State Actions—Claims—Board of Examiners—Legislature—Appropriations.

The legislature may not by consenting that the state be sued upon an unliquidated demand deprive the board of examiners of the power given by the constitution to pass upon all claims against the state.

When a claim has not been presented to the board of examiners no appropriation to pay the same can be made.

Judiciary Committee, February 5, 1925.
House of Representatives,
Helena, Montana.

Gentlemen:

You have requested my opinion whether the legislature has authority to consent that the state may be sued on an unliquidated demand by a citizen of this state in a court of this state and to make an appropriation to pay whatever judgment may be obtained.

It is, of course, fundamental that a state may not be sued without its consent.

It may also be said that as a general rule the legislature has authority to give such consent. This authority is inherent in the legislature unless prohibited by the constitution (36 Cyc. 912-913).

Our constitution treating of the method of examining claims against the state provides:

> "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 prisons as may be prescribed by law. They shall 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 legislative assembly without first having been considered and acted upon by said board."

In State ex rel. Schneider v. Cunningham, 39 Mont. 165, the supreme court of this state held that this section had application to unliquidated claims.

It appears from the facts submitted by you that the claim in question has never been presented to or acted upon by the board of examiners.

The state of Idaho has a constitutional provision identical with ours above quoted. In addition, the Idaho constitution contains the following provision:

> "The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the legislature for its action."

In the case of Thomas et al. v. State, 16 Idaho 81, 100 Pac. 761, these constitutional provisions were before the court for consideration. The legislature in creating the state normal school provided that the trustees may be sued. A judgment was obtained in the district court against

the trustees. The judgment was presented to the board of examiners and by it disallowed. The plaintiffs then brought action in the supreme court on the judgment for the purpose of securing a recommendatory judgment. The state demurred to the complaint and it was held by the supreme court that the demurrer should be sustained. The court, in the course of its opinion, after referring to certain sections of the Idaho statutes, said:

> "This section of the statute does not contemplate presenting to the board as a claim a judgment. This section must be taken and read in connection with Sec. 18, Art. 4 of the constitution, and when so read contemplates that all claims, except salaries and compensation of officers fixed by law, shall first be presented to the state board of examiners. (Winters v. Ramsey, 4 Ida. 303, 39 Pac. 193). If by them disallowed, action may be brought in the supreme court of the state where a recommendatory judgment may be entered.
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> "In the case under consideration it was the duty of the plaintiff, if the board of trustees failed to allow their claim, to have presented the same to the state board of examiners; if there disallowed, then to have brought action in this court for a recommendatory judgment."

The court then quoted from the case of Bragaw v. Gooding, et al. 14 Ida. 288, 94 Pac. 438, as follows:

> "Neither can this court withdraw from the state board of examiners its power and authority under the constitution and statutes and confer such power upon the state auditor, or any other state officer."

The court continuing, said:

> "If, then, the contention of plaintiffs be correct, that a judgment may be obtained in the district court and such judgment presented to the state board of examiners, and the board is required to allow the same, then the authority conferred upon the state board of examiners, by the constitution, is denied them, and such authority may be exercised by the district court. This would be a power that the supreme court of the state cannot exercise."

The same court in Davis v. State, 163 Pac. 373, held that the fact that the supreme court had original jurisdiction over claims against the state did not relieve claimant of the necessity to first present the claims to the board of examiners. The court said:

> "The mere fact that this court has original jurisdiction to hear claims against the state does not relieve claimants of the obligation in the first instance of presenting their claims to the state board of examiners."

In Pyke v. Steunenberg, 5 Idaho 614, 618, 51 Pac. 614, the court, in speaking of this question, said:

"The jurisdiction is conferred upon this court by the constitution (section 10, Art. 5) to hear claims against the state, and to make decisions thereon, which decisions 'shall be merely recommendatory'; and this court has declined to hear any claims against the state until the same have been passed upon by the board of examiners."

Utah has a constitutional provision identical with ours, and in Wilkinson v. State, 134 Pac. 626, the supreme court of that state held that the constitutional provision in question was an inhibition upon the maintenance of an action against the state. The court, after referring to Idaho and Nevada cases, used this language:

"The reasoning of both the Nevada and Idaho supreme courts seems reasonable and logical. It is pointed out by those courts that the board of examiners is a creature of the constitution, and that the courts are no more than that. It is also suggested that neither can exercise powers that are withheld by that instrument. The people of this state, who are responsible for the constitution and its terms, had the right to confer or to withhold power as to them seemed proper. If, therefore, they created a tribunal and conferred powers upon it to hear and determine the justness of all claims not specifically otherwise provided for, the will of the people must be obeyed by the courts as well as by all others. As we have seen, even the legislature is prevented from passing upon any claim until the same has been passed on by the state board of examiners. The conditions upon which a claimant may have his claim considered and passed on by the legislature of this state are provided for in Comp. Laws 1907, section 945. In the same compilation, sections 929 to 949x1, inclusive, the duties of the board of examiners and the procedure to be followed in presenting and disposing of claims are fully set forth. A constitutional tribunal is therefore provided for in this state in which any claimant may be heard and from whose decision he may appeal to the only power which can provide funds for the payment of his claim if found just and if it be allowed. This is all any claimant can reasonably ask."

In State v. Hallock, 22 Pac. 123, the supreme court of Nevada had an identical constitutional provision under consideration and said:

"In view of the manifest purpose of the constitution to protect the treasury by requiring the board of examiners to adjust all claims, it cannot be held that the many and important claims arising against the state, and which, as claims, have never been acted upon by the legislature, are exempted from the investigation of the board. Without stating at length the various positions taken by relator, there is an insuperable objection common to all. Each contention involves an exemption of the claim of the county from the action of the board of examiners, and each is conclusively answered by the provisions of the

constitution defining the duties of the board. It is not within the power of the legislature to confer this authority elsewhere."

From the foregoing decisions, this seems to me to be the proper answer to your inquiry. The legislature cannot take from the board of examiners (a constitutional board) the power to pass upon claims against the state and that if it did consent that the state may be sued the board of examiners would not be bound by any judgment obtained.

Furthermore, it is my opinion that no appropriation can be made at this time because the claim has never been presented to or acted upon by the board of examiners, and the legislature has no authority to pass upon it until that has been done, and, in my judgment, if an appropriation were made it would be equivalent to a declaration on the part of the legislature that the claim is in part, at least, valid.

Your attention is also called to section 242, R. C. M., 1921, requiring any person having a claim against the state to present it to the board of examiners at least two months before the meeting of the legislative assembly.

Section 243, R. C. M., 1921, provides for the publishing of notice of the time when the board will examine the claims.

Section 244 provides for the hearing of the claims by the board and that the board make its recommendations to the legislature. This report must be made at least thirty days before the meeting of the legislature. (Section 245.)

Anyone aggrieved by the action of the board of examiners may appeal to the legislative assembly. (Section 248.)

These provisions of our statute, until repealed, are binding upon all persons having claims against the state, and, in my opinion, furnish an exclusive remedy, and therefore an appropriation at this time would not be proper.

Very truly yours,

L. A. FOOT,
Attorney General.