

1952

State Board of Education and W. O. Bentley et al v. Commission of Finance et al : Brief of Plaintiff

Utah Supreme Court

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Clinton D. Vernon;

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In the Supreme Court of the State of Utah

STATE BOARD OF EDUCATION and W. O. BENTLEY, Chairman, and DR. GEORGE L. REES, DR. HAROLD E. NELSON, PARLEY T. RICHINS, RAY P. DYRENG, LYNN S. RICHARDS, DR. WELLS T. BROCKBANK, WILLIAM C. JENSEN, A. L. ELMER, members thereof, and E. ALLEN BATEMAN, executive officer thereof and Superintendent of Public Instruction,

Plaintiffs,

Case No.
7785

— vs. —

COMMISSION OF FINANCE and P. H. MULCAHY, TRUMAN S. CURTIS, and MILTON B. TAYLOR, members thereof,

Defendants.

BRIEF OF PLAINTIFF

CLINTON D. VERNON,
Attorney General

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Defendants.

Case No.
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BRIEF OF PLAINTIFF

STATEMENT OF FACTS

The 28th Legislature (Regular Session, 1949) adopt-
ed two Joint Resolutions proposing constitutional amend-
ments (1) to Article X, Section 8, and (2) to Article VII,

Sections 1, 10 and 20, Laws of Utah, 1949, pages 296 and 297. These proposed constitutional amendments were voted upon, and adopted, by the people at the general election in 1950.

Prior to its amendment Article X, Section 8, of the Utah Constitution provided:

The general control and supervision of the Public School System shall be vested in a State Board of Education, consisting of the Superintendent of Public Instruction, and such other persons as the Legislature may provide.

As amended said section now provides:

The general control and supervision of the public school system shall be vested in a State Board of Education the members of which shall be elected as provided by law.

The Board shall appoint the State Superintendent of Public Instruction who shall be the executive officer of the Board.

By the amendments to Article VII the Constitution was changed (a) to delete the Superintendent of Public Instruction from the list of elective officers constituting the Executive Department as set out in Section 1 thereof, (b) to delete the office of Superintendent of Public Instruction from the list of Executive Department offices named in Section 10 thereof where it is provided that in the event of vacancy in such offices by death, resignation or otherwise the Governor shall fill the same by appointment, and (c) to delete the office of Super-

intendent of Public Instruction from those named in Section 20 thereof, which provides that officers of the Executive Department, and other state and district offices provided for by law, shall receive for their services monthly a compensation as fixed by law.

The Joint Resolution proposing the amendment to Article X did not specifically provide for an effective date for that amendment. The Joint Resolution proposing the amendments to sections in Article VII, however, provided that "if adopted by the electors of the State, this amendment shall take effect the first day of January, 1951."

In the Regular Session of the 29th Legislature (1951) several bills were introduced to implement the approved constitutional amendment to Article X, Section 8. (H.B. No. 195, H.B. No. 221 and H.B. No. 222; S.B. No. 185, S.B. No. 186, S.B. No. 221, and S.B. No. 222). None of the bills, however, was passed. When the Legislature met in Special Session in June, 1951, the Governor called attention to the failure to pass implementing legislation in the Regular Session and added to the agenda of the Special Session the matter of considering such legislation. Three bills were introduced in the Special Session, H.B. No. 9 and S.B. Nos. 10 and 11. H.B. No. 9, as amended, was enacted and is now Chapter 16, Laws of Utah, 1951, First Special Session. S.B. No. 10 was passed and is now Chapter 17, Laws of Utah, 1951, First Special Session. S.B. No. 11 did not pass.

The Special Session of the Legislature adjourned

June 16, 1951. In accordance with Article VI, Section 25 of the Utah Constitution, the statutes passed during the Special Session became effective August 15, 1951. Under date of July 28, 1951 the Chairman of the State Board of Education asked the Attorney General of Utah for his opinion upon three questions: (1) Is it necessary that an election for a member of the Board of Education be held in Regional District No. 7 in 1951? (2) Does the State Board of Education have authority to appoint a State Superintendent of Public Instruction as soon as the law becomes effective? (3) Does the present State Superintendent have the right to continue in office until his elected term expires? In an opinion dated September 6, 1951 the Attorney General answered (1) that in his opinion no election should be held in 1951 in Regional District 7, (2) that in his opinion the Board of Education was then authorized to appoint the Superintendent of Public Instruction, and (3) that the term to which the Superintendent was elected in 1948 had been shortened and that he was not entitled as a matter of right to complete that term. At the meeting of the State Board of Education held September 7, 1951, the following motion was adopted:

Inasmuch as copies of the opinion requested by the Chairman of the State Board of Education from the Attorney General have not come to the attention of members of the Board until today, and inasmuch as all members of the Board are not present at today's meetings, the Board postpones action on permanent appointment of the State Superintendent of Public Instruction until the members have had opportunity to study possible

implications of the opinion and opportunity for a meeting to be held with a full membership of the Board present.

Pending final appointment, the Board appoints E. Allen Bateman as State Superintendent of Public Instruction and as Executive Officer of the Board at the present salary (\$6,000 per year.) Such appointment is to be effective as of August 16, 1951, and Superintendent E. Allen Bateman is authorized to sign all documents and carry out all business of the Board according to Board policy.

On October 5, 1951, the State Board of Education appointed E. Allen Bateman State Superintendent of Public Instruction and fixed his salary at \$10,000 per year. Exhibit "A" attached to Complaint. On October 9, 1951, the Board of Examiners, by a vote of two to one, approved the request of the State Board of Education to pay the Superintendent a salary of \$10,000 per year. Exhibit "B," attached to Complaint.

Section 5, Chapter 123, Laws of Utah 1951, provides that "Salaries of all state officers and employees shall be paid semi-monthly." Salary claims were submitted for and on behalf of the Superintendent of Public Instruction for the payroll periods October 1 to 15, 1951, and October 16 to 31, 1951, and said salary claims, each in the amount of \$416.66, were approved by the Board of Examiners, by a vote of 2 to 1. Exhibits "C", "D", "E" and "F", attached to Complaint. Defendants, however, refused, and despite the demand of Plaintiffs, still refuse, to prepare and issue warrants to Superintendent Bateman in payment of said salary claims. No salary

has been paid to Superintendent Bateman since his appointment by the Board of Education on October 5, 1951. Chapter 14, Laws of Utah 1943, (Section 87-5-3.10) provides that warrants shall be prepared, issued and drawn by the Commission of Finance.

Except for the allegations in the Answer filed herein, defendants have not advised plaintiffs of the reason or reasons why they have refused, and still continue to refuse, to prepare, draw and issue warrants for salary claims of the Superintendent of Public Instruction.

STATEMENT OF POINTS RELIED UPON

POINT I.

THE STATE BOARD OF EDUCATION WAS AUTHORIZED TO APPOINT AND FIX THE SALARY OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

Effect of 1950 constitutional amendments.

That part of the amendment to Section 8, Article X providing for the election of members of the State Board of Education was not self-executing.

Effect of the implementing legislation.

Superintendent Bateman's term was shortened, but the office was not abolished and no vacancy was created.

The offices of members of the Board were not abolished and no vacancies were created.

Under the amendments and statutes the Board of Education was authorized to appoint and fix the salary of the Superintendent.

POINT II.

THE AUTHORITY OF THE BOARD OF EDUCATION TO FIX THE SUPERINTENDENT'S SALARY WAS SUBJECT ONLY TO APPROVAL BY THE BOARD OF EXAMINERS, AND THE AVAILABILITY OF FUNDS.

Salary of Superintendent no longer had to be "fixed by law."

Not being a salary fixed by law, approval by the Board of Examiners was necessary.

The salary claims having been approved by the Board of Examiners the Commission of Finance could not refuse to issue warrants if funds were available.

ARGUMENT

POINT I.

THE STATE BOARD OF EDUCATION WAS AUTHORIZED TO APPOINT AND FIX THE SALARY OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

Effect of 1950 constitutional amendments.

Prior to its amendment in 1950 Article X, Section 8 of the Utah Constitution provided that the State Board of Education consisted of the "Superintendent of Public Instruction and such other persons as the Legislature may provide." By Section 75-7-1, UCA 1943, the Legislature had provided that the Board "shall consist of the state superintendent of public instruction and nine other persons, appointed by seven regional school board conventions."

The 1950 amendment changed Article X, Section 8 to read:

The general control and supervision of the public school system shall be vested in a State Board of Education the members of which shall be elected as provided by law.

The Board shall appoint the State Superintendent of Public Instruction who shall be the executive officer of the Board.

By Chapter 16, Laws of Utah 1951, First Special Session, the Legislature established the machinery for the election of members of the Board, continued the terms of present members of the Board until elections are held in 1952, 1954 and 1956 and their successors are elected and qualified, and also provided that the Board "shall fix the salary of the state superintendent of public instruction, who shall be the executive officer of the board."

Article VII, Sections 1, 10 and 20, prior to their amendment in 1950, provided:

The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years, beginning on the first Monday of January next after his election. * * * (Sec. 1)

* * * If the office of secretary of the state, state auditor, state treasurer, attorney general, or superintendent of public instruction be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified, as may be by law provided. (Sec. 10)

The Governor, Secretary of State, Auditor, Treasurer, Attorney General, Superintendent of Public Instruction and such other State and district officers as may be provided for by law, shall receive for their services monthly, a compensation as fixed by law. * * * (Sec. 20)

The 1950 amendments deleted the Superintendent of Public Instruction from each of the three Sections of Article VII.

The 1950 amendments did *not* change Section 19 of Article VII which provides:

The Superintendent of Public Instruction shall perform such duties as may be provided by law.

Neither did the 1950 amendments delete the reference to the office of Superintendent of Public Instruction in Section 15 of the same Article, which deals with the Board of Reform School Commissioners.

The effect of the amendment to Article X, Section 8 of the Constitution was to:

1. Provide that the State Board of Education shall be "elected as provided by law," whereas in the past the members have been appointed by regional school board conventions.
2. Eliminate the Superintendent from membership on the Board.
3. Authorize the Board to appoint the Superintendent, "who shall be the executive officer of the Board."

The effect of the amendment to Article VII, Sections 1, 10 and 20 was to:

1. Eliminate the Superintendent from the list of elected officers constituting the Executive Department. That Department now consists of the Governor, Secretary of State, State Auditor, State Treasurer and Attorney General.

2. Take the Superintendent out from the provisions of Section 2 of Article VII, which provides that the officers named in Section 1 shall be elected, etc.

3. Take the Superintendent out from the provisions of Section 3 of Article VII, which, among other things, provides that no person shall be eligible to any office listed in Section 1 unless he (a) is a qualified elector, and (b) shall have been a resident citizen of the State for five years next preceding his election.

4. Take the office of Superintendent out of the list of offices set out in Section 10 to which, in the event of vacancies, the Governor may make appointments.

5. Take the Superintendent out of the list of Executive Department officers and other state and district officers who, by virtue of Section 20, "shall receive for their services monthly, a compensation as fixed by law," etc.

That part of the amendment to Section 8, Article X, providing for the election of members of the State Board of Education was not self-executing.

In determining whether a constitutional amendment is self-executing the question is whether the "constitutional provision is addressed to the courts or to the legislature." Where, as in the case before the Court, the legislature is directed to make suitable provisions

for carrying the amendment into effect that amendment is "obviously addressed to the legislature and is indicative of the intention that such amendment should not become effective until made so by an act of the legislature." 11. Am. Jur. p. 690, Sec. 73. A constitutional provision is self-executing only if there is nothing to be done by the legislature to put it into operation, if the rights conferred and liabilities imposed are fixed by the Constitution itself, "and there is no language indicating that the subject is referred to the legislature for action. 11 Am. Jur. p. 692. Provisions relating to elections are not self-executing which "by express terms or by implication show the necessity for action by the legislature in order that they may become effective." 16 C.J.S. p. 109 Sec. 53. See *In Re Montello Salt Co.*, 88 U. 283, 53 P. 2d 727, 729, and *Anderson v. Cook*, 102 P. 265, 130 P. 2d 278; *State ex rel Richardson v. Ewing*, 17 Mo. 515; *State ex rel Hudd v. Timme Secretary of State* (Wis., 1882) 11 N.W. 785; *Opinion of Justices 3 Gray* (Mass.) 601; *State v. Scott*, 9 Ark. 270.

We think there can be no doubt that the provision in question was not self-executing. It specifically states that the members of the Board of Education shall be elected "as provided by law." Clearly this provision was directed to the Legislature, and implementing legislation was necessary to carry it out.

Effect of the implementing legislation.

As previously noted, several bills were introduced in the Regular Session of the 1951 Legislature to imple-

ment the constitutional amendments adopted in 1950. These bills failed of passage, however, and the subject was added to the agenda of the Special Session which convened in June 1951. See letter of the Governor to the House dated June 6, 1951, House Journal, 29th Legislature, First Special Session, p. 24, and Senate Journal, p. 32. Two statutes which were enacted at that Special Session are now designated Chapters 16 and 17, Laws of Utah 1951, First Special Session.

Chapter 16 amended Section 75-7-1, UCA 1943, to provide that the "state board of education shall consist of nine persons elected by qualified registered electors according to election districts, as hereinafter provided." It set up election districts on the same geographical basis as judicial districts, established a nominating procedure and then provided that the "elections shall be conducted as a part of the general election with the same judges of election, the same constables, and the same polling places, but with separate ballots." After stipulating that the returns shall be canvassed by district boards of education and the State Board of Education, Chapter 16 (in Sec. 75-7-1.50) provided (1) that in the November, 1952 general election, and every six years thereafter, three members shall be elected from Regional District No. 3, (2) that in the November, 1954 general election, and every six years thereafter, one member shall be elected in each of Regional Districts Nos. 4, 6 and 1, and (3) that in the November, 1956 general election, and every six years thereafter, one member shall be elected

in each of Regional Districts Nos. 5, 2 and 7. This new section then provided:

Each member of the state board of education shall be elected for a term of six years and until his successor is elected and qualified.

The terms of office of the present members of the state board of education are continued until their successors are elected and qualify.

Chapter 16 also amended Section 75-7-2 to in part provide:

The state board of education shall elect from its members a chairman and vice-chairman. Such officers shall be elected or appointed at the first meeting of the board in February, 1952, and each year thereafter. The duties of these officers shall be determined by the board. The board shall also appoint a secretary of the board who shall serve at the pleasure of the board.

The state board of education shall appoint and shall fix the salary of the state superintendent of public instruction, who shall be the executive officer of the board.

After making provision for the appointment of assistant superintendents, directors, supervisors, assistants, clerical workers and other employees, and for the fixing of their salaries by the Board, the statute also provides for an allowance of \$300.00 per year for members of the Board and for the payment of traveling expenses. It concludes with this provision:

All existing statutes of the state of Utah which are inconsistent or in conflict with this act, are to

the extent of such inconsistency or conflict, declared null and void insofar as they relate to the provisions of this act.

The provisions of Chapter 16 are consistent with the amendments adopted by the people in 1950, and with other provisions of the Constitution of this State. By enacting what is now Chapter 17, Laws of Utah 1951, First Special Session, the legislature specified what qualifications the Superintendent of Public Instruction must have and made it clear that he should "serve at the pleasure of the Board." The two statutes appropriately implemented the constitutional amendments and completed the changes in the State Board of Education and in the office of Superintendent of Public Instruction endorsed by the people of this state when they adopted the amendments in 1950.

It will be noted that the first sentence of Section 75-7-1.50 reads as follows:

There shall be elected on the first Tuesday after the first Monday of November in 1951, one member of the state board of education from Regional District No. 7.

We submit that it was a case of pure inadvertence to leave this sentence in the Section, and that the wording of the sentence is so meaningless and so inconsistent with the obvious intention of the Legislature that it should be rejected as surplusage and omitted, eliminated and disregarded.

Chapter 16 was H.B. No. 9 in the Special Session.

As introduced H.B. No. 9 provided that on the first Wednesday in *December*, 1951, one member of the state board of education should be elected from each of Regional Districts Nos. 1, 2, 4, 5, 6 and 7, and that in 1952 three members should be elected from Regional District No. 3. The Journal of the proceedings in the House shows that the House amended this section to provide for the election of one member from Regional District No. 7 in *November*, 1951, the election of three members from District No. 3 in December, 1952, and for the election of the other five members, one each year, in the following order: Region No. 4 in 1953, Region No. 6 in 1954, Region No. 1 in 1955, Region No. 5 in 1956, and Region No. 2 in 1957. (House Journal 29th Legislature, First Special Session, pp. 103-104)

When H.B. No. 9 was before the Senate it was amended so that Section 75-7-1.50 provided for the election of three members from District No. 3 in November 1952, one member from each of Districts Nos. 4, 6 and 1 in 1954, and one member from each of Districts Nos. 5, 2 and 7 in 1956. The Senate also amended the bill to provide that the *elections should be conducted as part of the general elections*, with the same judges, constables, and polling places, but with separate ballots. (Senate Journal 29th Legislature, First Special Session, pp. 126-127) It was purely an oversight not to strike out the first sentence of the Section, quoted above. That sentence is wholly inconsistent with the provision that elections of members of the State Board of Education should be conducted as part of the general elections. Not only was

there no general election in 1951, but no machinery whatsoever was set up to conduct any district-wide election in District No. 7, or any other district in the state in that year. Furthermore, the bill as passed provided (in Sec. 75-7-1.20) for nominations to be made by district conventions in the month of March in 1952, 1954 and 1956, and each six years thereafter. No provision was made for any nominating convention in 1951—in fact Chapter 16, which was passed on June 16, 1951, did not become effective until August 15, 1951. While the alternate method of being nominated — by filing a petition with the Secretary of State on or before the last Wednesday of September — was still open, the conclusion is inescapable that the Legislature did not intend that an election should be held in 1951. If it had so intended it would have provided the necessary machinery for holding a district-wide election and most likely would have provided a special nominating procedure.

The election of one member in 1951 is inconsistent with the provisions in Section 75-7-1 as amended by Chapter 16, and in Section 75-7-1.50 that each member should be elected for a term of six years. It will be remembered that Section 75-7-1.50 provided that in 1956—which would be only *five* years after 1951—one member should be elected from Regional District No. 7. We submit that the sentence in question comes within the rule that where “words of a statute are so meaningless or inconsistent with the intention of the legislature otherwise plainly expressed in the statute, * * * they may be rejected as surplusage, and omitted, eliminated, or dis-

regarded.” 50 Am. Jur., Statutes, Sec. 231, p. 219. See *Leibson v. Henry*, 356 Mo. 953, 204 S.W. 2d 310; *State v. Bates*, 96 Minn. 110, 104 N.W. 709.

Superintendent Bateman's term was shortened, but the office was not abolished and no vacancy was created.

The proposal to amend Sections 1, 10 and 20 of Article VII concluded with this language:

If adopted by the electors of the State, this amendment shall take effect the first day of January, 1951.

The amendments to Sections 1, 10 and 20, clearly were self-executing. There was nothing in them that was directed to the Legislature. Likewise, that part of the amendment to Section 8 of Article X which provided that the Superintendent should be appointed by the State Board of Education was self-executing and needed no legislation to be carried into effect. Together, these amendatory provisions changed the constitutional office of Superintendent of Public Instruction from one elected by the people, to one which thereafter should be filled by appointment by the State Board of Education. They also removed the Superintendent from the list of officers whose compensation must be “fixed by law,” and removed the office from the list of those which, in the event of vacancies, can be filled by gubernatorial appointment.

This Court in the case of *Snow v. Keddington*, 113 U. 325, 195 P. 2d 234, held that while the general rule is that “a constitutional amendment becomes effective on the date it is passed by a majority vote of the people”

this rule is "not applicable if the amendment that is submitted to the voters includes a provision that the same shall take effect on a later designated date." Under the authority of that case it would appear that the effective date of the amendments to Sections 1, 10 and 20 of Article VII was January 1, 1951, and that that part of the amendment to Section 8 of Article X which provides that the State Board of Education shall appoint the Superintendent of Public Instruction became effective when approved by the voters.

In the Snow case this Court also recognized the principle that public offices may be "created, abolished, or the time shortened or lengthened by constitutional amendment."

In the leading case of *Lockett v. Madison County*, 137 Miss. 1, 101 So. 851, 37 ALR 814, the Court said:

Certainly the people of the state by constitutional provision may abolish any office at any time. The Constitution is supreme, and voices the command of the sovereign people. The office holder has no vested right therein, nor does he hold the office by contract.

See also *Martello v. Superior Court*, etc. 202 Cal. 400, 261 P. 476; *Deupree v. Payne*, 197 Cal. 529, 241 P. 669; *State v. Duncan*, 108 Mont. 141, 88 P. 2d 73; *State v. Cooney*, 70 Mont. 355, 225 P. 1007; 42 Am. Jur. pp. 904-906; 4 ALR 210, and 172 ALR 1375.

The effect of the amendments to Section 8 of Article X and Sections 1, 10 and 20 of Article VII was to shorten

Dr. Bateman's term, to which he was elected in 1948, to January 1, 1951, or earlier. It may be concluded that that part of the amendment of Section 8 of Article X, providing that the Superintendent should be appointed by the Board, alone shortened the term to which Dr. Bateman was elected. Certainly, that amendatory provision plus the amendments to Sections 1, 10 and 20 of Article VII accomplished a shortening of the term. The Board of Education could have made an effective appointment on whatever date the term was shortened.

When the amendments are considered in the light of the circumstances under which they were proposed and adopted, the intent of the legislature and of the people in approving them, it is clear that they did not abolish the office of Superintendent, nor did they create any vacancy in that office. The purpose of the two amendments adopted in 1950 was to take the Superintendent "out of politics" by changing the office from one that was elective to one that was appointive, and to give the power of appointment to the Board of Education. Neither by specific provision, nor by implication, do the amendments indicate any intention to abolish the constitutional office of Superintendent. While the Superintendent is no longer one of the *elective* officers making up the Executive Department, as defined in Section 1 of Article VII, and the duties of the office are somewhat changed, nevertheless the status and duties of the Superintendent are still defined generally by constitutional provisions. Section 8 of Article X, as amended, provides that the Superintendent shall be appointed by the Board, and

that he shall be the executive officer of the Board, and Section 19 of Article VII still provides that the Superintendent "shall perform such duties as may be provided by law."

Clearly, the Superintendent is still a constitutional officer. The constitutional status, functions and duties of the office are not subject to change or termination by the Legislature. That body may not deprive the Superintendent of his status as the executive officer of the Board, nor take from him the powers and duties which the people conferred upon him when they made him the executive officer of the Board. Likewise, the Legislature may not provide for a different method or procedure for selecting the Superintendent than that set out in the constitutional amendment. Under Section 19 of Article VII the Legislature may provide additional duties to be performed by the Superintendent consistent with his status as an appointee and executive officer of the Board and consistent with his constitutional duties as such, but the people alone have the power to alter or take away his constitutional status, powers and duties.

At the time Dr. Bateman was elected to the office of Superintendent in 1948 both the Constitution and Section 75-8-1, UCA 1943, provided that his term should be for four years. Section 75-8-1 added the words "and until his successor is elected and qualified." If the constitutional amendments which shortened his term also by implication repealed the provisions of Section 75-8-1, then at least on January 1, 1951, there was no specific statu-

tory or constitutional provision authorizing the Superintendent to hold over until his successor was either elected or appointed and qualified. We think it is clear, under the authority of the holding of this Court in Peterson v. Benson, 38 U. 286, 112 P. 801, that Dr. Bateman was at least a *de facto* officer until the time of his appointment by the Board, at which time he became a *de jure* officer.

The fact situation before the Court in the Peterson case briefly was as follows: the town marshal in Logan was elected for a two year term at the election in November 1907; in 1909 the Legislature amended the law to provide that the marshal should be appointed by the mayor; this amended law was in effect when the marshal's two year term expired on January 3, 1910, but no appointment was made, and the action was brought to recover his salary for the month of February, 1910; while the law under which the marshal was elected provided that his term was for two years and until his successor was elected and qualified, there was, of course, no such provision in the new law which authorized the appointment of the marshal. The Court held that the marshal was not holding over, but was a *de facto* officer and was entitled to the compensation of the office. - In so ruling the court said:

As appellant was not appointed to the office after his term expired, and the law under which he had been elected having been, in effect, repealed, it follows that during the month of February, 1910, he was not a *de jure* officer, and was in no

sense a holdover, as the term 'holdover' is understood when applied to a person holding a public office. *State v. Simon*, 20 Or. 365, 26 Pac. 170. It does appear, however, that he was a de facto officer, and as such discharged all the duties of the office during the month of February, 1910. The important question therefore is, can an actual incumbent of a public office, who is only an officer de facto and in no sense a de jure officer, maintain an action for the salary, fees, or other compensation attached to the office, there being no adverse claimant, or de jure officer? * * * In cases, however, where there is no de jure officer, the line of decisions last mentioned hold that a de facto officer who, in good faith, has had possession of the office and has discharged the duties pertaining thereto, is legally entitled to the emoluments of the office and may, in an appropriate action, recover the salary, fees, and other compensation attached to the office.

See also *Fowler et al. v. Gillman, et al.*, 76 U. 414, 290 P. 358.

In Section 141 of 67 C.J.S. Officers, page 444, appears the following statement.

One who holds over after the expiration of his legal term, where no provision is made by law for his holding over, is generally regarded as a de facto officer, but on the office being filled either by appointment or election, as may be provided by statute for the filling of the office, and the qualification of the appointee or electee, the de facto status terminates.

In Section 135 of the same volume, at page 440, is the following:

Office holding *de facto* is a fiction of law designed to serve a useful purpose, but the fiction does not abolish the law. While a *de facto* officer has been held not to be an officer, although his acts may have legal effect, he has also been held to be a legal officer until ousted, and to be submitted to as such until displaced by a regular direct proceeding for that purpose.

From the time his elective term was shortened by adoption of the 1950 amendments until he was appointed Superintendent by the Board of Education, Dr. Bateman was at least the *de facto* Superintendent of Public Instruction. His acts were legal and he was entitled to the emoluments of the office. The office had not been abolished and there was no vacancy which could be filled by the Governor under Section 9 of Article VII of the Utah Constitution. Dr. Bateman was eligible for appointment to the office by the Board, and he was properly appointed.

The offices of members of the Board were not abolished and no vacancies were created.

The amendment to Section 8 of Article X did not abolish the State Board of Education. It changed the membership of the Board by taking the Superintendent off, changed the method of selecting members of the Board by providing that they "shall be elected as provided by law," and gave the Board the additional constitutional power to appoint the Superintendent of Public Instruction. No change was made in its fundamental constitutional powers and duties to exercise "general control and supervision of the public school system."

Just as in the case of the Superintendent, there is nothing in this amendment which either specifically, or by implication, indicates any intention to abolish the offices or to affect their status as constitutional offices. The very fact that the Legislature in Sec. 75-7-1.50 provided that the "terms of office of the present members of the state board of education are *continued* until their successors are elected and qualify" shows that that body did not consider the offices abolished. That part of the amendment to Sec. 8 of Article X which changed the method of selecting members of the Board was not self-executing and was directed to the Legislature for action. The Legislature in carrying out the constitutional mandate properly acted to continue the terms of the incumbents so as to prevent any hiatus or interruption in the administration of the educational system of the State.

In carrying into effect the non-self-executing constitutional provision the Legislature legally could have shortened the terms of all members of the Board and provided for immediate elections. The Legislature, however, decided that the entire membership of the Board should not be elected in the same election. Consequently, the election machinery approved provides for the election of three members in 1952, three in 1954 and three in 1956. Actually, the provision in the statute continuing the terms until their successors are elected and qualified lengthens the terms of some members and shortens the terms of others.

In *Snow v. Keddington*, *supra*, this Court recognized the power of the Legislature to harmonize and produce

uniformity in terms of office. The principle was stated in this language:

The legislature has the power to secure uniformity in official terms and to harmonize the terms of office of county officers. The fact that by changing the commencement date of a term, one officer obtains an additional period in which to serve does not render the plan illegal. If the act is fairly intended to co-ordinate and unify the various county offices into an operating political body with continuity, and is not intended solely to grant incumbent officers an extra term, then it cannot be rejected because it may extend a term of one office.

See also *State ex rel Jordan v. Bailey* (Minn. 1887) 33 N.W. 778. The Legislature was well within its power when it directed that three members of the Board be elected in 1952, three in 1954 and three in 1956, and that the terms of the incumbent members of the Board should be continued until their successors were elected and qualified. This action conformed to the mandate of the people as set out in the amendment calling upon the legislature to provide when and in what manner members of the Board should be elected and how many members should constitute the Board.

An interesting case involving a somewhat similar situation is *State ex rel Richardson v. Ewing*, 17 Mo. 515 (1853). There the constitutional amendment abolished the section of the constitution providing for the appointment of the Secretary of State and then provided that that officer "shall be elected by the qualified voters of

this state, at such time and in such manner as shall be provided by law." Ewing had been appointed to the office for a four year term in 1849. The amendment was adopted in 1851 and Richardson was elected to the office in 1852. In holding that the amendment did not abolish the office and did not create any vacancy the court said:

The first impression made by reading this amendment is, that the office created by the original constitution is abolished by abolishing the clause under which it existed; but an attentive examination of the whole amendment will satisfy the mind, that such is not its effect. * * * The whole amendment being ratified, the two clauses went into force together, and the second clause took its place in the constitution as the provision under which the office of secretary of state was to continue. Under it, the duty was imposed upon the general assembly to provide for the election of a secretary by the voters of the state; and when such provision was made and a person was duly elected to the office, then there would be a secretary of state elected, as the constitution required. In the mean time, before such election, the office existed, and the present incumbent was not disturbed in his right to it by the terms of the amendment. The office under the amendment, is the same office that existed before. As the amendment contemplated legislation for the purpose of electing a person to hold the office, and as the time at which such election should be held was left entirely to the discretion of the legislature, it would be a forced construction of the amendment to make it continue the office in being, and still render it vacant. It may be admitted that, after the amendment was adopted, the clause in the original constitution ceased to have any opera-

tion, and had no effect either upon the office or the rights of the officer. Still the amendment is to be regarded as having been adopted with reference to the actual condition of things existing at its adoption. The office then existed, and it was enjoyed by an officer regularly appointed. The amendment continued the existence of the office, and proposed that, at a future time, it should be filled by the election of an officer. It is but a reasonable interpretation of the amendment to say that, by implication from its own terms, it continued the incumbent in office until a secretary should be elected under the amendment. It speaks in the future; 'there shall be a secretary of state, who shall be elected.' Until such secretary is elected, it is implied that the officer in possession of the office shall continue to possess it. * * *

In that case the Missouri legislature by an act passed in 1851 had provided that "the incumbents of any of the offices aforesaid shall hold their office until their successors shall be elected and qualified." That language is similar to the provision in the statute passed by the Special Session that the "terms of office of the present members of the state board of education are continued until their successors are elected and qualify." The Missouri court held that even if the constitutional amendment were construed as leaving the person then in the office "without any right to it, under the constitution it is clear that no provision was made for any other person to hold it, until a person should be elected under a law to be enacted by the general assembly." Under the circumstances, the court said, the incumbent was entitled to hold over under the statutory provision.

The court held that when an election was held under the implementing statute such elected official was entitled to the office, and concluded with this language:

This construction gives to Mr. Richardson the right to the office from the time of his election, prevents any interregnum, preserves the government from confusion that would otherwise be introduced into its affairs, and gives effect to the intention of the people and the general assembly.

In the Ewing case the argument that the constitutional amendment abolished the appointive office was materially strengthened by the provision which specifically abolished the section of the constitution which authorized such appointment. In the case before this court the amendment to Section 8 of Article X simply changed the members of the board from appointive to elective officers. It would be a forced interpretation of the amendment, and certainly would be contrary to the intent of the people, to conclude that the offices of members on the Board were abolished or that vacancies were created in such offices.

In the case of *State ex rel Hudd v. Timme*, Secretary of State, (Wis. 1882), 11 N.W. 785 the Court had before it a constitutional amendment providing that the legislature should meet biennially instead of annually, and increasing legislators' salaries. The Court held that the amendment did not go in effect immediately so as to be applicable to members of the legislature elected in the same election at which the amendment was ap-

proved, and that it could not go into effect until the legislature had fixed the time for sessions of the biennial legislature and an election had been held. In so ruling the court said:

It is our duty to examine and construe the amendment as it has been adopted by the legislature and the people, and give it effect if we can, without interrupting the harmonious action of the government, until such time as its provisions can be carried into effect by proper action under it.

In giving construction to these provisions we must look at the existing state of things at the time of their adoption, and they must be considered in connection with the proposed change. * * * It would be absurd to hold that there was any intention, either on the part of the legislature or the people, to interrupt the regular course of government of the state by the adoption of these amendments. * * *

These provisions contemplate that there would be a constitutional law-making body in the state after the adoption of the amendment and before any legislature could be elected or convene under it. There can be, we think, no doubt but that the legislature in passing it, and the people in ratifying, the amendment contemplated and intended that the old system of things should remain in full force until an election could take place under the new. Any other construction of the amendment would be in plain contradiction of its terms, and would render it impossible to put its provisions into practical effect. To hold that these amendments took effect immediately on their adoption, so as to absolutely abolish the present provisions of the constitution for all purposes, would

compel us to hold that the present legislature was not a constitutional body, and that all its proceedings were absolutely void. We think no such construction is required from the language used in the amendment; and it is very clear that such was not the intention either of the legislature or the people.

The Wisconsin court relied upon Opinion of Justices, 3 Gray (Mass.) 601 and State v. Scott, 9 Ark. 270. In the Massachusetts opinion the Justices of the Supreme Court of that State answered questions propounded by the Governor of that state as to the effect of a constitutional amendment providing for the election of members of the executive council. Prior to the amendment members of the council were appointed by the Legislature. The Justices held that the amendment could not be "practically carried into effect, and there can be no election of councillors by the people, until the legislature shall have divided the Commonwealth into eight districts," as required by the amendment.

The constitutional amendment involved in the case of State v. Scott, *supra*, related to the method of selecting circuit judges. Prior to the amendment they were appointed, but the amendment provided: "The qualified voters of each judicial circuit in this state shall elect their circuit judge." As to the effect of this amendment the court said:

If the amendment so operated as to occasion a vacancy immediately upon its adoption, there being no express declaration to that effect, it can result alone from the fact that, in the transfer of the power of filling the office to the people

of the several circuits, the entire foundation upon which the incumbent stood was overturned and utterly destroyed. How would such a construction comport with the obvious sense of the terms used and the manifest intention of the framers of the instrument; or, in other words, would it be a fair and liberal interpretation and such an one as would be calculated to promote the true objects of the grant? If the amendment will bear such a construction as to allow other provisions of the constitution to stand without doing violence to any, it is then clearly permissible to put such a construction upon it. If the intention was to create vacancies, is it not fair and reasonable to suppose that words would have been employed directly and emphatically declarative of that purpose, and that no room would have been left for doubt or construction? I apprehend that such would have been the case. * * * The mere amendment itself cannot be said, in any possible view of the case, to produce a vacancy in the office; for all that could be claimed under it would be a mere naked power to be called into life and action when it should please the legislature to pass a law fixing the time and prescribing the manner of putting it into operation. This is the strongest view that could be taken against the defendant, and this most clearly shows that it could not go into immediate operation. The distinction then that lies at the bottom of the whole matter is, that the amendment was not designed to act either upon the office or the incumbent during his constitutional term, but that the only end and object of it was to change the mode of exercising the power of filling the offices. It is argued that, inasmuch as the power to elect the circuit judges has been taken away from the Legislature, and transferred to the qualified voters of the several circuits,

therefore the people have resumed one of the sovereign powers of the government, and that by the mere act of resumption, or withdrawal, of the power, the office that had previously been filled by its exercise, was immediately vacated. To the correctness of this proposition, I cannot yield by assent. The power to fill the office of circuit judge is equally sovereign whether exercised by the people's representatives, or by the people themselves, and as a matter of course, the rights that attach themselves to the officer upon the election, in either mode, must be identically the same.

Under the amendments and statutes the Board of Education was authorized to appoint and fix the salary of the Superintendent.

Those parts of the constitutional amendments which deleted the office of Superintendent of Public Instruction from Sections 1, 10 and 20 of Article VII, and which authorized the Board of Education to appoint the Superintendent, were self-executing. They had the effect of shortening the term to which Dr. Bateman was elected in 1948, and authorized the State Board of Education to appoint the Superintendent. The amendments neither abolished the office of Superintendent, nor did they create any vacancy in the office.

As we view the matter, the amendment to Section 8 of Article X authorizing the Board of Education to make an appointment to the office of Superintendent became effective upon adoption by the people, and the amendment of Sections 1, 10 and 20 of Article VII took effect on January 1, 1951. The amendment of Sections 1, 10 and 20 and Section 8 of Article X shortened the

term to which the Superintendent was elected in 1948 to January 1, 1951, after which date Dr. Bateman held the office at least as a *de facto* officer until the time of his appointment by the Board of Education.

The statute passed by the Special Session not only specifically authorized the Board of Education to appoint the Superintendent of Public Instruction but also empowered that Board to fix his salary. Proper action was taken by a *de jure* Board of Education appointing Dr. Bateman and fixing his salary. The action setting the salary at \$10,000 was approved by the Board of Examiners. Everything that has been done, each step, was consistent with both constitutional and statutory provisions.

POINT II.

THE AUTHORITY OF THE BOARD OF EDUCATION TO FIX THE SUPERINTENDENT'S SALARY WAS SUBJECT ONLY TO APPROVAL BY THE BOARD OF EXAMINERS, AND THE AVAILABILITY OF FUNDS.

Salary of Superintendent no longer had to be "fixed by law."

Prior to its amendment in 1950 Section 20 of Article VII provided:

The * * * Superintendent of Public Instruction and such other State and district officers as may be provided for by law, shall receive for their services monthly, a compensation as fixed by law.

The amendment of 1950 deleted the Superintendent of Public Instruction from that section, thereby eliminat-

ing the requirement that the compensation of that office must be fixed by statute. Consequently it was within the power of the Legislature to provide in Chapter 16, Laws of Utah 1951, First Special Session that the Board of Education "shall fix the salary of the state superintendent of public instruction."

Not being a salary fixed by law, approval by the Board of Examiners was necessary.

Section 13 of Article VII of the Utah Constitution in part provides:

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

Since the amendment eliminated the requirement that the salary of the Superintendent be fixed by law, and since the Legislature has specifically provided that the salary should be fixed by the Board of Education, that compensation no longer comes within the exception of Section 13. Consequently, salary claims presented by or on behalf of the Superintendent are claims against the State which must be examined, considered and acted upon by the Board of Examiners.

In discussing the authority of the Board of Examiners as set out in Section 13 this Court in *State v. Edwards*, 33 U. 243, 93 P. 720, said:

The powers conferred upon the board of examiners, with regard to claims against the state, by the constitutional provision quoted above, are general and sweeping. The power would include all claims against the state, were it not for the exception which excludes salaries or compensation of officers fixed by law. An exception of this character may not be enlarged, or extended by implication. An exception which specifies the things that are excepted from a general provision strengthens the force of the general provisions of the law. 2 Lewis' Sutherland, Stat. Const. Sec. 494. It is an elementary doctrine that, if there are any provisions in a statute which in any way conflict with a constitutional provision, the Constitution controls. * * * 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. * * *

This Court has ruled that claims for bounty for killing predatory animals were claims against the state requiring approval by the Board of Examiners. *Uintah State Bank v. Ajax, State Auditor*, 77 U. 455, 297 P. 434. In that case this 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. * * * 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.

Three other states—Nevada, Idaho, and Montana—have provisions similar to Section 13 creating Boards of Examiners with power to examine all claims, with certain exceptions, against the States. In *State v. Hallock*, 20 Nev. 326, 22 P. 123 the Nevada Supreme Court held that an election expense claim certified by a board of county

commissioners was subject to approval and audit by the Board of Examiners. The Court upheld action taken by the Board of Examiners adjusting the claim and reducing it from \$1,032.15 to \$775. The Nevada Court referred to the "manifest purpose of the constitution to protect the treasury by requiring the Board of Examiners to adjust all claims" and added that it was "not within the power of the legislature to confer this authority elsewhere."

The Idaho Supreme Court, in the case of *Suppiger v. Enking*, 60 Idaho 292, 91 P. 2d 362, made the following statement with reference to the power of the Idaho Board of Examiners under a constitutional provision identical to the provision in the Utah Constitution :

The board of examiners has sole discretionary power to decide how and in what manner it will pass upon and allow or reject claims against the state. * * *

The framers of the Constitution, by express direction, placed full and complete power and confidence in the state board of examiners to exercise its discretion in the ultimate approval or disapproval of claims against the state (*State v. Parsons*, 57 Idaho 775, 69 P. 2d 788) ; * * *

In the case of *State v. Robison*, 59 Idaho 485, 83 P. 2d 983, the Idaho Supreme Court referred to the Board of Examiners as the "final arbiters of expenditures." Other Utah, Idaho and Montana cases discussing the powers of the respective Boards of Examiners are: *Campbell Bldg. Co. v. State Road Comm.* 95 U. 242, 70 P.

2d 857; Winters v. Ramsey, 4 Idaho 303, 39 P. 193; Epperson v. Howell, 28 Idaho 338, 154 P. 621; Kroutinger v. Board of Examiners, 8 Idaho 463, 69 P. 279; Pyke v. Steuenberg, 5 Idaho 614, 51 P. 614; State v. Parsons, 57 Idaho 775, 69 P. 2d 788; Bragaw v. Gooding, 14 Idaho 288, 94 P. 438; Gem Irr. Dist. v. Gallet, 43 Idaho 519, 253 P. 128; Curtis v. Moore, 38 Idaho 193, 221 P. 133; and State v. Ericksen, 75 Mont. 429, 244 P. 287.

In the 1896 session of the Utah Legislature Section 13 of Article VII of the Constitution was supplemented by statutory provisions dividing claims against the State into three categories for examination and consideration by the Board of Examiners. Chapter XXXV, Laws of Utah 1896. Those provisions are now found in Title 26, UCA 1943. The three categories into which claims were divided are: (1) those for which an appropriation has been made; (2) those for which (a) no appropriation has been made but settlement of the claims has been provided for by law, or (b) an appropriation has been made but has been exhausted; and (3) claims "the settlement of which is not otherwise provided for by law."

Salary claims by or on behalf of Superintendent Bateman clearly come within the class for which an appropriation has been made. As to such claims Sections 26-0-7 and 26-0-8 provide:

Any persons having a claim against the state for which an appropriation has been made may present the same to the board in the form of an account or petition, and the secretary of the board must date, number and file such claim, and the

board must allow or reject the same in the order of its presentation. The board may, for cause, postpone action upon a claim for not exceeding one month. (26-0-7)

If the board approves such claim, the members thereof must indorse thereon, over their signatures, "approved for the sum of..... dollars," and transmit the same to the state auditor; and the auditor must draw his warrant for the amount so approved in favor of the claimant or his assigns in the order in which the same was approved; *provided*, that where a group of claims is presented from any one department or institution and the board approves the same, such group of claims may be transmitted to the state auditor with one certificate of the board showing the claim or claims designated by number, therein approved, the amount for which approved, the payee and the appropriation or fund out of which payable. Any member voting against the approval of a claim may specify his objection to its allowance in whole or in part by notation on the certificate over his signature. (26-0-8)

The exhibits attached to the complaint show that the procedure stipulated by the above sections was followed, and that a majority of the Board of Examiners approved the salary claims.

The salary claims having been approved by the Board of Examiners the Commission of Finance could not refuse to issue warrants if funds were available.

As previously noted, Plaintiffs have not been advised as to the grounds or reasons why the Commission of Finance refused, and still refuse, to prepare, draw

and issue warrants in payment of the salary of the Superintendent. It appears, however, that the Commission of Finance placed reliance upon the language of Section 82C-2-13, UCA 1943, which provides:

The commission of finance shall prescribe and fix a schedule of salaries for the officers, clerks, stenographers and employees of state offices, departments, boards and commissions, except where such salaries are fixed by statute or by appropriation; and 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 commission of finance.

Sections 82C-2-14 and 82C-2-21 also provide:

The commission of finance shall examine all requests for personnel and shall approve or disapprove the same and no new position shall be created and no vacancy shall be filled until the commission has certified to the department requesting the creation of a new position or the filling of the vacancy that the position is necessary to carry on the work of such department in an efficient and business-like manner and that the necessary funds therefor are available to the department. The commission shall investigate the need for every existing position in every department and shall report its findings to the board of examiners with its recommendations for the most effective means of discontinuing unnecessary positions. (82C-2-14)

The commission of finance shall exercise accounting control over all state departments and

agencies and prescribe the manner and method of certifying that funds are available and adequate to meet all contracts and obligations. The commission shall examine and approve, or disapprove, all requisitions and proposed expenditures for the several departments, except salaries or compensation of officers fixed by law, and no requisition of any of the departments shall be allowed nor shall any obligation be created without the approval and certification of the commission. The commission of finance shall pre-audit all claims against the state. The commission of finance shall, with the approval of the state auditor as to the adequacy of such documents in facilitating the post-audit of public accounts, prescribe all forms of requisitions, receipts, vouchers, bills or claims to be used by the several departments and the forms, procedures, and records to be maintained by all departmental, institutional or agency store rooms and exercise inventory control over such store rooms. (82C-2-21)

When the foregoing provisions were first enacted question was raised as to their constitutionality. Attached to the Complaint in this case as Exhibits "G", "H", "I" and "J" are copies of opinions issued by the office of Attorney General under dates of August 6, 1941, and August 20, 1941, a letter from the Chairman of the Commission of Finance to the Attorney General dated August 11, 1941, and excerpts from minutes of the meeting of the Board of Examiners held November 19, 1941, in which the question of constitutionality of provisions in the Finance Commission Act of 1941 is discussed. These documents demonstrate that in 1941 the Attorney General, the Commission of Finance and

the Board of Examiners recognized that some of the provisions in the sections quoted above impinged upon the constitutional powers and duties of the Board of Examiners. The excerpts from minutes of the meeting of the Board of Examiners held November 19, 1941, very clearly show that that Board, in an attempt to remove the difficulty, appointed the Commission of Finance as its agent to assist the Board of Examiners in the processing of claims. But in making the Commission of Finance its agent to assist the Board in the processing of such claims the Board of Examiners pointed out that it could not "evade or pass to the Commission of Finance its constitutional responsibility." Consequently, the Board of Examiners specifically, and expressly, reserved "supervisory control to the end that if, at any time, the procedure should prove inadequate to properly guard the public expenditures, the Board may have an opportunity to correct any irregularity found to exist," and the Board added: "This, of course, means that any time the Board sees fit to question any commitment at any stage of the procedure, it may do so."

We think the opinions and the letter from the Board of Examiners to the Commission of Finance dated November 19, 1941, clearly indicate that the Board was attempting only to constitute the Commission its agent to assist in the processing procedure connected with claims against the state. The Board did not, and it could not, delegate to the Commission of Finance power to approve or disapprove claims. That is the constitutional power of the Board of Examiners and it could not legally

delegate that power to the Commission of Finance, nor could the Legislature empower the Commission to perform such authority. To the extent that Sections 82C-2-13, 14 and 21 attempt to give the Commission of Finance power and authority to examine and approve or disapprove claims against the State, we submit that those provisions are unconstitutional because they conflict with the provisions of Section 13 of Article VII of the Constitution.

The provision in Section 82C-2-21 that the Commission "shall examine and approve, or disapprove, all requisitions and proposed expenditures of the several departments, except salaries or compensation of officers fixed by law, and no requisition of any of the departments shall be allowed nor shall any obligation be created without the approval and certification of the commission" we submit is directly in conflict with the constitutional power of the Board of Examiners to "examine all claims against the State except salaries or compensation of officers fixed by law." Likewise, we submit that the provision in Section 82C-2-13 that the Commission "shall prescribe and fix a schedule of salaries * * * except where such salaries are fixed by statute or by appropriation" and that such schedules of salaries "shall in no case be exceeded without the express approval of the commission of finance" does not and could not take away from the Board of Examiners its exclusive constitutional power to examine and approve or disapprove salary claims against the state, other than those fixed by law.

It will also be remembered that Chapter 16, as

passed by the Special Session in 1951, specifically authorized the Board of Education to "fix" the salary of the Superintendent. It is our contention that this statutory power given to the Board of Education was subject only to the constitutional power of the Board of Examiners.

If there is a conflict between the provisions of Section 82C-2-13 and Section 75-7-2, as amended by the Special Session, as to the power of "fixing" the salary of the Superintendent, then the provisions of Section 75-7-2 must prevail. That is the later statute, and under well established principles would repeal by implication any part of 82C-2-13 in conflict therewith. Chapter 16, Laws of Utah 1951, First Special Session, contains this provision:

All existing statutes of the state of Utah which are inconsistent or in conflict with this act, are to the extent of such inconsistency or conflict, declared null and void insofar as they relate to the provisions of this act.

Likewise, to the extent that there is conflict between the provisions in Chapter 16 that the Board of Education "shall fix the salary of the state superintendent of public instruction" and the provisions in Section 87-1-1, as amended by Chapter 124, Laws of Utah 1945, the 1951 act will prevail. Section 87-1-1, as amended, provides:

The annual salaries of the following state officers are fixed as follows: * * * superintendent of public instruction, \$6,000.

In *Commonwealth v. Rose*, Commissioner, 160 Va. 177, 168 S.E. 356, the Virginia court had before it a

situation not unlike the one before us. There, an act had been passed fixing the compensation of commissioners of revenue at not to exceed \$2500 per year for local services to cities. Later the Legislature enacted a new charter for the city of Richmond providing that the city council "may fix the compensation of the commissioner of the revenue for services rendered the city." In holding that the later provision repealed by implication the former limitation, the Court said:

It is not easy to understand how this statement could be misunderstood. To fix compensation is to name it * * *

It is said that repeal by implication is not favored and that statutes apparently in conflict are to be reconciled when possible. These are propositions at this late date not questioned; but, where the implication is inevitable, it has all the force of an express declaration. * * *

Unless words are smoke screens, a statement to the effect that a city shall not pay its commissioner of revenue more than \$2,500, followed by a later enactment to the effect that it may fix his compensation, leads to the inescapable conclusion that the first limitation is superseded. * * * The state, by statute, has given to the city in its charter, in words as clear as our language offers, power to say what it will pay to its commissioners of revenue. That declaration cannot be overridden so long as law requires us to give a plain meaning to plain words.

In the case of *Abrams et al., v. La Guardia, Mayor, et al.*, 174 Misc. 421, 21 N.Y.S. 2d 891 (1940), the court

held that language authorizing a Board of Estimate "to fix the salaries and compensation of the justices of the municipal court" did not confer a limited power but implied "a plenary right to act free from any judicial or administrative interference." In construing a constitutional provision authorizing the legislature to "fix" salaries of county superintendents of schools the court in *Woodcock v. Dick* (Cal. 1950), 222 P. 2d 667, said:

The word "fix" means to determine, to assign precisely, to make definite and settled. Webster's New Internat. Dict., 2d ed. To fix compensation is to prescribe a rule or rate by which it is to be determined. *Flagg v. Columbia County*, 51 Or. 172, 94 P. 184, 186; *Anderson's Law Dict.* It has been held that the power to fix compensation includes the power to adjust or regulate and implies a plenary right to act by lowering or raising salaries. * * * (citing cases)

We submit that the power of the State Board of Education to fix the salary of the Superintendent was subject only to the constitutional power of the Board of Examiners to examine claims against the State. To the extent that any statutes passed prior to Chapter 16 give power or authority to the Commission of Finance to fix, approve or disapprove the salary of the Superintendent, such provisions were repealed by implication when Chapter 16 became law.

Under the circumstances, the only function of the Commission of Finance was to determine whether funds were available to pay the salary claims and then to process them, and prepare and issue the warrants.

CONCLUSION

We submit that the State Board of Education was authorized to appoint Dr. Bateman Superintendent of Public Instruction and to fix the salary at \$10.000. After salary claims were processed and approved by the Board of Examiners the Commission of Finance had no legal right to refuse to issue warrants covering those claims. A Peremptory Writ should issue compelling defendants to issue warrants covering salary claims properly submitted by and on behalf of Dr. Bateman and approved by the Board of Examiners.

Respectfully submitted,

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