itor with all his rights to enforce the lien of his judgment on lands of the debtor, in the hands of the plaintiff in error; who purchased after his rendition, and must hold it as the debtor did, subject to his lien.

It is not alleged, that the proceedings subsequent to the levy on the lot are erroneous or void; they appear to have been regular, and therefore, vested the title to the lot in controversy in the lessor of the plaintiff. The judgment of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Bernard G. Farrar and Joseph C. Brown, Plaintiffs in error, [*373
v. United States.

Official bonds.—Action on bond.—Responsibilities of sureties.

F. and B. were sureties in a bond for $30,000, given to the United States, as sureties for one Rector, described in the bond as "surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas;" upon looking into all the laws on this subject, it can hardly be doubted, that this officer was intended to be included in the provisions of the act of congress of May 3d, 1822, requiring security of the surveyor-general; literally, there was, at that time, provision made under the laws for only one surveyor-general; but it is abundantly evident, that the officer who gave this bond was intended to be included in the provisions of that act, under the description of a surveyor-general; the indiscriminate use of this appellation in the previous and subsequent legislation of congress on this subject, will lead to this conclusion.

The surveyors of public lands are disbursing officers, under the provisions of the act of congress.

The defendants in the court below pleaded performance, and the plaintiffs alleged, as the breach that at the time of execution of the bond, there were in the hands of Rector, as surveyor, to be applied and disbursed by him, in the discharge of the duties of his office, for the use and benefit of the United States, divers sums of money, amounting, &c., and that the said Rector had not applied or disbursed the same, or any part thereof, for the use and benefit of the United States, as in the execution of the duties of his office he ought to have done; the jury found for the plaintiff, and assessed the damages for the breach of the condition at $40,000, and the judgment was entered "*quod recuperet*," the damages, not the debt: This judgment is clearly erroneous.

It would seem, that in adopting this form of rendering the judgment, the court below has been misled by the application of the 26th section of the act of 1789 to this subject; that section, if it sanctions such a judgment at all, is expressly confined to three cases: default, confession or demurrer.

The plaintiffs in error are sureties in an official bond; and if it is perfectly clear, as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is due, which, of course, can only be, where it is less than the penalty; the statute expressly requires, that the surveyors of the public lands shall give bond for the faithful disbursement of public money, and in this bond, the words which relate to disbursement are omitted, and the only words inserted are "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining, that where the conditions are cumulative, the omission of one condition cannot invalidate the bond, so far as the other operates to bind the party.

Rector was commissioned surveyor of the public lands, on the 13th of June 1823, and the bond bears date the 17th August 1823; between the 3d of March and the 4th of June, in the same year, there had been paid to Rector, from the treasury, the sum of money found by the jury, and thus it was paid to him, before the date of his commission, and before the date of the bond. For any sum paid to Rector, prior to the execution of the bond, *there is but one [*374
ground on which the sureties could be held answerable to the United States, and that is, on the assumption that he still held the money in bank or otherwise; if still in his hands, he

was, up to that time, bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the government, and his offence was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language; the sureties have not undertaken against his past misconduct; they ought, therefore, to have been let in to proof of the actual state of facts so vitally important to their defence; and whether paid away in violation of the trust reposed in him; if paid away, he no longer stood in the relation of bailee.[1]

Such a case was not one to which the act applies which requires the submission of accounts to the treasury, before discounts can be given in evidence; since this defence goes not to discharge a liability incurred, but to negative its ever existing.

ERROR to the District Court of Missouri. This was an action of debt, brought by the United States, in the district court of the United States for the district of Missouri, against Bernard G. Farrar, Joseph C. Brown and others, upon a bond dated the 7th day of August 1823, in the penal sum of $30,000, conditioned, that "whereas, the President of the United States had, pursuant to law, appointed William Rector surveyor of the public lands in the states of Illinois and Missouri, and in the territory of Arkansas; now, therefore, if the said William Rector shall faithfully execute and discharge the duties of his office, then the obligation to be void."

The defendants pleaded, that William Rector had performed his duties as surveyor. The breach assigned in the replication was, that at the time of the execution of the bond, "there were in the hands of the said William Rector, as such surveyor, to be by him, in the discharge of the duties of his office, applied and disbursed for the use and benefit of the plaintiffs, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of $44,780.38; and that the said William Rector hath not applied and disbursed the same, or any part thereof, for the use and benefit the plaintiffs, as in the execution of the duties of his said office he ought to have done." Upon this plea, issue was taken, and under the instructions of the court, the jury found the issne for the plaintiffs below, and *assessed the damages at $40,456.20; and judgment was rendered for that sum in damages.

*375]

At the trial, the plaintiffs produced and read in evidence a duly certified copy of this bond, and a transcript from the books and proceedings of the treasury, certified by the register of the treasury, and authenticated under the seal of the department. The certificate so annexed, was in the following words: "I, Joseph Nourse, register of the treasury of the United States, do certify, that the foregoing report and statement, No. 47,798, of the account of William Rector, late surveyor of public land in the states of Illinois and Missouri, and the territory of Arkansas, are true copies of the originals on file in this office." The defendants objected to the reading of this evidence, and the court overruled the objection.

The defendants then offered competent evidence to prove that Rector, before the execution of the bond declared on, had expended for his own private use all the money charged to have been received by him from the United States, which proof the court refused to admit. The defendants then offered to prove, that Rector, before the execution of the bond, had expended $32,000 of the balance appearing against him in the account given in evidence, in legal payments to deputy-surveyors; but the court refused

[1] S. P. United States *v.* Boyd, 15 Pet. 187; United States *v.* Linn, 1 How. 104; United States *v.* Irving, Id. 250; Bruce *v.* United States, 17 Id. 437.

to admit the evidence, because no claim for credits on account of said payments, or any of them, had been made at the treasury department.

They also gave in evidence a letter from John McLean, commissioner of the land office, to William Rector, dated 13th of June 1823, as follows: "Inclosed you have a commission from the President of the United States, appointing you, by and with the advice and consent of the senate, surveyor of the public lands in the states of Illinois and Missouri, and in the territory of Arkansas, for the term of four years from the date thereof, the 20th of February 1823. You will please to qualify yourself, by taking an oath to support the constitution of the United States, and by entering into bond with one or more good securities, in the sum of $30,000; the securities to be *approved by the United States district judge or attorney, whose certificate must be indorsed on the bond, a form of which is inclosed. [*376 The bond and oath to be sent to this office."

As has been stated, the bond sued on was dated on the 7th of August 1823, and it appeared by Rector's account with the government, exhibited in the bill of exceptions, that the money now sought to be recovered of the sureties, was intrusted to Rector, at various times, from the 3d of March to the 4th of June, inclusive, of the same year.

The defendants below prayed the court to instruct the jury, that "if they find from the evidence, that William Rector, at the time the money with which he is charged was received, had not received a commission, as surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas, the present defendants are not liable to this action, upon the breach assigned," which instruction the court refused to give; but instructed the jury, "that all moneys which had been received by the said William Rector, as surveyor of the public lands in the states of Illinois and Missouri, and territory of Arkansas, prior to the execution of the writing obligatory declared on, and which had not been duly disbursed by him, in the discharge of the duties of his office, or paid back to the government, would be considered in his hands, in the sense of the issue joined between the parties in this case; and that whether the moneys so received were received between the date of his appointment, and the time when the commission came to his hands, or after the last-mentioned time, was immaterial; and whether he had given bond and taken the oath of office before the receipt of the money, as aforesaid, was equally immaterial." And further instructed the jury, "that the transcript aforesaid might be received by them as evidence that the money charged in the account had been received by him, as surveyor as aforesaid, and was evidence that there were moneys in his hands, at the date of the said writing obligatory, as stated in the account contained in the said transcript, to be disbursed in the due discharge and execution of the duties of his office, or accounted for to the government, as surveyor as aforesaid; subject, however, to be impeached by evidence on the part of the defendants. That the letters testamentary and of administration, in evidence in the present *case, on the part of the defendants, entitle them [*377 to the benefit of a credit for the amount of the items which appear by the account to have been suspended, for want of proof of the executorship of William Rector, and the want of proof that letters of administration had been granted to Thomas C. Rector, against the balance appearing on the accounts."

The defendants then moved the court to instruct the jury, "that upon the whole evidence, the plaintiff could not recover," which instruction was refused.

The defendants, by their counsel, moved the court for a new trial; for a repleader; in arrest of judgment; and for judgment for the defendants, *non obstante veredicto;* all which motions were overruled. They then prosecuted this writ of error.

The case was argued by *Geyer* and *Benton*, for the plaintiffs in error; and by *Berrien*, Attorney-General, for the United States.

For the plaintiffs in error it was contended: 1. That the judgment is erroneous. 2. That the act of congress requiring surveyors-general to give bond and security, does not apply to Rector, who was not a surveyor-general. 3. That the bond sued upon is not such a one as the act of congress prescribes. 4. That it was no part of the duties of the office filled by Rector, to disburse moneys. 5. That the money alleged to have been put into his hands was before he had been commissioned, and before the bond in question was given. 6. That the treasury transcript of Rector's account, admitted on the trial, was not in this case evidence under any act of congress. 7. That the appellants had a right to have proved that Rector had applied the money put into his hands to the public use. 8. That the court below erred upon all these points, as set forth in the record and bill of exceptions; and also erred in refusing a new trial, and overruling the motion in arrest of judgment.

Geyer and *Benton*, for the plaintiffs in error, argued, that this was an action of debt on a penal bond; judgment has *been rendered in dam-
*378] ages, for an amount exceeding the penalty; and although the excess may be corrected by a *remittitur*, there is error in the form of the judgment, which the statute referred to (authorizing breaches to be assigned and damages assessed) does not cure; that statute expressly declares that the judgment is to be entered as theretofore had been usually done.

A surveyor like Rector was not bound to give a bond with security. (Land Laws 698, 818, Acts of Congress, passed 6th February 1806, 7th May 1822.) He was a subordinate officer, and the law applies only to the surveyor-general; and he only is required to give a bond. Nor was it a part of the duty of this officer to disburse public money; it not being a part of the regular duties of this inferior officer to receive and pay the public funds his sureties are not answerable for any violation of a trust illegally or without authority cast upon him.

Unless the bond sued on was authorized by some act of congress, it is not obligatory. Although the power of making contracts is inherent in every sovereignty, and may be exercised in every government which has a constituted agent authorized to exert that power, and an existing code of laws ascertaining the obligation of such contracts; yet the United States not having by the constitution of their government committed the exercise of this attribute of sovereignty to any officer or agent, it cannot be exercised, in the absence of any expression of the legislative rule. The common law of England cannot be referred to, for the purpose of ascertaining the powers, or measuring the capacity, of this government or its agents. The

United States recognise no common law. To make a valid contract, the party must not only have a capacity to contract, but the means of exercising that capacity, by expressing their assent to its stipulations. The power of this government to make contracts can only be exercised by an agent delegated for that purpose; though inherent, it remains dormant, until it is called into action by law. It has been contended, that this portion of sovereignty has been delegated to the executive. This proposition is inadmissible. It accords to the president, as a part of his constitutional power, a right to contract in the name and to pledge the faith of the nation in any manner, for any purpose, and to an infinite extent, in the absence of all law. To this extent is the power claimed. The authority to make one contract, in the absence of *law, can only be defended by the assertion of the [*379 general right to make any contract whatever. This power is said to have been delegated to the president in that clause of the constitution which declares that "he shall take care that the laws be faithfully executed:" but it is submitted, that before he can execute a law of the Union, it must have been enacted by the legislature; he cannot, in the absence of law, exercise the power of making contracts, and much less, as in this case, against the expression of the legislative will.

Again, a contract can have no validity, in a legal sense, unless there be a law to ascertain and fix its obligation. If it be true, that this government has no common law, nor any general statute law, defining the obligation of contracts with the government; it follows, that every such contract must derive its obligation by an act authorizing it, or it has no obligation. We maintain, therefore, that no contract with the United States can be valid, which is not previously authorized by an act of congress appointing an agent to express the assent of the government, and referring the contract, when made, expressly, or by implication, to some law to govern its obligation.

But the power of making contracts, thus admitted to be inherent in the government, whatever may be its incidents, is subject to be controlled, modified and regulated by the legislature of the Union. They have, in the act of 1822, under consideration, exercised this controlling power; they have created an agent to take bonds of surveyors, and have prescribed the very terms in which it shall be drawn; by the terms of art employed, and the form of the instrument to be executed, they refer to the law of its obligation. This expression of the legislative will cannot lawfully be departed from; it excludes the idea that any other officer than the secretary of the treasury should act in behalf of the United States, or that any other contract than that prescribed, should be entered into in the particular case. If the act has any force as a law, it narrows the general power to contract; and implies a dissent on the part of the government, that any other than the bond prescribed should be taken. Any other construction of this act would deny its force as a law, by allowing a discretion in the executive officers to exercise their pleasure, notwithstanding the expression of the sovereign will. This bond, not being in *conformity with the act, is not [*380 only taken without authority, but against law.

The surveyor of the public lands for the states of Illinois and Missouri, and territory of Arkansas, was not, by law, a disbursing officer; consequently, the breach assigned is not within the condition of the bond. Not one of the several acts of congress, defining the powers and duties of this

officer, make it his duty to receive or disburse money; his salary and fees are fixed by law; he is no where authorized to receive or pay out money; he receives no commission for any such service, nor is he authorized or required to do any act rendering it necessary that he should disburse money; nor do any regulations of the department appear to have been before the jury, by which it became his duty to act as a disbursing officer. The legislature expressly required a condition for the faithful disbursement of moneys, to be inserted in the bond; as well as the condition for the faithful performance of the duties of the officer. The bond sued on does not contain the first condition. The legislature did not suppose that the last would include the first, or they would not have required the double condition. The words in the bond are not more comprehensive than the last condition required by the law. The first condition being omitted, the other cannot now, by any fair construction, be held to comprehend both.

The plaintiffs in error cannot be held liable for moneys received by their principal, before the date of their bond; even if its obligation is admitted, and Rector be a disbursing officer. The condition of the bond is prospective, and the act of congress of 1822, declares, that the bond shall be given before the surveyor shall enter upon the duties of his office. No money could lawfully be placed in his hands, before the date of the bond; in the sense of the issue, he could not have received the money, as such surveyor, &c., until he was authorized; certainly, not while he was forbidden to act. Until the 7th of August, he was a debtor of the United States; not an officer holding their money according to law. The credit had been given on his individual responsibility; and the subsequent execution of the bond, which is prospective, and provides for the faithful performance of future official duties, cannot be converted into a security for a pre-existing private debt, to legalize the *unlawful acts of the treasury officers, and convert the past conduct of Rector into a breach of the bond, the moment it was signed.

*381]

The treasury transcript of Rector's account was improperly admitted in evidence. The account should contain every item of charge and discharge, so that the party should have full notice of every part of the claim. Revenue officers, or officers accountable for public money, are those against whom the transcripts from the treasury are evidence. The provisions of the law do not apply to sureties; as to them, as they cannot be supposed to be cognisant of the accounts of their principal, there should be the usual mode of proof, and they should have all the means of defence which are known to the law. A contrary principle is pregnant with injustice as to the sureties; no notice is given to them of the settlement of the account, and they will be subjected to charges which they had no opportunity to repel or disprove. They cannot make the affidavit which the law demands, to enable them to resist, on the trial, the claims of the United States; or to maintain the right of their principal to credits which have been withheld by the treasury department.

The first item in the account is for a balance of $14,000, ascertained on some previous settlement, before the 3d March 1823; consequently, before the date of the bond; a default ascertained, for which these sureties cannot be held liable. This evidence was not only improperly admitted, but the court instructed the jury, that the whole amount of the account, including this item, must be presumed to have been in Rector's hands at the date of

the bond: assuredly, a default (of which the ascertainment of a balance is evidence) happening before the date of the bond, cannot be charged on the sureties.

The court erred in rejecting the evidence offered by the defendants below. The court presumed, that the money received by Rector, before the 4th June, remained in his hands on the 7th August 1823. The defendants ought to have been allowed to rebut this presumption, by proving the facts to show that what had been placed in his hands on his individual responsibility, and against law, had been wasted or disbursed, *lawfully or unlawfully, before he became entitled to have any money in his official [*382 character; and that the default had actually happened before the date of the bond. The evidence was not offered, for the purpose of establishing credits; but to show that the defendants ought never to have been debited; that the money had passed out of Rector's hands before, and consequently, was not in his hands on the 7th August 1823.

The judgment ought to have been arrested. The breach assigned, and the facts found and admitted, do not amount to a breach of the bond. Money is alleged by the plaintiff to have been in Rector's hands on the 7th of August 1823, to be applied and disbursed in the discharge of the duties of his office, and that he neither disbursed nor accounted for it. It is not averred, and consequently, neither found by the jury, nor admitted by the pleadings, that there ever was occasion to disburse money, or that Rector ever was required to account. If there was any money in his hands, in his official character, he had a right to retain it, until demands which he was bound to pay were presented, or the government required him to account for it. The facts alleged in the replication were true, the moment before the execution of the bond, and the very moment it was signed. In fact, the court so instructed the jury. The substance of the instruction given is, that the money must be presumed to have been in Rector's hands, undisbursed and unaccounted for, on the 7th of August. These sureties are then held liable, because the money committed to their principal remained, after the execution of the bond, in the very condition in which it was before, without the averment or proof of any duty requiring a change of that condition.

Berrien, Attorney-General, for the United States.—This is an action of debt for the performance of covonants. The principal in the bond was a surveyor of public lands, bound to perform certain duties, under the laws of the United States, and by virtue of his commission. The judgment must, therefore, be in damages; being for the amount which, by the breach of the obligations of the principal, was due to the United States. If the judgment is beyond the penalty of the bond, the difference may be, and will be released. This may be done in court. 2 Pet. 327.

*A bond voluntarily given to the United States by a public officer [*383 is good, although no law requires that such bond shall be executed. The absence of authority to take such a bond does not make the condition illegal. The cases establish the following principles:

1. That a bond given by or to a public officer, or to the government, is not invalid, merely because there is no law which specifically authorizes the one to demand, or requires the other to give it. That it is only void where

the condition is against law requiring, 1st. Something to be done which is *malum in se*, or *malum prohibitum*: 2d. The omission of a duty: 3d. The encouragement of crimes or misdemeanors.

2. That as the statute which authorizes a bond to be taken may have specified the terms of the condition, it does not, therefore, render void a bond voluntarily given, although the condition be variant from that prescribed by the statute.

3. That a bond is not less voluntary, because it has been required by a public officer, if the condition be not contrary to law. *Mitchell* v. *Reynolds*, 1 P. Wms. 181; 2 Str. 745, 1137; 2 Ld. Raym. 1459, 1327; 6 T. R. 588; 2 Dall. 118; 6 Binn. 292; 5 Mass. 314; 12 Ibid. 367; *Postmaster-General* v. *Early*, 12 Wheat. 136; 9 Cranch 28; 1 Ibid. 137.

The United States may be indorsees of a bill of exchange, and sue as such. 3 Wheat. 172. If they may do this, on the same principles, they may become the assignees of a bond; or may be the obligees of a bond, in the same manner as an individual, and with all the rights and privileges of such assignee or obligee. The government of the United States have always acted on these principles. Where acts of congress have directed bonds to be given, without saying to whom, they are taken to the United States. If the United States may take a bond, it must be directed by the executive. It is a part of his constitutional power, under which he is to see that the laws are executed, to designate the manner and the form to be employed; and this in any way not forbidden by law. The president appoints officers to execute the laws; and if, in his opinion, the most appropriate means to secure their execution by those so appointed, is by requiring bonds for the performance of the duties intrusted to them, he may require them.

*384] *The bond, then, on which this suit has been brought must be considered as having been taken under the direction of the President of the United States, acting under the constitution.

The disbursement of the public money was a part of the duty of the surveyor; it was necessarily involved in the performance of the trust delegated to him. He must have had assistants, and they were to be paid. They were to be provisioned, and those supplies could only be procured by the payment of money. His office was, therefore, one peculiarly requiring a bond, with security.

The office of surveyor of the public lands, which was held by Rector, was authorized by law. The provisions of the land laws are not confined to the surveyor-general, but the legislation of congress applies to those who were employed to perform the duties of making surveys of the public lands, and those persons are in the acts of congress recognised as surveyors-general.

The treasury-transcript is evidence, although no notice was given to the sureties (9 Wheat. 651): and the transcript was made out according to the law of 1796 (1 U. S. Stat. 468); and to the forms which have been constantly pursued at the treasury. If the transcript was evidence, no payments could have been shown on the trial, but those which had been previously submitted to the accounting officers of the treasury. In this there is no difference between the principal debtor to the United States and his sureties. 6 Wheat. 135; 9 Cranch 212. If Rector was an officer within the meaning of the laws which make the transcript evidence, it was properly admitted

by the court. The giving a bond and taking the oath of office was not necessary to authorize him to enter on the duties of the office.

By the settlement, it does not appear that he was in default at the date of the bond, nor until 1824. Conceding that the sureties are not bound for the acts of Rector, before the date of the bond, August 1823, yet the duty of the principal to pay continued afterwards; and unless the balance which was afterwards ascertained to be due was paid, they are liable. The default of Rector did not occur until he was called upon to *account, and this was after the execution of the bond, in 1824. The case of the *United States* v. *Giles*, 9 Cranch 212, was cited and commented upon. [*385

Johnson, Justice, delivered the opinion of the court.—This was a suit instituted below, against the plaintiffs here, to recover a debt of $30,000, for which they had become bound to the United States, as sureties for one Rector; who is described in the bond as "surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas." The plea was performance, and the breach alleged in the replication is in these words: "that at the time of the execution of the bond, there were in the hands of the said William Rector, as such surveyor, to be by him, in the discharge of the duties of his office, applied and disbursed for the use and benefit of the plaintiffs, divers sums of money, amounting, &c., and that the said William Rector hath not applied and disbursed the same money, or any part thereof, for the use and benefit of the plaintiffs, as in the execution of the duties of his said office he ought to have done." On this plea, issue was taken, and at the trial, a bill of exceptions was taken to sundry instructions of the court, given or refused, which will be considered in their proper place. Two questions of a more general character must first be disposed of.

The first arises on the form of the judgment; the jury having found for the plaintiffs below, on the breach assigned, assess the damages for breach of the condition, at $41,000; and the judgment rendered is "*quod recuperet*," the damages, not the debt aforesaid. The parties, plaintiffs in error, are the sureties, and it is perfectly clear, that as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is actually due; which, of course, can only be, where it is a sum less than the penalty. It is proposed, on behalf of the United States, to release the surplus, and such is their right; but this still leaves the form of the judgment uncured and unamended. It would seem, that in adopting this form of rendering judgment, the court below has been misled by the application of the 26th section of the act of 1789 to this subject. If so, it is a clear misapprehension; since that section, if it sanctions such *a judgment at all, is expressly confined to three cases—default, confession, or demurrer; with neither of which is the present case affected. There is no doubt, then, that the judgment must be reversed on this ground; but as other points, as well as those made in the bill of exceptions, might again embarrass the cause in the court below, and would most probably bring it back again here, it becomes necessary to consider those points. [*386

The seeond preliminary point alluded to is, whether the bond was not taken without law, or contrary to law, so as to be illegal and invalid. This turns on the official character assigned to Rector in the bond, or on that in

which, in fact, he is to be regarded in law. He is described as "surveyor of public land" in certain districts, not as surveyor-general. And such, in fact, was his literal character, for the office of surveyor-general still exists, nominally unique, although a large proportion of his powers and duties have been transferred to the surveyors of public lands in certain districts, subsequently detached from the region over which his powers were originally extended. In deciding on this point, three questions are to be considered; 1st, whether he was bound to give bond at all; 2d, whether the words of the condition embrace the duties of a disbursing officer; and 3d, whether those duties were incident to his office.

Upon looking through all the laws passed upon this subject, it can hardly be doubted, that this officer was intended to be included in the provision of the act of May 7th, 1822, requiring security of the surveyor-general. Literally, there was, at that time, provision made under the laws for only one surveyor-general; but it is abundantly evident, that the officer who gave this bond was intended to be included in the provisions of that act, under the description of a surveyor-general. The indiscriminate use of this appellation in the previous and subsequent legislation of congress on the subject, will lead us to this conclusion. Until the passing of the act of Febuary 28th, 1806, all the surveying for the United States was carried on under the provisions of the act of May 18th, 1796, as amended by the act of May 10th, 1800; and under the control and superintendence of the surveyor- general.

*387] In the year 1806, after the *purchase of Louisiana, the powers of that officer were extended to the country newly acquired, and he was enjoined to appoint a sufficient nnmber of skilful surveyors, as deputies, one of whom, to be appointed with the approbation of the secretary of the treasury, was to assume the character of principal deputy, and to exercise over the co-deputies the general power vested in and exercised previously by the surveyor-general. The subordinate character of all these officers was distinctly marked by that act; and yet we find, that in the act of March 3d, 1807, in the second section of the act, the epithet of surveyor-general is expressly applied to that individual of them who should have been employed in surveying the public lands south of the Tennessee. (2 U. S. Stat. 440.) Yet at a subsequent day, to wit, March 3d, 1815 (3 Ibid. 229,) we find the same officer designated generally as a surveyor of that district of country. So also, when the act of April 29th, 1816, was passed, which abolished the appointment of these deputies, and conferred the appointment of their present substitutes upon the president, the latter are simply designated as a surveyor, and not surveyor-general. Yet when the act of May 7th, 1822, is passed, requiring bond to be given by these officers, it is expressed altogether in the plural number, as recognising the existence of more than one surveyor-general.

There were, then, no other officers in existence, besides the actual surveyor-general, who could come within the literal enactments of that statute; unless we include a surveyor appointed under the provisions of the act of Aprll 29th, 1816. That is the present obligor. And if further confirmation be required to establish the necessary extension of the provisions of that law to tho present cause, we have it in the act of May 26th, 1824, in the second section of that act; the language of which expressly recongises the existence of more tnan one surveyor-general. It is clear, then, that from the

time that the appointment of deputies by the surveyor-general was superseded by the appointment of surveyors by the treasury department, the independent character in which whose officers then acted, identified them with the surveyor-general, so far as to have led to the use of language by congress, adapted to confounding them with the surveyor-general. We, therefore, have no doubt, that they were included in the *provisions of the act which required bonds to be taken on their accession to [*388 office. Nor do we think that there is any more doubt, that the law contemplates them as disbursing officers. It is express in requiring them to give bond for the faithful disbursement of public money; and *cui bono* do this, if they were not regarded as disbursing officers?

But the words of the statute which relate to disbursements are omitted from the condition of this bond, and the only words inserted are, "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining that where the conditions are cumulative, the omission of one condition cannot invalidate the bond, so far as the other operates to bind the party. But the question is one of much more difficulty, whether, where the law is express that the condition shall be both for the faithful disbursement of money, and the general discharge of duty, and the latter only is inserted; the former may still be held to be comprised within the general words of the latter. But for the language used in the statute, the court has no doubt, that the case would have been open to proof, that the disbursement of money was one of the known and habitual duties of the office, and included in the general words; but whether the omission of the express words which imposed this liability does not preclude a resort to their restoration incidentally by proof, is a question on which the court have felt much difficulty, and which they will not now decide.

The next questions to be considered are those presented by the bill of exceptions, and of these, that which goes to the sufficiency of the certificate, has already been disposed of in the case of *John Smith T.* v. *United States* (*ante*, p. 233), in which the same form of certificate was held to be a substantial compliance with the law under which it was resorted to as proof.

The remaining questions grow out of this state of facts. Rector was appointed surveyor, or, at least, commissioned as such, on the 13th of June 1823; and this bond bears date the 7th of August 1823. Between the 3d of March and the 4th of June, in the same year, there had been paid to him from the treasury, the sum of money found by the jury. So that it was paid to him before the commission, and before the bond in proof. *On this state of facts, the bill of exceptions asserts three grounds of [*389 defence: 1. That the sureties could not be made liable at all for the money so paid: 2. That if at all, they ought to be let into proof that Rector had appropriated the money to his own use before the date of the bond: or, 3. That he had paid it, or enough of it to cover the penalty of the bond, to the use of the United States, before they became bound for him.

On these points we feel no difficulty in affirming, that for any sums paid to Rector prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is, on the assumption that he still held the money, in bank or otherwise. If still in his hands, he was, up to that time, bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the

government, and his offence was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct; they ought, therefore, to have been let into proof of the actual state of facts so vitally important to their defence; and whether paid away in violation or in execution of the trust reposed in him; if paid away, he no longer stood in the relation of bailee. It was not, then, a case to which that act applies, which requires the submission of accounts to the treasury, before discounts can be given in evidence; since this defence goes not to discharge a liability incurred, but to negative its ever existing. In giving instructions to the jury on these points, therefore, the court erred, as well as in refusing to let the defendants into proof, as prayed; since such testimony presents a direct negative to the breach alleged, which is, that the obligor then had the money in his hands.

Judgment reversed, and *venire facias de novo* awarded.

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*390] *Alexander B. Shankland, Plaintiff in error, *v.* The Mayor, Aldermen and Common Council of Washington, Defendants in error.

Lotteries.—Parol evidence.—Delegation of authority.

The plaintiff was the owner of a half ticket in "the fifth class of the National Lottery," authorized by the charter granted by congress to the city of Washington; the number of the original ticket was 5591, which drew a prize of $25,000; the whole ticket was in the hands of Gillespie, to whom all the tickets in the lottery had been sold by the corporation of Washington; and his agent issued the half ticket, which was signed by him, as the agent of Gillespie, the purchaser of all the tickets in the lottery; after the drawing of the prize, and before notice of the interest of any other person in the ticket No. 5591, Gillespie returned the original ticket to the managers or commissioners of the lottery, and the agents of the corporation, and received back from the corporation an equivalent to the value of the prize drawn by it, in securities deposited by him with the corporation for the payment of the prizes in the lottery: *Held*, that the corporation of Washington were not liable for the payment of half of the prize drawn by ticket No. 5591, to the owner of the half ticket.

The purchaser of tickets in a lottery, authorized by an act of congress, has a right to sell any portion of such ticket, less than the whole; the party to whom the sale has been made would thus become the joint owner of the ticket thus divided, but not a joint owner by virtue of a contract with the corporation of Washington, but with the purchaser in his own right, and on his own account; the corporation promise to pay the whole prize to the possessor of the whole ticket, but there is no promise on the face of the whole ticket, that the corporation will pay any portion of a prize to any sub-holder of a share; and it is not in the power of a party, merely by his own acts, to split up a contract into fragments, and to make the promisor liable to every holder of a fragment for a share.[1]

It is certainly very difficult to maintain, that in a court of law, any parol evidence is admissible, substantially to change the purport and effect of a written instrument, and to impose upon it a sense which its terms not only do not imply, but expressly repel.

It is a general rule of law, that a delegated authority cannot be delegated.[2]

This case came before the court under an unusual agreement of the parties, by which matters of fact, properly cognisable before a jury, are submitted to the judgment of the court. The court desire to be understood, as not admitting that it is competent for the parties by any such agree-

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[1] S. P. Tiernan *v.* Jackson, *post*, p. 580.

[2] Pearson *v.* Jamison, 1 McLean 197; Pendall *v.* Rench, 4 Id. 259.