

1964

Lamont F. Toronto v. George D. Clyde, A. Pratt Kesler, Clair R. Hopkins and State of Utah : Brief of Appellants

Utah Supreme Court

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IN THE
SUPREME COURT
 OF THE
STATE OF UTAH

APR 1 - 1964

LAMONT F. TORONTO,

Plaintiff-Respondent

vs.

GEORGE D. CLYDE, A. PRATT
 KESLER, CLAIR R. HOPKINS and
 the STATE OF UTAH,

Defendants-Appellants.

Supreme Court, Utah

Case No.

10069

BRIEF OF APPELLANTS

Appeal from the Judgment of the
 Third District Court for Salt Lake County
 Hon. A. H. Ellett, Judge

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Case No.

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BRIEF OF APPELLANTS

STATEMENT OF NATURE OF THE CASE

This action was instituted by plaintiff to determine the constitutionality of Chapter 148, Laws of Utah 1963 (codified as Chapter 2, Title 63, Utah Code Annotated (1953, as amended)), and further to determine the legality of the payment to defendant Clair R. Hopkins of his salary for the period July 1 through July 15, 1963. The legislation in question is commonly known as the Finance Act which was enacted into law in 1963 by the 35th Legislature as Senate Bill No. 48. The basic contention of plaintiff is that the Act in question invades constitutional duties of the Board of Examiners and is therefore invalid.

DISPOSITION IN THE LOWER COURT

The effect of the judgment entered by the lower court actually results in the following conclusions:

1. Section 63-2-13 and Section 63-2-15 are unconstitutional insofar as the following language restricts the constitutional duty of the Board of Examiners to set or reset salary figures for state employees, or to establish rules for travel expenses:

The board of examiners in conducting any examination of claims shall not have authority to fix, reset or arbitrarily refuse to pay salaries set by the director of finance or officers' salaries as determined by agency governing boards. (Section 63-2-13.)

The director of finance shall establish mileage and travel expense schedules and set up rules and regulations for travel of all state officers, employees and part-time officials; and such schedules shall have the force of law in all departments and no voucher for travel expense shall be paid until the same has been approved by the director. No obligation shall be incurred for travel outside of the state without the advance approval of the governor through the director of finance. Such approval shall consist of a certification as to the availability of funds as well as a review of the necessity and desirability of such travel. This provision shall not apply to the Legislature, legislative committees or members and employees of the legislative council. (Section 63-2-15.)

2. Section 63-2-20 is unconstitutional insofar as the following language restricts the constitutional duty of the Board of Examiners to examine claims against the State:

Any examination of claims as may be conducted by the board of examiners shall be made prior to payment but only after the obligation has been incurred and an account has been submitted and audited by the state's accounting officer.

3. Article VII, Section 13 of the Constitution of Utah imposes upon the Board of Examiners a constitutional duty to examine all claims against the State, including salary claims to be paid from appropriated funds, and since the Board did not approve the salary claim of Clair R. Hopkins for the pay period July 1 through July 15, 1963, in either a regular or special meeting, such salary payment was unlawful.

RELIEF SOUGHT ON APPEAL

Defendants (appellants) seek the following relief on appeal:

1. As to Section 63-2-13, defendants seek a determination that Article VII, Section 13, Constitution of Utah, does not give the Board of Examiners the power to set salaries, re-set salaries, or arbitrarily refuse to permit payment of salaries, and that, therefore, the legislation is valid.

2. As to Section 63-2-15, defendants seek a determination that the authority of the Department of Finance to review and approve or disapprove requests for travel, and to establish travel reimbursement schedules and limits, does not in any way conflict with the constitutional authority of the Board of Examiners.

3. As to Section 63-2-20, defendants seek a determination that the word "claims" as used in Article VII, Sec-

tion 13, Constitution of Utah, means only a "claim of right" when the demand is against appropriated funds, and that, therefore, the legislation is valid because it does not restrict any constitutional authority of the Board to examine claims.

4. As to the semi-monthly salary payment to Clair R. Hopkins, defendants seek a determination that Article VII, Section 13, Constitution of Utah, gives to the Board of Examiners the *power* to examine claims, but does not impose upon the Board a duty to examine those claims which the Board believes do not justify examination, and that, since the Board in its discretion elected not to examine the semi-monthly salary claim of Clair R. Hopkins (but could have done if it had so desired), the payment thereof was lawful.

STATEMENT OF FACTS

The issues in dispute are purely questions of law. The facts were in no way in dispute and were stipulated by counsel and filed with the court as follows:

A. Plaintiff, Lamont F. Toronto, is the duly elected and qualified Secretary of State of the State of Utah and a citizen and taxpayer of the State of Utah. Defendant, George D. Clyde, is the duly elected and qualified Governor of the State of Utah; defendant, A. Pratt Kesler, is the duly elected and qualified Attorney General of the State of Utah; and defendant, Clair R. Hopkins, is the duly appointed and qualified Director of Finance of the State of Utah.

B. George D. Clyde, as Governor, A. Pratt Kesler, as Attorney General, and Lamont F. Toronto, as Secretary of State, are members of the Board of Examiners of the State of Utah.

C. In accordance with Senate Bill 48 of the Thirty-Fifth Legislature, amending various provisions of Chapter 2 of Title 63, Utah Code Annotated 1953, and known as Chapter 148, Laws of Utah 1963, Clair R. Hopkins was appointed Director of Finance by Governor George D. Clyde at a salary of \$14,520.00 payable semi-monthly, which salary was fixed and determined by the defendant, George D. Clyde. Such appointment was made July 1, 1963, which was the effective date of Senate Bill 48.

D. On or about July 15, 1963, the defendant, Clair R. Hopkins, as Director of Finance and under the authority of Senate Bill No. 48 and in particular that part of Section 1 thereof amending Sections 63-2-13 and 63-2-20, Utah Code Annotated 1953, caused the payroll for State employees to be prepared for the pay period July 1 1963 through July 15, 1963, including the semi-monthly installment of the annual salary claimed by him as Director of Finance.

E. The semi-monthly installment of the salary claimed by the defendant, Clair R. Hopkins, was thereafter paid on a warrant drawn by the Department of Finance upon the State Treasurer. Prior to the payment thereof, a summary sheet having attached thereto the payroll for all State employees for the pay period in question (including the salary claim of Clair R. Hopkins), was presented

to the plaintiff, Lamont F. Toronto, for his signature of approval, and he refused to sign his approval; and said summary sheet with the attached payroll was also presented to defendant, A. Pratt Kesler, who did sign his approval. At the time the summary sheet and attached payroll were presented to Lamont F. Toronto and A. Pratt Kesler, Governor George D. Clyde had departed for the State of Florida to attend a Governor's convention and was not available to sign said summary sheet. Upon his return to the State of Utah, but after the warrants in payment of the payroll had issued, Governor Clyde signed his approval to the summary sheet with the attached payroll. A procedure which has been adopted and followed by the Board of Examiners to cover certain situations where members of the Board are unavailable is attached hereto as Exhibit A. The Board of Examiners did not consider or act upon, in any regular or special meeting, the warrants to be drawn to pay the salary claims of individuals for the period in question. The payroll with the attached summary sheet was simply circulated to the individual members of the Board of Examiners in their respective offices, consistent with past practice.

F. At the time request for payment of said salary claim was made and at the time of payment thereof funds sufficient to pay the same were available from the current budgetary allocations to the Department of Finance of the funds appropriated by the Thirty-Fifth Legislature of the State of Utah.

G. Since the effective date of Senate Bill No. 48 the

Board of Examiners has not delegated to the Department of Finance any of its authority to examine, approve or disapprove claims against the State of Utah. In 1941 (See Exhibit B), 1942 (See Exhibit C) and in 1943 (See Exhibit D), the Board of Examiners purported to delegate certain of its authority with respect to the examination of claims against the State to the Commission of Finance, the predecessor of the Department of Finance, and since that time and until the effective date of Senate Bill No. 48, all expenditures and public funds of the State of Utah have been made in accordance with the procedures outlined in Exhibits B, C, and D.

H. The procedure with respect to the expenditures of public funds may be outlined as follows:

(1) Prior to the convening of each legislature the various departments and agencies of the State submit budget requests to the Governor who, with the assistance of the Department of Finance, formulates a proposed budget for the ensuing biennium.

(2) Using the budget as a guide but without being bound thereby, the Legislature determines the amount of funds to be appropriated to the various departments and agencies of the State.

(3) Following the enactment of the appropriations bill or bills by the Legislature, the Governor, with the assistance of the Department of Finance, allocates the biennial appropriations to the particular departments on a yearly and quarterly basis.

(4) When a department or agency of the State requests a disbursement of public funds for a particular purpose the request and the amount thereof are submitted to the Department of Finance:

(a) The Department of Finance determines whether the proposed expenditure is mathematically accurate and supported by proper vouchers or other evidence of the amount of the expenditure.

(b) The Department of Finance determines whether the proposed expenditure exceeds the budgetary allocations to the Department under the particular classification of expenditure allocated in the budget.

(c) Prior to July 1, 1963, if the proposed expenditure was within the appropriated funds of the Department and the budgetary allocations to the Department, the request was certified as to availability of funds and passed on to the Board of Examiners, who approved or disapproved the same.

(d) Since July 1, 1963, the Department of Finance has not only certified proposed expenditures as to availability of funds, but has further approved or rejected such proposed expenditures as to their propriety. The Department of Finance contends that from and after July 1, 1963, it has no duty or obligation to present the questions of salary figures or salary raises to the Board of Examiners for its approval. The Department has, however, consistent with past practice,

presented to the Board for its approval summary sheets having attached thereto the payroll for all state employees for a particular pay period, but the Board has not met to separately consider and approve salary increases, new salaries and similar matters.

ARGUMENT

POINT I.

SECTION 63-2-13 IS VALID LEGISLATION.

- A. The Legislature intended to take away certain statutory duties and powers of the Board of Examiners.

It is helpful initially to put in proper perspective what the Legislature intended to do in its enactment of Chapter 148, Laws of Utah 1963. There were in fact a group of companion bills introduced and passed with Senate Bill No. 48, which generally took from the Board of Examiners the previous statutory duty to examine transactions involving sales and exchanges of land and various other matters (including payment of claims from appropriated funds), and which purported to consolidate these general administrative duties relating to the State's finances and property within the Department of Finance under the supervision of the office of the Governor. Senate Bill No. 48 as codified recites in Section 63-2-1 that:

“There is created a department to be known as the department of finance attached to the office of the governor to assist the governor in the execution of his constitutional duties as the state's chief

executive officer and which shall perform such duties and functions as may be prescribed by law. In construing the authorities and duties imposed by this act, it is the intent of the legislature to define budgetary functions relating to the approval and allocation of funds, budgetary control of funds, prescribing personnel qualifications and salary schedules, approval of proposed expenditures for the purchase of supplies and services; and prescribing other budgetary functions under the constitutional authority of the state's chief executive to transact all executive business for the state, *as differentiated from the examination of claims as may be exercised by the board of examiners.*" (Emphasis added).

It is therefore important to note that Senate Bill No. 48 is essentially for the purpose of consolidating and implementing the administrative processes for budgeting, allotting, and spending public funds under the general supervision and control of the State's chief executive. Any examination of claims by the Board of Examiners is completely independent from the administrative processes outlined by the act.

It is not denied that the Legislature intended to remove the Board of Examiners from the administrative functioning of the Department of Finance. It is clear that the Legislature intended such administrative supervision to be directly under the Governor. Perhaps this legislation was prompted in part because the Board of Examiners had previously exercised certain supervision over the administrative procedures of the Department of Finance and perhaps because the Utah Supreme Court had earlier charac-

terized the Commission of Finance as the "administrative arm" of the Board of Examiners. See for example, *Bateman v. Board of Examiners*, 7 Utah 2d 221, 322 P. 2d 381 (1958).

- B. Article VII, Section 13, Constitution of Utah, does not give the Board of Examiners the authority to set or re-set salary figures, or to arbitrarily refuse to permit payment of salaries.

The lower court found part of Section 63-2-13 to be unconstitutional as an invasion of the constitutional authority of the Board of Examiners. Section 63-2-13 provides as follows:

"The director of finance shall prescribe and fix a schedule of salaries for the officers, clerks, stenographers and employees of all state offices, departments, boards and commissions, except where such salaries are fixed by statute, by appropriation or where agency governing boards are authorized by statute to fix the salary of certain officers. The director of finance must in all cases give certification as to the availability of funds to pay salaries. *The board of examiners in conducting any examination of claims shall not have authority to fix, reset or arbitrarily refuse to pay salaries set by the director of finance or officers' salaries as determined by agency governing boards.* Such schedule of salaries shall have the force of law in all state offices, departments, boards and commissions, and shall in no case be exceeded without the express approval of the director of finance. No salary schedule shall be put into effect until approved by the governor." (Emphasis added.)

This section was stricken by the lower court to the extent that the part in italics states that the Board of Examiners shall not fix, reset or arbitrarily refuse to pay salaries.

Article VII, Section 13, Constitution of Utah, provides that:

Until otherwise provided by law, the Governor, Secretary of State and Attorney-General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They 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 as 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.

It is difficult to see why the statute offends any constitutional authority of the Board of Examiners. There is no suggestion, not even the slightest hint, in Article VII, Section 13, that the Board of Examiners may set or fix, or reset or refix, salaries. It is true that the Board of Examiners could refuse to permit a salary claim if for some justifiable reason the claim was not a proper one. But, the discretion of the Board would be limited to an examination of the validity of the salary claim and under no theory could extend to permit establishment of salary rates to be paid, unless legislation empowered the Board to do

so. The above section, however, has specifically provided that the Board of Examiners shall not set salaries.

Since a legislative prohibition against the Board of Examiners either setting or resetting salaries in no way conflicts with its constitutional authority, the only remaining question as to the validity of Section 63-2-13 would be the language which says the Board cannot "arbitrarily refuse to pay salaries." This provision can only be unconstitutional if the Board of Examiners has a right arbitrarily to refuse to pay salaries. There can be no question in this regard, because this Court has specifically held that the Board of Examiners cannot act arbitrarily. In *State v. Cutler*, 34 Utah 99, 95 Pac. 1071 (1908), this court said that the Board of Examiners had discretion in allowing or rejecting claims, "But this discretion is not one that may be arbitrarily exercised * * *." Further, in *Bateman v. Board of Examiners*, 7 U. 2d 221, 322 P. 2d 381 (1958), this court said:

"We do not desire to be understood as saying that Examiners can go so far as to in effect exercise a veto power over legislation by *arbitrarily* refusing to make funds available which have been appropriated to Education for either general or specific purposes. Insofar as this has been done in certain instances which had considerable bearing upon precipitating this litigation, such actions were wrong." (Emphasis added.)

Since the Board of Examiners can make no claim to any constitutional authority to establish or to reset salaries, and since this Court has specifically stated the rather ob-

vious rule of law that this Board cannot act arbitrarily, it is impossible to see any reason why Section 63-2-13 can conflict with any constitutional power or authority of the Board of Examiners. If the section referred to provided that the Board of Examiners "could not refuse or deny payment of salary claims," then it is admitted that the section would certainly be unconstitutional, but the statute neither says nor suggests any such thing.

POINT II.

SECTION 63-2-15 IS VALID LEGISLATION.

It is not clear why either plaintiff or the lower court thought Section 63-2-15 was unconstitutional. No mention was made of that section in any of the pleadings. No reference was made to it in the lower court's memorandum decision (R. 30-34). The first time Section 63-2-15 appeared in this lawsuit was when the final Judgment and Decree was prepared by plaintiff's counsel and signed by the judge, wherein paragraph 2 simply recites that Senate Bill 48 is unconstitutional insofar as it "authorizes the Director of Finance of the State of Utah to process and pay claims against the State of Utah * * * without the examination and approval of the Board of Examiners * * *" (R. 36).

The judgment then declares that "the following provisions of Senate Bill 48" are unconstitutional, and, without further comment, sets forth Sections 63-2-13, 63-2-15 and 63-2-20 (R. 36-37). Section 63-2-15 simply provides that:

The director of finance shall establish mileage and travel expense schedules and set up rules and regulations for travel of all state officers, employees and part-time officials; and such schedules shall have the force of law in all departments and no voucher for travel expense shall be paid until the same has been approved by the director. No obligation shall be incurred for travel outside of the state without the advance approval of the governor through the director of finance. Such approval shall consist of a certification as to the availability of funds as well as a review of the necessity and desirability of such travel. This provision shall not apply to the Legislature, legislative committees or members and employees of the legislative council. (Section 63-2-15.)

Since the above statute in no way provides for payment of claims without the approval of the Board of Examiners (and, in fact, does not even refer to the Board), it is difficult to see why the constitutional authority of the Board could be impaired by this legislation. If the lower court thought the Board of Examiners had constitutional authority to set travel expense rules and regulations and to establish mileage reimbursement figures, then we consider the argument under Point I above to be a complete answer to such a contention. If the lower court thought the legislation was unconstitutional because it prevents the creation of an out-of-state travel expense "obligation" without prior approval of the Director of Finance, then we consider the argument under Point III, *infra*, to be a complete answer to such contention.

POINT III.

SECTION 63-2-20 IS VALID LEGISLATION.

- A. The Legislature has merely defined "claims" to mean obligations of the State when such claims are processed administratively by the Department of Finance, and this definition does not offend the reasonable meaning of that word as used in Article VII, Section 13, Constitution of Utah.

The lower court also found unconstitutional certain parts of Section 63-2-20, which provides:

"The director of finance shall exercise budgetary control over all state departments, institutions and agencies. The director shall require the head of each department to submit to him not later than May 15th of each year, a work program for the ensuing fiscal year and may at any time require any department to submit a work program for any other period. Such program shall include appropriations and all other funds from any source whatsoever made available to said department for its operation and maintenance and shall show the requested allotments of said appropriations and other funds by quarterly periods for the ensuing or current fiscal year by function, division, program or activity authorized. The director of finance shall review the work program of each department and shall, if the governor deems necessary, revise, alter, decrease or change such allotments before or after approving the same; or, may proceed to make independent allotments which shall be binding on the said department when a work program is not furnished by any said department as required by this

section. The aggregate of such allotments shall not exceed the total appropriations or other funds from any source whatsoever made available to said department for the fiscal year in question. The director of finance shall transmit a copy of the allotments when approved by the governor to the head of the department concerned and also a copy to the auditor of the state. The director of finance shall thereupon permit all expenditures to be made from the appropriations or other funds from any source whatsoever on the basis of such allotments and not otherwise, unless such allotments or any part thereof are subsequently revised or changed by the director of finance. The director shall examine and approve or disapprove all requisitions and requests for proposed expenditures of the several departments, except salaries or compensation of officers fixed by law in which case the director shall certify only the availability of funds, and no requisitions of any of the departments shall be allowed nor shall any obligation be created without the approval and the certification of the director. The director shall employ such budget examiners as may be necessary to approve allotments and examine the propriety of all proposed expenditures and facilitate program planning and management improvement of state operations. It is the intent of the legislature that the department of finance shall examine and pass upon all proposed expenditures. *Any examination of claims as may be conducted by the board of examiners shall be made prior to payment but only after the obligation has been incurred and an account has been submitted and audited by the state's accounting officer.* (Emphasis added.)

The language found by the court to be objectionable was the last sentence which is set forth above in italics.

That sentence simply provides that any examination, which the Board of Examiners in its discretion decides to conduct, shall be prior to payment of the claim but after there has been a pre-audit and an account established so that there is an obligation created or some right or claim of right established in favor of the claimant. This amounts to nothing more than an attempt by the Legislature to define the word "claims" with reference to State fiscal procedures. The Board of Examiners in no way is prevented from conducting an examination with regard to any claims which it may wish to examine, but is simply restricted from an examination of something which is not yet a claim and is requested to make any such examination before the claim ceases to become a claim. In other words, no claim comes into existence until the claimant can assert a bona fide claim of right, and that cannot occur prior to some commitment on the part of the State which would create an obligation or an apparent obligation on the part of the State. All that the Legislature has done in the language above quoted is to say that applications, bids, *etc.*, in the process of preliminary administrative handling are not claims until some person is hired, some contract awarded, or until something happens which would purportedly create an obligation.

The other apparent requirement of the legislation under discussion is that the Board conduct any examination it wishes to conduct prior to payment of a claim. The Legislature has thus said, in effect, that after a claim is paid it no longer is a claim because the obligation is discharged.

It is submitted that this unquestionably is a correct statement of the law. While this Court, rather than the Legislature, is the proper entity to construe the meaning of words and phrases appearing in the Utah Constitution, there is nothing improper with legislation which properly explains and defines words in the Constitution for the purpose of implementing sound fiscal procedures. While it is perfectly proper for this Court to strike any legislation which improperly construes constitutional provisions, this Court should not strike legislation which correctly construes portions of the Constitution. Since Section 63-2-20, quoted above, in effect defines the word "claim" in a manner completely consistent with established law, there is nothing offensive about the language used in that statute.

- B. The word "claim" is clear and unambiguous, and means a demand pursuant to an asserted right.

As already mentioned, the language used in Section 63-2-20 can be offensive only if it is an inaccurate definition of the word "claims" as used and intended by the framers of the Constitution. All that the Legislature has done is to establish a time at which a claim comes into existence and a time at which a claim goes out of existence, and provides that the Board of Examiners, if it wishes to examine claims, should examine claims, while they are claims. State fiscal procedures and processes involve a good many applications, requests, bids, and other preliminary dealings between the State and prospective claimants which never ripen into claims. For example, if someone submits

an application for employment with the State of Utah but there is no position available, it can hardly be said that such applicant has a claim against the State; or, if a person submits a bid pursuant to a request for bids and it is found that such bid is the high bid and nowhere near competitive, then it can hardly be said that such bidder has a claim against the State. It is only when the preliminary processes have proceeded to a point where the claimant can assert some theory whereby he has a right against the State of Utah that a claim comes into existence. Similarly, after any claim of right has been paid by the State, then such claimant no longer has a claim because such claim has been fully satisfied and discharged.

Since a claim must be considered to be a claim of right, it is submitted that the language of the statute under consideration is accurate in reciting that there is no claim prior to the existence of an obligation by the State nor after the payment and discharge of such obligation. Therefore, it is completely permissible to recite that the Board of Examiners conduct its examination after the obligation is created and before the obligation is paid. If the meaning of the word "claim" is so construed, then the language of the statute as above quoted is not offensive and is not unconstitutional.

While several of the earlier Utah cases discussed the meaning of the word "claim" as used in Article VII, Section 13, of the Constitution, the most recent and by far the most liberal definition of that word appears in *Bateman v. Board of Examiners*, cited *supra*, as follows:

“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 moral claim; or the seeking of legislative largesse; or asserting a privilege; to asserting right to compensation for property or materials furnished, or salary for services rendered, to the state.”

To the extent that the foregoing definition purports to define those claims which may be examined by the Board of Examiners prior to submission to the Legislature, it is submitted that the definition is a good one. This is so because any person who has any claim of any kind under any theory is free to present the same to the Board of Examiners for its action, and further, to petition the Legislature by way of special legislation. But, the foregoing definition cannot have complete application to the claims which are paid from appropriated funds. Even this is clear from the fact that the above definition refers to legislative largesse, which certainly could not be granted by anyone except the Legislature itself.

Further, it is important to note that the legislation in question in no way purports to restrict or prevent the Board of Examiners from examining any claim or assertion whereby any person aggrieved believes that he has a claim against appropriated funds. The only effect of the language in Section 63-2-20 is that, with reference to those claims which are processed pursuant to the administrative procedures set forth in that section, the examination shall be made after the obligation is created and before payment is made. Nothing is said to suggest that the Board

of Examiners in any way is restricted from examining claims which have not been processed pursuant to the procedures of said section.

The vital criterion applicable here as to the meaning of the word "claim" is whether or not the person asserting it does so as a claim of right. Anything short of this should not be considered to be a claim with respect to payments from appropriated funds. Illustrative of the numerous authorities which have digested the cases and uniformly recited the rule are the following:

Winfield, *Adjudged Words & Phrases*, page 110:

"[A claim] is, in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty."

Black's Law Dictionary (1891 Ed.), page 209:

"A claim is a right or title, actual or supposed, to a debt, privilege, or other thing in the possession of another; not the possession, but the means by or through which the claimant obtains the possession or enjoyment."

Stroud's Judicial Dictionary (2nd Ed.), Vol. 1, page 317:

"'Claime', is a challenge by any man of the propertie or ownership of a thing which hee hath not in possession, but is withholden from him wrongfully."

Wharton's Law Lexicon (12th Ed.), page 177:

"[A claim is] a challenge of interest of anything which is in another's possession, or at least

out of a man's own possession, as claim by charter, descent, etc."

Repalje and Lawrence's Law Dictionary, Vol. 1, page 215:

"[A claim is] a challenge by any man of the property or ownership of a thing, not at the time in his possession, but (as he contends) wrongfully withheld from him."

Kinney's Law Dictionary and Glossary, page 157:

"[A claim is] a challenge or demand of the property or ownership or of some interest in a thing which the person demanding has not in his possession, but which is withheld from him unlawfully; a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty."

Bouvier's Law Dictionary (Rawle's Revision), Vol. 1, page 332:

"[A claim is] a challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant * * *. The assertion of a liability to the party making it to do some service or pay a sum of money."

Words and Phrases (Permanent Ed.), Vol. 7, pages 457-58:

"In its ordinary sense, a 'claim' imparts the assertion, demand, or challenge, of something as a right, or it means the thing thus demanded or challenged.

"* * *

"'Claim', in its primary meaning, is used to indicate the assertion of an existing right. In its

secondary meaning it may be used to indicate the right itself.”

Ballantine, Law Dictionary (2nd Ed.), page 220:

“[A claim is] the assertion of a demand, or the challenge of something, as a matter or right; a demand of some matter, as of right, made by one person upon another to do or to forbear to do some act or thing, as a matter of duty.”

Anderson’s Dictionary of Law, page 185:

“[A claim is] the assertion, demand or challenge of something as a right, or the thing thus demanded or challenged.”

From the forgoing authorities, it is clear that no other meaning or connotation of the word “claim” could have been intended by the framers of the Constitution other than an assertion of something as a matter of right, at least with respect to those requests for payment from appropriated funds. And further still, the language of 63-2-20, referring to the Board’s examination of claims, relates only to those claims processed in accordance with such section and in no way purports to restrict the Board in its examination of other claims. It is, therefore, submitted that Section 63-2-20 should be sustained.

POINT IV.

THE SALARY PAYMENT TO CLAIR R. HOPKINS WAS LAWFUL.

- A. To hold that the Board of Examiners has a constitutional duty rather than a constitu-

tional power demeans rather than dignifies the Board.

The real question of power versus duty has been clouded to the extent that it has caused considerable confusion. It has been assumed and believed (in the press and elsewhere) that this litigation involves the question of broad powers within the Board of Examiners versus restricted powers within the Board of Examiners. Nothing could be further from the truth. The position of the defendants is that the Board of Examiners has a very broad power to examine any and all claims against the State of Utah, but that it is not absolutely necessary for the Board to examine all of such claims if in its discretion it decides that it is unwise, unnecessary or impractical to examine certain claims. In other words, defendants contend that the Board of Examiners as a responsible constitutional entity is equipped with the necessary discretion and responsibility to decide when and under what circumstances any certain claim or group of claims should be examined. If it decides to examine all claims, it may do so. If it decides that there are certain routine claims which do not justify an examination, it has the constitutional discretion to decide not to examine such claims. But, this discretion as to whether to examine or not to examine lies solely within the Board itself, and not in any other agency or officer. It is submitted that this position is fundamentally sound, for to hold that the Board of Examiners must examine all claims whether it wants to or not, is to hold that the Board of Examiners has sufficient discretion to examine and ap-

prove or reject claims, but does not have reliable discretion to determine which claims should be examined. Such a result, to say the least, is both anomalous and paradoxical.

Plaintiff contends and the lower court held that the Board of Examiners has a constitutional duty to examine every claim of every nature, regardless of how routine, insignificant, or mechanical the claim might be. Plaintiff, therefore, concludes that the failure of the Board of Examiners to examine any claim, including any semi-monthly salary payment of any State employee, is a failure to perform a constitutional requisite and, therefore, causes any payment of such claim to be absolutely void. Plaintiff would thus say that, if the Board of Examiners failed to examine and approve the validity of a \$5.00 purchase of supplies, the payment for such supplies would be unlawful and void.

It must at once become obvious that plaintiff's position would not dignify the Board nor increase its power, but would, rather, reduce the Board of Examiners to a rather menial and perfunctory body which would have to examine many thousands of claims each month even though the Board itself saw no reason to examine many of the claims and did not want to examine many of the claims. When one considers the thousands of warrants that are issued semi-monthly by the Department of Finance for the payment of salaries, and the thousands of other warrants that are drawn to pay travel expenses, contract expenses, acquisition of supplies, etc., it is absurd to believe that the Board of Examiners could perform such a task

even if it devoted itself to a full time attempt to examine such claims.

It must be assumed that the Governor, the Attorney General, and the Secretary of State each have full-time demands upon them in their respective offices, aside from the requirements of service upon the Board of Examiners. To hold that these busy chief officials of the State of Utah *must* take the time to examine and act upon *all* claims, and thus, in effect, do what it takes literally dozens of employees in the Department of Finance to do, is to depart from reason, logic and practicality, and to impose a completely illogical, unreasonable, and impossible burden upon the Board of Examiners.

It therefore is obvious that in order to sustain the greatest dignity, independence, and power in the Board of Examiners as a responsible constitutional entity, it is necessary to conclude that the Board has both discretion and power to examine all claims it wishes to examine, but that it does not have the menial and mechanical duty of examining those claims which in its discretion do not justify nor deserve examination.

Plaintiff's position and the lower court's holding in this lawsuit is in fact one which demeans rather than dignifies the Board of Examiners.

B. The legislation under review is not affected by a determination of the question of constitutional power versus constitutional duty.

It is important to clarify the issue of a constitution-

ality *duty* versus a constitutional *power* with respect to the legislation in question. Neither Section 63-2-13, Section 63-2-15, nor Section 63-2-20 is affected by a determination of this question, since it must be recognized that if the Legislature has a constitutional duty, it cannot be interfered with by the Legislature, and if the Board of Examiners has a constitutional power, it cannot be interfered with by the Legislature. Therefore, the legislation cannot in any way preclude the Board of Examiners from examining any or all claims against the State of Utah. If the legislation purports to do so, it must be unconstitutional, whether this Court finds that the Board has a constitutional duty or a constitutional power. The only affect of this court's determination of the question of duty versus power is with regard to the validity of the salary payment of defendant Clair R. Hopkins. This is so because the Board of Examiners as a board did not elect to examine or to approve the salary payment in question. If there was a constitutional power to examine or not to examine in the discretion of the Board, then the salary payment was lawful. If, on the other hand, there was a constitutional duty to examine this salary payment in question, then, since that duty was not exercised, the salary payment would be unlawful because of a failure to satisfy a mandatory condition precedent to payment.

Therefore, it is emphasized that the resolution of the question of power versus duty does not affect the legislation. If the legislation restricts or prevents the Board of Examiners from examining claims, it must be unconstitu-

tional whether it interferes with a power or a duty. The only importance of the determination of this question relates solely to the salary claim of Clair R. Hopkins and not to the validity of the legislation.

C. The Constitution specifically and clearly grants a power rather than imposes a duty.

It is submitted that the Utah Supreme Court has never distinguished power versus duty when speaking about the Board of Examiners. When deciding other issues, the Court has on occasion used language by way of dicta which would suggest that the Board had a duty. But, as will be shown in a later discussion of those cases, little significance can be attached to such language because the court was not focusing upon the distinction between a power and a duty.

Of critical significance is the language of Article VII, Section 13, of the Constitution of Utah, which provides:

“* * * They 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 as 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.)

The above language is clear to the effect that the Board has *power* to examine all claims against the State except salaries or compensation of officers fixed by law.

As to those claims which must be acted upon by the Legislature, the Board must as a constitutional prerequisite act upon such claims prior to their consideration by the Legislature. It is significant to note that there is no similar prerequisite for the payment of claims which are not presented to the Legislature.

In other words, claims such as tort claims for which the State is not liable because of its sovereign immunity, and other claims for which no legal redress is available to the claimant except by petition to the Legislature, require examination by the Board of Examiners. But claims for which appropriations have been made and which can be paid through ordinary State fiscal procedures without submission to the Legislature do not require examination by the Board of Examiners as a constitutional prerequisite, although the Board has power to examine such claims if it wishes to do so.

Two factors of importance appear from the language of the constitutional provision. First, the Constitution uses the clear, unambiguous, meaningful word "power", and neither uses nor suggests the word "duty" when referring to an examination of claims. The second factor is that the Constitution does establish a *required* examination by the Board of those claims which are submitted to the Legislature. The negative implication must be that claims not required to be submitted to the Legislature need not be examined unless the Board elects to examine them. Therefore, the use of the word "power", coupled with the negative implication that no examination is mandatory for pay-

ments of claims from appropriated funds, establishes with clarity that the Board has simply a power and not a duty.

As earlier stated, no case decided by this Court has ever held that the Board of Examiners has a constitutional duty to examine claims which are to be paid from appropriated funds. This is so because the specific question has never been presented to the Court. When discussing other issues, the Court has used language which might be considered dicta and which might suggest that the Board did have such a duty. But, it will appear from an examination of those cases that such language not only was not the holding of the Court, but was not even dicta, for the reason that the Court was not considering the specific question. In other words, true dictum is a clear statement by the Court on an issue which it was not necessary for the Court to decide. But, a statement by the Court which is not even in response to a consideration of a specific question can hardly be said to be dicta with respect to such a question. This will be illustrated in the cases of *State v. Edwards*, *Uintah State Bank v. Ajax*, and *Board of Education v. Commission of Finance*, discussed in that order below.

In *State v. Edwards*, 33 Utah 243, 93 Pac. 720 (1908), a certain statute provided for the employment of court stenographers and for the payment of certain travel expenses by a procedure whereby the District Judge would certify the travel expense vouchers to the State Auditor, who in turn was required to draw a warrant in payment of such travel expense. The question was not whether the

Board of Examiners had a duty to examine such claims for expense reimbursement, but was whether the Legislature could provide for a procedure of payment which would bypass the Board of Examiners and thereafter prevent the Board of Examiners from conducting an examination even if it wished to. Despite this clear-cut issue, the Court was rather loose in the language which it employed, and such language might mistakenly be construed to suggest that the court thought an examination by the Board of Examiners was a constitutional prerequisite to payment:

“The attempt by the Legislature to *require* the Auditor to allow a claim which by the Constitution must first be approved by the board of examiners can avail nothing. *The Auditor is bound by the constitutional provision. The Legislature is so bound, and so are we. The Legislature may make certain evidence conclusive with regard to a specific matter, but it may not interfere with powers conferred or duties imposed by the Constitution.* This, in effect, is what is attempted to be done in section 2, c. 72, p. 112, aforesaid. To the extent that the provisions of that section are in conflict with the constitutional provision governing salaries and compensation of officers fixed by law, the Constitution must prevail.” (Emphasis added.)

It must be borne in mind, in reading the foregoing quote, that the issue was whether the Legislature could exclude the Board of Examiners from examining travel reimbursement claims. The issue was not whether the Board of Examiners was required to examine such claims if in its discretion it considered such an examination unnecessary.

The second case using confusing language is *Uintah State Bank v. Ajax*, 77 Utah 455, 297 Pac. 434 (1931), which involved a mandamus proceeding to compel the State Auditor to draw a warrant in payment of bounty claims for killing predatory animals (25 coyotes and 7 bobcats). The bank apparently had taken an assignment of the bounty claim as security for a loan and then found it necessary to seek payment of the bounty claim in satisfaction of the debt. In any event, the bank demanded payment from the State Auditor and the Auditor declined on the ground that the statute providing for bounty payments purported to bypass the Board of Examiners. The issue in this case was identical to the issue in the *Edwards* case, i.e., whether the Legislature could bypass the Board of Examiners so as to exclude the Board from any examination of bounty claims. The Court said that the *Edwards* decision was controlling and proceeded to hold that the Legislature could not bypass the Board of Examiners:

“* * * May the Legislature then, in the face of our constitutional provision, pass over the board of examiners and set up some local agency by which claims may be fixed and settled without any state officer having power to examine and approve or disapprove such claim?

“* * * The Constitution 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 or officer.

“* * * 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 power or authority to effectuate

* * *

It will be observed that the language used by the Court in the *Uintah State Bank* case suggests in some respects that an examination by the Board of Examiners is a prerequisite to payment of bounty claims. Such a conclusion would mean that the Board has a constitutional duty to examine claims. However, the Court also employed language which suggested that the Board had merely a power and that such power could not be taken from the Board of Examiners and given to some other agency or officer. The reason for this loose and apparently conflicting language is simple—the Court was considering and deciding whether the Legislature could bypass the Board of Examiners and prevent the Board from examining bounty claims, and the Court held that the Legislature could not enact such a statute. But, that was all that the Court did decide, since there was no consideration of the question as to whether the Board of Examiners was required as a constitutional prerequisite to examine each and every bounty claim.

The third case which used language suggesting that the Board of Examiners might have a duty to examine claims related to a salary claim. That case was *Board of Education v. Commission of Finance*, 122 Utah 164, 247 P. 2d 435 (1952), wherein the Board of Education instituted an original proceeding in the Supreme Court to compel the Commission of Finance to issue warrants on the State Treasurer for payment of salary claims of Dr. E. Allen Bateman. The issue in the case did not relate in any way to the power or duty of the Board of Examiners to approve salary claims, since the Board of Examiners had

already approved the salary claim in question. However, in making a passing comment with reference to the salary claim, the Court noted that it had been approved by the Board of Examiners, and said parenthetically, that the Board "must approve all salary claims against the State":

"The Board of Examiners (composed of the Governor, Secretary of State and the Attorney General) *which must approve all salary claims against the State*, except those fixed by law, approved by a vote of two to one the request of the Board of Education to pay Dr. Bateman a salary of \$10,000.00 per annum." (Emphasis added.)

It again is emphasized that no issue is present with respect to whether the Board had a power or a duty to examine salary claims, and in fact the Board had approved the salary claim in question. Therefore, the particular language used by the Court could not be deemed to have any particular significance with respect to the particular issue of a constitutional power versus a constitutional duty.

Aside from the three cases just mentioned (which vaguely suggest a constitutional duty), there is a fourth case, which is the clearest pronouncement available. That case, *Thoreson v. State Board of Examiners*, 21 Utah 187, 60 Pac. 982 (1900), involved a claim for refund of lease rentals which had been paid pursuant to a void lease. Certain school lands had been leased by the claimant pursuant to a statute which later was declared unconstitutional. The Legislature then enacted a statute which provided for refund of all rentals collected under the void leases, and specifically directed the Board of Examiners "to receive,

audit, and allow all just claims of persons who have paid moneys in pursuance of (the void leases).”

In the original appeal, the Court held that the Board could do no more than perform the ministerial act of auditing and allowing all claims which met the legislative criteria for payment. The Board then petitioned for rehearing, and on rehearing the Court discussed the constitutional and statutory duty of the Board in examining claims for lease refunds:

The board of examiners are required to perform the duties mentioned in said section of the constitution, and also to perform such other duties as may be prescribed by law. *Therefore, the only duties in the premises imposed upon the board of examiners are such as section 963 of the Revised Statutes prescribes.*” (Emphasis added.)

The Court thus clearly stated that, under the constitutional provision and the applicable statute, the *only* duties of the Board were under the *statute*. Nothing could be clearer than the conclusion that there could thus be no *constitutional* duty. But, in fairness, it is admitted that, here again, the Court was not considering the power to examine versus the duty to examine, and an objective analysis of the cases cannot lend more weight to *Thoreson* than to the other cases.

The four cases discussed above are the only ones using any language of particular significance that even discussed whether the Board of Examiners has a constitutional duty to examine claims to be paid from appropriated funds. Such language is not only unclear, but it was not

even used in response to the particular issue under discussion. Therefore, it could not be said that such language could have the effect of establishing a *stare decisis* precedent for construing the word "power" to mean duty rather than power. Therefore, it appears clear that there is no judicial precedent to justify construing the clear phraseology of Article VII, Section 13, of the Utah Constitution, to mean anything more, less or different from what it says.

POINT V.

THE BOARD OF EXAMINERS CANNOT DELEGATE ITS CONSTITUTIONAL DISCRETION.

It is believed that the lower court's determination with respect to delegation of constitutional authority is correct. In essence, the lower court held that the Board of Examiners could not delegate any of its constitutional discretion but could establish certain criteria for guidelines and permit some subordinate officer or agency to examine certain claims to determine whether the criteria were met. If so, the Board of Examiners would then accept such determination and then exercise its discretion in approving the claims. If the criteria were not met, then the Board could use its discretion in determining the validity of the claim.

The reason the question of delegation is raised in this brief is because this Court has not yet spoken concerning the extent to which the Board of Examiners can delegate such discretionary authority. Since plaintiff did not appeal, it is deemed advisable to raise this issue in this appeal so that it will be proper for the Court to comment

upon the extent to which such a delegation is proper. This issue would become critically important if this Court were to hold that the Board of Examiners had a constitutional duty to examine every claim of every nature, because the Board simply is not equipped to do that type of job without a great deal of assistance. If the Board of Examiners were to attempt to delegate any routine matters to the Department of Finance, serious questions would arise as to the propriety of such a delegation because the Legislature created the Department of Finance to function directly under the office of the Governor and not under the Board of Examiners. Therefore, no funds were appropriated for the Department of Finance to function as an agent of the Board of Examiners. Further, even if it should be considered proper for the Department of Finance to so function, it would appear that the Department could not be compelled to accept such an assignment except by specific legislation assigning such a task to it. Of course, no such legislation presently exists.

If the Board of Examiners is found to have a constitutional duty and if the Department of Finance cannot function as the agent of the Board of Examiners, then the Board of Examiners would have to find funds to employ a great many assistants to process all claims prior to their payment. Such a result would seem to be an illogical and unnecessary duplication of the services now performed by the Department of Finance under the direction of the Governor.

As observed above, it is believed that the lower court did not commit error in the general decision which it made

concerning delegation of constitutional authority, but a good many practical problems are created by the lower court's further holding that the Board of Examiners had a constitutional duty to examine all claims. Therefore, if this Court should hold that the Board has a constitutional duty, then it should consider and perhaps speak upon the nature and extent to which such a duty can be exercised by delegation.

POINT VI.

IF THIS COURT HOLDS THAT THE BOARD OF EXAMINERS MUST APPROVE ALL CLAIMS, THEN THE BOARD MAY APPROVE ROUTINE CLAIMS BY A MAJORITY THEREOF INDIVIDUALLY SIGNING THEIR NAMES IN APPROVAL WITHOUT MEETING IN A CONVENED SESSION OF THE BOARD.

Appellants emphasize that this point is important only if the Court holds that the Board has a constitutional duty to approve all claims (other than salaries and compensation of officers fixed by law). If the Court holds, as appellants contend, that the Board has only a constitutional power, to be exercised in the discretion of the Board, then this point becomes moot, because the Board then can consider only those claims which it wishes to examine, and can conduct any such examination in a meeting of the Board.

The lower court held that any constitutional authority exercised by the Board of Examiners would have to be

exercised in either a regular or special meeting of the Board. The practice followed for some time by the Board has been for the members to sign their names to a "summary" sheet which is attached to payroll claims, expense reimbursement claims, contract payment claims, *etc.* This perfunctory approval has been performed in the respective offices of the members, and there has been no meeting where the members have met together for the purpose of approving these claims. Of course, many claims which the Board thought worthy of its attention have been considered in meetings of the Board, but the general procedure for approving routine items has been as stipulated by counsel in the Statement of Facts.

This means, then, that, under the lower court's ruling, the Board will be compelled to meet in session for the purpose of approving all claims. We do not necessarily contend that a constitutional function of the Board of Examiners can be discharged by members of the Board acting individually. We submit that all claims which the Board desires to examine should be examined by it in either a regular or special meeting.

But, if this Court were to hold that the Board had a constitutional duty to examine all claims (as did the lower court), then this would require the Board to meet with impractical frequency. This Court will take judicial notice of all official acts of executive departments of the State of Utah (Section 78-25-1 (3), Utah Code Ann.). Therefore, this Court will judicially notice that the Department of Finance issues payroll warrants to State employees on

the 5th, 10th, 20th and 25th of each month, and that, in addition thereto, there is an average of at least two warrant "runs" each week to pay other claims. There is an average of from 12 to 15 separate IBM "runs" of warrants every month, and the Board of Examiners would thus have to meet in session at least this often to examine and approve these claims prior to issuing the warrants thereon. Meeting in this manner not less than three times a week is very impractical.

The practice of the Board of Examiners over the years has demonstrated the futility of meeting to examine and approve all claims. The Board members have individually signed approval to cover sheets or summary sheets so that all routine expenditures could be made. This was done, not because the Board made any actual examination of the claims, but because the Board wasn't sure whether it was required to approve such claims or not, and the simplest means was individual signatures of approval without meeting in session. Matters which the Board considered of sufficient importance for its attention were discussed in actual meetings of the Board.

If the Court holds that the Board has a constitutional power to examine claims, then the Board can examine those claims which it wishes to examine in the meetings of the Board. If this Court holds that the Board *must* examine all claims (even against its wishes), and further holds that the examination must be conducted by the Board in a meeting, then the Board would be required to meet with impractical and annoying frequency to discharge a task which

would be considered by the Board to be an unnecessary, burdensome nuisance.

CONCLUSION

Three significant questions of law have been presented in this appeal, none of which has heretofore been determined by this Court. All three of the questions relate to the meaning of Article VII, Section 13, of the Utah Constitution. The first question is whether the Board of Examiners has constitutional authority to fix salary figures or to arbitrarily prevent payment of salary claims. The second question is whether the word "claims" means only those demands pursuant to an asserted right, or whether it means something broader, including applications for employment, uncompetitive bids, and similar matters wherein no right or claim of right is present. The third question is whether the Board has simply a constitutional power to examine claims, or whether it has the more onerous burden of a constitutional duty to examine claims.

Based upon the arguments presented in this brief, we conclude as follows:

A. Article VII, Section 13, Constitution of Utah, uses the clear, meaningful and unambiguous words "power" and "claim". Nothing is said about a "duty" to examine claims, and nothing is said about "claims" meaning and including something more than claims. Nor is there the slightest hint that the Board has any authority to fix or set salaries.

B. The most efficient and practical administration of state fiscal matters will be realized by giving the con-

stitutional provision a literal interpretation and thus sustaining the legislation in question. Further, such a result will not deny the Board of Examiners full power to examine claims, but-in fact will give it greater dignity and discretion. It should be noted that the Legislature considered the constitutional power of the Board of Examiners when the finance law was passed (by specifically mentioning the Board's power to examine claims), and that Senate Bill 48 had bi-partisan support in that it was sponsored by Senator Thorpe Waddingham (Democrat) and Senator Hughes Brockbank (Republican). Senate Bill 48 further had the approval of the Governor, as attested to by his signing the bill into law and further by his position in this litigation. Senate Bill 48, as now enacted into law, also has the support of the Department of Finance and a majority of the Board of Examiners (evidenced by their positions in this litigation).

C. Since the Legislature, the Governor, the Department of Finance and a majority of the Board of Examiners have demonstrated their support of Senate Bill 48 as enacted into law (and which was the product of 22 years experience with the previous Commission of Finance), this Court should not construe the clear and unambiguous word "power" to mean something completely different, nor should it construe the clear and unambiguous word "claims" to mean something more than claims, nor should it judicially create authority to fix salaries when no such authority is suggested; particularly when to do so would produce an illogical and unworkable end result.

D. In other words, this Court should not hold that the constitutional phrase “with power to examine all claims” means a duty to examine all applications, requests and petitions, and the authority to fix salaries, as did the lower court. The Board’s constitutional power to examine claims which are to be paid from appropriated funds was intended as a protection to public funds, not as a device to require administrative processing, fixing and adjudicating of all conceivable requests, applications and petitions.

Therefore, the judgment of the lower court should be reversed, and Sections 63-2-13, 63-2-15 and 63-2-20 should be sustained as constitutional, and the salary payment to Clair R. Hopkins should be declared lawful.

Respectfully submitted,

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APPENDIX

This Court has on ten separate occasions spoken concerning the constitutional authority of the Board of Examiners. These cases are discussed chronologically and in some detail in the following appendix. The appendix is attached as a somewhat objective analysis of the cases pertaining to the Board of Examiners and its constitutional authority. A detailed discussion of all of those cases within the body of this brief would have made the brief too long and too involved. But, the issues in this case have sufficient importance to justify a careful examination by the Court of all previous cases to review the complete body of case law relating to the *Board* as a constitutional entity. It is hoped that the appendix will be a convenience to the Court.

The Board of Examiners is created by Article VII, Section 13, Constitution of Utah, which provides:

“Until otherwise provided by law, the Governor, Secretary of State and Attorney-General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They 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 as 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.”

An examination of the constitutional power of the Board is largely confined to an examination of Article VII, Section 13 of the Utah Constitution, as it has been judicially construed. In *Thoreson v. State Board of Examiners*, 19 Utah 18, 57 Pac. 175 (1899), the Utah Supreme Court was confronted with the question as to whether the Board of Examiners had discretionary authority to reject a claim for refund of moneys paid pursuant to a void lease, when the Legislature had provided for such refund. The claimant had leased from the state certain school lands pursuant to an early statute authorizing such leases, and had paid lease rentals in accordance therewith. The statute authorizing such leases was later declared unconstitutional and the Legislature thereupon passed an act providing for repayment of lease rentals collected under the void leases. The Board of Examiners rejected a part of Thoreson's claim on the ground that the money paid did not reach the territorial treasury. The statute directed the Board "to receive, audit, and allow all just claims of persons who have paid moneys in pursuance of (the void leases)." In holding that the function of the Board in this instance was ministerial and not discretionary, the court said:

"It is contended by appellant's counsel 'that the board cannot audit and allow just claims presented to it without first sitting in judgment upon such claims, and hearing the necessary evidence, and making a proper investigation to determine whether claims come within this class.' This states the matter too broadly. The only investigation which the board is authorized to make is whether the money claimed was paid in pursuance of the act

of 1892. The board had no authority to reject a portion of the respondent's claim on the ground that none of the money paid, except the amount of the claim audited and allowed, ever reached the territorial treasury; for no such condition as that is contained in section 963 of the Revised Statutes. Its terms are plain, explicit, and unambiguous. They are susceptible of but one interpretation, and that is: The board shall receive, audit, and allow all moneys paid in pursuance of the act of 1892. The payments under that act were to be made to the county courts, and not to the territorial treasurer. The facts admitted by the appellant and found by the court show that the money claimed was paid by the relator's assignor in pursuance of the act of 1892. The money so paid was, as has already been shown, the money which the legislature intended should be refunded, and therefore any claim for money so paid is a just claim."

The primary reason the Board refused payment of the disputed part of Thoreson's claim was because Article X, Section 7 of the Utah Constitution provided "All public School Funds shall be guaranteed by the State against loss or diversion," and that to pay money as reimbursement for school land lease rentals, when such funds never reached the territorial treasury, would violate such constitutional provision. The court rejected this contention, not deciding whether in fact the Constitution would be violated, but saying simply that the Board had no authority to decide judicial questions and that the court couldn't decide the question in a mandamus proceeding:

"The decision of such a question by the board was the exercise of a judicial function. No such

judicial power was conferred upon it. Its discretion and duty in the premises were confined to the ascertainment of what, if any, amount the relator's assignor had paid in pursuance of the act of 1892.

* * * To allow mere ministerial officers, who have no direct personal interest in the matter, to refuse to perform an act clearly pointed out, and made their official duty, by a statute, on the ground that the performance of the act would violate the constitution, would be establishing a very dangerous precedent, and one not warranted by the authorities."

It is important to note that in the *Thoreson* case the court seemed to focus only upon the statute requiring repayment of the lease rentals, and refused to recognize more than an auditing function in the Board because the *statute* conferred nothing more than an auditing function. The first opinion in *Thoreson* certainly is not very persuasive authority as to the discretionary or quasi-judicial powers given to the Board by the Constitution.

On rehearing in the *Thoreson* case, 21 Utah 187, 60 Pac. 982 (1900), it was contended by the Board that the statute directing repayment of the lease moneys was unconstitutional to the extent that it reduced the Board to a mere auditor of claims contrary to the constitutional power the Board had to examine claims. In affirming its original decision, and after quoting the constitutional provision creating the Board, the court said:

"The board of examiners are required to perform the duties mentioned in said section of the constitution, and also to perform such other duties as may be prescribed by law. *Therefore the only*

duties in the premises imposed upon the board of examiners are such as section 963 of the Revised Statutes prescribes. In our former opinion we held that the only discretionary power which the board of examiners had in the matter was to ascertain whether or not respondent's assignor had paid on a lease made in pursuance of the void act of the territorial legislature the sum claimed by the respondent, and it having been admitted that said sum had been so paid, that such payment was, therefore, a just claim within the meaning of said section of the statute, and that said board of examiners had no right to reject said claim on the ground that section 963 of the Revised Statutes was violative of the constitution, but that it became and was the mandatory duty of the said board to receive, audit, and allow said claim, and that mandamus lies to enforce the performance of that ministerial duty. We did not hold, as intimidated in appellant's brief, that the board of examiners is a mere perfunctory body, not capable of exercising any judgment or discretion in matters of allowing or rejecting claims against the state, but held that in the particulars mentioned in this case, where the claim is admitted to be just, the board had no discretion, but their duties were mandatory. Upon a careful review of the case, we are satisfied that our former conclusions are correct." (Emphasis added.)

Justice Miner, concurring, seemed to suggest that the Board of Examiners was to act under the Constitution only "until otherwise provided by law," at which time the Board would act pursuant to statute only, the provision of the Constitution then being fully supplanted by legislation as was intended by the Constitution :

“By the constitution the board were to examine all claims against the state until otherwise provided by law, and were also to perform such other duties as might be provided by law. Section 963 was a provision authorizing and directing the board to examine and allow all just claims arising under a former statute. * * * *Until otherwise provided by law, the board were to act under the constitution.* Until otherwise provided by law, no claim against the state, except salaries, etc., could be passed upon by the legislature, without having been considered and acted upon by the board; but the board were to perform such other duties as might be provided by law, and section 963 was enacted in pursuance of the provision in the constitution. I am unable to see any good reason why the claim should not have been audited and allowed.” (Emphasis added.)

As shall be seen later, Justice Miner’s reasoning was rejected in subsequent cases decided by the court.

In *Marionneau v. Cutler*, 32 Utah 475, 91 Pac. 355 (1907), the petitioner, a district judge, applied for a writ of mandate against the Board of Examiners to compel payment for mileage as a travel expense. The statute fixing compensation of district judges at \$4,000.00 per year provided that no mileage or expenses should be allowed in addition to the salary. Initially, Article VIII, Section 20 of the Utah Constitution fixed the salary of district judges at \$3,000.00 per year until otherwise provided by law. Subsequent legislation allowed mileage reimbursement in addition to the \$3,000.00 salary. Finally, the act in question raised the annual salary to \$4,000.00 but expressly disallowed the mileage.

The Board rejected the claim for mileage because it was contrary to the statute. The plaintiff District Judge contended (1) that the provision denying mileage expense was void because it constituted a double subject matter in one statute, thereby violating the single subject requirement of the Constitution; (2) that the mileage limitation was not the proper subject of a proviso; (3) that the subject of the act was not clearly expressed in the title because no reference was made in the title to the elimination of the mileage expense; and (4) the earlier statute allowing mileage was still in effect because no express provision was enacted to repeal it. The petitioner alleged, *inter alia*, that the Board refused to audit and allow the mileage claim, "upon the sole ground that respondents (Board members) were advised and believed that there was no law of this state authorizing the allowance thereof, and therefore rejected the same."

In rejecting the contentions of the petitioner, and in dismissing the petition for writ of mandate, the court apparently sustained the quasi-judicial determination of the Board that the claim was not permitted by law. In so doing, the court examined and decided the legal questions to determine whether the action of the Board was sound as to the principles of law involved.

Marionaux may not be entirely consistent with the first *Thoreson* case, *supra*, wherein the court held the Board of Examiners was without authority to decide the judicial question as to whether refund of lease rental payments was an unconstitutional "loss or diversion" of pub-

lic school funds. In that case the court simply said "the decision of such a question by the board was the exercise of a judicial function. No such judicial power was conferred upon it." The court then refused to decide the question for itself, stating such would be improper in a mandamus proceeding.

In *State v. Edwards*, 33 Utah 243, 93 Pac. 720 (1908), the court was called upon to decide whether reimbursement for travel expense of a court stenographer was "salary or compensation of officers fixed by law," and therefore beyond the province of the Board to examine. A statute permitted district judges to employ court stenographers and to provide for certain travel expenses, not exceeding certain maximum limitations. The statute further provided that upon a certification by the judge as to the amount to be paid the State Auditor would draw a warrant for payment of the same. The court held that the employment of, and reimbursement of travel expenses for, court stenographers was compensation *fixed by contract* between the district judge and the stenographer, and that, even though such was *authorized by law*, it was not compensation *fixed by law*. The court said that the Legislature had no authority to bypass the Board of Examiners by directing the State Auditor to make payment directly upon receiving a certification by the District Judge:

"The authority conferred by the state upon certain officials to enter into contracts with other persons, and to agree upon the compensation to be paid for public services contemplated by the contract, not exceeding a specified sum, as we view

it, falls far short of fixing such compensation by law as contemplated by the Constitution."

"* * *

"The attempt by the Legislature to *require* the Auditor to allow a claim which by the Constitution must first be approved by the board of examiners can avail nothing. *The Auditor is bound by the constitutional provision. The Legislature is so bound, and so are we. The Legislature may make certain evidence conclusive with regard to a specific matter, but it may not interfere with powers conferred or duties imposed by the Constitution.* This, in effect, is what is attempted to be done in section 2, c. 72, p. 112, aforesaid. To the extent that the provisions of that section are in conflict with the constitutional provision governing salaries and compensation of officers fixed by law, the Constitution must prevail." (Emphasis added.)

Thereafter, the stenographer's claim was presented to the Board of Examiners, but was denied, *inter alia*, because the Board thought the certification insufficient in that the mileage reimbursement was based upon a fixed rate per mile, and the Board thought the reimbursement should be limited to the amount actually spent by the stenographer. In any event, the court issued its mandate requiring the Board to audit and pay the claim for mileage, holding that the rate per mile was authorized by the Legislature and that in such instances the Board had practically no discretionary power other than to ascertain that the legislative requirements are met:

"It is further urged that a writ of mandate should not issue against respondents for the reason

that in passing upon claims against the state they act in a quasi judicial capacity and must therefore be permitted to exercise the discretion usually exercised by such boards. *That respondents do act in such a capacity, and that they may exercise discretionary powers in the discharge of their official duties in passing upon and in allowing or rejecting claims, does not admit of doubt.* But this discretion is not one that may be arbitrarily exercised so as to prevent a claimant from seeking redress in the courts where purely questions of law are involved. In such cases even courts may be compelled to proceed to judgment, and, where the law directs what the judgment shall be in case all the facts are found or admitted, a superior court may direct an inferior one with respect to the particular judgment that shall be entered by it. The power to do this is not limited to appellate proceedings, as is illustrated in the case of *State v. Morse*, 31 Utah 213, 87 Pac. 705. In this case the essential facts entitling the relator to have his claim audited and allowed are all admitted. The questions, therefore, are purely questions of law. If the claim, therefore, is one which is admitted to be just, and is authorized by law, and there is no dispute with regard to any fact involved, and the claim is presented to the board in due form as the law requires, we know of no law nor reason why respondents, although acting in a quasi judicial capacity, should not be *required* to audit and allow the claim. (Emphasis added.)

* * *

“In view of the conceded facts, there is nothing upon which the respondents can legally exercise any discretionary powers in this case, and therefore they should have audited and allowed the claim.

No doubt they would have done so had they not entertained a view of the law different from the one we feel constrained to take. In such a case it is clear that the law in effect directs what the action of the board shall be, and, this being so, there is no reason why the board of examiners should not be required to comply with what it commands. There would be something lacking in our system of government or jurisprudence if under such circumstances a claimant could be defeated simply because the officer or board required to audit and allow his claim exercised some discretion in the matter. Where the duty to act is clear, and the law gives a right to obtain payment of a claim owing by the state, courts should not hesitate to enforce the right by mandamus. It follows, therefore, that the relator is entitled to have his claim for mileage as set forth in his petition audited and allowed by the respondents as the state board of examiners." *State v. Cutler*, 34 Utah 99, 95 Pac. 1071 (1908). (Emphasis added.)

The two cases involving the stenographer's claim for mileage invite an interesting observation. In the first case the court held that the Legislature as well as the courts were powerless to interfere with the constitutional right of the Board of Examiners to examine claims against the State, and that, therefore, the claim for mileage reimbursement could not by-pass the Board irrespective of any contrary language in the statute authorizing payments for such mileage. In the second case the court held that the claim, once presented to the Board, *must* be audited and paid if the statutory requirements are met, and that, though the Board is a quasi-judicial body, it exercises no judgment or discretion beyond that of a simple audit to

ascertain the facts when the Legislature has set the standard for payment. Apparently then, the Legislature could not by-pass the Board by directing that the State Auditor pay by warrant upon receipt of a district judge's certification of miles traveled, but, on the other hand, the Board could not add to nor detract from the requirements of the statute, and while the Board has a constitutional right to examine the claims, it is simply a constitutional right to audit (ascertain facts but not exercise discretion) in those areas where the Legislature has spelled out the criteria for payment.

To this point (1908), after deciding *Thoreson, Marion-eaux, Edwards* and *Cutler*, the court apparently had recognized in the Board a discretionary and quasi-judicial constitutional power to examine all claims against the State except salaries and compensation of officers fixed by law, but that, when the Legislature specifically assigns to the Board a statutory duty to receive, audit and allow claims, the Board cannot exercise its constitutional discretion beyond a mechanical and ministerial examination to determine that the facts surrounding the claim comply with the legislative criteria for payment.

The next case to be decided bearing upon the discretionary power of the Board was *Uintah State Bank v. Ajax*, 77 Utah 455, 297 Pac. 434 (1931). The plaintiff sought mandamus to compel the State Auditor to draw a warrant in payment of bounty claims for killing predatory animals. The Legislature had made an appropriation for payment of such bounty claims and had prescribed a

procedure for payment. Plaintiff, as assignee of the bounty claim for 25 coyotes and 7 bobcats, presented the claim in the statutory form and manner to the State Auditor for payment, but the Auditor declined to draw his warrant on the ground that an examination and approval of the claim by the Board of Examiners was a constitutional prerequisite. The court was divided, with two of the five justices joining in a vigorous dissenting opinion. Perhaps the holding of the court will be better clarified against the background of the dissenting opinion.

Justice Straup, joined by Justice Ephraim Hanson, dissented from the opinion of the court. Justice Straup reviewed the specific statutory procedures for obtaining bounty payments, and then concluded:

“It thus is seen that by the act a complete procedure is provided for the presentation and payment of bounty claims and all that is required to be done to entitle the claimant to a warrant from the state auditor. Such requirements necessarily negative a presentation of the claim to the state board of examiners for its approval. * * *

“For thirty years claims for killing predatory animals have been paid as by the act provided without presenting them to the board of examiners. Not until now, to entitle the holder of a certificate to a warrant or to authorize the state auditor to issue a warrant in payment thereof, was it at any time contended that such claims required presentation to or approval by the board. * * *

“That the *statute* clearly permits and contemplates the issuing of warrants in payment of bounty claims, without requiring the claims to be presented

to and approved by the board, may not well be doubted. No serious contention is made to the contrary. While in the prevailing opinion it is not expressly stated that the statute in such particular is unconstitutional, yet the holding necessarily is to that effect." (Emphasis added.)

Justice Straup then quoted Article VII, Section 13 of the Constitution, relating to the Board of Examiners, and argued that the only *mandatory* duty of the Board was to pass upon claims prior to their presentation to the Legislature, and that, unless the Board so acted, the Legislature was prohibited from acting:

"It is thus seen that the inhibition related only to the Legislature, forbidding it to pass on any claim against the state not considered and acted on by the board of examiners. As to the board, the Constitution but confers power on it to examine all claims against the state, except salaries, etc., and to perform such other duties as may be prescribed by law."

Justice Straup next argued that the *constitutional power* of the Board was intended to be only one of examining "unliquidated" claims:

"When properly considered, I think the sections have no application to the character of claims as here involved and which are to be paid not out of public revenues or of a general fund, but as expressly provided are to be paid out of a special fund created by the Legislature for a particular purpose, and where by the act itself creating the fund, payment of claims and the manner of presenting and paying them are specifically prescribed by the same

act creating the fund and where the law itself fixes the amount and manner of payment. * * *

“This brings us to the constitutional provision. Similar provisions by Idaho and Nevada were held to embrace or include only claims of an unliquidated character (citing Idaho and Nevada cases). I think such is the proper construction of our provision. *State v. Edwards*, 33 Utah 243, 93 P. 720, is referred to and relied on as supporting a contrary doctrine and as an authority that the constitution includes all claims, liquidated and unliquidated, except compensation and salaries of officers, etc., and requires all claims against the state to be presented to and approved by the board of examiners before the state auditor is authorized to issue a warrant in payment of them. In the opinion of that case there is undoubted language to that effect. However, the claim there considered was unliquidated. The facts recited in the opinion clearly show that; the court in effect so stated. What the court decided with respect to such a claim constituted an adjudication and a precedent of binding effect as to unliquidated claims. What was said beyond that, was mere dicta without binding effect.” (Emphasis added.)

The opinion of the court, however, thought *State v. Edwards* was controlling. Mr. Justice Folland, joined by Justices Cherry and Elias Hansen, held:

“This decision (*Edwards*) we think controlling in the present case. It follows, therefrom, *from the Constitution and statutes as thus construed*, that the bounty claims or certificates in question must be presented to and approved by the board of examiners unless it appears that they are either not ‘claims against the state’ or that they represent ‘sal-

aries or compensation of officers fixed by law.' It is not seriously contended that these are not claims against the state, but, on the contrary, it is rather assumed in the arguments and briefs of counsel that they are. This could not well be otherwise. That these are demands against the state seems clear because the fund from which bounty claims are paid is raised by taxation; the money is paid into the state treasury, is subject to appropriation by the Legislature, and is paid out by the state treasurer on warrant of the state auditor. We see no good reason why a fund raised by taxation for a special purpose is not entitled to the same protection as is the general fund. That they are 'claims' is equally clear." (Emphasis added.)

In response to the argument that the Constitution only intended the Board to examine "unliquidated" claims, the court said:

"A complete answer to this argument is that the Constitution makes no such exception. All claims are subject to action by the board of examiners, except only claims for 'salaries and compensation of officers fixed by law.' 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. It is true that a unit price to be paid on certain animals as a bounty is fixed by law, but before the claim is liquidated it must be determined how many animals were killed, where and within what county, and the pelts submitted must be examined and found to comply with state statute. While the duty is imposed upon the county clerk to make this examination and deliver his certificate, it is no answer to the constitutional requirement to say that the county clerk has audited and examined the claim, and that that is sufficient.

There could be no claim against the state for bounty until the animals are killed and the pelts presented to the county clerk. It is by the county clerk that the claim is liquidated, not by the Legislature. May the Legislature then, in the face of our constitutional provision, pass over the board of examiners and set up some local agency by which claims may be fixed and settled without any state officer having power to examine and approve or disapprove such claim?

“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 and responsibility with respect to claims thus liquidated pursuant to legislative authority. We cannot agree to any such construction of the constitutional language, nor may we by construction interpolate the word ‘unliquidated’ into the Constitution so that it would provide that the board of examiners have power to ‘examine all unliquidated claims against the State,’ etc. The Constitution 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 or officer.

“* * *

“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 power or authority to effectuate * * *.”

In the above discussion by the Court in the *Uintah State Bank* case, it is made clear that the Legislature cannot delegate to another officer or body the authority to “liquidate” claims, thus by-passing the Board of Examiners. But, the court also refused to construe the constitutional provision to mean only “unliquidated” claims. Therefore, even if some officer were designated to liquidate claims, it seems that such claims still must go to the Board of Examiners. Perhaps what the court really held was that a claim properly liquidated by the Legislature (rather than a subordinate public officer) must still be approved by the Board, but that the Board has a much narrower range of discretion in acting upon such properly liquidated claims. Therefore, this range of discretion cannot be diminished by a legislative *delegation* of the authority to liquidate claims to another officer or board. To do so would be to vest in another officer or agency the real discretionary duties of the Board of Examiners, and would reduce the Board to a mere auditing agent of the legislatively created agency. But, while the court strongly denounced any authority in the Legislature to so delegate, it sustained in the Legislature itself the authority to “liquidate” claims. Further, while the court said that the “Constitution and statutes” *required* the Board to examine claims, it did not say whether it was the Constitution *or* the statutes which established the requirement.

The next case decided by the court and dealing with the Board of Examiners was *Board of Education v. Commission of Finance*, 122 Utah 164, 247 P. 2d 435 (1952),

wherein the plaintiff instituted an original proceeding in the Supreme Court to compel the Commission of Finance to issue warrants on the State Treasurer for payment of salary claims of Dr. E. Allen Bateman. There is little discussion, and no specific holding, concerning the constitutional authority of the Board of Examiners. But, apparently one of the conditions precedent to payment of the salary (whether a statutory or constitutional prerequisite) was thought by the court to be approval of the Board of Examiners:

“The Board of Examiners (composed of the Governor, Secretary of State and the Attorney General) *which must approve all salary claims against the State*, except those fixed by law, approved by a vote of two to one the request of the Board of Education to pay Dr. Bateman a salary of \$10,000.00 per annum.” (Emphasis added.)

Despite the approval of the Board of Examiners, the Commission of Finance refused to pay because it questioned the legality of the constituency of the Board of Education and the appointment of Dr. Bateman. For reasons immaterial to this discussion, the court ordered the salary paid. Suffice to say that the Board of Education case simply recited that the Board of Examiners *must* examine and approve salary claims, without specifying whether such necessity was created under Article VII, Section 13 of the Constitution, or under Title 63, Chapter 6 of the Code.

In March of 1956 the court decided *University of Utah v. Board of Examiners, et al.*, 4 U. 2d 408, 295 P. 2d 348 (1956), wherein the University challenged the authority

of the Commission of Finance, the Board of Examiners, the Legislature and certain state officers to exercise financial or other control over the University. The contention of the University was that it was an entity created by the Constitution and was beyond the control of the State in financial and fiscal matters. In a lengthy opinion, written by Justice Worthen, the court rejected the position contended for by the University, holding the laws of the Legislature from time to time enacted to control the fiscal and financial affairs of the University. The case really seemed to be an argument between legislative control of the University versus an autonomous University. Therefore, the position of the Board of Examiners as a constitutional entity did not get very clear treatment, and the decision is of little help in clarifying the constitutional powers of the Board. The case seemed to hold that the University is subject to the Board of Examiners because the Legislature has so provided, but such a holding certainly fails to define the constitutional authority of the Board of Examiners.

A further observation about the University of Utah case is that the court, although unanimous in the result, was far from unanimous as to the rationale. In fact, no other judge concurred in Justice Worthen's opinion as written. Justices McDonough and Henriod concurred in the result, and Justice Crockett concurred in a separate opinion, which was adopted by Justice Wade in his concurrence in the result. Therefore, the statements made in the University case are not only unclear as to the position of the Board of Examiners, but they also do not have the approval

of any member of the court except the author of the opinion.

Early in 1958 the Supreme Court decided *Bateman v. Board of Examiners*, 7 U. 2d 221, 322 P. 2d 381 (1958), wherein the court sustained the power of the Board of Examiners and the Commission of Finance, as its administrative arm, to examine into and approve or disapprove proposed expenditures, including salary schedules, of the Superintendent of Public Instruction and Board of Education. After quoting Article VII, Section 13 of the Constitution, the Court said:

“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 moral claim; or the seeking of legislative largesse; or asserting a privilege; to asserting right to compensation for property or materials furnished, or salary for services rendered, to the state. But the pivot of the controversy has developed upon the term ‘to examine.’ *On the one hand, Education espouses the view that the power ‘to examine all claims against the state, merely denotes an auditing function; and on the other, Examiners takes the position that it confers plenary power to examine into the advisability and necessity of any expenditure or proposed obligation of the state.*

“The first facet of Education’s argument against the power claimed by Examiners is that the framers of the Constitution envisioned Section 13, quoted above, as legislative in nature, intended to be subsequently modified and controlled by legislative enactments such as the statutes conferring powers on Education. They emphasize that such was the plain import of its first clause, ‘Until otherwise provided by law, * * *’ which they insist modified the entire section. Without going into the detail of the arguments pro and con on this facet of the subject it is readily seen that attempting to give that proviso application to each of the subsequent parts of the section gives rise to some difficulty grammatically. i.e., it would read: ‘Until otherwise provided by law, * * * (they shall) * * * perform such other duties as may be prescribed by law.’ Absent knowledge of the facts concerning its adoption, the most natural meaning would be that it applies only to the first sentence dealing with the membership of the Board of State Prison Commissioners, and by parallel reasoning, to the second sentence relating only to the membership of the Board of Examiners.” (Emphasis added.)

Here, for the first time, the Court suggested that the composition of the Board of Examiners could be changed by the Legislature. Does this mean that the Legislature could replace all three of the present members (Governor, Secretary of State and Attorney General) and provide for an entirely different Board, perhaps with 5, 7 or 15 members? Perhaps, or perhaps not. In any event, the court continued to make it reasonably clear (though only dictum) that the composition of the Board could be changed:

"The idea that the boards themselves were to be subject to change by the Legislature also finds support in the practical construction which has been placed upon it. The membership of all of the other boards provided for in the sections just referred to (of the Constitution) has now been changed. A conclusion that the initial clause affects the entire section would not cast the die in favor of Education any more than it would in favor of Examiners, as will appear from our discussion of the statute relating to the powers of the latter board. Yet it does have an important bearing on the over-all conclusion we reach in this opinion, which is based to a considerable extent upon the concept that the fundamental power of government rests in the legislature."

In the *Bateman* case the argument was again presented that the Board of Examiners had constitutional authority to pass only upon *unliquidated* claims against the State. To this argument, the court responded:

"Certain it is that one of the functions of Examiners is to investigate and act as a fact finder and advisor to the legislature on claims of that nature, such as tort claims, or other claims for damages or compensation claimed for property, goods or services, by persons who would not otherwise have legal redress available.

"One of the major difficulties with Education's contention that, except as to unliquidated claims against the state, Examiners has no discretionary authority and can perform only an auditing function, is that that would be but a duplication of the duties of the state auditor who is charged with the responsibility of auditing the records and accounts

of all departments of state government. *The question as to the extent of the power of Examiners has been dealt with by this court in numerous decisions. They clearly demonstrate that Examiners has powers beyond mere auditing.*" (Emphasis added.)

The court then went on to note that the Legislature, itself, had recognized the constitutional discretionary power of the Board of Examiners, as demonstrated by various acts of the Legislature:

"This interpretation of the law is also consonant with the legislative conception of the powers of that board. They provide for the presentation of all claims against the state to the Board of Examiners to be passed upon; that it has certain supervisory powers over the Auditor; and the unanimous consent of its members is required before officers of the state may make deficit expenditures. It is expressly provided that the Department of Finance, the legislatively created administrative arm of the Board of Examiners, is endowed with authority to approve or disapprove of the hiring of all personnel, * * *."

However, the court conceded that, in large part, it was controlled by the past history of governmental function and by earlier decisions of the court, indicating that, if the question were one of first impression, the Board of Examiners might emerge in a different light:

"Were we interpreting the statutes and constitutional provisions relating to the Board of Examiners for the first time we might be more impressed by arguments proposed by Education. However, history and experience have always been the very bone and sinew of the law. As stated by the great

Justice Holmes: 'The Life of the law has not been logic; it has been experience.'

"Looking at the problems here presented in broad perspective it is important to realize that our legislature has met biennially and in special sessions for many years with both the statutory and decisional law of this state being so understood and applied that in practical operation the Examiners and Finance have exercised general supervisory powers over the fiscal and budgetary affairs of other departments of state government and no substantial changes have been made in the law in reference thereto.

"On the basis of the constitutional provisions, legislative enactments and decisional law of our state as it has developed, we are constrained to reject the contention of Education that it is entirely free from control of or responsibility to Examiners. We do not desire to be understood as saying that Examiners can go so far as to in effect exercise a veto power over legislation by arbitrarily refusing to make funds available which have been appropriated to Education for either general or specific purposes. Insofar as this has been done in certain instances which had considerable bearing upon precipitating this litigation, such actions were wrong. But inasmuch as the funds in question have reverted to the general fund, and the problems are now moot, there is no point in particularizing them. (Emphasis added.)

"Notwithstanding the powers conferred upon Examiners *by the statutes* hereinabove discussed, which must be recognized, that does not mean that it can by arbitrary actions in budgetary matters intrude into the internal affairs of management or control of the functions of Education within the

purview of its purpose as provided by law. The latter alone is given the authority and charged with the duty of the 'administration of the system of public instruction' in the schools of the state. *In order to discharge that responsibility it is essential, and the law contemplates, that it have full control of the framing of policy and other aspects of the internal management of that department in accordance with such purpose.*" (Emphasis added.)

The most recent case decided by the court and touching upon the powers of the Board of Examiners is *Wood v. Budge*, 13 U. 2d 359, 374 P. 2d 516 (1962), wherein the Board had examined and rejected certain unliquidated claims, and the Legislature subsequently appropriated to the Attorney General money to pay the claims upon securing appropriate releases. The Attorney General refused to pay the claims until a judicial declaration was had to determine the propriety of a legislative grant to pay an unliquidated claim rejected by the Board. In requiring the Attorney General to pay in accordance with the statutory appropriation, the court said:

"We are in accord with the defendant's assertion that the constitutional grant of authority 'to examine all claims against the State' gives the Board something more than an auditing duty to perform; *and that within its proper prerogative it has extensive power and discretion in examining into and determining the merits of claims asserted against the State.* We so observed in the recent case of *Bateman v. Board of Examiners*, after quite thoroughly considering the problem and our cases which have dealt with it. * * *

"The provision of Section 13 of Article VII, quoted above, that '* * * no claim * * *

shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners' plainly indicates that the action of the Board was not intended to be so final and absolute as to preclude other action by the Legislature. We can perceive no other meaning than that after the Board has performed its duty of examining and acting upon such claims, the Legislature may then 'pass upon,' i.e., exercise its judgment, on them and take such action as it deems appropriate. Entirely in harmony with this conclusion are: our statutory provision that 'any person who is aggrieved by disapproval of such a claim by the Board (Examiners) may appeal therefrom to the legislature'; the prior decisions of this court that have touched upon the matter; and the practice which has been followed since statehood. To decide otherwise would produce the illogical result of turning the subsequent presentation of claims to the Legislature into an empty gesture whose only purpose would be to rubber-stamp the action of the Board." (Emphasis added.)

It would seem that the court's conclusion does not necessarily follow from its argument. Certainly, if the Legislature only considered those claims recommended for approval by the Board, the Legislature could still exercise its discretion in approving or rejecting the claims previously examined and recommended by the Board, and there would be no compulsion upon it to appropriate money to pay claims recommended for approval by the Board. Further, the statutory provision for appeal to the Legislature on all claims rejected by the Board can hardly have persuasive weight as to the intent of the framers of the Constitution.

Nevertheless, the court so held, apparently adopting the concept that in areas of doubt or question as to constitutional jurisdiction, the uncertainty should be resolved in favor of the Legislature:

“There is another principle which bears upon the question here under consideration. Our Legislature is directly representative of the people of the sovereign state, and thus has inherently all of the powers of government except as otherwise specified by the State Constitution. By way of comparison, it is significantly different in that respect from the federal government, which is a government of limited powers that can properly do only those things within the scope of the powers expressly granted to it by the states through the Federal Constitution; whereas, the State Legislature, having the residuum of governmental power, does not look to the State Constitution for the grant of its powers, but that Constitution only sets forth the limitations on its authority. Therefore, it can do any act or perform any function of government not specifically prohibited by the State Constitution. In order to justify a conclusion that the power to approve and pay such claims has been taken away from the Legislature and placed exclusively within the control of the Board of Examiners, it would have to clearly so appear, which is not the case here.”

Having held that all such claims, whether approved or rejected by the Board, could properly pass to the Legislature for its disposition of them, the court suggested that the decision of the Board should be given careful consideration by the Legislature, and that if the Legislature appropriated money to pay claims in areas where the state would not be liable, even absent its sovereign immunity, perhaps the

appropriation would be a gift of public funds, and the court would have the final say as to whether the claim could be paid :

“Although the privilege is not ours to pass upon the wisdom of legislative action, we think it 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 assumed 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 State’s 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 to avoid making grants in cases where the State should assume no responsibility.”

If the framers of the Constitution “purposely” made the Attorney General, as the State’s legal advisor, a member of the Board to provide legal advice as to the claims, and if the framers “undoubtedly” named the Governor and Secretary of State to the Board because of their familiarity with the fiscal affairs of the State, then one cannot help but contrast this dictum as to the composition of the Board with the dictum of *Bateman*, which suggests that the Legislature could change the composition of the Board at its will, naming a Board with no legal advisors and having no person familiar with the fiscal affairs of the state.

Justice Henriod, concurring in the result and stating separately his opinion, seems to concur in the main opinion’s reference to the intent of the framers of the Constitution in making the Attorney General a member of the Board:

“It seems obvious to this writer that the Board of Examiners was a creature of its constitutional parents, *who deliberately and with wisdom* designed it to include the highest elected legal officer of the State. Also obvious, it seems, is that such officer was made a member of the Board to determine if a so-called ‘claim’ really is one against the State, or whether it simply is a request for a gift inaccurately called a ‘claim,’ or some other illegitimate petition for funds.

“Furthermore, the decision of the Board, after it has ‘passed upon’ a ‘claim’ should be overridden by the Legislature only upon a clear showing that its action wholly was arbitrary and capricious. Any arbitrary and capricious action of either the Board or the Legislature itself in effectuating any action

beyond its recognized functions would be subject to judicial review in an appropriate proceeding." (Emphasis added.)

Justice Henriod, in his separate opinion, stated that no issues were really before the court in the *Wood* case except whether, as a matter of procedure, the claims should be paid by the Attorney General. But under the test set forth by Justice Henriod, the Legislature could only appropriate money to pay a claim rejected by the Board if the Board's action had been arbitrary or capricious. Thus, to phrase the matter another way, if the Legislature did appropriate money to pay a claim *reasonably* rejected by the Board, then the action of the Legislature would be arbitrary and would be stricken in an appropriate proceeding for judicial review.

But the opinion of the court seemed to suggest a different test, stating simply that the Legislature should give careful consideration to the action of the Board, and implying that the court might be called upon to invalidate legislative grants if they amounted to a private gift of public funds.