. 112) provide:

18. The plaintiff and his counsel agreed that plaintiff would pay reasonable attorneys fees if an when plaintiff obtained the means.

19. The passage of Section 60-30a-2, Utah Code Annotated, 1953, by the Legislature was, in fact, the occurrence of the condition precedent, or contingency, upon which plaintiff's obligation hinged. Plaintiff is now obligated by his own promise to pay a reasonable fee for services rendered, and he has "incurred" such a fee within the meaning of the statute. (Emphasis added.)

The statute here involved permits recovery by the respondent for attorney's fees "necessarily incurred" by him in the defense of the grand jury indictments here involved. The evidence is undisputed that he had "incurred" attorney's fees of \$18,500 and anything received by him in addition thereto would constitute an unjust enrichment. If such recovery was intended for the benefit of the attorneys then the real party in interest is not before the court, as was pointed out to the lower court at R. 164-168. But the proceedings before the Utah House of Representatives upon

clearly indicates that the lawmakers only intended "reimbursement" to the aggrieved public officer or employee--not a windfall to his attorneys.

With respect to the "contract" envisioned by the lower court as superseding the only enforceable agreement between the respondent and his attorneys, this court has spoken in rather clear terms. Thus in Skeen v. Peterson, 113 U. 483, 196 P.2d 708, 712, the court held as follows:

* * * After the attorney-client relationship has been entered into, the parties thereto may change the terms of their agreement or enter into an entirely new agreement, and if the substituted agreement was entered into after full and fair disclosure by the attorney, such an agreement will be upheld. However, such contracts are looked upon with great-suspicion by the courts, and there is a presumption that such agreements are invalid, especially where the result thereof is to increase the compensation to be received by the attorney, or is otherwise of greater advantage to him. (Emphasis added.)

The court then concluded that money paid by the plaintiff-attorney to outside counsel could not be recovered by the plaintiff as part of his compensation. Under the facts of the case at bar, it would appear unquestionable that any attempt by the respondent's attorneys to recover fees against him in addition to the \$18,500 amount as set forth in Exhibit 4-P would be doomed to failure under the holding of the Skeen case. And the public should be no less protected than the attorney's client by alleged "agreements" entered into subsequent to the creation of an

the attorney is increased 3 1/2 times at the understood expense of the public rather than the client. The rationale underlying the decision in the foregoing Skeen case was more fully explained in Ashton v. Skeen, 85 U. 489, 39 P.2d 1073:

Notwithstanding the rule that contracts between attorney and client are held to be valid, if entirely fair and equitable, while the client forms an entirely free and unfettered judgment, and within any sort of control, yet an agreement between attorney and client, varying the terms of the original contract or employment by allowing the attorney greater compensation than therein provided, is sometimes held invalid, regardless of whether it is fair or otherwise. One of the earliest cases in the United States is Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am.Dec. 249. In the syllabus, which accurately reflects the opinion, it is said that: "An agreement made by a client, with his counsel, after the latter has been employed in a particular business, by which the original contract is varied, and greater compensation is secured to the counsel, than may have been agreed upon, when first retained; is invalid, and cannot be enforced."

And the court gives the following reasons for the rule:

"The firmest ground for the support of the principle to which the complainant has resorted, for relief, consists of the confidence reposed by a client, in his attorney, and the influence which an attorney has, over his client. * * * Integrity of character and purity of motive, have never enabled such contracts to stand in full force, against the principle of equity, which commonly excludes all inquiry into the fairness of the transactions, and sets them aside as violations of the policy of justice. * * *

"The principle will best preserve the high reputation of the profession, by elevating its members above the temptation to exercise their influence, to obtain advantageous bargains of their clients; and consequently, above the suspicion of having done so."

There are many cases which do not go as far as this case, and the views thereon are well expressed by the Supreme Court of Nevada in Moore v. Rochester Weaver Mining Co., 42 Nev. 164, 174 P. 1017, 1020, 19 A.L.R. 830, where it is said: "No principle has been so rigidly adhered to by the courts of this country and England than that where an attorney deals with his client for the former's benefit, the transaction is not only regarded with suspicion and closely scrutinized, but it is presumptively invalid on the ground of constructive fraud, and that this presumption can be overcome only by the clearest and most satisfactory evidence. The rule is founded in public policy, and operates independently of any ingredient of actual fraud, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise."

In this case, the lower court specifically found that the basis of the subsequent "agreement" between the respondent and his attorneys was contingent upon transferring the obligation for increased attorneys' fees from the client to the taxpaying public. (Findings of Fact 13, 18 and 19, R. 111-112.) Such an "agreement" is invalid under the foregoing authorities and contrary to public policy, even if such an "agreement" can be tortured from the evidence. See also Centurian Corporation v. Ryberg, McCoy & Halgren, 588 P. 2d 716 (Utah, 1978).

It is, therefore, the position of the appellant that the evidence in this case does not sustain an enforceable contract between the respondent and his attorneys other than that set forth in Exhibit 4-P, and even if it does, such subsequent "agreement" is presumptively invalid under

the foregoing Utah cases and should be declared contrary to public policy. The reputation of attorneys is subject to enough present criticism without granting to them a special sweepstakes privilege at public expense.

POINT III

SECTION 63-30a-3, UTAH CODE ANNOTATED 1953, AS ENACTED IN 1977, CONSTITUTES RETROACTIVE LEGISLATION WHICH EXTINGUISHES VESTED RIGHTS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7, OF THE UTAH CONSTITUTION AND IT ALSO RENDERS THE ENTIRE STATUTE PRIVATE OR SPECIAL LEGISLATION IN VIOLATION OF ARTICLE VI, SECTION 26 OF THE UTAH CONSTITUTION.

Section 63-30a-3, Utah Code Annotated 1953, as enacted by Chapter 245 of the Laws of Utah, 1977, provides as follows with respect to the right of the respondent to recover against the State of Utah as provided in the preceding section:

This act shall apply to claims arising prior to the effective date of this act so long as those claims are filed in the manner provided in the Utah Governmental Immunity Act and within two years after the cause of action arises.

It is only by virtue of the foregoing provision of the statute that the respondent had any standing at all to bring the present action inasmuch as every claim for attorneys fees asserted by him arose prior to the enactment of the statute which was tailored to cover such claims. Although Utah has no specific constitutional prohibition

has evolved that such legislation is prohibited by the Fourteenth Amendment when it divests any vested interest. See 16 Am.Jur.2d, Constitutional Law, §416. The Supreme Court of Utah has recognized such restraint. Thus in State ex rel Stain v. Christensen, 84 U. 185, 35 P.2d 775, the court was confronted by a statute requiring the State Treasurer to give a bond but did not provide the time in which to do so. After his election and commencement of the term to which he was elected, the legislature passed laws requiring the Treasurer to give bond within sixty days after his term commenced. The court held as follows as page 787 of the P.2d Reporter as to the retroactive legislation involved:

* * * In doing so no vested right nor obligation of a contract was divested or impaired nor any new obligation or duty created or imposed. The enactment merely fixed a time when the bond was required to be given, the giving of which, as I view the case, was by law required and in force when Stain was elected and before he could legally assume the duties of the office. * * * We have no constitutional provision as found in constitutions of some states forbidding not only ex post facto laws but also retrospective laws or giving retroactive operation or effect to a statute. * * * I am not holding that a statute, however characterized, may be given retrospective operation, when by giving it such effect will divest or impair vested rights or obligations of a contract or impose new obligations etc. What I say is that the application of the statute in question to the matter in hand does not do that. (Emphasis added.)

In Spanish Fork Westfield Irrigation Co. v. District Court of Salt Lake County, 99 U. 527, 104 P. 2d 353, rehearing denied 99 U. 550, 110 P. 2d 344, amendments to a statute

pertaining to the duties of the State Engineer in water controversies was involved. In holding that such amendments only changed procedural rights and could be retrospectively applied inasmuch as there are no vested rights in procedure, the court said, at page 360 of 104 P.2d:

Counsel for defendants is confusing the distinction between a "vested" right in procedure from a "vested" right of action.

A vested right in procedure of a court is quite different from a vested right of action. With reference to a right of action it is stated in 6 R.C.L. under title "Constitutional Law", p. 316, par. 304, as follows: "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference, and whether it springs from contract or the principles of the common law, it is not competent for the legislature to take it away."

And this court has approved and affirmed this doctrine in the case of Halling v. Industrial Commission of Utah et al., 71 Utah 112, 263 P. 78, citing 2nd Cooley's Cons.L., 8th Ed., page 756, and cases cited in the footnote.

With respect to the divestment of property or imposition of liability by retrospective legislation, the law is well established. Thus in 16 Am.Jur.2d, Constitutional Law, §426, the rule is thus stated as to taking property from one person and vesting it in another:

Under the restraint which the Fourteenth Amendment to the Federal Constitution imposes upon retrospective legislation, as well as under the restraints imposed thereon by state constitutional provisions expressly prohibiting the enactment of retrospective laws, a state cannot be a mere act of the legislature take property from one man and vest it in another.

Under the Fourteenth Amendment, no state can take property from one person and vest it in another by the retrospective operation of laws.

transferred from one to another. Hence, a statute is unconstitutional which in effect, either by legislative fiat or by direct or indirect operation, takes the property of one man and gives it to another.

As to vested rights in a defense to a cause of action, it is stated as follows in 16 Am.Jur.2d, supra, §425:

While it has been said that there is no vested right in a mere defense to a personal demand, the general rule may conveniently be summarized by stating that a vested right to an existing defense is protected in like manner as a right of action, with the exception only of those defenses which are based on informalities not affecting substantial rights.

Illustrations abound of defenses which are clearly substantial and of which a party cannot be deprived. (Citing Annotation, 113 A.L.R. 769.)

And with respect to the imposition of an obligation where none existed previously, it is stated in 16 Am. Jur.2d, supra, §433, as follows:

While in general a statute, operating upon facts existing at the time of its passage, which attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the act, is unconstitutional, where a moral obligation exists, the legislature may give it legal effect by a retroactive statute.

As to moral obligations there is authority to sustain retroactive imposition upon the state or its subdivisions of such obligations which were theretofore unenforceable (16A C.J.S. Constitutional Law, §417) but it is submitted that no moral obligation is involved in the instant case. Liability for the payment of attorneys fees

agreement or express authorization by statute. Walker v. Sandwick, 548 P.2d 1273 (Utah, 1976); Hawkins v. Perry, 123 U.16, 253 P.2d 898. It has nothing to do with a moral obligation and, if it did, why did the legislature limit the obligation under Section 63-30a-2 to elected and appointed officers and employees of public entities indicted for acts within the scope of their employment. Certainly such a "moral" obligation, if it exists at all, would extend to others required to defend against grand jury indictments as well as public officers and employees. Such limitation of the beneficiaries of the act in question negates any application of the "moral" obligation argument.

The statute here involved clearly creates an obligation on the part of the defendant which did not exist at the time the events giving rise thereto occurred. There was no moral obligation on the part of the state to pay attorneys fees retroactively for any group of litigants--let alone a specially favored group consisting of public employees among the general class of persons subject to grand jury indictments. In this respect, the legislation would clearly appear to be private or special legislation in violation of Article VI, Section 26, of the Utah Constitution which provides:

No private or special law shall be enacted where a general law can be applicable.

It is undisputed in this case that the respondent, at the urging of friends and members of the legislature, conceived

the idea of the legislation here involved, secured its preparation with the assistance of his attorneys, arranged its introduction into the 1977 Legislature and personally lobbied "many, many days" for its passage (R. 156-160.) The retroactive provisions of Section 63-30a-3 were clearly designed for Mr. Hulbert's own personal benefit. If these facts do not establish "private or special" legislation within the framework of our organic law, it is hard to conceive of any statute which would do so in the absence of the use of private given names therein.

A law relating to particular persons or things as a class is said to be general, while a law relating to particular persons or things of a class is deemed special and private. Johnson v. City of Milwaukee, 88 Wis. 383, 60 N.W. 270. Under the facts of the instant case, Section 63-30a-2 applied prospectively to particular persons as a class but the retroactive provisions of Section 63-30a-3 was clearly designed to extend the benefits thereunder to extremely few particular persons of the class who had become fixed and identifiable at that time. Such legislation would appear to fall within the purview of 16 Am.Jur. 2d, Constitutional Law §531, wherein it is stated:

* * * Efforts are not infrequently made by interested parties to procure legislation in their own behalf against other classes of the community, but such legislation is not favored by the courts, and will be upheld only when it is strictly within the legitimate power of Congress or the state or municipal legislatures.

The retroactive provision of Section 63-30a-3 clearly offends Article VI, Section 26 of the Utah Constitution under the facts of this case.

POINT IV

THE LOWER COURT ERRED IN FAILING TO GRANT
THE DEFENDANT-APPELLANT'S MOTIONS TO DISMISS.

The appellant incorporates herein the arguments set forth above in support of POINT IV.

CONCLUSION

The lower court totally misconceived the law applicable to the facts of this case in its desire to teach the State of Utah a costly lesson and thereby chill the functions of grand juries in this state. First of all, the lower court was without jurisdiction to hear the case inasmuch as the Board of Examiners of the State of Utah has exclusive jurisdiction in such matters and the attempt by the Legislature to circumvent such jurisdiction was invalid. Secondly, the evidence in this case does not support an enforceable agreement by the respondent to pay his attorneys more than \$18,500 but even if it did such an agreement would be invalid. And last, the legislation relied upon by the respondent is a retroactive intervention in the vested rights of the respondent and the taxpayers of this state and constitutes private or special legislation contrary to the organic law of this state.

The judgment of the lower court should be reversed and the case dismissed as prayed for by the appellant.

DATED this 23rd day of February, 1979.

Respectfully submitted,

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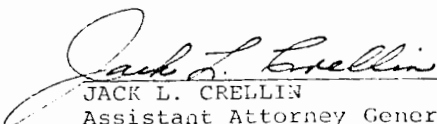
CERTIFICATE

I hereby certify that twelve copies of the foregoing brief were filed with the Supreme Court of the State of Utah this 23rd day of February, 1979.

I further certify that two (2) copies of the foregoing brief were served on each of the following counsel of record, at the respective addresses indicated, by mailing the copies thereof to their offices, first class mail, postage prepaid, this 23rd day of February, 1979:

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