

1952

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

Utah Supreme Court

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Case No. 7785

UNIVERSITY UTAH

OCT 30 1957

**IN THE SUPREME COURT**

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**of the**

**STATE OF UTAH**

STATE BOARD OF EDUCATION,  
et al.,

*Plaintiff and Respondent,*

— vs. —

COMMISSION OF FINANCE, et al.,  
*Defendant and Appellant.*

**BRIEF OF DEFENDANTS**

**FILED**

FEB 20 1962

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Clark, Supreme Court

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# IN THE SUPREME COURT of the STATE OF UTAH

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STATE BOARD OF EDUCATION,  
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*Plaintiff and Respondent,*

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*Defendant and Appellant.*

Case No. 7785

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## BRIEF OF DEFENDANTS

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The questions raised in this proceeding seem to require a judicial clarification of certain important constitutional provisions involving the Board of Examiners, the Finance Commission, the State Board of Education, and the State Superintendent of Public Instruction.

The authors of this brief have no official connection with any agency of the state government. They have accepted this assignment in the hope that they may be of some aid to the court in arriving at a correct solution of the problems involved.

## STATEMENT OF POINTS RELIED UPON

## POINT I.

BATEMAN STILL OCCUPIES OFFICE TO WHICH HE WAS ELECTED.

## POINT II.

OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION AND STATE BOARD OF EDUCATION ABOLISHED.

## POINT III.

CHAPTER 16, FIRST SPECIAL SESSION 1951, UNCONSTITUTIONAL.

## POINT IV.

OFFICES ON BOARD OF EDUCATION VACANT.

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 ARGUMENT

## POINT I.

BATEMAN STILL OCCUPIES OFFICE TO WHICH HE WAS ELECTED.

Our research has brought us into agreement with the Attorney General upon certain important points. It is our purpose, therefore, to first state the extent of our agreement, and thereafter set forth the points upon which we disagree, with the reasons therefor.

The power and authority of the Board of Examiners springs directly from the Constitution. The power and authority of the Finance Commission arises from legislative enactment. We are in agreement with the Attorney General that any conflict between the two agencies

must be resolved in favor of the Board of Examiners. The Finance Commission was created to protect the taxpayers from the improvident or unlawful expenditure of public funds, but it is subordinate to the Board of Examiners. This does not mean that the Board of Examiners is above or beyond lawful restraint. It cannot make lawful a claim against the state if the claim is in fact not a lawful claim.

A State Board of Education lawfully constituted and validly subsisting may, at the proper time, appoint a State Superintendent of Public Instruction and fix his salary, subject to the approval of the Board of Examiners. We feel forced to the conclusion that an approval by the Board of Examiners could not be vetoed by the Finance Commission.

So far we have been in at least qualified agreement with the Attorney General, but we find ourselves in disagreement with some of his premises, and with his final conclusions.

Under Point I, at page 10 of his brief, the Attorney General says:

“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.”

Therein lies the point of our departure. The language just quoted states the Attorney General’s fundamental premise. We disagree with the premise and the conclusions drawn from it.



The two amendments discussed by the Attorney General were both adopted by the people on November 5, 1950. They expressed the solemn judgment of the people. They relate to a single subject and embrace a single plan and purpose. Whether this court shall follow and apply that line of cases which hold that the effective date of a constitutional amendment may be suspended for a reasonable time pending the enactment of implementing legislation or the line of cases which hold that in the absence of expressed conditions or reservations an amendment becomes immediately effective upon its adoption, this court cannot approve the conclusion advocated by the Attorney General without defeating and frustrating the expressed purpose and intention of the electorate.

Previously, the management of the public school system was vested in an elective Superintendent of Public Instruction and an appointive Board of Education. On November 5, 1950, the people expressed their determination that the management of the public school system should reside in an elective Board of Education and an appointive superintendent. It is respectfully suggested that there is no room for any inference that the electorate intended that after November 5th, 1950, the legislature should, for a long period of years, take to itself the management of the public school system by unduly prolonging the life and functions of the old board or by assuming to appoint the members of the newly created elective Board of Education.



The legislature has apparently assumed that the will of the electorate, as expressed in the amendment to Article X, Section 8, can be held in suspense and successfully thwarted until such time as it sees fit to give it effect. It has further assumed that in the meantime it can lawfully determine who shall occupy offices upon the Board of Education and for how long they may hold such offices. It has further assumed that such a board may appoint a superintendent and otherwise function without early or timely interference by the electorate or any other agency of government.

The Attorney General supports his contention by cases which hold, in general effect, that when a constitutional amendment altering the structure of government requires legislative implementation before the amendment can become functional the status quo shall obtain until the new constitutional provision is made effective by legislative implementation: *State ex rel Richardson v. Ewing*, 17 Mo. 515; *State ex rel Hudd v. Timme Secretary of State* (Wis.) 11 N.W. 785; *State v. Scott*, 9 Ark. 270; *Opinion of Justices*, 3 Gray 601 (Mass.). To the same effect see: *Broadwater v. Kendig, et al.*, 261 P. 264 (Mont.); *Andrews v. Neil, et al.*, 120 P. 383 (Ore.); *Hawley v. Anderson, et al.*, 190 P. 1097 (Ore.).

The statement that the office to which Mr. Bateman was elected was not abolished and no vacancy therein was created by adoption of the constitutional amendment is just another way of stating that the office to which Mr. Bateman was elected survived the adoption of the amendment, and that Mr. Bateman is still the incumbent.

If the office to which Bateman was elected was not abolished by the mere adoption of the constitutional amendment, then it survived at least until August 15, 1951. If it survived, and if no vacancy in the office was created by the adoption of the amendment, it is because Bateman still occupies the office. If the act of the legislature (Chapter 16, First Special Session Laws 1951) accomplished the implementation of the constitutional amendments, it terminated, as of August 15, 1951, both the office to which Bateman was elected and the offices on the Board of Education to which the old appointive members had been appointed. Chapter 16, First Special Session was enacted and approved May 15, 1951, and became effective August 15th.

Some of the cases cited and relied upon by the Attorney General, as well as those cited by us above, would support the view that the amendments were not intended to alter the status quo until sufficiently implemented by legislation to make them operative within the general framework of the state government. Until that time, however, according to some cases, the office to which Bateman was elected survived and he continued to be the incumbent. As such incumbent he would be entitled to only the powers of the office to which he was elected, and to the emoluments thereof as fixed by law at the time he sought and was elected to the office. Such must be the result pending the falling in of the effective date of the constitutional amendments if the cases relied upon

by the Attorney General are to be followed. Bateman's term was shortened only if his office ceased to exist.

It will doubtless be asserted that the effective date of the amendment to Article X, Section 8, was held in suspension pending the legislature's leisurely enactment of implementing legislation, while the amendment to Article VIII, Section 1, conveniently took effect on January 1, 1951. Such a contention will be in direct conflict with the Attorney General's statement on page 10 of his brief that Bateman's office was not abolished and no vacancy therein was created. Furthermore, it represents a unwarranted division into two parts of a single plan and purpose expressed by the electorate when it adopted the two amendments. Such a construction would require us to conclude that the people, having given up the right to elect a State Superintendent of Public Instruction and at the same time having reclaimed the right to elect a State Board of Education, surrendered its purpose to the whims of the legislature by leaving the legislature free to control the Board of Education and thereby bring about the appointment of a Superintendent of Public Instruction in direct conflict with the expressed purpose of the voters.

If the foregoing analysis should appeal to the court as sound and supported by respectable authority, the court will rule that if Bateman now lawfully occupies the office of superintendent it is the office to which he was elected, and he is entitled to only the emoluments of that office, which amount to \$6,000.00 per year.

## POINT II.

## OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION AND STATE BOARD OF EDUCATION ABOLISHED.

There is an alternative which we desire to submit for the serious consideration of the court. If the office to which Bateman was elected still exists and is not vacant, then Bateman is the incumbent by force of his election, and he cannot be appointed to an office which he already occupies by election. He can be appointed to fill an office only if such office is vacant.

Both constitutional amendments were adopted by the people on November 5, 1950. The one substituting an appointive Superintendent of Public Instruction for an elective state office became effective by its terms on January 1, 1951, the one substituting an elective State Board of Education for the old appointive board became effective on November 5, 1950. If at any time after January 1, 1951, Bateman became detached from the office to which he was elected, with its advantages and disadvantages to him, then it must be so because the adoption of the amendment abolished the office to which he was elected. There cannot be two offices of State Superintendent of Public Instruction in existence at the same time: (1) the office to which Bateman was elected, and (2) the one created by the amendment. The Attorney General is forced to detach Bateman from the office to which he was elected and get him into a new one in order to save for him the new salary attempted to be voted by the purported State Board of Education.

If the constitutional amendment brought to an end

the office to which Bateman was elected, then Bateman was no longer an incumbent of that office. Likewise, if the constitutional amendment brought an end to Bateman's office, it brought an end to the offices to which the old members of the old Board of Education were appointed. By adoption of the amendment on November 5, 1950, the people abolished the old Board of Education and substituted a new board in its place, the offices pertaining to which will remain vacant until filled as provided by law. The Constitution provides means to prevent any interregnum. We desire to press this point further, but will diverge briefly to expose an incidental but significant point.

The Attorney General devotes one section of his brief to the argument that the provision of Chapter 16, Section 2, First Special Session 1951, (75-7-1.50) providing for the election of one member of the State Board of Education in November, 1951, should be ignored upon the ground that the entire provision was enacted through carelessness and inadvertence upon the part of the legislature. This would be our first experience in seeing the effect of a statute avoided upon the ground that the legislature not only did not mean what it said, but did not mean to say anything upon the subject. The chapter under discussion does impress us as an example of bad draftsmanship, and the Attorney General could be right in inviting the radical judicial treatment which he urges. His reasoning is persuasive and is supported by authority. Bad legislative practices may not, however, justify the warping or abridging of constitutional pro-

visions. Whether an election of one board member should have been held in 1951, and the effect of such failure upon the competency of the board as such to function, raise some interesting abstract questions which we forego the pursuit of to avoid obscuring other points of greater significance. It may be that a State Board of Education, otherwise validly subsisting after November, 1951, might not have a valid existence in the absence of one elected member.

The constitutional amendment which terminated the existence of the old appointive board, and substituted in its place an elective board, had its origin in a joint resolution of the two Houses in 1949. Session Laws 1949, p. 296. The amendment as adopted was written by the legislature. The legislature in drafting the amendment could have made provisions for suspension of the effective date of the amendment until implementing legislation could make it functional. The legislature failed to so provide.

Not having done so, the amendment which it proposed became effective immediately upon its adoption. See the instructive opinion of Chief Justice Hughes in *United States of America v. Chambers, et al.*, 291 U.S. 216, 78 L. Ed. 763, wherein these statements appear:

“\* \* \* Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the court could give it continued vitality. The National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, im-

mediately fell with the withdrawal by the people of the essential constitutional support."

Further on, the Chief Justice says:

"\* \* \* The Congress, while it could propose, could not adopt the constitutional Amendment or vary the terms or effect of the Amendment when adopted. The Twenty-first Amendment contained no saving clause as to prosecutions for offenses theretofore committed. The Congress might have proposed the Amendment with such a saving clause, but it did not.

And again the Chief Justice said:

"\* \* \* The principle involved is thus not archaic but rather is continuing and vital,—that the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it."

To the same effect see *State v. Anderson, et al.*, 166 Atl. 662, 664 (Del.).

### POINT III.

#### CHAPTER 16, FIRST SPECIAL SESSION 1951, UNCONSTITUTIONAL.

During the regular session of 1951, the legislature failed to enact any implementing legislation. Not until the special session of 1951 did the legislature get around to the passage of any law upon the subject. Not only does the bill as finally enacted merit the criticism of carelessness, leveled at it by the Attorney General, it is subject to serious, and, we urge, fatal constitutional objections. We humbly suggest that the legislation was bad and should have been vetoed by the Governor.



By the two amendments of 1950 the people surrendered the right to elect a State Superintendent of Public Instruction, but took back to themselves the right to elect the members of the State Board of Education. The right to elect is certainly one of the fundamental rights of citizenship. Such rights cannot be unreasonably suspended, or the exercise thereof long delayed by the legislature.

Article I, Section 17, Constitution of Utah:

“All elections shall be free, and no power, civil or military, shall at any time *interfere to prevent the free exercise of the right of suffrage*. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law.” (Italics ours.)

The 1951 legislature should have promptly provided for an election forthwith of the entire Board of Education. It could have provided for different tenures for the several members so that in the future the entire membership would not be subject to change at any one election. In such manner the determination of the people to elect the Board of Education would not have been defeated by unreasonable delay and suspension. What the legislature did was quite different. Under the provisions of Chapter 16, First Special Session, 1951, the electorate will not have a chance to fill the Board of Education by elected officers until January of 1957—seven years and two months after the adoption of the amendment. (Ch. 16, First Special Session, 1951, Sec. 75-7-1.50.)

If there was an unoccupied office to which Bateman was eligible for appointment in 1951, it was because his old office was gone and he therefore no longer occupied it. If such were the case then the old offices of State Board of Education were gone. New offices existed, but they were vacant. The legislature cannot continue in existence an office terminated by the Constitution. *People ex rel. Bledsoe v. Campbell, et al.*, 70 P. 918 (Cal.). In that case the California Supreme Court said:

“\* \* \* But when the term of office is fixed by the constitution in definite and precise language, as it is in the case of judges of the superior court, it is not competent for the legislature to extend that term.”

*Scott et al. v. Singleton, et al.*, 188 S.W. 302 (Ky.). In that case the Kentucky Court of Appeals said:

“\* \* \* The General Assembly therefore had the power to prescribe the qualifications and fix the manner in which the vacancies should be filled, but did not have the power to extend the length of time the appointees should hold office beyond the time fixed by section 152 of the Constitution \* \* \*.”

*In re Opinion of the Justices*, 171 N.E. 237 (Mass.), wherein the Supreme Judicial Court of Massachusetts said:

“\* \* \* The tenure of office of judges as thus settled by the Constitution is imperative and final. It cannot be enlarged, limited, modified, altered or in any way affected by the General Court.”

*Byrne & Speed Coal Co. v. City of Louisville*, 224 S.W. 883 (Ky.), wherein it is stated:

“This rule, however, cannot be applied to members of the Legislature or members of legislative municipal boards such as city councils, because the Constitution has in effect and by clear implication prescribed the terms of members of the General Assembly and city councils, and it would not be competent for the Legislature to extend their terms by providing that they should hold over until their successors were elected and qualified or beyond the term fixed in the Constitution.”

Neither can the legislature, by appointment, fill vacancies in state offices.

*Board of Elections for Franklin County, et al. v. State ex rel. Schneider*, 191 N.E. 115 (Ohio):

“In this holding we are not denying any right to the General Assembly to extend the term of county recorder to four years, the maximum fixed by the Constitution. But all this can be done without extending the terms of incumbents for full two years. Nor are we condemning reasonable extensions of terms of office to meet constitutional requirements. We do hold that, under its constitutional grant of power, the General Assembly cannot present to an incumbent an extra term of office.”

See also *State v. High*, 130 P. 611 (Ariz.)

The point for which we here contend finds support by clear implication in the opinion of this court in *Snow*

v *Keddington*, 113 Utah 325, 195 P. (2d) 234, wherein it is said at page 339:

“\* \* \* The vice of extending a term is that it denies the people a chance to select the officer at the time he should be voted for, but in this case, if there has been a postponement of any election, the delay has been brought about by the people themselves.”

See also Article VII, Section 9, *Constitution of Utah*, and *Board of Elections for Franklin County, et al. v. State ex rel. Schneider*, supra.

It is stated in American Jurisprudence, Volume 43, at page 12 that:

“\* \* \* It has been declared that a legislative extension of the term of an incumbent is virtually an appointment of the office for the extended time, and is void if the office is one that the legislature may not fill by direct appointment.”

When the legislature provided for holding over of the old board members it was either extending terms of offices which had been cut off by the constitutional amendment, or it was appointing members to new offices. Under the cases it was without power to do either.

#### POINT IV.

#### OFFICES ON BOARD OF EDUCATION VACANT.

As stated in an earlier section of this brief, there is a rule of law relied upon by the Attorney General to the general effect that when a constitutional amend-

ment does not point out the time when or the procedure by which it is to become effective, its effective date is suspended until implementing legislation makes the amendment operative. According to those cases, the old offices endure for a time unimpaired by the amendment. If this be the rule then Bateman, in 1951, still held the office to which he was elected, and the old board members the offices to which they were appointed. In such case the Attorney General cannot be sustained because the board could not displace Bateman in his office, nor appoint him to a new office. Such a situation would require two offices existing at the same time.

But the legislature could not seize upon such rule even if this court adopted it as the law of this state, and for a long and unreasonable time defeat the will of the electorate. If the old board members were lawfully held over at all it is not because the legislature has so provided. Such holding over, if lawful, was by operation of law. It is because the effective date of the amendment was suspended pending the enactment of implementing legislation. If the legislature could, under the protection of such a rule, postpone the time when a full board may be elected and qualified until 1957, it could postpone the election until 1967, and thus successfully defeat the purpose of the amendment.

In *Board of Elections for Franklin County, et al. v. State ex rel. Schneider*, supra, it is stated that:

“It is not necessary to cite cases to the effect that the inviolability of the right to vote must be preserved. The physical act of casting a ballot



means nothing, but the expression of that ballot means everything, and its expression must not be defeated, directly or indirectly. \* \* \*

“In brief, present incumbents in the office of county recorder are given an extra term by the General Assembly. Such officers are thereby given a full term of office without an elector in the state having voted for them or having been given an opportunity to vote for them. Is this not a dangerous departure under a republican form of government? If such action on the part of the General Assembly were given the stamp of constitutional approval, then subsequent General Assemblies could provide for further extensions ad infinitum, and the right of the governed to select their governors would be nullified.”

See also *Snow v. Keddington*, supra, wherein this court said:

“The general rule is that the term for which an officer is elected shall be fixed before the election. This is founded on the principle that the right of selecting officers for fixed terms belongs to the people, and the legislature is not permitted to defeat this right by changing the length of term of office after an officer has been elected.

“\* \* \* Neither party contends that the voter can be denied the right to elect constitutional officers and to set the term of office. \* \* \*”

and further on this court says:

“The authorities generally hold that an act which extends the term of office so as to defeat the voter’s right to elect the officer at the times provided in the constitution is unconstitutional.”

The implementing legislation provides in part, in 75-7-1, as amended by Chapter 16, First Special Session, 1951, that:

“The State Board of Education shall consist of nine persons elected by qualified registered electors \* \* \*.”

The legislature thus defined the new board created by the Constitution—a new board elective in character and substituted for the old appointive board discarded and abolished.

The legislature so far implemented the amendment as to define the new board. This, under any view of the law, brought the old board to the end of its existence. The attempt to defer election of the full board until 1956 was an unconstitutional and unreasonable restraint upon the right to vote. Hence it should be ruled that the offices upon the new board are unoccupied and vacant. This is not speaking in behalf of confusion and interregnum. The members of the new board are state officers, and as such the vacancies can and should be filled at once by the Governor in the exercise of his constitutional power. *Mitchell v. Taylor*, 43 P. (2d) 803 (Calif.); *Askew v. Bassett*, 158 S.E. 577 (Ga.); *State v. Jorgensen*, 142 N.W. 450 (N. D.); *Waldamer v. Britton*, 113 S.W. 1178 (Tenn.); Article VII, Section 9, *Constitution of Utah*; *McCornick v. Thatcher*, 8 Utah 294; 30 Pac. 1091.

The McCornick case just cited deserves special attention. From the decision it appears that the territorial



legislature on March 10, 1892, enacted a law which contained the following:

“Sec. 5. For the Agricultural College of Utah, buildings, the sum of \$65,000.00; which sum shall be expended by and under the direction of a board of construction, to consist of George W. Thatcher, Isaac D. Haines and William Goodwin, who shall receive for their service the sum of \$300.00 to be paid upon the completion of said buildings. Said board of construction shall each give a bond in the sum of \$25,000.00, to be approved by the territorial auditor, and qualified by taking the official oath before entering upon their duties. Such board shall elect a chairman, and warrants for the money appropriated for said buildings shall be drawn by the auditor of public accounts upon the order of such chairman.”

The foregoing language was held to create, identify and enumerate the offices upon the board of construction. As soon as the act was passed the board came into existence. But that part of the act by which the legislature attempted to fill the offices by appointment was held to be unlawful as in violation of the Organic Act. The offices were, therefore, vacant and subject to appointment only by the Governor.

Here the First Special Session of 1951 gave identity, body and enumeration to the offices of the newly elected school board when it said:

“75-7-1. Personnel, Number, Appointment, Term.

“The state board of education shall consist of nine persons elected by qualified, registered elec-

tors according to election districts as hereinafter provided. \* \* \*

The implementation embodied in the foregoing is fully as complete as that contained in the statute reviewed in the McCornick case. It is observed that the McCornick case was decided before statehood, but the Organic Act stood in the place of the state Constitution, and the parallel between the two decisions is in no wise impaired. The vacancies now existing upon the state Board of Education should be filled by the Governor in accordance with the power and authority enjoined upon him by Article VIII, Section 9, of the Constitution. The legislature may then be expected to provide for timely election of the members of the Board.

When the constitutional amendment does not otherwise provide, it takes effect upon adoption. (See *United States of America v. Chambers, et al.*, supra.)

The amendment to Article 10, Section 8, was adopted on November 5, 1950. If by that adoption the abolishment of the old appointive board and the substitution of the new board, without defining the number of members thereof, became immediately effective, the legislature could neither extend the life of the old board nor appoint members to the new one. In such case there was no validly subsisting board to appoint a superintendent, nor fix his salary. If, on the other hand, the old board remained unaffected by the amendment until the amendment was made functional by the legislature, then the old board survived until and only until August 15, 1951. The surviving old board could not in November, 1951,

appoint Bateman as Superintendent. If the old board and its officers survived the amendment, so did Bateman, and the office to which he was elected. The Attorney General states affirmatively that the office to which Bateman was elected was not abolished, and no vacancy therein was created.

Even if the old board survived the amendment for a time, it expired when the legislature defined and set up its successor. It might have survived a reasonable time longer if the legislature had provided for timely election of its successors. In the circumstances the offices upon the board were and are vacant from August 15, 1951, and should be filled by the Governor pending further lawful action of the legislature to give the electorate a timely opportunity to vote. *McCornick v. Thatcher*, supra.

We invite the court to hold:

### CONCLUSION

1. That Bateman is still occupying the office to which he was elected, and therefore is entitled only to the advantages and disadvantages of that office; or,

2. That Bateman's office was abolished and his pretended appointment was not made by a validly subsisting or lawfully existing Board of Education.

In either event, plaintiffs are not entitled to the relief here prayed for, and the alternative writ heretofore issued should be recalled and dismissed.

Respectfully submitted,

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