*United States, Plaintiffs in error, *v.* Walter Jones, Administrator *de bonis non* of Benjamin G. Orr.

Treasury transcripts.

O. made a contract with the government to supply the troops of the United States with rations within a certain district, and executed a bond and contract, agreeable to the usages of the war department; the United States brought an action against O. on the bond, and gave in evidence the contract annexed to the bond, and a treasury statement, which showed a balance against O.; the United States also gave in evidence another transcript, to prove that O., under a previous account, had been paid a balance of $19,149.01, stated to be due to him, which was paid to his agent, under a power of attorney, and the receipt for the same indorsed on the back of the account. The circuit court instructed the jury, that the second transcript was not evidence, *per se*, to establish the items charged to O.: *Held*, that there was no error in this instruction.

The counsel for the United States also gave in evidence the power of attorney to R. Smith, and his receipt, proved by Smith, that the money received by him, under the said power of attorney, was applied to the credit of O., in the Bank of the United States, at Washington; which payment the witness supposed was made known to O., though he could not speak positively on the subject, as he did not communicate the information to him; and the counsel who offered this evidence stated, that he offered it to show that the accounts between O. and the government, under the contract of 15th of January 1817, had been settled up to that time, and that the balance of $19,149.01 had been paid to Smith, as the agent of O., and that he offered the evidence for no other purpose. The counsel for the United States then gave in evidence to the jury, a subsequent account between O. and the government, under the contract; and on the prayer of the defendant, the circuit court instructed the jury, "that the said accounts were not competent *per se*, upon which to charge the defendant, or his intestate, for any sums therein contained, further than the mere payment of money from the treasury to the said intestate, or to his authorized agent."

The items embraced by this instruction were charges made against O., for the acts of certain persons, alleged to be his agents, without annexing to the transcript copies of any papers showing their agency, or offering any proof that they acted under the authority of O. The circuit court, therefore, properly instructed the jury, that the transcript, *per se*, did not prove these items.

The plaintiffs then proved by R. S., that he received, as the agent of O., $6350.99, on warrant No. 5471, under the contract, and that the same was applied to the credit of O., in the Bank of the United States, at Washington, of which payment the witness believed O. had notice; the counsel for the plaintiffs stated, that they confined their claim to the above item, which was the first one charged *in the treasury account exhibited. The counsel for the defendant then moved the court to instruct the jury, that this account as also the preceding one [*388 offered in evidence by the plaintiffs, was evidence for the defendant, for the items of credits contained in either; and that in claiming them, he did not admit the debits; which instruction was given by the court, and to which an exception was taken. This instruction involves the same question which has already been decided, between the same parties, at the present term; there was no error, in giving the instruction.

In the further progress of the trial, the plaintiffs offered to withdraw from the jury the said two accounts mentioned in the preceding exception, and all the evidence connected with said accounts, to which the defendant's counsel objected, and the court refused the motion. A treasury account which contains credits as well as debits, is evidence for the defendant as well as the government; and unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury, any part of the credits relied on by the defendant.

The circuit court, on the prayer of the defendant, instructed the jury, that the transcript from the books and proceedings of the treasury, can only be regarded as establishing such of the items of debit, in the account stated in the said transcript, as are for moneys disbursed through the ordinary channels of the treasury department, where the transactions are as shown by its books, and where the officers of the department must have had official knowledge of the facts stated; but that the transcript is evidence for the defendant of the full amount of the credits therein stated; and that, by relying on the said transcript, as evidence of such credits, the defendant does not admit the correctness of any of the debits in the said account, of which

the transcript is not, *per se*, evidence; and that the said transcript is not, *per se*, evidence of any of the items of debit therein stated, except the first. The correctness of the principle laid down by the circuit court in this instruction, has been recognised by this court, in a case between the same parties, at the present term.

ERROR to the Circuit Court of the District of Columbia and county of Washington.

This was an action of debt, instituted by the plaintiffs in error against the defendant's intestate, Benjamin J. Orr, and two others, on a joint and several bond to the United States, dated 15th January 1817, in the penalty of $40,000, conditioned that the intestate, Orr, should fulfil certain articles of agreement of the same date, made between the acting secretary of war and the intestate, by which the intestate agreed to supply the rations required for the use of the United States troops, within the limits of the states of South Carolina and Georgia, from the 1st of June 1817, to the 31st of May 1818, inclusive.

*389] *The defendant, after *oyer* of the bond and condition and of the articles of agreement, pleaded performance, according to the true intent and meaning of the condition of the bond. The plaintiffs replied, that the said Benjamin G. Orr did not well and truly perform and fulfill the covenants and agreements comprised and mentioned in the articles of agreement referred to in the said condition of the said writing obligatory, but broke the said covenants and agreements in the following instances, to wit:

That although the said United States did advance and furnish to the said Benjamin G. Orr divers large sums of money, at divers times, on account of, and to enable him, the said Benjamin, to carry into effect the said articles of agreement, which said several sums of money amounted altogether to the sum of $109,500; and although the accounts of the said Benjamin G. Orr, in relation to the articles of agreement aforesaid, have been duly and finally settled by the accounting officers of the government of the United States; and, upon the said settlement, there was found to be due to the United States, from the said Benjamin, the sum of $2012.33, of which the said Benjamin had due notice; yet the said Benjamin altogether failed to pay to the United States the said sum of money, or any part thereof, and the same remains still due and unpaid to the United States.

The defendant rejoined, that the said Orr did not break the condition in manner or form; and upon these pleadings issue was joined. In December 1831, the case was tried, and a verdict, under the charge of the court, was rendered for the plaintiff, upon which judgment was entered.

On the trial of the cause, the counsel for the United States gave in evidence the bond executed by the said Orr, with the condition thereto annexed, dated 15th of January 1817; a contract between the said Orr and George Graham, acting secretary of war, for the supply and issue of all the rations for the use of the troops of the United States, within the limits of the states of South Carolina and Georgia, including that part of the Creek lands lying within the territorial limits of Georgia, thirty days' notice being given of the post or place where rations may be wanted, or the number of troops to

*390] be furnished on *their march, from the 1st day of June 1817, until the 31st day of May 1828, inclusive, for prices fixed in the contract; and an account-current stated and settled by the accounting officers of the treasury, between the United States and the defendant's intestate, on

the 18th of August 1820, upon which a balance was due, amounting to $2012.30.

The plaintiffs' counsel also gave in evidence a previous account, dated May 11th, 1819, stated by the proper accounting officers of the treasury, for the purpose of proving that the balance of $19,149.01, which appeared to be due to him, had been paid to him or his agent; and produced the power of attorney, and the receipt on the back of the said account. Annexed to the transcript from the treasury containing the account, was the following letter:

Washington, 6th May 1819.

Sir:—I will thank ——— to pay to R. Smith, Esq., any sum which may be found due me on my late Georgia contract, to the amount of, or within the limit of twenty-five thousand dollars, which will cover the interest which has accrued upon the drafts heretofore conditionally accepted of, as well as the principal, and oblige, Yours, &c. BENJAMIN G. ORR.

To the Honorable the Secretary of War,
or person acting for him.

On the back of the transcript was the following receipt. Received, May 11, 1849, warrant numbered 3944, for $19,149.01, in full of the within account.

Among other debits in the account were the following:

1817. To account transferred from the books of the second auditor, for this sum, standing to his debit on those of this office—$15,000.

1817, Sept. 19. For warrant No. 972, for payment of his draft, favor R. Smith, dated 22d July 1817, on account of do.—$20,000.

1817, Nov. 6. For warrant No. 1219, for payment of his draft, favor R. Smith, dated 20th September 1817, on account of do.—$12,000.

*1819, May 14. To warrant of the treasurer, No. 3944, for this sum, paid R. Smith, per order of B. G. Orr—$19,149.01. [*391

And the defendant thereupon prayed the court that the said account last mentioned, was not evidence *per se* that certain charges in said account were correctly chargeable to the said contractor; which opinion the court gave; to which opinion the counsel for the plaintiffs excepted.

The court charged the jury that the accounts produced in evidence by the United States were evidence for the defendant of all the items of credit therein contained; and that the defendant, by referring to and relying on them as evidence for that purpose, did not admit the correctness of any of the debits therein of which the account was not *per se* evidence, nor make the same evidence before the jury. To these instructions the plaintiffs excepted. The plaintiffs prosecuted this writ of error.

The case was argued by *Butler*, Attorney-General, for the United States; and by *Coxe* and *Jones*, for the defendant.

For the United States, it was contended, that the judgment of the circuit court ought to be reversed for the following reasons:

1. The account stated was, under the acts of congress, and the provisions of the contract, competent evidence to charge the defendant—1st. With all the items of charge therein contained; and if not, then: 2d. It was, at

all events, sufficient to charge him with the moneys received on the various warrants specified in the account.

2. The court erred in its decision on the second point above stated—1st. The account was one entire document, and the defendant, if he elected to rely on any part thereof, was bound, by the general rules of evidence, to take the whole as evidence, so far as it was pertinent to the subject-matter of the suit. 2d. There is the more reason for adhering to the general rule *392] *in this case, because the account was stated by a public officer, to whom, by law, and by the contract of the parties, the duty of settling the accounts in question was to be referred.

The *Attorney-General* argued, that the treasury statement exhibited and read in evidence on the trial of the cause, ought to have been admitted as *primâ facie* evidence of the balance due to the United States. Large sums were admitted to have been received by Orr; and this was sufficient to authorize the admission of other items in the accounts, not included in those sums. These items were charges, in some instances, for sums paid on warrants drawn in favor of the contractor, and in others, for sums paid also on warrants, in favor of other persons, under his authority. He cited the acts of congress relative to the settlement of public accounts. Act of 1792 (1 U. S. Stat. 281); Act of 1797 (Ibid. 513); Act of 1795 (Ibid. 441); Act of July 16th 1798 (Ibid. 610); Act of March 3d, 1817 (3 Ibid. 366).

By the act of 1817, all accounts for army supplies are to be settled at the treasury department, and the third auditor is particularly charged with the settlement of army accounts. This act refers to the law of 1797, and adopts it as applying to accounts to be settled by the third auditor; and the law of 1797 makes the books and proceedings of the treasury evidence.

The auditor had a right to charge the defendant's intestate for warrants drawn in favor of other persons on his contract. He was bound, and had authority to inquire, whether the advances were made on the contract, and by his order. He must have had evidence of the money having been drawn by such order. The transcript was certainly evidence, and was so admitted; and the whole question in the court below was, as to the effect of that evidence. If it was evidence of money paid to Orr himself, it must be evidence of money paid to others by his order. The vouchers for the payment to Richard Smith, of $19,149.01, must have been left in the office, and have been the authority on which the payment is made. The warrant for the *393] account *must have shown the authority by which the money was paid, and this was apparent upon it, viz., the orders in favor of Richard Smith and others. It could not have been the exclusive object of the act of congress making the transcript evidence, to supersede the necessity of producing the original books. The whole sums charged in the account growing out of the warrants, stand on the same ground, and come within the ordinary official action of the auditor; and the whole account, thus entered, should have been admitted as proved, *primâ facie*.

The attorney-general referred to the case of the *United States* v. *Buford*, 3 Pet. 12, and contended, that the principles laid down by the court in that case had no application to the present question.

Upon the second exception, it was argued, that the permission to use a part of the account in his favor, by the defendant, and yet to deny that the

other parts of the same account were evidence against him, was contrary to the established rules of evidence. 1 W. C. C. 344; *Bell* v. *Davidson*, 3 Ibid. 328. The whole transcript was one paper, and all its contents should have been taken together.

Coxe and *Jones*, contrà:—The principles involved in this case are of general importance. In the cases of the *United States* v. *Fillebrown*, 7 Pet. 28; *United States* v. *McDaniel*, Ibid. 1, and *United States* v. *Ripley*, Ibid. 18, the same questions were under examination. The decisions of the court in these cases are decisive upon the matters now presented for their consideration.

The transcript was admitted as competent evidence, but the question was, as to the effect of the evidence: what did it prove? The act of congress of 1797 makes the treasury transcripts evidence; but this was for the purpose only of substituting the transcripts for the original books and accounts of the treasury. The books, if produced, would only be evidence of the money paid on the warrant, which is very special; and the receipt is given on the warrant, which receipt authorizes the *charge against [*394
the party to whom the money was paid. But it furnishes no evidence to charge any other person. The authority given by Orr to some person to receive money, is not a proceeding at the treasury, or to be proved by a transcript. *United States* v. *Buford*, 3 Pet. 29; 6 Ibid. 172, 201; also, the case of *Randolph*, decided by Mr. Chief Justice MARSHALL and Judge BARBOUR, in Virginia, in 1833. The balance of the account transferred from the books of the second auditor, cannot be proved by its entry in the transcript. The transcript of the account should have been produced, and it could be seen from it, which part of the sum claimed as the balance, was proved by it. Its introduction in this form as an item of debit can have no effect.

As to the second exception. The general rule of evidence which obliges a party who introduces a piece of evidence, to take the whole together, is distinguishable from the rule which sanctions the claim of the defendant to the credits in the account, without admitting the debits. In this case, the plaintiff introduced the account. It contained the admissions of the United States, that the defendant was entitled to certain credits. They had been established by vouchers, which were retained by the treasury department. The defendant had a right to call upon the treasury department for a list of these credits, without their being connected with an account containing charges against him. They are not conditional credits, or such as the United States allowed in the event of the debits being admitted. They are independent and absolute charges against the United States, and have no other connection with the debits against the defendant, than that they arose out of the same transaction. The exception allowed by Judge WASHINGTON, in the circuit court of Pennsylvania (*Bell* v. *Davidson*, 3 W. C. C. 328), was the principle claimed for the defendant.

MCLEAN, Justice, delivered the opinion of the court.—This suit was originally brought by the plaintiffs, against Benjamin G. Orr, who has since deceased, in the circuit court of the United States for the district of Columbia, to recover the balance of treasury settlement, charged against him on the

books of the treasury department. At the trial, several exceptions *were taken to the instruction of the court to the jury, and those exceptions are brought before this court, for their decision, by a writ of error.

On the 15th of January, 1817, Orr made a contract with the government, to supply the troops of the United States with rations, &c., within a certain district, and executed a bond and contract, agreeable to the usages of the was department, in such cases. The action was brought upon the bond, and at the trial, the plaintiffs gave in evidence the contract annexed to the bond, and a treasury statement, which showed a balance against Orr of $2012.32. And the plaintiffs also gave in evidence another transcript, in order to prove that Orr, under a previous account with the United States, had been paid a balance of $19,149.01, stated to be due to him, which was paid to his agent, under a power of attorney, and the receipt for the same was indorsed on the back of the account. And the court, on the prayer of the defendant, instructed the jury, that this second transcript was not evidence, *per se*, to establish all the items charged to the defendant; to which instructions the plaintiff excepted.

The item principally objected to, was paid to Richard Smith, as the agent of Orr. In proof of this agency, the following letter was relied on, and which was annexed to the transcript. "Washington, 6th May, 1819. Sir:—I will thank——to pay to R. Smith, Esquire, any sum which may be found due me on my late Georgia contract, to the amount of, or within the limit of twenty-five thousand five hundred dollars, which will cover the interest which has accrued upon the drafts heretofore conditionally accepted of, as well as the principal; and oblige yours, &c." (Signed) "Benjamin G. Orr," and directed to the secretary of war. On the back of the transcript was indorsed the following receipt: "Received, May 4th, 1819, warrant numbered 3944, for nineteen thousand, one hundred and forty-nine dollars and one cent, in full of the within account. (Signed,) Richard Smith." Orr's contract commenced on the 1st day of June 1817, and terminated on the 31st day of May 1818.

*396] *It appears, therefore, that at the time the above order was given to Smith, the contract of Orr had expired nearly a year. The order requested the secretary of war to pay any sum that might be due on the contract, not exceeding a specified amount. Under this authority, the government could not pay to Smith, so as to charge Orr, a larger sum than was due on his contract. It was neither the expectation of Smith to receive, nor the intention of Orr to pay a greater amount than was due on his contract; and for any payment beyond this, the government must look to the agent, and not to Orr, for repayment. It, therefore, appears, that the circuit court did not err in their instruction, above stated, to the jury.

The counsel for the United States, in addition to the above transcript, the power of attorney to Smith, and his receipt, proved, by Smith, that the money received by him under the said power of attorney, was applied to the credit of Orr, in the Bank of the United States, at Washington; which payment, the witness supposed was made known to Orr, though he could not speak positively on the subject, as he did not communicate the information to him. And the counsel who offered this evidence stated, that he offered it to show that the accounts between Orr and the government, under the contract of the 15th of January 1817, had been settled up to that time, and

that the balance of $19,149.01 had been paid to Smith as the agent of Orr, and that he offered the evidence for no other purpose.

The counsel for the United States then gave in evidence to the jury, a subsequent account between Orr and the government, under the above contract. And on the prayer of the defendant, the court instructed the jury, "that the said accounts were not competent, *per se*, upon which to charge the defendant, or his intestate, for any sums therein contained, further than the mere payment of money from the treasury to the said intestate, or to his authorized agent." The items embraced by this instruction were charges made against Orr for the acts of certain persons alleged to be his agents, without annexing to the transcript copies of any papers showing their agency, or offering any proof that they acted under the authority of Orr; the circuit court, therefore, properly *instructed the jury, that the [*397
transcript, *per se*, did not prove these items.

The plaintiffs then proved, by Richard Smith, that he received, as the agent of Orr, $6350.99, on warrant No. 5471, under the contract, and that the same was applied to the credit of Orr, in the Bank of the United States at Washington, of which payment the witness believed Orr had notice. The counsel for the plaintiffs stated, that they confined their claim to the above item, which was the first one charged in the treasury account marked A. And the counsel for the defendant then moved the court to instruct the jury, that this account, as also the preceding one offered in evidence by the plaintiffs, was evidence for the defendant, for the items of credits contained in either, and that in claiming them, he did not admit the debits; which instruction was given by the court, and to which an exception was taken. This instruction involves the same question which has already been decided, between the same parties, at the present term. There was no error in giving the instruction.

In the further progress of the trial, the plaintiffs offered to withdraw from the jury the said two accounts mentioned in the preceding exception, and all the evidence connected with said accounts; to which the defendant's counsel objected; and the court refused the motion. A treasury account which contains credits as well as debits, is evidence for the defendant as well as the government; and unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury any part of the credits relied on by the defendant.

The next and last instruction given by the court, on the prayer of the defendant, and to which the plaintiffs excepted, was, "that the said transcript A, from the books and proceedings of the treasury, can only by regarded as establishing such of the items of debit, in the account stated in the said transcript, as are for moneys disbursed through the ordinary channels of the treasury department, where the transactions are shown by its books, and where the officers of the department must have had official knowledge of the facts stated; but that the transcript is evidence for the defendant of the full amount *of the credits therein stated; and that, by relying on the [*398
said transcript, as evidence of such credits, the defendant does not admit the correctness of any of the debits in the said account, of which the transcript is not, *per se*, evidence; and that the said transcript is not, *per se*, evidence of any of the items of debit therein stated, except the first." The correctness of the principle laid down by the court, in this instruction, has

been recognised by this court, in a case between the same parties, at the present term, as above referred to.

As this court sanctions all the instructions of the circuit court given to the jury, in this case, at the prayer of the defendant, and also in refusing to instruct on the prayer of the plaintiffs, the judgment of the circuit court is, as a matter of course, affirmed.

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 ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*399] *United States, Plaintiffs in error, *v.* Walter Jones, Administrator *de bonis non* of Benjamin G. Orr.

The Same *v.* The Same.

Public contracts.—Sureties.

A contract was made for the delivery of rations for the use of the troops of the United States, "thirty days' notice being given of the post or place where the rations may be wanted; in an action on a bond, with sureties, for a balance claimed to be due to the United States by the contractor, the United States introduced the testimony of a Mr. Abbott, and proved by him, that at the time when contracts were made for the supply of the United States troops, the contractors (as he believed) were then informed of the fixed posts within the limits of the contract, and the number of troops there stationed; and that rations were to be regularly supplied by such contractor, according to the number of troops so stationed at such places; and that the contractor was informed he was to continue so to do, without any other notice; and that special requisitions and notices of thirty days would be made and given, for all other supplies at other places or posts, and for any change in the quantity of supplies which might become necessary at the fixed posts, from a change in the number of troops stationed at such fixed posts; and that such was the understanding at the war department, in settling the accounts of contractors; but he did not know of any verbal explanation between the secretary of war and Orr on this subject, specifying anything more or less than what the contract specified; and he did not know that there had been any submission or agreement of contractors, to such a construction of their contracts, but that such was the rule adopted by the accounting officers, in settling the accounts of contractors. The defendant, among other things, introduced evidence to show, that the contractor always insisted on the necessity of requisitions and notices, according to the terms of the contract, for supplies at all posts, before he could be charged with a failure; and also to show the custom of making requisitions, and giving such notices for supplies at all posts where provisions were required, and without regard to their being old established posts, or new ones established after the contract. After the whole evidence was closed, the attorney for the United States prayed the court to instruct the jury, "that it was competent for them to infer from the said evidence, that the contractor, in supplying the fixed posts as he had before done under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice, in relation to such supplies to said posts; and in case of failure to supply such posts, according to usage and knowledge, is liable, under the bond and contract upon which this action is founded." The circuit court refused to give this instruction, and the question was, whether it ought to have been given: *Held*, that there was no error in the refusal of the circuit court to give the instructions.

*400] The sureties in the bond of a contractor, given to secure the performance of *a contract for the supply of the rations for the troops of the United States, are not responsible for any balance in the hands of the contractor, at the expiration of the contract, of advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies, where accounts of the supplies, the expenditures and the funds, had all been throughout blended indiscriminately by