

\*UNITED STATES *v.* VANZANDT.*Discharge of sureties.*

The case of the United States *v.* Kirkpatrick, 9 Wheat. 720, reviewed, its authority confirmed, and applied to the present case.

An omission of the proper officer to recall a delinquent paymaster under the injunctions of the 4th section of the act of the 24th of April 1816, c. 69, does not discharge his surety.

The provisions requiring the delinquent paymaster to be recalled, and a new appointment to be made in his place, are merely directory, and intended for the security of the government; but form no part of the contract with the surety.

The statute not removing from office the delinquent paymaster, *ipso facto*, but only making it the duty of the proper officer to remove him, the circumstance of new funds being placed in his hands, after his delinquency, does not discharge the surety.

United States *v.* Vanzandt, 2 Cr. C. C. 388, reversed.

## Error to the Circuit Court for the District of Columbia.

February 8th, 1826. This cause was argued by the *Attorney-General* and *Swann*, for the plaintiffs, citing *United States v. Kirkpatrick*, 9 Wheat. 720; and by *Jones* and *Key*, for the defendant.

February 16th. WASHINGTON, Justice, delivered the opinion of the court.—This was an action of debt, brought in the circuit court for the district of Columbia, upon a paymaster's official bond, against the defendant in error, one of the sureties in that bond. The condition of the bond, as set out upon *oyer*, is in the following words, viz :

"That whereas, the above-bounden John Hall is appointed paymaster of the rifle regiment, in the army of the United States; now, if the said John Hall shall well and truly execute, and faithfully [\*185 discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster aforesaid, and he, his heirs, &c., shall regularly account, when thereunto required, for all moneys received by him, from time to time, as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and moreover, pay into their treasury such balance as, on final settlement of the said J. Hall's accounts, shall be found justly due from him to the United States, then," &c.

To the declaration filed in this action, the defendant pleads, that the said John Hall did well and truly observe and discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster in the rifle regiment of the army of the United States, and did pay into the treasury such balance as, on settlement, was found due, and hath observed, kept and fulfilled, every matter and thing in the condition of the said bond, which, according to the said condition, ought to have been observed and kept. The breach set out in the replication is, that the said John Hall did not pay to the United States the sum of ———, which was due, and in arrear, on a certain day, and which he ought then to have paid, according to the condition of his bond.

\*Upon the trial of the issue formed on the matter stated in the replication, a bill of exceptions was taken to the opinion of the court, [\*186 by the United States, which states, that to support the issue on the part of the United States, they gave in evidence a certified copy of the bond aforesaid, together with the account of the United States against the said John

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Hall, settled at the treasury department, and duly certified according to law, whereby it appeared, that a balance of \$29,266.06 was due to the United States by the said John Hall, as paymaster of the rifle regiment of the army of the United States. Whereupon, the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, they should believe, that John Hall, named in the condition of the bond, had neglected and failed to make any report to the paymaster-general, once in two months, showing the disposition of the funds previously transmitted, with estimates for the next payment of the said regiment, and had also neglected and failed, either to transmit such estimates, or to render his vouchers to the paymaster-general, for settlement of his accounts, more than six months after receiving funds, and was not recalled for such default and neglect, but additional funds were placed in his hands, notwithstanding his known defaults and neglects, in the instances aforesaid, then the defendant is not chargeable for any failure of the said John Hall to account for such additional funds, so placed in his hands after his said defaults and neglects, in respect of the \*187] funds \*previously received, were known as aforesaid. The court gave the instruction as prayed; and a verdict being found for the defendant, a writ of error was sued out to the judgment rendered thereon.

The counsel for the plaintiffs in error have rested their cause entirely upon the decision of this court in the case of the *United States v. Kirkpatrick*, 9 Wheat. 720, and as we do not feel disposed to dissent from the opinion given in that case, it becomes material, in the first place, to inquire, whether the two cases are the same in principle, or not. If they are, it will avoid the necessity of any general reasoning upon the point decided in this cause by the court below. The case referred to, arose upon the act of congress for the collection of the direct taxes and internal duties. The action was founded upon the collector's bond, against the sureties; and one of the questions which came up for decision was, whether the failure of the comptroller to call the collector to account, at the periods prescribed by law, and the consequent injury to the sureties, did not discharge them from their responsibility, upon the ground of *laches*? By the 28th section of the above act, the comptroller of the treasury is required, in case any collector should fail to collect, or to render his account, or to pay over quarterly, or sooner, if required, the moneys by him collected, immediately after such delinquency, to issue a warrant of distress against the delinquent collector, to be \*188] \*levied on his personal estate, and in case that should prove insufficient to satisfy the warrant, then upon his real estate. The decision of this court was, 1. That *laches* is not imputable to the government; and 2. That the provisions of the law requiring settlements by its officers to be made at short periods, are designed for the security and protection of the government, and to regulate the conduct of those officers; that they are merely directory to the officers, and form no part of the contract with the surety.

The correctness of these principles is admitted by the counsel for the defendant; but they insist, that they are inapplicable to the case of a surety in a paymaster's bond, because, by the 4th section of the act "for organizing the general staff, and making further provision for the army of the United States," if the paymaster fail to render his vouchers to the paymaster-general, for settlement of his accounts, for more than six months after his

having received funds, the injunction of the act is imperative, "that he shall be recalled, and another appointed in his place." It is contended by the defendant's counsel, that this section leaves no discretion in the proper officer of the government, to continue the paymaster in office after his delinquency, but that he ceases thereafter to be paymaster, and the responsibility of his sureties is terminated.

It must be conceded, that the injunction on the proper officer of the government to recall the delinquent paymaster, is expressed in very strong language. But, whether the omission to perform the act, amounts, [\*189 under every possible circumstance, to a breach of official duty, may admit of some doubt. May it not be excused, in a case where the paymaster has been prevented from rendering his vouchers, at the periods mentioned in the act, by causes acknowledged by the government to have been beyond his control? And if it may, it would seem, that the ground of excuse could not properly be made a subject of judicial inquiry, in an action against the surety. It may further be remarked, that if it had been the policy and intention of the legislature, that the act of delinquency should be inexorably followed by a removal from office, it might not be unreasonable to presume, that such a consequence would have been distinctly announced. It is not, however, the intention of the court, to express any opinion upon this point, because, whatever may be the duty of the proper officer of the government in this respect, it must, we think, be admitted, that until the paymaster is recalled, he continues in office. The act authorizes, perhaps, requires, his recall, but it does not displace him. The officer whose duty it may be to recall him, acts upon his own responsibility to the government, by declining to do so; but until he acts otherwise, the paymaster is authorized, notwithstanding his delinquency, to receive, and to disburse the funds which may be placed in his hands.

The attempt to distinguish this from *Kirkpatrick's Case*, is made upon the ground, that that \*was purely a case of *laches*, whereas, in this, [\*190 an unauthorized act was done by the government in confiding funds to the disposal of a public defaulter, whom the government was bound by law to have dismissed from office. But will it be contended, that the obligation to dismiss this officer was more imperative than that imposed upon the comptroller to call the collector of direct taxes to account, at the periods prescribed by law, and in cases of delinquency, to pursue the summary remedy which the same law provided for the public, and, consequentially, for that of the surety? The neglect in the one case, and in the other, imputes *laches* to the officer whose duty it was to perform the acts which the law required; but in a legal point of view, the rights of the government cannot be affected by these *laches*. The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety. If, then, the paymaster continues in office, notwithstanding the omission of the proper officer to recall him on the ground of his defaults, the act of placing funds in his hands, to be disbursed according to law, is not one of which the surety can complain, since the public interest requires that the troops should be paid, which can be done only by the officer appointed for that purpose. If the neglect of the officers of government, from which the surety suffers, does not discharge him from

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his responsibility \*in either case, it is not perceived how the placing funds in the hands of the paymaster, who continues in office, can have that effect, seeing that the latter circumstance is the necessary consequence of the former. If the law displaced the officer, upon the ground of delinquency, the placing funds in his hands, after his removal from office, could not possibly be upon the responsibility of the surety, inasmuch as his undertaking was for the faithful discharge of the duties of his principal as paymaster, and, consequently, he is not bound for his acts, after he has ceased to hold that office. The whole argument of the counsel for the defendant proceeded upon the assumption, that the office terminated, *ipso facto*, as soon as the delinquency occurred, which, we have endeavored to show, presents an incorrect view of the subject.

Whether, admitting that the surety could claim to be discharged from his responsibility, upon the ground assumed by his counsel, such a defence could be set up on the proceedings in this cause, is a question upon which the court avoids expressing an opinion, because it is rendered unnecessary, by that which has been pronounced, and because it was not argued at the bar.

The opinion of the court is, that there is error in the judgment of the court below, and that the same ought to be reversed.

Judgment reversed.

\*192] \*OTIS, Plaintiff in error, v. WALTER, Defendant in error.

*Embargo bond.*

Under the embargo act of the 25th of April 1808, c. 170, § 11, the collector is protected, in the honest exercise of his discretion, in detaining the vessel, and securing both vessel and cargo, until an actual termination of the voyage.

Whether the voyage has terminated, is a question of fact, and if the voyage be colorably, but not really, terminated, the collector may detain the vessel, if he has honest suspicions.

ERROR to the Supreme Judicial Court of the State of Massachusetts. This is the same cause which was formerly before this court. (2 Wheat. 18; 6 Ibid. 583.)

February 9th, 1826. It was argued at this term, by the *Attorney-General* and *Blake*, for the plaintiff in error; and by *Webster* and *Read*, for the defendant in error.

February 13th. JOHNSON, Justice, delivered the opinion of the court.— This cause is brought up by writ of error, from the supreme judicial court of Massachusetts, for the purpose of reviewing a judgment of that court, given in favor of the defendant here, upon an action of trover, instituted in that state, \*to recover damages for the alleged conversion of sun-  
\*193] dry articles composing the cargo of the sloop *Ten Sisters*. Otis, in the capacity of collector of the district of Barnstable, had, in the year 1808, seized and detained the vessel and cargo, under the provisions of the embargo act of the 25th of April in that year.

This is the third time that this cause has been brought to the notice of this court. In the two former instances, it came up upon bills of exception,