

IN SENATE OF THE UNITED STATES.

MARCH 3, 1853.—Ordered to be printed.

Mr. GEYER made the following

REPORT.

[To accompany bill S. No. 647.]

*The Committee on the Judiciary, to whom was referred the memorial of Thomas Ap Catesby Jones, report :*

That Walter F. Jones having been appointed postmaster at Norfolk, in the State of Virginia, on the 8th August, 1836, executed his bond, with the memorialist and one Duncan Robertson as his sureties, in the penalty of \$10,000, conditioned for the faithful performance of the duties of his office. In 1839 said Walter F. Jones was removed from office, and the United States, in the year 1840, brought suit on his official bond, against principal and sureties, to recover an alleged balance of \$5,515 89. Pending the action Walter F. Jones died; Robertson made default, and as to him a writ of inquiry of damages was executed: the memorialist alone made defence, relying upon the 3d section of an act of Congress of the 3d March, 1825, entitled "An act to reduce into one the several acts for establishing and regulating the Post Office Department," which provides, among other things, that if default shall be made by a postmaster at any time, and the Postmaster General shall fail to institute suit against such postmaster and his sureties for two years from and after such default, the sureties shall not be liable.

The defence was overruled, and damages assessed by the jury to the sum of \$4,387 09, with interest thereon from the 31st August, 1839, till payment. Upon this verdict judgment was rendered for \$10,000, the penalty of the bond, to be discharged by the payment of the damages assessed, interest and cost of suit.

A writ of error was prosecuted by the memorialist, and at the January term, 1839, of the Supreme Court of the United States, the judgment was affirmed, the court holding that the act of the 3d March, 1825, did not apply to the case, because, by the mode of keeping the account at the Post Office Department, the balance due from the postmaster is thrown upon the last quarter.

The memorialist represents that Walter F. Jones, the principal in the bond, died wholly insolvent, and that Robertson, the co-security, soon after the execution of the bond, became, and still is, utterly insolvent, in consequence of which the burden of the judgment falls upon the memorialist alone; that in his absence in command of the United

States squadron in the Pacific ocean, his agent paid to the United States \$2,500, and also the whole cost of suit.

The memorialist alleges that since the affirmance of the judgment and his return to the United States, he has discovered facts unknown to him before, which establish irregularities, abuses, and neglects, on the part of the Post Office Department, inconsistent with law and good faith, and which he claims ought to exonerate him from liability for the default of his principal.

It appears that Walter F. Jones was appointed postmaster at Norfolk, Virginia, on the 30th November, 1830, and gave bond as required by law, with Benjamin Pollard, J. Whithead, and J. F. Andrews, as his sureties. He continued in office until the passage of the act of 2d July, 1836, when, his office being of the class which required the appointment to be made by the President, with the advice and consent of the Senate, he was reappointed, and entered into bond, with the memorialist as one of his sureties, being the bond on which suit was brought and judgment recovered as before stated.

The 3d section of the act of the 3d of March, 1825, provides that it shall be the duty of the Postmaster General, upon the appointment of any postmaster, to require and take of said postmaster bond with good and approved security, in such penalty as he may judge sufficient, conditioned for the faithful discharge of all the duties of such postmaster, or which may be required by any instruction or general rule for the government of the department.

The 31st section of the same act provides, that if any postmaster shall neglect or refuse to render his accounts and pay over to the Postmaster General the balance by him due at the end every three months, it shall be the duty of the Postmaster General to cause suit to be brought against the delinquent.

The regulations of the Post Office Department forbade the use of money received for postages by any postmaster, and required him to deposit all such money in bank quarterly, or, in case the quarterly balance should exceed six hundred dollars, monthly, within seven days of the end of each month.

The memorialist alleges that, although Walter F. Jones had been in office six years, subject to the laws and regulations before mentioned, no suit had been brought against him; and as the Post Office Department possessed the ready means of detecting any delinquency, or malfeasance, and was vested with the power and expressly charged with the duty of proceeding promptly against delinquents, the reappointment of Postmaster Jones afforded evidence of the highest character of his fidelity and good conduct; and relying upon that evidence, and the good faith of the Post Office Department in the execution of the laws, he become security as already stated.

But since the trial of the action on his bond he has ascertained, what he did not and could not know before, though well known to the department at the time of the reappointment, that Postmaster Jones had been habitually delinquent before, and was largely a defaulter at the time of his reappointment; that he failed to deposit moneys received for postages, or pay them as required by laws and regulations, but applied a part to his own use; that he acknowledged his delinquencies in

his correspondence with the department, and proposed to supply deficiencies by the proceeds of property which he promised to sell, in which the department acquiesced, until, at the end of the third quarter of the year 1835, the balance in his hands amounted to \$3,554 59, which he had failed to deposit or pay over, when the then securities were informed that he was about to be removed from office; and upon their request he was continued in office, and by their exertions the balance was reduced to \$909 26 at the end of the first quarter of the year 1836, but again increased at the end of the second quarter of that year to \$1,783 50, which was unaccounted for at the time of his re-appointment.

That after his reappointment, Postmaster Jones continued to be habitually in default, retaining in his hands large sums of money contrary to law and the regulations, without any action on the part of the department; that he was indulged in his delinquencies, with an increasing balance against him at the end of each quarter, amounting, on the 1st of April, 1837, to \$3,027 47. That the department, with a full knowledge of his delinquency, not only neglected to take measures to enforce the law, but, on the 13th of May of that year, directed him by letter to retain in his hands, in specie, the proceeds of his office to meet drafts of the department, to report on the first day of every month the amount of net revenue of the preceding month, and pay over, without fail, when drafts should be presented; which order had the effect of increasing the balances, and consequently the risk of the sureties. That on the 13th of October, 1838, a draft was drawn on Postmaster Jones by the department for \$1,500, payable at sight, which was not paid; and although the department had notice of the dishonor of the bill, the delinquent was continued in office until the 3d of April, 1839, when the balance, which was \$4,730 55, had increased to \$6,637 43.

The memorialist prays not only to be released as to the balance unpaid of the judgment against him, but to have refunded to him the money already paid on the judgment.

The committee, upon an examination of the evidence accompanying the memorial, find the facts to be substantially as alleged by the memorialist, and are of opinion that he is entitled to relief, though not to the extent prayed for.

The misconduct of postmaster Jones before the execution of the bond, and the neglect of the Postmaster General to bring suit against him, or remove him from office, though his delinquencies were known, do not, in the opinion of the committee, affect the obligation of the bond, which appears to have been voluntarily executed by the memorialist. Nor does the mere omission to bring suit, or to remove the principal, for like misconduct and delinquencies, after the execution of the bond, entitle the securities to be discharged.

The act of Congress declaring it to be the duty of the Postmaster General to cause suit to be commenced against delinquent postmasters is merely directory to that officer; and his neglect to perform that duty is available to the securities only when he fails to institute suit for two years. And on that the memorialist relied as a defence in the suit against him, without success.

The memorialist claims to be discharged from all liability on the bond by reason of the order of the 13th May, 1837, directing postmas-

ter Jones to retain in his hands in specie the proceeds of his office to meet drafts of the department, which order, it is alleged, the Postmaster General had no power to give—that it materially changed the contract, and increased the risk of the sureties.

In the opinion of the committee it was entirely competent for the Postmaster General to issue that order, and a part of the condition of the bond that the principal should observe it.

The law in force at the time of the execution of the bond required, in general terms, that it should be conditioned for the faithful discharge of all the duties of the postmaster required by law, or which may be required by any instruction or general rule for the government of the department; and, among the express powers of the Postmaster General, he had authority to superintend the disposition of the proceeds of post offices and other moneys of the department, and to prescribe the manner in which postmasters shall pay over their balances.

The condition of the bond in this case, conforming to law in other respects, expressly stipulates that the principal shall pay the balance of all moneys that shall come into his hands for the postage of whatever is by law chargeable with postage, in the manner prescribed by the Postmaster General of the United States for the time being. It was therefore contemplated by the bond that the regulations of the department, including that requiring deposits every three months, might be changed, and a different manner of payment required; and consequently, the order of the 13th May, 1837, was not a change or attempt to change the contract of the memorialist.

It appears, however, that on the 1st of July, 1836, thirty-nine days before the execution of the bond, the balance in the hands of postmaster Jones was \$1,783 50, which constitutes a part of the balance against him at the time of his removal from office in April, 1839; and it is the opinion of the committee that the memorialist ought not to be charged with that sum.

The former sureties were undoubtedly bound for the good conduct of their principal, and responsible for any default prior to the reappointment; and the sureties on the new bond cannot, by any mode of keeping the accounts, be made to answer for prior delinquencies. As between the principal and the government the transfer of the balance from the old to the new account is unobjectionable; but, as between the securities on the different bonds, it ought not to be allowed, so as to discharge securities who are legally responsible, and charge those who are not.

The deposits and payments made after the date of the new bond cannot be assumed to have extinguished the antecedent balance, because, according to the laws and regulations, the receipts of each quarter were to be deposited and paid over at the expiration of the quarter; and it must be presumed the payments and deposits were of the receipts of the quarter, unless the contrary appears.

The memorialist is not only entitled to the benefit of that presumption, but inasmuch as it appears that the balance due at the date of the bond was at no time reduced, there is nothing from which it can be inferred that any part of that balance was paid; and, consequently, it remains, as it was before the reappointment, a default for which the memorialist ought not to be held. And the committee being of opinion that he is entitled to relief to that extent, report a bill.