

MAINE STATE LEGISLATURE

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DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE.

1861.



AUGUSTA:
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1861.

FORTIETH LEGISLATURE.

HOUSE.

No. 39.

COMMUNICATION

From the Governor, transmitting the Reports of the Commissioners appointed to settle with the Sureties on the Bonds of B. D. Peck, late State Treasurer.

To the House of Representatives :

In obedience to the order of the House of Representatives, adopted on the fourteenth day of February instant, I herewith transmit two Reports of the Commissioners appointed to settle with the late Treasurer, B. D. Peck, which I am advised are all that have been made upon this subject.

ISRAEL WASHBURN, JR.

EXECUTIVE DEPARTMENT, }
February 19, 1861. }

REPORT

*Of the Commissioners appointed to settle with the Sureties
of B. D. Peck.*

To the Governor and Council:

By virtue of a resolve approved March 20, 1860, the undersigned were appointed Commissioners "with authority to adjust with the Sureties of B. D. Peck, late State Treasurer, their liabilities on said Peck's official bonds, with full power to settle and apportion the same on such terms as shall be just and equitable; and upon adjustment by said Sureties to discharge them."

In obedience to the duty thus enjoined, the Commissioners met at the Treasury office in Augusta on the 10th inst.; and the Sureties of 1859 appeared before them and had a hearing from day to day until an adjustment of their liabilities was effected, the mode of payment agreed upon, and a discharge formally entered upon their Bond. The Commissioners now submit the following report of their proceedings and conclusions.

By the report of the Investigating Committee, the amount apportioned to the Sureties of 1859 was \$62,563.61, and to the Sureties of 1858, \$14,352.89. That the acceptance of this report by the Legislature was not to be considered a definitive apportionment of the liabilities, is sufficiently evident from the language of the resolve above quoted—in which express authority is conferred upon the undersigned to "*settle and apportion the liabilities on such terms as shall be just and equitable.*" The undersigned have therefore felt fully warranted in making such changes in the respective liabilities of the Sureties of 1858 and of 1859 as seemed to them to be demanded by the application of legal principles which by the best counsel they can obtain, must govern in the strict settlement of the various questions involved. The Investigating Com-

mittee very naturally assumed that the period of liability on the part of the Sureties was coterminous with the fiscal year of the State, and hence in the division made in their report, the Sureties of 1858 are held to be chargeable only with that part of the defalcation which actually and palpably occurred in that year, and previous to the legislative inspection of the Treasurer's accounts made the first of January, 1859. This construction implied that the Sureties of the one year were discharged as soon as the accounts of the Treasurer were declared to be correct, and that the Bond of the succeeding year, subsequently filed, included all liabilities thereafter occurring. Such a construction has been the one popularly accepted in the past, and the apprehension of its correctness was so general that the Investigating Committee adopted it without special scrutiny as the basis of their conclusions. The more rigid examination, however, which the undersigned have felt called upon to make touching this particular point, has convinced them that the Sureties of 1859 did not become responsible for any of the Treasurer's doings until their Bond was approved by the Legislature, and that up to the same date, the Sureties of 1858 are holden. The language of the Constitution would seem to be entirely conclusive so far as the first point is involved—viz: as to the time when the liability of the Sureties of 1859 commenced. Section 2, article V, part fourth, is as follows :

“The Treasurer shall, before entering on the duties of his office, give bond to the State with Sureties, to the satisfaction of the Legislature for the faithful discharge of his trust.”

It is quite manifest therefore that Mr. Peck did not enter “*on the duties of his office,*” under and by virtue of his election of 1859, until he had given a Bond “*to the satisfaction of the Legislature,*” which satisfaction could only be indicated by an explicit approval of his Bond ; and this approval, as appears by the legislative records, was not effected until the 4th of February. From and after that date therefore, and not until then, the Sureties of 1859 became liable for the acts and deeds of the Treasurer. It is equally manifest that up to that date the Sureties of 1858 are responsible to the State. The condition of the Bond of that year (which is a precise copy of the Bonds given for a long series of years previous, and exactly similar also to the Bond of 1859) is among other

requirements, that the said Benj. D. Peck "shall well and truly pay to his successor in office, or to any other person that may be appointed by the Legislature to receive the same, all such sum or sums of money, books, property and appurtenances as upon such settlement of his accounts, or otherwise, shall be found due and payable from him or his agents or servants to this State, as Treasurer aforesaid." It thus becomes evident that the Sureties of 1858 were bound not only to see that Mr. Peck's accounts were correct at the annual legislative settlement, but also that the moneys of the State were actually in the Treasury when his successor took possession of his office. That Mr. Peck was his own successor does not alter the matter in the least, for *officially* considered, "B. D. Peck of 1858" and "B. D. Peck of 1859" were essentially distinct—just as much so as any other two consecutive incumbents of the Treasury office. And as no new Treasurer does or can "enter upon the duties of his office" until his Bond is approved by the Legislature, so Benj. D. Peck, as already affirmed, did not and could not "enter upon the duties of his office" under his election of 1859 until his Bond was approved on the 4th day of February. The Treasurer is not elected for the precise period of a year, though such is a very general impression. The Constitution simply declares that "the Treasurer shall be elected *annually*, at the first session of the Legislature;" and hence an election any time during that session is plainly within the requirements of this provision; and most obviously the Treasurer of the year preceding remains in office till such election is effected and his successor qualified. Any other construction would involve an intermediate period during which the funds of the State would be left to no responsible keeper.

If these positions be correct, and the Commissioners are fully persuaded that they are, it is evident that all moneys unlawfully removed, by Mr. Peck, from the Treasury, between the 1st of January and the 4th of February, 1859, must be made good by the Sureties of 1858; as their responsibility is explicitly declared in their Bond to extend to the date at which his successor enters upon the duties of his office. Upon a careful examination of the books of the Treasury Department and a comparison of the same with the accounts of the various banks in which the Treasurer had dealings, it appears that between the dates named, the sum of \$22,136.99 was

drawn from the Treasury for other than State uses, and all the deficit created by these acts, the undersigned consider as falling within the liability of the Sureties of 1858. Should this amount be deducted from the \$62,563.71 for which the Sureties of 1859 were alleged to be liable in the report of the Investigating Committee, their liability would be reduced to the sum of \$40,426.72.

It has also been shown to the satisfaction of the Commissioners, that an official check for \$2000 was deposited by Mr. Peck at the Augusta Bank during the last days of 1858, and that this amount went to cover his deficiency of that year, just as did the \$10,200 worth of checks discounted at other banks and described at length in the report of the Investigating Committee. This sum is of course to be deducted from the amount claimed of the Sureties of 1859 and is to be recovered from the Sureties of 1858. It belongs to precisely the same class that the others do, and is to be treated in the same manner. It also appears that the tax of the town of Paris, amounting to \$841.31, was received by Mr. Peck and that he did not give credit therefor at the proper time—withholding it just as he did the taxes of Westbrook, Yarmouth and other towns, and thus concealing his deficiency of 1858 in the mode fully set forth in the report of the Investigating Committee. These two sums, (the Augusta Bank check and the Paris tax) amounting together to \$2841.31, must be further subtracted from the liability of the Sureties of 1859 and added to the sum for which the Sureties of 1858 are responsible. Deducting it then from the \$40,426.72 above found, and there will remain as the undoubted liability of the Sureties of 1859 the sum of \$37,585.41.

Of the sum of \$22,136.99 removed from the Treasury between January 1, and February 4, 1859, there is no positive and conclusive evidence that any of it was used to pay the obligations incurred by Mr. Peck officially, when he was raising money in order to make his accounts good at the legislative inspection. There is, however, some inferential proof amounting to a strong presumption, that \$4,038.44 of the gross sum was thus used, and the result of this, if established beyond doubt or cavil, would be to increase the liability of the Sureties of 1859 and diminish that of the Sureties of 1858 by precisely this amount—inasmuch as to reckon it all against the latter might be duplicating the payment of the same specific

sums. The case, however, is not one of such clear and imperative obligation on the part of the Sureties of 1859 as to warrant the Commissioners in exacting its payment, and as they are proceeding under a legislative resolve, which directs them to settle with the Sureties "in a just and equitable manner," they feel well persuaded that both justice and equity will be best subserved by declining to enforce the payment of that sum from the Sureties of 1859. The admitted, unquestioned and indisputable liability of those Sureties is \$37,585.41; when anything beyond this is demanded, doubts and cavils and disputes arise, such as the Commissioners conceive it highly desirable to avoid.

There is another consideration which entitles the Sureties of 1859 to some leniency, at the hands of the State, in adjusting their liability. It is the fact that private notes and drafts to the amount of \$14,900, negotiated by Mr. Peck for the acknowledged purpose of concealing his deficiency of 1858, were nevertheless all paid out of the Treasury funds in the spring of 1859. The sureties of 1859 have therefore to assume this amount, which was a virtual deficit in 1858, but which did not become so technically and legally till 1859. While this presents no ground for the evasion of proper and legal responsibility, it certainly does suggest the most cogent reasons for a settlement on the basis of equity and liberality. Under these circumstances, while the undersigned have not felt authorized to remit the payment of the deficit caused in 1859 by the notes negotiated in 1858, they have felt that it would be oppressive to insist on the last dollar by exacting this sum of \$4,038.44 from the Sureties of 1859, when their liability therefor is in any event a matter of serious doubt.

When the Commissioners had succeeded in adjusting the liability of the Sureties of 1859, and had found that the amount due from them was \$37,585.41, they received a proposition from those Sureties to pay \$37,000 to the State, and receive discharge from all further liability on the Bond. The terms proposed were \$7,000 in cash, and \$10,000 per year for three years, in notes of Samuel F. Hersey and Walter Brown, satisfactorily secured by mortgage on real estate. The undersigned accepted the offer, and Messrs. Comstock, Porter and Jewett were appointed a sub-committee to proceed to Bangor and examine the real estate proposed to be mortgaged,

and ascertain if it constituted sufficient security to insure the prompt payment of the notes to which it is collateral. The subcommittee devoted some three days to the task assigned them, and became satisfied that the security was ample for the protection of the State, and at once had the mortgages executed. Upon this fact being certified, the notes and mortgages formally delivered, and \$7,000 in cash paid according to agreement, the undersigned, by virtue of the authority vested in them, discharged the Sureties of 1859 from all future or further liability to the State on their Bond. The Commissioners feel that it is but simple justice to acknowledge the prompt and earnest purpose so uniformly manifested by these Sureties to meet all legal and equitable demands against them. They have most honorably discharged their obligations to the State, and have set an example that is worthy of all praise.

The amount of the deficiency thus far recovered, is as follows :

Mechanics' Bank,	\$1,100
Neal Dow,	8,500
Sureties of 1859,	37,000
	\$46,600

Allowing for the odd sum, \$581,41, not exacted from the Sureties of 1859, and also for \$100 correction made on the general deficiency account on the Treasurer's books, and the amount still due to the State will be found to be \$46,738.58. Of this gross sum the Legislature selected its own remedy for the recovery of \$7,507.-39 by the passage of the following Resolve :

STATE OF MAINE.

Resolve relating to certain demands of the State.

RESOLVED, That the Governor and Council be directed to accept the proposition made by Neal Dow in his letter to the Investigating Committee as detailed in their Report, and take measures at once to have the proposition carried into effect. That the Governor and Council be directed to demand payment by John Wyman and Walter Brown of the amounts shown by the Report of said Committee to be due from them to the State, and if not paid, to take measures for the collection thereof.

[Approved March 20, 1860.]

The Sureties of 1858 were found by the Report of the Investigating Committee to be liable for the sum of \$14,352 89. A deduc-

tion of \$100 is to be made from this amount, by reason of an error in regard to the tax of the town of Gray, the correction of which reduces the total deficit of the late Treasurer to \$93,923 99. To the \$14,252 89, for which the Sureties of 1858 would still be liable on the basis of the Report of the Investigating Committee, there must be added, in the first instance, the Augusta Bank check and the Paris tax before referred to, amounting to \$2,841 31, and thus increasing their liability to \$17,094 20. And in addition to this amount, the Commissioners, as already stated, consider the Sureties of 1858 responsible for all moneys misappropriated by Mr. Peck between January 1, and February 4, 1859. The gross amount thus misappropriated was \$22,136 99, which, added to the \$17,094 20, sums up \$39,231 19 as the possible ultimate liability of the Sureties of 1858. Further investigation, and the examination of some Bank Books which have not been before the Commissioners, may prove that the \$4,038 44 before referred to, was undoubtedly in payment of checks already included in the sum for which they are held accountable. In that event, the Sureties of 1858 will be entitled to a reduction to that amount, and the sum which will be then demanded of them is \$35,192 75. It is certainly better that the State should lose the \$4,038 44 than that it should be paid by any one from whom it is not equitably and indisputably due. The undersigned have already shown good reasons why the Sureties of 1859 should not be compelled to pay this sum, and unless future investigation shall clearly prove it to be due from the Sureties of 1858, it must be a loss to the State. One half of the defalcation is already made up, and if the State shall escape with the loss of only some four thousand dollars, as now seems probable and hopeful, it may be accounted the best of fortune. The Sureties of 1858 are amply able to respond to these liabilities, and the State may be considered as secure against any further ultimate loss than the comparatively trifling sum just stated. What particular course the Sureties of 1858 design to take, the undersigned are not able to state, inasmuch as they have not appeared before the Commissioners either in person or by attorney, though requested to do so by special notification. The Commissioners have been ready and willing to adjust the amount to be paid according to a standard of justice and equity, and in the absence of all propositions from those Sureties they have resolved

upon the following course. The Commissioners will hold an adjourned session at the Treasury office on the 20th of June, for the purpose of affording a full opportunity to these Sureties to make a fair and equitable adjustment of their liability. Should no such adjustment be effected at that time, it will be the duty of the undersigned, in accordance with the Resolve under which they are acting, to fix the "terms and stipulations" of payment; after which the Sureties will be allowed sixty days to comply with the same. In the event of their failing to do so, the measures to be subsequently pursued are left by the Resolve with the Governor and Council.

All which is respectfully submitted.

J. G. BLAINE,
GEO. K. JEWETT,
FREDERICK ROBIE,
JAS. M. STONE,
ROLAND FISHER,
JOSEPH PORTER,
GEO. COMSTOCK.

N O T E .

The following correspondence is pertinent to the foregoing Report, and is accordingly submitted in connection therewith :

TREASURY OFFICE, }
Augusta, April 12, 1860. }

HON. J. H. DRUMMOND, *Attorney General* :

Dear Sir : I am instructed by the Commissioners appointed to settle with the Sureties of B. D. Peck, to submit to you the following statement and questions and to solicit an answer at your earliest convenience.

The Bond of Benj. D. Peck for his last term as Treasurer was approved by the Legislature on the 4th day of February, 1859—he having been elected on the 13th of the preceding month.

When did the liability of his Sureties for 1859 commence ?

When did the liability of his Sureties for 1858 terminate ?

Very truly yours,

J. G. BLAINE.

WATERVILLE, April 16, 1860.

JAS. G. BLAINE, ESQ., *Chairman Commissioners, &c.* :

Dear Sir : Your note of April 12 was duly received. Without entering at all into my reasons therefor, I submit the following answers to the questions contained in your note :

1. The liability of the Sureties on the Bond of 1859 commenced Feb. 4, 1859, and they are not liable for any act of the Treasurer previous to that date.

2. The liability of the Sureties on the Bond of 1858 continued for all the acts, &c., of the Treasurer until Feb. 4, 1859, and they must account for all money received by him up to that date.

Yours very truly,

JOSIAH H. DRUMMOND.

The following receipt shows the payment into the Treasury of the money received from the Sureties, and the delivery of the Securities to the Treasurer :

STATE OF MAINE.

TREASURY OFFICE, }
Augusta, April 25, 1858. }

I hereby certify that the Commissioners appointed by the Legislature to settle with the Sureties of B. D. Peck, Treasurer of Maine for the year 1859, have deposited in this office three notes of \$5,000 each, dated April 23, 1860—signed by Walter Brown and Samuel F. Hersey, surety, and payable to Nathan Dane, Treasurer, or his successors in office, as follows, viz :

\$5,000 on the first day of September, 1861 ;

\$5,000 on the first day of September, 1862 ;

\$5,000 on the first day of September, 1863 ;

Also three notes of \$5,000 each, dated April 23, 1860—signed by Samuel F. Hersey, and Walter Brown as surety, and payable to Nathan Dane, Treasurer, or his successors in office, as follows, viz :

\$5,000 on the first day of September, 1861 ;

\$5,000 on the first day of September, 1862 ;

\$5,000 on the first day of September, 1863 ;

Also, mortgages of certain real estate given as security for the payment of the above described notes.

I also certify that the said Commissioners have paid into this office seven thousand dollars in cash.

NATHAN DANE, *State Treasurer.*

REPORT

*Of the Commissioners appointed to settle with the Sureties
of Benj. D. Peck.*

To the Honorable Governor and Council:

The undersigned in their former Report, dated April 25, 1860, communicated to you the terms of the very advantageous and honorable adjustment which they had effected with the Sureties of the late Treasurer for the year 1859. They farther advised you that a meeting with the Sureties of 1858 would be held at the Treasury office on the 20th of June, in order, if possible, to adjust the basis and extent of their liability. The Sureties of that year (Messrs. Neal Dow, John B. Cummings, Thomas Abbott, Ezra Carter, Jr., William Chase, Allen Haines and Isaac Dyer,) represented by the four of their number last named, appeared before the Commissioners on the day specified, and urgently requested a postponement, in order that they might have farther time to investigate the particular nature and grounds of the claims against them—assuring the Commissioners, at the same time, that it was their desire and purpose to settle all proper and legal liabilities promptly, amicably and without litigation of any kind with the State.

In response to their request, thus pressinglly preferred, the Commissioners consented to a postponement until the 18th day of September, and at the same time furnished to the Sureties a full specification of the claims against them, amounting, in all, to \$39,231 19. At the adjourned meeting, on the 18th of September, three of the Sureties, Messrs. Carter, Chase and Haines, appeared before the Commissioners and stated that upon a careful examination of the claims preferred against them by the State, and after prolonged consultation with eminent legal gentlemen touching the same, they were fully satisfied that no liability in law could attach to them. Nevertheless, as they further stated, they felt wholly averse to litigation

and would prefer to pay any reasonable sum, rather than be forced into a law suit. "Thinking moreover," they said, "that the claims for town taxes withheld by the late Treasurer, stood on a basis that might subject them in equity to payment," they proposed to make good all the defalcation resulting from that source, and would therefore pay the sums claimed under this head, some *five thousand dollars* in all, *provided they could thereupon be discharged from all further liability on their Bond*. To this proposition the undersigned could not assent, and as the Sureties tendered no other terms, the Commissioners, in pursuance of the Resolve under whose authority they are acting, proceeded to fix the "terms and stipulations" on which they would discharge the Sureties from all further obligation to the State. Their action, on this point, was embraced in the following resolves which were unanimously adopted:

"*Resolved*, That the Sureties of B. D. Peck, late State Treasurer, for the year 1858, be notified by the Secretary of this Commission on or before the 21st inst., that the amount found due to the State from said Sureties is \$39,231 19, and that payment of the same is hereby demanded as follows, viz.: \$9,231 19 on the 1st day of November next, in cash; \$10,000 on Nov. 1st 1861; \$10,000 on Nov. 1st 1862; and \$10,000 on Nov. 1st 1863—the three last named amounts to be in notes of responsible parties, thoroughly secured by mortgage of real estate.

Resolved, That if said Sureties accept these terms, a meeting of the Commissioners will be held at such time as said Sureties may desire, within the next sixty days from the 20th inst., and that in any event the Commissioners will meet in the Treasury office, Augusta, on Wednesday, Nov. 21st, at 4 o'clock P. M."

Upon the day appointed, the Commissioners reassembled at the Treasurer's office and their Secretary reported that he had communicated the terms and stipulations to the Sureties at the required time, by handing to each one of them a copy of the foregoing Resolves. Messrs. Carter, Dyer, Haines and Chase, of the Sureties, again appeared before the Commissioners and stated that they had not called for a meeting of the Commissioners within the "sixty days" because they were not disposed to accept the "terms and stipulations" enjoined in the Resolves which had been communicated to them. They then presented three propositions for the consid-

eration of the Commissioners, any one of which they were willing to abide by; viz.:

FIRST—to pay the amount of the defalcation arising from the withholding of town taxes, being some five thousand dollars in all.

SECOND—to refer the whole question of their liability, together with the amount they should pay, to some impartial tribunal, to be mutually selected by the Commissioners and Sureties.

THIRD—to agree upon a *case* for submission to the Supreme Judicial Court, the Sureties binding themselves to abide by the judgment.

The *first* of these propositions was the same that was previously tendered by the Sureties and rejected by the Commissioners, and there was no disposition on the part of the latter to reverse their action on that point.

To the second and third propositions, the Commissioners had but one answer to make, viz.: that the authority with which they were clothed by the Resolve appointing them, did not in their judgment warrant them in adopting any such mode of settlement; that the power bestowed upon them was limited and clearly defined, and that they had no right whatever to transfer or delegate their trust to any other person or tribunal; and that whilst the proposition, coming from the Sureties, exhibited an honorable disposition on their part, there was no power competent to meet them on such terms, except the Supreme Legislative authority of the State.

The Commissioners having therefore failed to effect a settlement with the Sureties of 1858, conclude their duties by reporting the state of facts to the Governor and Council.

Respectfully submitted,

J. G. BLAINE,
G. K. JEWETT,
FREDERICK ROBIE,
JAS. M. STONE,
ROLAND FISHER,
JOSEPH PORTER,
GEO. COMSTOCK.

TREASURY OFFICE, }
Augusta, Nov. 22, 1860. }

STATE OF MAINE.

IN COUNCIL, December 26, 1860.

The Committee of the whole Council, to which was referred the Report of the Commissioners appointed by Resolve of the Legislature, approved March twentieth, eighteen hundred and sixty, to adjust the claims of the State against the Sureties on the Bonds of B. D. Peck, late Treasurer of State, filed on the twenty-fourth instant,

REPORT:

That it appearing by said report that no adjustment having been made with the Bondsmen aforesaid, for the year eighteen hundred and fifty-eight, the Governor be advised, in compliance with said Resolve, to request the Attorney General of the State to institute such legal measures as may be necessary to enforce the collection of said Bond.

Which is respectfully submitted.

JARED FULLER.

Per Order.

IN COUNCIL, December 27, 1860.

Read and accepted by the Council, and by the Governor approved.

Attest :

NOAH SMITH,
Secretary of State.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
February 20, 1861. }

On motion of Mr. LIBBEY of Orono, taken from the table and 1,000 copies ordered to be printed, together with the Reports of the Commissioners.

CHARLES A. MILLER, *Clerk.*