

P628

OPINIONS

OF

Hon. John H. Holt, Judge J. W. Mason

AND

Tax Commissioner Fred O. Blue

In Re State's Financial Situation

April 25, 1915

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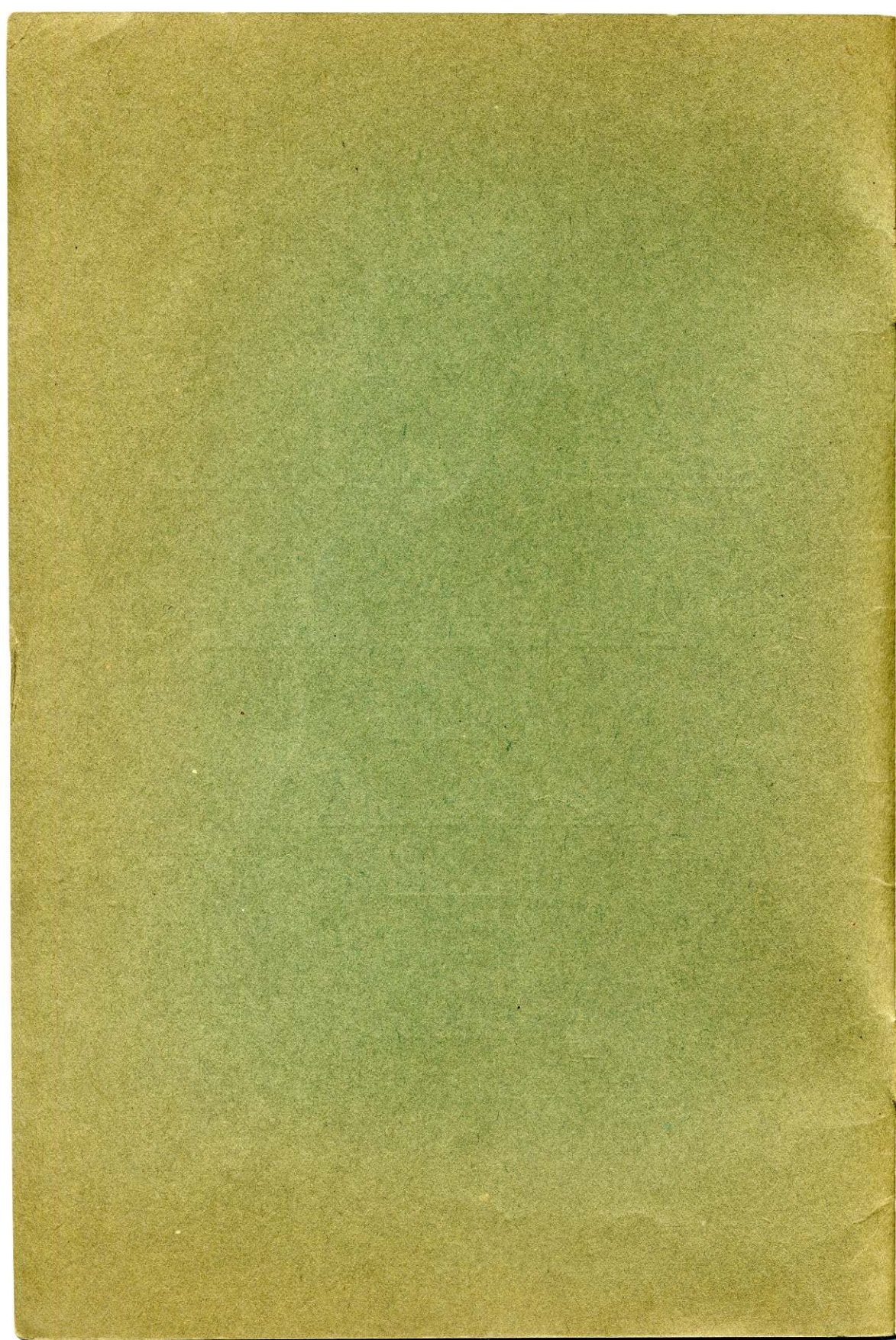
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OPINION OF JUDGE HOLT

HUNTINGTON, W. VA., April 7, 1915.

HON. H. D. HATFIELD,
Governor of West Virginia,
Charleston, West Virginia.

DEAR SIR:—I am in receipt of your request for an opinion upon the legal question involved in the following interrogatories, and will give a brief answer to each in its order.

INTERROGATORIES.

“1. When is the Governor authorized to borrow money for State purposes, and, if loans can be made by him, for how long?

“2. In case of outstanding liabilities of the State being in excess of available revenue, what is the duty of the officers who have to deal with such a condition? As an example: In case of liabilities exceeding revenues in the way of appropriations, is any preference to be given with respect to the department of government maintenance over appropriations for general and sundry purposes, or should they pro-rate available sources of revenue among all appropriations made by the Legislature?

“3. Is it the duty of the auditor to issue warrants, when the proper requisitions are made upon him, for a part or all of an appropriation made by the Legislature for any purpose, whether the revenue has been provided or not for such an appropriation, or in case it requires the payment out of the general state fund, and there is no money in the treasury to meet such obligation at the time being, but in the future funds will be available for

that purpose, what would be his duty in this regard? Also the reverse position, wherein the appropriation was made by the Legislature, and no funds provided for its liquidation, what would be the duty of the auditor?

“4. Is an appropriation made in excess of the State’s available revenues a valid appropriation?”

FIRST.

POWER OF GOVERNOR TO MAKE TEMPORARY LOANS.

The power of the Governor to borrow money under our law is exceptional, and not general, and is governed by Section 4 of Article 10 of the State Constitution, and Section 26 of Chapter 14 of the Code of West Virginia.

So much of the constitutional provision as relates to the question under consideration reads as follows:

“No debt shall be contracted by this State except to meet casual deficits in the revenue * * * *.”
Article X, Sec. 4, W. Va. Consti.

And the statute referred to provides that—

“The Governor may raise, from time to time, by temporary loans, not having over eighteen months to run, nor bearing a greater interest than two cents per one hundred dollars per day, so much as may be needed to supply the wants of the treasury.”
Code, W. Va., Ch. 14, Sec. 26.

The power of the Governor, therefore, to borrow is limited to temporary loans, not to run more than eighteen months, and solely for the purpose of meeting a casual deficit in the State treasury; and, in consequence, it becomes necessary to determine what is a casual deficit, and “the word ‘casual’ (as defined by the law writers) means happening by accident or brought about by an unknown cause”.

Am. & Eng. Ency. of Lw. (2 ed.) Vol. 5, page 762.

As applied to the case in hand, my information is that the deficit began in 1913, and was called by you to the attention of the Legislature in your biennial message of 1915, as well as by your Special Message upon the subject of taxation addressed to that body in its regular session of the same year. Under these circumstances, it became the duty of the Legislature, under the Constitution, to "levy a tax for the ensuing year sufficient, with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year".

W. Va. Const., Art. X, Sec. 5.

This, however, the Legislature refused or declined to do, and adjourned without taking any note of the deficiency. Immediately they were reconvened by you in extraordinary session, and their attention once more called by special message to the deficit, and once again they declined to "levy a tax for the ensuing year sufficient, with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year", and adjourned. Under such circumstances, whatever may have been the character of the deficit in the beginning, whether "casual" or otherwise, it looks now as if it were no longer accidental or fortuitous, but had become *intentional*, upon the part of the Legislature at least. This, of course, is based upon the statement of fact that there was then an actual deficiency in the revenue.

I am likewise informed that this deficit is growing, and that the revenue and liabilities of the State are in such condition that, if a loan were effected for a period of eighteen months, under the statute, upon the theory of a casual deficit, the incoming revenues would not be sufficient to meet the current expenses and pay the loan at the time specified; so that the loan would either have

general public revenue of the State, without reference to the date of their passage, and irrespective of emergency clauses."

Syl. 7.

And, in the case last above cited, it was held that—

"A general appropriation Act to defray the expenses of the executive, legislative and judicial departments of State government must take precedence over an appropriation for the Soldiers and Sailors Home."

Syl. 3.

THIRD.

DUTY OF AUDITOR IN ISSUING WARRANTS.

Your question is threefold:

(a) "Is it the duty of the Auditor to issue warrants when the proper requisitions are made upon him, for a part or all of an appropriation made by the Legislature for any purpose, whether the revenue has been provided or not for such an appropriation";

(b) "What is his duty when the appropriation requires the payment to be made out of the general state fund, and there is no money in the treasury to meet such obligation at the time being, but in the future funds will be available for that purpose," and,

(c) "What is his duty where the appropriation was made by the Legislature, but no funds were provided for its liquidation?"

In response to the first query, I am of the opinion that the Auditor ought not to issue warrants, although an appropriation has been made and a requisition based thereon presented, unless there is money in the treasury applicable to the payment of the same, or at least unless funds will be available in the future for its payment. This latter contingency is involved in the second query.

The Auditor is a constitutional officer, elected by the

people, and with certain powers and duties vested in him by statute. These duties are set forth in part in Section 5 of Chapter 17 of the Code, and require him, before he issues his warrant upon the Treasurer, to ascertain how much is justly *due* by the State, whether or not the same has been authorized by law, and also whether or not there is an appropriation not exhausted or expired out of which it is properly payable. He is no mere clerk, but has serious and responsible duties to perform looking to the protection of the treasury, and with power of investigation and decision.

In response to the second query, I am likewise of the opinion that, when the appropriation requires the payment to be made out of the general State fund, and there is no money in the treasury to meet such obligation at the time being, but in the future funds will be available for that purpose, the Auditor ought not to issue his warrant until the funds provided shall have become available. A warrant so issued would scarcely call for a check from the Treasurer until the funds had actually been covered into the treasury for its payment; for, if the Treasurer were to issue his checks upon such warrants, and in advance of deposits to meet them, the result would be a cloud of worthless checks issued in the name of the State that would bring discredit and disgrace.

In response to the third query, "Where the appropriation was made by the Legislature, but no funds were provided for its liquidation," I should say that it is the plain duty of the Auditor to issue no warrant.

FOURTH.

*IS AN APPROPRIATION MADE IN EXCESS
OF THE STATE'S AVAILABLE REVENUES
A VALID APPROPRIATION?*

Revenues may be diminished by delinquencies, and

casual deficits therein occur. Likewise, casual deficits in the treasury may be produced by excessive appropriations; and I should say that, wherever the excess of an appropriation over available revenues "happens by chance of accident, and without design or intention to evade the constitutional inhibition," the excessive appropriation so casually occurring would not be void; otherwise, Section 4 of Article X of the Constitution would not recognize the legality of a debt created "to meet casual deficits in the revenue." All other appropriations in excess of the State's available revenues are invalid.

In re Appropriations, 13 Colo. 316; 22 Pac. Rep. 464.

Very respectfully,

JOHN H. HOLT

OPINION OF JUDGE MASON

CHARLESTON, W. VA., April 13, 1915.

HONORABLE H. D. HATFIELD,
Governor of West Virginia,
 Charleston.

MY DEAR GOVERNOR:—I am just in receipt of your letter today asking for my opinion upon two questions concerning your duty as Governor of the State.

First. "Am I, as Governor, in the present financial conditions of the State and upon the State's credit, authorized to borrow money so as to meet expenditures under the appropriations made by the Legislature?"

In reply to this question I will say that, as I understand the law, the only authority you have to borrow money for the use of the State is found in Section 26, Chapter 14, of the Code of West Virginia, which is as follows:

"The Governor may raise, from time to time, by temporary loan, not having over eighteen months to run, nor bearing a greater interest than two cents per hundred dollars per day, so much as may be needed to supply the wants of the treasury."

This statute limits your authority to raising money by temporary loans. When it is made to appear to you that it is necessary to raise money to supply the wants of the treasury, this may be done by a temporary loan not having over eighteen months to run. You must be the judge as to the necessity and as to whether or not the loan is a temporary one.

It would seem that the legislature intended to confer this authority upon the Governor to provide money

when it appeared that there were assets applicable to the payment of the State's debts, but not available at the time. I do not understand that the Governor would be authorized, under this statute, to provide funds for the payment of debts created by the legislature, but to pay which no provision was made by it. In other words, the authority of the Governor under this statute is simply to raise money by temporary loans to supply the wants of the treasury for the time being. Whether or not conditions exist justifying you in raising the money in this way is a question for you to determine under all the circumstances.

Second. You also ask me the following question:

“In case of the outstanding liabilities of the state being in excess of available revenues, what is the duty of the officers who have to deal with such a condition? As an example: In case of liabilities exceeding revenues in the way of appropriations, is any preference to be given with respect to the department of government maintenance over appropriations for general and sundry purposes, or should they pro rate available sources of revenue among all appropriations made by the legislature?”

The Supreme Court of Colorado has answered this question very fully, and as I believe, correctly.

In a case decided by that court, October 25, 1889, the court says:

“Acts of the General Assembly making the necessary appropriations to defray the expenses of the executive, legislative and judicial departments of the state government for each fiscal year, including interest on any valid public debt, are entitled to preference over any other appropriations from the general public revenue of the State without reference to the date of their passage and irrespective of emergency clauses.”

This opinion has been repeatedly affirmed by the same

court, and, as I have indicated in my opinion, correctly propounds the law of this State.

If the Auditor and Treasurer of the State of West Virginia shall find that the available resources of the state are insufficient to pay all of the appropriations made by the legislature, then it is clearly the duty of these officers to give preference to the payment of appropriations made to defray the expenses of the legislative, judicial and executive departments of the State. Any other disposition of the public funds, in case the revenues are insufficient to pay all of the debts, would weaken, and perhaps destroy the state government. The business of the State government cannot be carried on except through the agency of these officers, and the services of these officers cannot be secured without the payment of their salaries.

It seems to me very plain, both upon principle and upon authority, that where the revenues are insufficient to pay all of the obligations of the State directed by the legislature, that it is the duty of the Auditor and Treasurer to make preference in favor of the payment of the salaries and appropriations made for the three departments of the state government, without which the functions of the State could not be performed. A different course would permit the funds of the State to be withdrawn from the State treasury without reserving a sufficient amount to pay the expenses necessary to sustain and support the state government.

These are my views hastily prepared. I regret that I have not had more time, and better opportunity, for a fuller investigation, so that I might give you a more satisfactory answer to the questions propounded.

Very truly yours,

JOHN W. MASON.

OPINION OF TAX COMMISSIONER BLUE

Office of State Tax Commissioner, Charleston
April 2, 1915.

MY DEAR GOVERNOR HATFIELD:—

You have requested my views upon the following questions:

First: Are you as governor, in the present financial condition of the state, and upon the state's credit, authorized to borrow money so as to meet expenditures under the appropriations made by the legislature?

Second: If you are authorized, and if money should be borrowed upon the state's credit, from what source could the loan be repaid?

Under the provisions of the Constitution, bills making appropriations for the pay of members and officers of the legislature, and for salaries of the officers of the government, and for general purposes, are required to be made separately. Consequently, appropriations of public moneys are made in three bills, known as the *legislative appropriation* bill, the *executive* appropriation bill and the *general* appropriation bill. It is well to keep in mind that appropriations of moneys out of the public treasury are required to be made by three separate bills, for it must be presumed that the makers of the Constitution had in mind some good purpose for such requirement.

CONDITION OF THE STATE'S FINANCES.

In your several messages to the legislature, both to the regular session of 1915 and the extraordinary session immediately thereafter following, you called attention to

the fact that sufficient revenues were not provided to take care of existing deficit and appropriations as made by the legislature.

The Auditor and the Treasurer have publicly announced that there are not sufficient funds to the credit of the general revenue to meet current requisitions thereon, and consequently the state has suspended payment out of the general revenues. My understanding is that on the 22nd day of March, 1915, the general revenues of the state were overdrawn about \$200,000; that in consequence thereof the Treasurer will issue no checks for warrants drawn upon the general revenue until the overdraft therein has been made up and funds are available to the credit of the general revenue.

*PROVISIONS OF THE CONSTITUTION AND THE
GENERAL STATUTE.*

Sections 3, 4 and 5 of Article 10 of the Constitution are as follows:

“3. No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated, or provided. A complete and detailed statement of the receipts and expenditures of the public moneys, shall be published annually.

“4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, or to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

“5. The power of taxation of the Legislature

shall extend to provisions for the payment of the State debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State; but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year."

Section 26 of Chapter 14 of the Code is as follows:

"The governor may raise, from time to time, by temporary loans, not having over eighteen months to run, nor bearing a greater interest than two cents per hundred dollars per day, so much as may be needed to supply the wants of the treasury."

The provision in section 4 of Article 10 to the effect that no *debt* should be contracted by the state, etc., is an inhibition upon the *legislative* as well as other departments of the state government. Whether an appropriation creates a *debt* within the meaning of the constitutional inhibition against contracting a debt depends on the character of the appropriation and the manner of its payment. In general, any act or transaction by which the state becomes bound to pay money creates a debt; but making appropriations already provided for by the revenue laws is not creating a debt in the sense of the inhibition, even though in anticipation of such revenue. But an appropriation for which the revenue laws are inadequate, and for which no provision is made by the appropriation itself, *creates a debt*. If, however, the appropriation law makes such provision, no debt is created. 36 Cyc., 884 and authorities there cited.

CASUAL DEFICIT.

The phrase "casual deficits in the revenue" has not been construed by the courts of this state nor the courts of Virginia. Like phrase in constitutions of other states has been defined as follows:

"A casual deficiency of the revenue is one that happened by chance or accident, and without design or intention to evade the constitutional in-happens by chance or accident, and without *de-vey v. Foster* (Ind.) 21 N. E., 41.

A LEGAL PRESUMPTION.

It is a legal presumption that the legislature would recognize any deficiency in the revenue and stay within the inhibitions of the constitution, and at the same time make provision for payment of all legal demands upon the public revenue.—Gray's Limitation on Taxing Powers, Sec. 2159. While this presumption exists, it has been said, however:

"Hence, while the general assembly must exercise their own judgment in the first instance, yet if, by reason of error of judgment, or for any other cause, they exceed the constitutional limit in making appropriations or in authorizing expenditures, such excessive acts are mere nullities." In *Re Appropriations*, 22 Pac. Rep., 467 and authorities there cited.

It therefore follows that so far as the *appropriations* as made by the legislature, *exceed the revenue* provided by the legislature, the excessive appropriations are *nullities*, and the decisions indicate that as to such nullities the state auditor should not draw his warrants. In *Re Appropriations*, *supra*, the Court said:

"If legislative acts making appropriations in excess of constitutional limits have unfortunately received the governor's signature, instead

of his veto, he should nevertheless withhold his approval from any and all vouchers relating to such unconstitutional appropriations. *So, also, the auditor should refuse to draw any warrant therefor, and the treasurer should decline to make payment thereon.* In reference to matters arising under an act which is clearly unconstitutional, the unauthorized act of one government official is no justification or excuse for a similar act by another."

See also *Stuart v. Nance*, 28 Colo., 194 and *Soldier's Home* case, 17 Colo., 587. Particularly in last case where it was held:

"It is the duty of every public officer connected with the administration of the state finances to treat as void each and every appropriation in excess of constitutional limits."

The Colorado constitution is similar to ours, and some years ago a financial situation somewhat like unto ours, arose in Colorado and the decisions of that state on such questions seemed to be the leading cases.

PREFERRED APPROPRIATIONS.

When the total *appropriations* exceed the *total revenue*, the question arises, What appropriations shall be preferred, or rather, what claims on appropriations shall be preferred? The provisions of the Constitution requiring the *legislative* and *executive* appropriations to be made in separate bills from the *general appropriation* bill may indicate the purpose of the makers of the constitution as to this. The sovereignty of the state is exercised through its three great governmental departments,—the executive, the legislative and the judicial. To destroy or so impair these three departments that they cannot exercise their usual and necessary functions, destroys the very government itself,

brings the sovereignty of the state into contempt, and results in chaos and anarchy. The language of the Court of Appeals of Kentucky in *Rhea, Treasurer v. Newman*, 153 Ky., 611, aptly expresses the proposition:

“But should the Legislature fail in its plain duty under section 171, by refusing to levy any tax whatever, should the State cease to govern? Would its courts of justice and its penal and charitable institutions close their doors? Would its peace officers, for want of support, be compelled to turn the State over to the passions of the lawless and vicious elements? Would the legislature be incapable of incurring the expense of a session, and therefore unable to meet, even though the meeting were called for the sole purpose of levying the necessary tax to pay the running expenses of the state? No one would hesitate to answer these questions in the negative. Considerations of this character have necessarily led to the recognition and adoption of certain elementary canons of construction, which are peculiarly applicable to the interpretation of constitutional provisions, and especially to constitutional prohibitions.”

As said in *In Re Appropriations*, *supra*, appropriations, other than those necessary to defray the expenses of the state government, may be made to foster and maintain public institutions and public improvements that are proper, to the extent of the *surplus* over the amount required for the necessary appropriations to maintain the government. And, as said in *Stuart v. Nance*, 28 Colo. 194.

“The necessary appropriations to defray the expenses of the executive, legislative and judicial departments of the state government for each fiscal year, including interest on any valid public debt, are entitled to preference over any other appropriations from the public revenue of the state,

without reference to the date of the passage of the acts making such appropriations.”

The whole question of preference, as well as the auditor's duty will be found fully discussed in the cases of *In Re Appropriations*, *Stuart v. Nance*, and *Old Soldiers Home Case*, *supra*.

AUTHORITY TO BORROW.

The Constitution does not say who, if any one, shall borrow for the State. It does not provide that a *debt* may be contracted “to meet casual deficits in the revenue.” Section 26 of Chapter 14 of the Code, above set out, provides that the governor may raise from time to time, by temporary loans, not having over eighteen months to run, “so much as may be needed to supply the wants of the treasury.”

There are three limitations in this section. First, the loans must be temporary and payable within eighteen months. Second, must be restricted to the needed supply of the treasury. Third, not exceeding the rate of interest provided by statute.

CONCLUSION.

The governor, in my opinion, cannot borrow on the credit of the state, unless the same can be paid and discharged within eighteen months out of the revenue provided for and to be collected. But temporary loans, not having over eighteen months to run, to supply the wants of the treasury, may be made by the governor on the credit of the state, when the same can be paid and discharged out of the revenues provided for and to be collected, within eighteen months, particularly for the purpose of maintaining the three great departments of gov-

ernment. See *Hovey, Governor v. Foster*, (Ind.) 21, N. E., 39.

I have endeavored to show (1) that the revenue provided for and to be collected must be first used to maintain the three great departments of government; (2) that all appropriations for other purposes, so far as they exceed the revenues provided for and to be collected, are *nullities*. Therefore, if any moneys are borrowed, the same must be first applied to the maintenance of the three great departments of government, and such moneys must be repaid within eighteen months out of the revenues provided for when collected. It follows, of course, that moneys may also be borrowed to maintain such institutions as by their very nature cannot be well dispensed with, provided that the same can be repaid and the obligation discharged within eighteen months out of the revenues already provided for, when collected. If the auditor's warrants and treasurer's checks thereon are restricted to the purposes and within the limitations stated herein, the revenues, when collected, will be sufficient to discharge the loan within the statutory limit.

Very sincerely yours,

FRED O. BLUE,

State Tax Commissioner.

GOVERNOR H. D. HATFIELD,

Charleston, West Virginia.

