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IN THE

SUPREME COU

OF THE

STATE OF U

PHIL L. HANSEN, Attorney
of the State of Utah,

Plaintiff and

- v -

OMAR B. BUNNELL; SAMUEL
TAYLOR; RAY M. HARDING;
JOHN E. SMITH, individually
members of the Thirty-Seventh
State Legislature, comprising
Legal Services Committee,

Defendants

APPELLANT'S

Appeal from the Judgment of
trict Court, in and for Salt Lake
the Honorable Stewart M. Hanson,

MEL
Assist
318
Salt L
Attorney

JOSEPH P. McCARTHY
Chief Assistant Attorney General
236 State Capitol
Salt Lake City, Utah
Attorney for Respondent

FIL

Clerk,

TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	2
POINT I. WHEN CONSIDERING SECTION 36-8-6, UTAH CODE ANNOTATED 1953, FOR POSSIBLE CONSTITUTIONAL DEFECTS, ITS CONSTITUTIONALITY IS PRESUMED	2
POINT II. SECTION 2 OF SENATE BILL NO. 181 (CHAPTER 73, LAWS OF UTAH 1967) WHICH BECAME CODIFIED AS SECTION 36-8-6, UTAH CODE ANNOTATED 1953, IS NOT IN VIOLATION OF THE PROVISIONS OF ARTICLE VI, SECTION 7, OF THE UTAH CONSTITUTION	3
A. ARTICLE VI, SECTION 7, OF THE UTAH CONSTITUTION PRESCRIBES CONSTITUTIONAL DISQUALIFICATIONS FOR OFFICE THAT ARE TO BE NARROWLY CONSTRUED IN FAVOR OF ELIGIBILITY	4
B. A LEGISLATOR WHO MAY BE APPOINTED TO THE JOINT LEGAL SERVICES COMMITTEE IS NOT APPOINTED TO A "CIVIL OFFICE OF PROFIT" UNDER ARTICLE VI, SECTION 7, OF THE UTAH CONSTITUTION	4
POINT III. SECTION 2 OF SENATE BILL NO. 181 (CHAPTER 73, LAWS OF UTAH 1967) WHICH BECAME CODIFIED AS SECTION 36-8-6, UTAH CODE ANNOTATED 1953, DOES NOT INCREASE THE COMPENSATION OF LEGIS-	

Page

LATORS APPOINTED TO THE JOINT LEGAL SERVICES COMMITTEE IN VIOLATION OF ARTICLE VI, SECTION 9, OF THE UTAH CONSTITUTION 10

CONCLUSION 16

CASES CITED

Baird v. Lefor, 52 N. D. 155, 201 N. W. 997 (1924) 5

County Auditors v. Anderson, 133 Pa. Super. 475, 3 A. 2d 28 (1938) 12

Curtin v. State, 61 Cal. App. 377, 214 Pac. 1030 (1923) 5

Gragg v. Dudley, 143 Okla. 281, 289 Pac. 254 (1930) .. 4

Great Salt Lake Authority v. Island Ranching Co., 18 U. 2d 45, 414 P. 2d 963 (1966) 3

Highland Boy Gold Mining Co. v. Strickly, et al., 28 Utah 215, 78 Pac. 296 (1904) 3

In Re Opinion of Justices, 3 Me. 481 (1822) 5

Norville v. State Tax Commission, 98 Utah 170, 97 P. 2d 937 (1940) 3

Oceanographic Commission v. O'Brien, ... Wash. ......, 447 P. 2d 707 (1968) 6, 8

Parker v. Riley, 18 Cal. 2d 83, 113 P. 2d 873 (1941) 9

Parkinson v. Watson, 4 U. 2d 191, 291 P. 2d 400 (1955) 3

Shields v. Toronto, 16 U. 2d 61, 395 P. 2d 829 (1964) .. 13

Spearman v. Williams, ... Okla. ......, 415 P. 2d 597 (1966) 14

State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 Pac. 411 (1927) 5, 6, 7

State ex rel. Donyes v. Commissioners, 23 Mont. 250, 58 Pac. 439 (1899) 15

TABLE OF CONTENTS—Continued

Page

State ex rel. Hamblen v. Yelle, 29 Wash. 2d 68, 185 P. 2d 723 (1947) 6, 9

State ex rel. Harbage v. Ferguson, 68 Ohio App. 189, 36 N. E. 2d 500 (1938) 12

State ex rel. James v. Aronson, 132 Mont. 120, 314 P. 2d 849 (1957) 9, 14, 15

State ex rel. Johnson v. Nye, 148 Wis. 659, 135 N. W. 126 (1912) 4

State ex rel. McIntosh v. Hutchinson, 187 Wash. 61, 59 P. 2d 1117 (1930) 6

State Tax Commission v. Harrington, 126 Md. 157, 94 A. 537 (1915) 5

Stillman, et al. v. Lynch, 56 Utah 540, 192 Pac. 272 (1920) 3

Tintic Standard Mining Co. v. Utah County, 80 Utah 491, 18 P. 2d 633 (1932) 3

Wallace v. Grubb, 154 Tenn. 655, 289 S. W. 530 (1926) 4

Wood v. Budge, 13 U. 2d 359, 374 P. 2d 516 (1962) 3

STATUTES CITED

Section 36-8-6, Utah Code Annotated 1953, or as Section 2 of Senate Bill No. 181 (Chapter 73, Laws of Utah 1967) 1, 2, 3, 10, 11, 13, 15, 16

Chapter 8 of Title 36, Utah Code Annotated 1953 7

CONSTITUTIONS CITED

Utah Constitution, Article VI, Section 7 .... 2, 3, 4, 9, 10, 16

Utah Constitution, Article VI, Section 9 .. 2, 11, 12, 14, 15, 16

Montana Constitution, Article V, Section 5 14

Montana Constitution, Article V, Section 7 .... 6, 9

TABLE OF CONTENTS—Continued

Page

Oklahoma Constitution, Article 5, Section 21 14

Washington Constitution, Article II, Section 13 .... 6, 7

OTHER AUTHORITIES

Annot., 53 A. L. R. 583 5

Annot., 118 A. L. R. 182 .... 4, 5

43 Am. Jur., Public Officers, § 359 12

Ballentine's Law Dictionary, Third Edition, 939 12

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

PHIL L. HANSEN, Attorney General of the State of Utah, *Plaintiff and Respondent,* - v - OMAR B. BUNNELL; SAMUEL J. TAYLOR; RAY M. HARDING; and JOHN E. SMITH, individually and as members of the Thirty-Seventh Utah State Legislature, comprising the Joint Legal Services Committee, *Defendants and Appellants.*	Case No. 11917

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action that was brought by the Attorney General of the State of Utah, seeking to have declared unconstitutional the provisions of Section 36-8-6, Utah Code Annotated 1953. This section provided that members of the Joint Legal Services Committee of the Utah State Legislature were to receive a per diem payment of $25.00 per day and reimbursement for actual and necessary expenses incurred while attending meetings of that Committee.

DISPOSITION IN LOWER COURT

The trial court granted the respondent's motion for

summary judgment, finding such payments to the Joint Legal Services Committee to be unconstitutional.

RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the trial court's decision and a determination that Section 36-8-6, Utah Code Annotated 1953, is constitutional.

STATEMENT OF FACTS

The 37th Legislature for the State of Utah enacted as Section 2 of Senate Bill No. 181 that which has been codified as Section 36-8-6, Utah Code Annotated 1953. It reads as follows:

> "Members of the committee shall be paid a per diem of $25 per day and shall be reimbursed for actual and necessary expenses incurred while attending committee meetings."

Thereafter the respondent commenced this action in his official capacity as the Attorney General of the State of Utah, contending that this Section was in violation of both Sections 7 and 9 of Article VI of the Utah Constitution, the result of which was the above-described decision of the trial court.

ARGUMENT

POINT I

WHEN CONSIDERING SECTION 36-8-6, UTAH CODE ANNOTATED 1953, FOR POSSIBLE CONSTITUTIONAL DEFECTS, ITS CONSTITUTIONALITY IS PRESUMED.

A fundamental precept regarding the constitutionality of legislative acts is that such acts are presumed to be valid and that all doubts should be resolved in favor of constitutionality. No act should be declared unconstitutional unless it is clearly and palpably unconstitutional. This principle

has been long enunciated and followed in decisions in this jurisdiction as well as elsewhere in the United States. *Highland Boy Gold Mining Co. v. Strickly, et al.*, 28 Utah 215, 78 Pac. 296 (1904); *Stillman, et al. v. Lynch*, 56 Utah 540, 192 Pac. 272 (1920); *Tintic Standard Mining Co. v. Utah County*, 80 Utah 491, 15 P. 2d 633 (1932); *Norville v. State Tax Commission*, 98 Utah 170, 97 P. 2d 937 (1940); *Parkinson v. Watson*, 4 U. 2d 191, 291 P. 2d 400 (1955); *Wood v. Budge*, 13 U. 2d 359, 374 P. 2d 516 (1962); *Great Salt Lake Authority v. Island Ranching Co.*, 18 U. 2d 45, 414 P. 2d 963 (1966).

POINT II

SECTION 2 OF SENATE BILL NO. 181 (CHAPTER 73, LAWS OF UTAH 1967) WHICH BECAME CODIFIED AS SECTION 36-8-6, UTAH CODE ANNOTATED 1953, IS NOT IN VIOLATION OF THE PROVISIONS OF ARTICLE VI, SECTION 7, OF THE UTAH CONSTITUTION.

Section 2 of Senate Bill No. 181 (Chapter 73, Laws of Utah 1967, which became codified as Section 36-8-6, Utah Code Annotated 1953, was enacted by the 37th Legislature to read as follows:

> "Members of the committee shall be paid a per diem of $25 per day and shall be reimbursed for actual and necessary expenses incurred while attending committee meetings."

At that time Article VI, Section 7, of the Utah Constitution read as follows:

> "No member of the Legislature, during the term for which he was elected, shall be appointed or elected to any civil office of profit under this State, which shall have been created, or the emolu-

ments of which shall have been increased, during the term for which he was elected."

A. ARTICLE VI, SECTION 7, OF THE UTAH CONSTITUTION PRESCRIBES CONSTITUTIONAL DISQUALIFICATIONS FOR OFFICE THAT ARE TO BE NARROWLY CONSTRUED IN FAVOR OF ELIGIBILITY.

Utah is not unique in having a provision in its Constitution like Section 7 of Article VI, for nearly all of the other states have almost identical provisions in their constitutions. One of the important questions posed by each such provision is what public positions are within the scope of the prohibition it contains. In its construction there has arisen a general rule that provisions such as this will be strictly construed and not extended beyond the office named as being prohibited and further will be narrowly construed in favor of eligibility. *Gragg v. Dudley,* 143 Okla. 381, 389 Pac. 254 (1930); *State ex rel. Johnson v. Nye,* 148 Wis. 659, 135 N.W. 126 (1912); *Wallace v. Grubb,* 154 Tenn. 655, 289 S.W. 530 (1926); 118 A.L.R. 182, 184. If it were otherwise held, such provisions could very well deny to members of any legislature the right to serve on any interim committee it might create from time to time. This would, in view of the ever greater usage of interim committees in aid of legislation, serve to grossly thwart the legislative process.

B. A LEGISLATOR WHO MAY BE APPOINTED TO THE JOINT LEGAL SERVICES COMMITTEE IS NOT APPOINTED TO A "CIVIL OFFICE OF PROFIT" UNDER ARTICLE VI, SECTION 7, OF THE UTAH CONSTITUTION.

In many instances the most important inquiries when

construing constitutional provisions like Article VI, Section 7, of the Utah Constitution have been as to whether the prohibited office was created or the emoluments were increased during the term of the legislator involved. This is not so in this case, for here the critical question is whether a legislator appointed to the Joint Legal Services Committee was appointed to a "civil office of profit" as contemplated by this Section. Many of the cases dealing with this make distinctions between what is termed a mere employment, which is allowed, and a public or civil office, which is not. If the office involves a delegation of some of the sovereign functions of government to be exercised for the public welfare, then it is considered a public or civil office and within the constitutional prohibition. *In Re Opinion of Justices*, 3 Me. 481 (1822); *State Tax Commission v. Harrington*, 126 Md. 157, 94 A. 537 (1915); *Baird v. Lefor*, 52 N.D. 155, 201 N.W. 997 (1924); *Curtin v. State*, 61 Cal. App. 377, 214 Pac. 1030 (1923); 53 A.L.R. 583, 602; 118 A.L.R. 182, 187.

Of more precise definition as to what constitutes a public or civil office under such constitutional provisions is *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411, 418 (1927) where the Montana Supreme Court stated as follows:

> ". . . we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2)

> it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional."

At the time this decision was handed down, Section 7 of Article V of the Montana Constitution read in part as follows:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any civil office under this state . . ."

These requisites for an office to be characterized as a public or civil office under such constitutional provisions have been adopted in other leading cases in the area. *State ex rel. McIntosh v. Hutchinson,* 187 Wash 61, 59 P. 2d 1117 (1936); *State ex rel. Hamblen v. Yelle,* 29 Wash. 2d 68, 185 P. 2d 723 (1947); *Oceanographic Commission v. O'-Brien,* ...... Wash. ......, 447 P. 2d 707 (1968). When these cases were handed down, Article II, Section 13 of the Washington Constitution read as follows:

> "No member of the legislature, during the term for which he is elected, shall be appointed or elected to any civil office in the state, which shall have been created, or the emoluments of which shall have been

> increased, during the term for which he was elected."

All of the five elements, these cases reiterate, must be present for the office involved to achieve such stature, and if any are missing, then it is not a civil or public office as to which the constitutional disqualification applies.

An analysis of the duties and functions of the Joint Legal Services Committee reveals that under Chapter 8 of Title 36, it concerns itself primarily with considering and investigating, in conjunction with a member of the staff of the Attorney General of Utah, various legal problems that confront the Utah State Legislature and making recommendations in these regards to the Legislature and its various other committees. This results in many instances in the preparation of proposed legislation for these committees and for the Legislature to consider. It also seeks to coordinate similar activities being carried on by various committees of the Legislature but has no precise power to implement this. The Joint Legal Services Committee has no power, moreover, to place its findings and recommendations in effect. Its duties and functions, therefore, are restricted to that which is investigative and advisory.

If the five requisites set forth in *State ex rel. Barney v. Hawkins*, supra, are applied to the Joint Legal Services Committee and its members, it appears that they cannot possibly fulfill very many of them. Of these, the first and third requisites are ones that can probably be met: The Committee was very assuredly created by the Utah State Legislature, thus fulfilling the first; and its functions and

duties have been defined by this Legislature, thus fulfilling the third requisite. There are grave doubts as to whether the fourth and fifth requisites can be met: in that the Committee works closely with the Legislature, being subject to its close control and supervision, and cannot for this reason be said to possess the required independence; and in the fact that the membership of the Committee is changed every two years, at the end of every General Session of the Legislature, lacking, therefore, the continuity and permanency required.

The second requisite, furthermore, appears to be an even more insurmountable barrier to characterizing a member of the Joint Legal Services Committee as one occupying a civil office of profit. It is whether the membership of this Committee possess any delegation of the sovereign power of government. For these members to have this power they must be engaged in making laws or in executing or administering the same. Of this particular requisite the Washington Supreme Court has said:

> "However broadly or particularly the term sovereign power may be defined, it is certain that, among other attributes, it embraces an exercise of the government's inherent police power, which, in turn, and by ordinary definition, extends to the preservation of the public health, safety and morals. . . ." *Oceanographic Commission v. O'Brien*, ... Wash. ......, 447 P. 2d 707, 711 (1968)

With the Joint Legal Services Committee being restricted to investigative and advisory functions, it cannot be said to possess such delegation of sovereign power.

While there appear to be no cases that deal precisely with a legislative committee like the Joint Legal Services Committee in the context of the constitutional disqualification provided for in Article VI, Section 7, of the Utah Constitution, there have been cases from various jurisdictions that have held under similar constitutional prohibitions that membership in various legislative committees was not a public or civil office. This was the decision in *State ex rel. Hamblen v. Yelle*, supra, where membership in the legislative council of Washington was attacked upon these constitutional grounds. There the Court said:

> "The council members will not legislate, execute, or administer laws enacted by them. The only power of the legislative council is to collect information and report as to the facts it finds to the next legislature and to make its reports public. Since it is not engaged in making laws, executing them, or administering them, no member of the council is a holder of a public office . . ." *State ex rel. Hamblen v. Yelle*, 29 Wash. 2d 68, 76, 185 P. 2d 723, 728 (1947)

This was also the holding in another leading case involving membership in a legislative council where the Montana Supreme Court held that the members of this council had not been appointed thereby to a civil office in contravention of Article V, Section 7, of the Montana Constitution earlier quoted. *State ex rel. James v. Aronson*, 132 Mont. 120, 314 P. 2d 849 (1957). Yet another case is *Parker v. Riley*, 18 Cal. 2d 83, 113 P. 2d 873 (1941) in which the California Supreme Court held that membership by legislators on a joint committee on interstate cooperation that the Cali-

fornia State Legislature had created by statute did not violate a more restrictive constitutional provision than Article VI, Section 7 of the Utah Constitution. The California constitutional provision prohibited any legislator from accepting any office, trust, or employment under that state, which was much more restrictive than the previous constitutional provision in California, this former provision being very close to Section 7; and membership on this committee, which was formed to further participation of that state in the council of state governments and cooperation with other governments ,was determined as not being in violation of the then effective constitutional prohibition. Thus, the appellant respectfully submits that an appointment or election of a member of the Utah State Legislature to the Joint Legal Services Committee is not an appointment or election to a "civil office of profit" prohibited by Article VI, Section 7, of the Utah Constitution.

POINT III

SECTION 2 OF SENATE BILL NO. 181 (CHAPTER 73, LAWS OF UTAH 1967) WHICH BECAME CODIFIED AS SECTION 36-8-6, UTAH CODE ANNOTATED 1953, DOES NOT INCREASE THE COMPENSATION OF LEGISLATORS APPOINTED TO THE JOINT LEGAL SERVICES COMMITTEE IN VIOLATION OF ARTICLE VI, SECTION 9, OF THE UTAH CONSTITUTION.

When Section 36-8-6, Utah Code Annotated 1953, was enacted in 1967, Article VI, Section 9, of the Utah Constitution read as follows:

> "The members of the Legislature shall receive such compensation ,not exceeding $500.00 a year for the legislative term and $5.00 a day expenses

> while actually in session, and mileage as provided by law."

Prior to January 1, 1945, this Section 9 read as follows:

> "The members of the Legislature shall receive such per diem and mileage as the Legislature may provide, not exceeding four dollars per day, and ten cents per mile for the distance traveled going to and returning from the place of meeting on the most usual route, and they shall receive no other pay or perquisite."

Between January 1, 1945, and January 1, 1951, this Section 9 read as follows:

> "The members of the Legislature shall receive such compensation and mileage as the Legislature may provide, not exceeding $300.00 per year, and ten cents per mile for the distance traveled going to and returning from the place of meeting in the most usual route, and they shall receive no other pay or perquisite."

Then on January 1, 1951, this Section 9 became what it was when Section 36-8-6 was enacted. It should be noted that both of the earlier versions of this section of the Utah Constitution stated specifically that "they shall receive no other pay or perquisite."

The deletion of this latter clause from Article VI, Section 9, of the Utah Constitution must be construed as purposeful, and as such leads to some very important conclusions. A "perquisite" is normally defined as emoluments or profits accruing to a public officer beyond the salary payable to him. It is an allowance that is paid in addition to ordinary salary or fixed wages for services rendered, an

addition to fixed compensation. *Ballentine's Law Dictionary, Third Edition*, 939; 43 *Am. Jur.*, Public Officers, § 359; *County Auditors v. Anderson*, 133 Pa. Super. 475, 3 A. 2d 28 (1938); *State ex rel. Harbage v. Ferguson*, 68 Ohio App. 189, 36 N.E. 2d 500 (1938). By this deletion there arises the very strong implication that restrictions against certain types of remuneration for legislators were being removed and that some degree of extra pay or perquisite was being authorized in certain instances in addition to the compensation precisely set forth in Section 9.

This is made more apparent if this deletion is placed into the context of the then (and now) ever-increasing complexity of state government and the rise of interim legislative committees to act as fact-finders and to make recommendations to the particular legislature to which they were connected. These functions entailed on behalf of the members of such committees considerable expenditure of time and effort as well as out-of-pocket expense. The services rendered in such interim tasks constitute extraordinary services, being in addition to those rendered during or incident to the sessions of the legislature involved. It is only reasonable that legislators serving on these committees receive some modicum of compensation for their extraordinary services rendered and expenses. It would appear, moreover, that the electorate of Utah in 1944 and again in 1949, in deleting the prohibition against other pay or perquisites for legislators, intended that where members of the Utah State Legislature performed services and incurred expenses for legislative purposes in addition to those during a session, such members should be compensated for this.

Today the legislative process includes a great deal of extra effort and expense between sessions of the Legislature by the members of various interim committees, such as the Joint Legal Services Committee, the membership as to which include only a portion of all the legislators. To deny the members of these committees the right to a small measure of compensation for their services in these capacities and their expenses seem grossly unreasonable and would, most assuredly, serve to frustrate the legislative process. It certainly cannot be denied that the framers of the Utah Constitution and those who by vote since then have changed it did not intend to frustrate this process. The strong policy considerations for permitting payment of the very reasonable amounts provided for in Section 36-8-6, Utah Code Annotated 1953, are apparent from one of the most recent Utah cases involving Article VI of the Utah Constitution where this Court said:

> "One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions." *Shields v. Toronto,* 16 U.2d 61, 63, 395 P.2d 829, 830 (1964).

The principle of allowing remuneration for legislators serving on interim committees, such as the Joint Legal Services Committee, in excess of that provided in the constitutional provisions covering compensation for legislators

is well established. Where new and additional duties are imposed upon legislators by reason of their serving on such committees, it is only logical that they should receive compensation for same. This obtains even though the particular constitutional limitation upon their compensation is couched in terms of denying their right to receive any other compensation, pay, perquisite, or allowance, similar to Article VI, Section 9 of the Utah Constitution as it existed prior to January 1, 1951. *State ex rel. James v. Aronson,* supra; *Spearman v. Williams,* ...... Okla. ......, 415 P. 2d 597 (1966). In the former case the Montana Supreme Court upheld as constitutional under such constitutional limitation a payment for actual travel and other expenses incurred by a member of the new legislative council created in that state. These expenses had been provided for in the statute creating the council but were attacked as being in violation of Article V, Section 5 of the Montana Constitution which provided a per diem and mileage to each member of the legislative assembly but stated that they ". . . shall receive no other compensation, perquisite, or allowance whatsoever." In the latter case the Supreme Court of Oklahoma came out to a similar result where members of that state's legislative council were to receive certain lump sums each month in lieu of expenses, this being in addition to the compensation provided for legislators in Article 5, Section 21 of the Oklahoma Constitution. This particular constitutional provision ended with ". . . and shall receive no other compensation," and the court found such lump sums to be constitutional. While both of these cases speak in terms of such payments not being additional compensation but

rather reimbursement of actual cash outlays incurred for serving on the particular legislative councils involved, implicit within the reasoning of both these courts is that the members of the interim committees should receive same modicum of remuneration for their additional services and expenses. This is evident from *State ex rel James v. Aronson*, supra, where the court refers with approval to language from a previous Montana case:

> "It is a well-settled principle of law that a provision such as is contained in the Constitution of this State, prohibiting any law diminishing the salary or emolument of a public officer after his election or appointment, does not forbid the allowance of compensation for new and different services exacted from him during his term, where the statute imposing the duties also prescribes the compensation for their performance." *State ex rel. Donyes v. Commissioners*, 23 Mont. 250, 253, 58 Pac. 439, 440 (1899).

With Article VI, Section 9, of the Utah Constitution having been amended to delete the prohibition against a legislator receiving any additional pay or perquisite, there is an even stronger case for declaring the payments provided for in Section 36-8-6, Utah Code Annotated 1953, to be valid. Thus, the appellant respectfully submits that the payments provided for in Section 36-8-6 are constitutional under Article VI, Section 9, of the Utah Constitution as it existed when Section 36-8-6 was enacted in 1967.

CONCLUSION

By way of summary then, Section 36-8-6, Utah Code Annotated 1953, is valid and not in violation of either Section 7 or 9 of Article VI of the Utah Constitution for the following reasons:

1. There is a strong presumption as to the constitutionality of such legislation, and all doubts should be resolved in favor of same.

2. A legislator appointed to the Joint Legal Services Committee is not appointed to a "civil office of profit" as contemplated by Article VI, Section 7, of the Utah Constitution in that the requisites of such civil office simply cannot be met by the members of this Committee.

3. Section 36-8-6, Utah Code Annotated 1953, did not increase the compensation of legislators appointed to the Joint Legal Services Committee in violation of Article VI, Section 9, of the Utah Constitution by reason of the fact that this particular section of the Utah Construction limits only the compensation that legislators are to receive for work performed during legislative sessions and does not prohibit remuneration to legislators in respect to new and additional duties imposed on them by reason of membership of an interim legislative committee like the Joint Legal Services Committee.

On the basis of the foregoing, it is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,

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