

United States Vs. Giles

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Appeal No. : 13 U.S. 212

Appellant : United States

Respondent : Giles

Judgement :

United States v. Giles - 13 U.S. 212 (1815)

U.S. Supreme Court United States v. Giles, 13 U.S. 9 Cranch 212 212 (1815)

United States v. Giles

13 U.S. (9 Cranch) 212

ON CERTIFICATE OF DIVISION OF OPINION AMONG THE JUDGES

OF THE CIRCUIT COURT FOR THE DISTRICT OF NEW YORK

SYLLABUS

If a marshal, before the date of his official bond, receive, upon an execution, money due to the United States with orders from the Comptroller to pay it into the Bank of the United States, which he neglects to do, the sureties in his official bond,

executed afterwards, are not liable therefor upon the bond, although the money remain in the marshal's hands after the execution of the bond.

Quaere whether the sureties in a marshal's bond conditioned for the faithful execution of his duty "during his continuance in the said office" are liable for money received by him after his removal from office upon an execution which remained in his hands at the time of such removal.

The Comptroller of the Treasury has a right to direct the marshal to whom he shall pay money received upon executions, and a payment according to such directions is good, and it seems he may avail himself of it upon the trial without having submitted it as a claim to the accounting officers of the Treasury.

No debtor of the United States can, at the trial, set off a claim for a debt due to him by the United States unless such claim shall have been submitted to the accounting officers of the Treasury and by them rejected, except in cases provided for by the statute.

This was a case certified from the Circuit Court for the District of New York, in which the opinions of the

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judges of that court were opposed upon ten questions of law arising out of a special verdict.

It was an action of debt brought by the United States against Giles, late Marshal of the District of New York, and his sureties upon his official bond, dated 9 January, 1801, the condition of which was as follows:

"Whereas the above bound Aquila Giles hath been appointed the Marshal in and for the New York District in pursuance of the act entitled 'An act to establish the judicial courts of the United States,' now therefore, the condition of the preceding obligation is such, that if the said Aquila Giles shall, by himself and by his deputies, faithfully execute all lawful precepts directed to the marshal of the said district under the authority of the United States, and true returns make, and in all

things well and truly and without malice or partiality, perform the duties of the office of marshal, in and for the said District of New York, during his continuance in the said office, and take only his lawful fees, then the preceding obligation to be void, or else to remain in full force and virtue."

The defendants pleaded performance. The replication set forth six breaches of the condition of the bond.

1. That the United States having, in May, 1799, recovered judgment in the district court against one John Lamb for the sum of \$127,952.99 debt, and \$20 damages, a writ of *feri facias*, was thereupon issued and delivered to the defendant, Giles, then being marshal, upon which he returned in August, 1799, that he had taken goods and chattels to the value of \$50, which remained unsold for want of buyers, whereupon a writ of *venditioni exponas* and *feri facias*, was issued and delivered to the said defendant, Giles, on 9 January, 1800, by virtue whereof he sold the said goods and chattels for \$50, which sum he received, and also, by virtue of the said writ, sold lands of Lamb to the amount of \$60,000, which sum he received and continued to hold until 1 February, 1801, when he converted the same to his own use, contrary to the tenor and effect of the condition of his said bond.

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2. That by virtue of the said writ, the defendant, Giles, on 17 September, 1800, sold other lands of Lamb, for \$60,000, which he received on 20 January, 1801, and on that day converted the same to his own use, contrary to the tenor and effect of the condition of the bond.

3. That on 17 December, 1800, the Comptroller of the Treasury of the United States directed the defendant Giles to pay into the Office of Discount and Deposit of the Bank of the United States, at New York, to the credit of the account of the Treasurer of the United States, all such sums of money as should be made from the property of Lamb, by virtue of the aforesaid writ. That the defendant, Giles, afterwards, on 23 December, 1800, by virtue of that writ sold other lands of Lamb,

to the amount of \$60,000, which he received on 15 January, 1801, but has not paid the same, nor any part thereof, into the said Office of Discount and Deposit in the manner directed, contrary to the tenor and effect of the condition of his said bond.

4. That on 1 February, 1801, the defendant, Giles, being marshal as aforesaid, had in his hands as marshal, 14 bonds, the property of the United States (particularly described), and on that day converted the same, to his own use, contrary to the tenor and effect of the condition of his bond aforesaid.

5. That the defendant, Giles, having, in September, 1800, made the sum of \$309.87, by virtue of a *fiери facias*, in behalf of the United States, against one Richard Capes, and having received the same, converted it to his own use on 1 February, 1801, contrary to the tenor and effect of the condition of his bond.

6. That the defendant, Giles, having so received all the several sums of money before mentioned, retained the same in his hands until 27 March, 1801, when he was duly removed and dismissed from his office of marshal, and ceased to be marshal of the New York District, and has retained the said several sums of money in his hands ever since. That on 2 June, 1804, he was duly notified according to law, by the Comptroller

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of the Treasury of the United States, to render to the auditor of the Treasury of the United States on or before 10 October, then next, all his accounts and vouchers for the expenditure of all monies received by him as marshal of the New York District, but he has never rendered the same, contrary to the tenor and effect of the condition of his bond aforesaid.

The defendants rejoined,

1. To the first breach, that the defendant, Giles, received the sum of \$50, and sold the lands of Lamb for \$30,000 and no more. That by the orders of the Comptroller of the Treasury of the United States, he received on 10 December, 1800, from the

purchasers \$11,000, and no more, in cash, in part of the said sum of \$30,000, and took from them, by the like orders of the said Comptroller, their respective bonds and mortgages, 30 in number, for \$19,000 being the residue of the said sum of \$30,000. That on that day the United States was justly indebted to the said Giles in the sum of \$20,000, for money paid by him at their request for their use, and for fees justly due by them to him as marshal, and for services performed by him for them at their request, when he retained in his hands the said sums of \$50, and \$11,000, as it was lawful for him to do, in part payment and satisfaction of the sum of \$20,000 so due to him from the United States, and then and there delivered to the United States, the said several bonds and mortgages in full payment and satisfaction of the said residue of the said sum of \$30,000. Without that, that he converted to his own use the said sums of \$50 and \$60,000, in the replication, in assigning the first breach mentioned, or any part thereof in manner and form, &c.;, any otherwise than by retaining the said sums of \$50 and \$11,000 as aforesaid.

2. To the second breach, they say that on 17 December, 1800, the defendant Giles, by virtue of the said writ, sold other lands of the said Lamb for the sum of \$29,383.30, and no more, and that by order of the Comptroller he received from the purchasers only the sum of \$10,000, and took their bonds and mortgages, 30 in number, for the payment

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of the balance, being \$19,383.30. That the United States was on that day justly indebted to him in the sum of \$20,000 for monies expended, &c.;, and for fees, and services, &c.;, wherefore he retained in his hands \$8,950, part of the \$10,000 in part payment and satisfaction of the said sum of \$20,000, and paid to the United States the sum of \$1,050, the residue of the said sum of \$10,000, and delivered to the United States the 30 bonds and mortgages aforesaid in full payment and satisfaction of the aforesaid sum of \$29,383.30; without that, that the said Giles converted to his own use, &c.;, otherwise than by retaining the said sum of \$8,950 as aforesaid, &c.;

3. To the third breach, they say that the said Giles did not receive \$39,000, parcel of the said \$60,000, but that he received in all the sum of \$21,000 only from the buyers of the lands of the said John Lamb, and that the United States was on the said 15 January, 1801, justly indebted to the said Giles in the sum of \$22,000, wherefore he did not pay the said sum of \$21,000 or any part thereof into the Office of Discount and Deposit of the Bank of the United States, &c.;, but then and there retained the same in his own hands, as it was lawful for him to do, &c.;

4. To the fourth breach they say that the said Giles, on 1 February, 1801, delivered the said bonds to the attorney for the United States -- without that, that he converted them to his own use, &c.;

5. To the fifth breach, they say that on 8 January, 1801, the United States was justly indebted to Giles, in the sum of \$22,000, wherefore he retained the said sum of \$309.87, in part payment and satisfaction of the said sum of \$22,000; without that, that he otherwise converted the same to his own use, &c.;

6. To the sixth breach, they aver that Giles did render his accounts to the auditor on 10 October, 1804, as he was required to do.

To these rejoinders there were general surrejoinders

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and issues except as to the rejoinder to the third breach, upon which the plaintiffs took issue as to \$39,000 and demurred as to the retainer of the \$21,000, upon which demurrer the court gave judgment for the United States.

The jury found a special verdict which stated in substance, as follows:

1. As to the first breach, it finds that the defendant Giles was authorized by the officers of the Treasury Department of the United States, in executing the aforesaid writ of *fieri facias* , to sell the lands of the said John Lamb on the following terms, *viz.* , one-fourth of the purchase money to be paid in cash, one-fourth with interest in 2 years, one-fourth with interest in 3 years, and the residue with interest in 4 years from the day of sale, to be secured by bonds and

mortgages, and was directed by the Comptroller of the Treasury on 17 December, 1800, to pay over all monies he might receive therefor into the Office of Discount and Deposit of the Bank of the United States in the City of New York to the credit and account of the Treasurer of the United States. That the sales were commenced on 26 November and continued from time to time to 23 December, 1800. That Giles received from the purchasers before 9 January, 1801 (the date of the bond), \$3,713.98, and no more, which sum, together with the sum of \$50, which he had before received for the sales of the goods and chattels of the said John Lamb, he never had, nor any part thereof, before the said district court, to render to the United States, and never paid the same nor any part thereof into the said Office of Discount and Deposit, and that he has never been required by any rule or order of the said district court to bring the said monies into the court nor to pay them over in any manner whatever. That between August, 1800, and May, 1801, he arrested one Elias Hicks by virtue of a writ of *ca. sa.* in favor of the United States for \$80,000, and by an endorsement thereon was directed to levy, by virtue thereof, \$33,156.38, besides marshal's fees and poundage. That he kept the said Hicks in custody, in execution, until he was discharged by order of the Secretary of the Treasury of the United States pursuant to the act of

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Congress, entitled "An act providing for the relief of persons imprisoned for debts due to the United States." That the poundage fees for the service of that writ, if any such fees were due to the defendant Giles thereon have not been paid to him, and that they amounted to the sum of \$419.57.

That the United States also became indebted to the defendant Giles in the further sum of \$8,133.96 for his own fees and services in taking the second census or enumeration of the inhabitants of the United States in the said district, and for monies paid by him as marshal as aforesaid to his assistants in taking the said census, pursuant to the act of Congress in such case provided, which several sums, so due from the United States to the said Giles, amount to the sum of \$8,553.53, and that he has retained the said sums of \$50 and \$3,713.98 from the times when they were received by him, and still retains them, claiming to hold and

retain the same towards the payment and satisfaction of an equal sum due to him from the United States as aforesaid. But whether upon the whole matter aforesaid the said Giles did in law convert the said several sums of \$50 and \$3,713.98 to his own use, contrary to the tenor and effect of the condition of his said bond, the jurors aforesaid are ignorant, &c.;, and if the said Giles did so convert, &c.;, it assesses the damages at \$3,763.98, and if, &c.;

2. As to the second breach they find that the said Giles, having received such instructions as aforesaid from the Comptroller of the Treasury, and having sold the lands as aforesaid, afterwards, and after 9 January, 1801 (the date of the bond), and at different times before the commencement of this suit, received of certain other purchasers of the said lands several other sums of money, viz., before 27 March, 1801, (when he was removed from office) the sum of \$1,683.52, and after that day the sum of \$17,191.58, which two sums amount to \$18,875.10, which was all the money he received from the said purchasers after 9 January, 1801, and that the poundage, and charges due to and paid by the said Giles upon the execution and the said sales, and

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legally chargeable against the proceeds of the said sales amounted to the sum of \$1,332.85, which being deducted from the said sum of \$18,875.10, left the net sum of \$17,542.25 in the hands of the said Giles of the money so received by him after 9 January, 1801. That on 13 April, 1803, he paid part of the same, viz., \$6,238.35, to Edward Livingston, who was then the United States attorney for the New York District, which payment was so made with the assent and approbation of the Comptroller of the Treasury of the United States, and agreeably to the usage and practice in that district; that the said Giles never had the said sum of \$6,238.35 nor any part thereof before the district court to render to the United States and has never paid the same to the United States in any other manner than by the said payment to the said Edward Livingston (if such payment was a payment to the United States) and never paid the same, nor any part thereof into the Office of Discount and Deposit, &c.;

That as to another part of the said sum of \$17,542.25, to-wit, as to the sum of \$4,479.68, the said Giles never had the same, nor any part thereof, before the district court to render to the United States, nor paid the same into the said Office of Deposit, &c.;, but has ever since held and retained the same, claiming to hold and retain the same towards payment and satisfaction of an equal sum so due to him by the United States as aforesaid.

That as to the residue of the said sum of \$17,542.25, to-wit, as to the sum of \$6,824.25, the said Giles never had the same nor any part thereof before the district court to render to the United States, nor paid the same to the United States nor into the Office of Discount and Deposit, &c.;, but still retains the same; but whether, in law, he converted the said three sums, viz., the \$6,238.35 -- \$4,479.68 -- and \$6,824.25, or either of them to his own use contrary to the tenor and effect of the condition of his said bond, they are ignorant, &c.; If in law he so converted the whole to his own use, then it so finds and assesses

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damages at \$20,613.12. If he did not so convert the first of the said three sums, but did so convert the other two, then it so finds and assesses damages at \$14,374.77. If he did not so convert the first and second of the said three sums, but did so convert the third, then it so finds and assesses damages at \$9,895.09. If he did not so convert the said third sum, but converted the two first sums, then it so finds and assesses damages at \$10,718.03. If he did not so convert the said second sum, but converted the first and third sums, then it so finds and assesses damages at \$16,133.44. If he did not so convert the two last of the said three sums, but converted the first, it so finds and assesses damages at \$6,238.35. If he did not so convert the first and third of the said three sums, but converted the second, then it so finds, and assesses damages at \$4,479.68. And if he did not so convert either of the said three sums to his own use, then it so finds.

3. As to the third breach, the jurors find that the defendant, Giles, did not receive the sum of \$39,000, and as to the judgment upon the demurrer respecting the retainer of the sum of \$21,000, it assesses damages at \$21,000.06.

4. As to the 4th breach, it finds that the defendant Giles kept possession of the said fourteen bonds, from 1 February, 1801, until 3 January, 1803, when he delivered them with the assent and approbation of the Comptroller of the Treasury of the United States to Edward Livingston, then being the United States Attorney for the District of New York. That on 12 January, the Comptroller of the Treasury of the United States directed the said Giles to deliver the said fourteen bonds to his successor in office, John Swartwout, marshal of the said district, which the said Giles did not do.

But whether upon the whole matter aforesaid he did, in law, convert the same bonds to his own use, contrary to the tenor and effect of the condition of his said bond, it is ignorant, &c.;, and if, &c.;, then it assesses damages at \$5,255.73.

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5. As to the fifth breach, it finds that the defendant, Giles, having levied and received the said sum of \$309.87, never had the same before the district court to render to the United States, nor paid the same to the United States, but retains the same claiming to hold it in payment and satisfaction of so much due to him by the United States as aforesaid, but whether in law he converted the same to his own use, contrary to the tenor and effect of the condition of his said bond they are ignorant -- and if, &c.;, then it assesses damages at \$309.87.

6. As to the sixth breach, it finds that the defendant Giles did not render to the auditor of the Treasury of the United States all his accounts and vouchers, &c.;, in manner and form as the defendants in their rejoinder have averred, and assesses damages at six cents.

This cause came up to this Court in the year 1812, with a certificate from the court below that after argument upon the special verdict thereunto annexed,

"it appeared that the opinions of the judges were opposed upon all the points submitted by and in the said special verdict, and thereupon at the request of the attorney of the United States for the said district, the judges of the said court have

directed this disagreement of opinion to be certified,"

&c.;

But this Court, upon inspecting the record, was of opinion that the points on which the opinions of the judges of the circuit court were opposed, were too imperfectly stated to enable this Court to form an opinion thereon.

Whereupon the cause was remanded to the circuit court, and came back with a certificate that the opinions of the judges of that court were opposed upon the ten following questions arising on the said special verdict, *viz.*,

1. Whether judgment ought to be given for the plaintiffs

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or for the defendants as to the sum of \$3,763.98, being the damages assessed upon the first breach.

2. Whether, &c., as to the sum of \$20,613.12, being the first sum assessed as conditional damages upon the second breach.

3. Whether, &c., as to the sum of \$14,374.77, being the second sum assessed as conditional damages on the second breach.

4. Whether, &c., as to the sum of \$9,895.09, being the third sum assessed as conditional damages on the second breach.

5. Whether, &c., as to the sum of \$10,718.03, being the fourth sum assessed as conditional damages on the second breach.

6. Whether, &c., as to the sum of \$16,133.14, being the fifth sum assessed as conditional damages on the second breach.

7. Whether, &c., as to the sum of \$6,238.35, being the sixth sum assessed as conditional damages on the second breach.

8. Whether, &c.;, as to the sum of \$4,479.68, being the seventh sum assessed as conditional damages on the second breach.

9. Whether, &c.;, as to the sum of \$5,255.73, being the damages assessed upon the fourth breach, and

10. Whether, &c.;, as to the sum of \$309.87, being the damages assessed upon the fifth breach.

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LIVINGSTON, J. delivered the opinion of the Court as follows:

This is a joint action of debt on a bond dated 9 January, 1801, in the penalty of \$20,000.

The condition of the bond is as follows:

"Whereas the above bound Aquila Giles hath been appointed the Marshal in and for the New York District, in pursuance of an act entitled 'An act to establish the judicial courts of the United States,' now, the condition of the preceding obligation is such that if the said A. G. shall, by himself and his deputies, faithfully execute all lawful precepts directed to the marshal of the said district under the authority of the United States and true returns make, and in all things well and truly and without malice or partiality perform the duties of the office of Marshal in and for the said District of New York during his continuance in the said office, and take only his lawful fees, then the obligation to be void, &c.;"

General performance is pleaded by the defendants, to which a replication is filed assigning six breaches, to all of which there was a rejoinder, sur-rejoinder and issue.

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On the issue joined on the first breach the special verdict finds, that on 20 January, 1800, the said writ of *vend. exp.* and *fi. fa.* was delivered to Giles, who, before he proceeded to execute it, was authorized by the officers of the Treasury to sell the land of Lamb under said writ for one-fourth part of the purchase money in cash, one-fourth part payable in two years from the time of sale, one-fourth part in three years, and the other fourth part in four years, with interest from the time of sale, to be secured by bonds and mortgages payable to Giles as marshal, or to the marshal of the district for the time being, to and for the use of the United States. That on 17 December, 1800, John Steele, being Comptroller of the Treasury, did instruct and order Giles to pay into the Office of Discount and Deposit of the Bank of the United States in New York, to the credit of the Treasurer of the United States, all the monies which might be levied from the property of Lamb by virtue of the said writ of *vend. exp.* and *fi. fa.* That under these instructions, Giles proceeded to sell the lands of John Lamb, the sales of which commenced on 26 November, 1800, and were continued until 23 December in the same year. That during the sales and afterwards, and before the execution of the bond by the defendants, Giles received from some of the purchasers several sums amounting to \$3,713.98, and no more, which sums were paid as the fourth of the purchase money of the lands bought by them. That Giles has never brought into court or paid into the bank either of the said sums, of %50, which was received on 20 January, 1800, on a sale, by Giles, of the chattels of Lamb, or of \$3,713.98, and that he never was required so to do by any order of the district court. That while Giles was marshal as aforesaid, a writ of *capias ad satisfaciendum* was issued out of said court and delivered to him against Elias Hicks on a judgment recovered by the United States on which was endorsed a direction to Giles to levy the sum of \$33,156.38, besides marshal's fees and poundage; that Hicks was arrested by Giles and in custody on said writ until discharged therefrom by the Secretary of the Treasury; that the poundage fees of Giles thereon, if any were due, have not been paid to him by anyone, and that they amount, if due at all, to \$419.57.

That the United States became indebted to Giles, while marshal as aforesaid, in the sum of \$8,133.96 for his fees and services in taking the second census in his district and for monies paid to his assistants, in taking the said census, pursuant to the act in such case made and provided, which sums amount to \$8,553.53, in part payment of which Giles retains the two sums of \$50 and of \$3,713.98. But whether in law he converted them to his own use contrary to the form and effect of the condition of the said bond the jurors pray the advice of the court. If the court shall think that it was such a conversion, the jurors assess damages on this breach at \$3,763.98. But if the court shall be of opinion that such retaining was no conversion then, the jury says that he did not convert the same to his use.

2. The second breach assigned is that Giles having, on 17 December, 1800, sold other lands of Lamb under the writ aforesaid for the further sum of \$60,000, received the said sum on 20 January, 1801 (which was after the execution of the bond), and converted and disposed of the same to his own use.

On the issue joined on this breach, the jury found that Giles, having made the sales as aforesaid and under the instructions and orders aforesaid, received from the purchasers, after 9 January, 1801, and before 27 March, 1801 (when he went out of office), the sum of \$1,683.52, and after that day the sum of \$17,191.58, amounting in the whole to \$18,875.10, which sums were paid by the purchasers as the cash payment which was to be made by them for the land so purchased (which sales took place between 26 November and 23 December, 1800). That the poundage and charges due to and paid by Giles, and legally chargeable against the proceeds of these sales amounted to \$1,332.85, which leaves in the hands of Giles the net sum of \$17,542.25 of the monies received by him after 9 January, 1801. That on 13 April, 1803, he paid to Edward Livingston, who was district attorney, the sum of \$6,238.35, which was receipted for on the said writ of execution. That it was then and yet is the usage and practice

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within the said district for the marshal to pay to the district attorney all monies levied by executions issued by the said attorney in suits in which the United States

is plaintiff. That this payment was made by and with the approbation of the Comptroller of the Treasury, and that Giles has never in any other way paid the said last mentioned sum to the United States or brought it into court in any other way than by paying it as aforesaid to the district attorney. That as to another part of the said sum of \$17,542.25, to-wit, the sum of \$4,479.68, Giles retains the same towards satisfaction of an equal sum due to him as aforesaid from the United States. That the residue of the said sum, to-wit, the sum of \$6,824.22, Giles retains to this day. But it prays the advice of the court whether Giles converted to his own use, contrary to the condition of the said bond, the said several sums of \$6,238.35, \$4,479.68, and \$6,824.22.

1. If he converted all of the said sums contrary, &c., then it assesses damages at \$20,613.12.

2. If he did not convert the said sum of \$6,238.35, paid to Livingston, but converted the other two sums, then it assesses damages at \$14,374.77.

3. If he did not convert the two first sums, to-wit, the sum of \$6,238.35 and \$4,479.68, but did convert the sum of \$6,824.22, to his own use, then it assesses damages at \$9,895.09.

4. If Giles did not convert to his own use the sum of \$6,824.22s, but did convert the other two sums, then it assesses damages at \$10,718.03.

5. If Giles did not convert to his own use the said sum of \$4,479.68, but did so convert the other two sums, it assesses damages at \$16,133.44.

6. If Giles did not convert to his own use the two sums

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of \$4,479.68, and \$6,824.22, but did so convert the other sum of \$6,238.35, then the damages are assessed at \$6,238.35.

7. If Giles did not so convert the two sums of \$6,238.35, and \$6,824.22, but did so convert the other sums of \$4,479.68, it then finds damages to the amount of

\$4,479.68.

8. If, in the opinion of the court, Giles converted neither of those sums, to his own use, contrary to the effect of the said condition, then the jury finds that he did not so convert either of them.

On the issue joined on the fourth breach, the following facts appear on the special verdict. That on 1 February, 1801, Giles had in his hands, as marshal, 14 bonds, described in assigning the fourth breach, belonging to the plaintiffs. That Giles continued marshal until 27 March, 1801, when he was duly removed and dismissed from office, and John Swartwout on the same day appointed marshal of the said district in his place, who continued marshal until the commencement of this suit. That the said bonds continued in the hands of Giles until 3 January, 1803, when they were delivered by him to Edward Livingston who was then district attorney, by and with the assent and approbation of the Comptroller of the Treasury. That on 12 January, 1803, Gabriel Duval being Comptroller of the Treasury, as such did instruct, order, and direct Giles as late marshal to deliver immediately the said 14 bonds to the said John Swartwout his successor in office, which he did not do. If the court shall think this was a conversion of these bonds, the jury assesses damages at \$5,255.73. If the court think otherwise, the jury finds it to be no conversion.

On the subject of the fifth breach, it is found that Giles, on 1 September, 1800, received as marshal \$309.87, on an execution issued against one Richard Capes at the suit of the plaintiffs, which he retains towards satisfaction of an equal sum due from them to him. If this be deemed a conversion by the court,

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the jury assesses damages at \$309.87. But if the court shall not think so, then the jury on this breach find for the defendants.

It is certified that the circuit court was divided in opinion on the following points arising on this record.

1. Whether judgment should be given for the plaintiffs or for the defendants as to the sum of \$3,763.98, being the damages assessed upon the first breach assigned.
2. The like question as to the sum of \$20,613.12, being the first sum assessed as conditional damages, on the second breach.
3. The same question as to the sum of \$14,374.77, being the second sum conditionally assessed on the second breach.
4. The like as to the sum of \$9,895.99, being the third sum assessed conditionally on the second breach.
5. The like as to the sum of \$10,718.03, being the fourth sum assessed on the second breach.
6. The like question as to the sum of \$16,133.44, being the fifth sum assessed on the second breach.
7. The like question as to the sum of \$6,238.35, being the sixth sum assessed on the second breach.
8. The like question as to the sum of \$4,479.68, being the seventh sum assessed on the second breach.
9. The like question as to the sum of \$5,255.73, being the damages assessed on the fourth breach.
10. The like question as to the sum of \$309.87,

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being the damages assessed on the fifth breach.

The first point on which the direction of this Court is asked will require a decision of the following questions.

1. Had Giles a right to retain out of the public monies in his hands any sums which might be due to him for his services or for advances made by him as marshal?
2. Are the defendants liable, under the condition of their bond, for the two sums of \$50 and of \$3,713.98, received by Giles, the first sum on 20 January, 1800, and the other on some day prior to 9 January, 1801, which is the date of their bond?

The act of Congress providing for the settlement of accounts between the United States and the receivers of public monies is so explicit as to preclude every difficulty in deciding on the first question. The third section of the law provides that where a suit shall be instituted against any person indebted to the United States, the court shall grant judgment at the return term on motion unless the defendant shall in open court make oath or affirmation that he is equitably entitled to credits, which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the Treasury and rejected, specifying each particular claim so rejected in the affidavit. The next section declares that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been submitted to the accounting officers of the Treasury for their examination and by them disallowed, unless it shall appear that the defendant at the time of trial is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit by absence from the United States, or by some unavoidable accident.

It is clear then that if this had been an action against Giles for monies received by him as marshal, he could not

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have availed himself of any credit against the public, however well founded the claim might be, unless he had previously submitted his title to such a credit to the accounting officers of the Treasury and they had rejected the same or unless he had been prevented from so doing by one of the accidents mentioned in the law.

On this subject, the special verdict on the issue joined on the sixth breach finds that Giles did not render to the auditor of the Treasury all his accounts and vouchers for the expenditure of monies received by him as marshal as aforesaid.

If then, in a suit against Giles himself, a claim for these credits, under existing circumstances, could not be sustained, neither can it in an action on this bond without permitting the defendants to do indirectly what the marshal could not have done directly, and in this way avail themselves of what the law seems to regard as default, or at least a negligence on the part of their principal.

We are next to consider whether the defendants are liable for the sum of \$50 and the sum of \$3,713.98 received by Giles. The first sum was received on 20 January, 1800, en the *fi. fa.* and *vend. exp.* issued against the estate of John Lamb, and the other was received on the same writ after 27 November, 1800, but before the date of the bond upon which the action is brought.

It is contended by the defendants that the retaining of monies which were received by Giles anterior to the date of the bond cannot be considered a conversion by him within the terms of its condition, while the plaintiffs, on the contrary, maintain that as these sums were in his hands at the time of its execution and have not been paid over to this day, his official delinquency is made out within the meaning of this instrument, and the responsibility of the defendants thereby established.

On this point, two of the judges think that the conversion of these sums by Giles was complete by his not paying them into the bank, agreeably to the directions of the Comptroller of the Treasury under which he acted, and that this having taken place prior to the execution of the

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bond the defendants are not liable therefor within the terms of its condition which are entirely prospective. Two other members of the Court are of opinion that no demand appearing on the record to have been made on the marshal for these sums, either by rule of court or otherwise, no conversion of them is made out, and that therefore the defendants are not liable. The other two judges think that

although these two sums were received before the date of the bond, yet as they remained in the hands of the marshal afterwards, and have not been paid over to this day, the defendants are accountable for them.

Judgment must therefore be rendered for the defendants as to the sum of \$3,763.98, being the damages assessed upon the first breach assigned.

The next question on which the court below was divided related to the sum of \$20,613.12, being the first sum assessed as conditional damages upon the second breach.

By recurring to the special verdict, it appears that Giles having had a *fieri facias* put into his hands on 20 January, 1800, against the real estate of John Lamb, was directed by the officers of the Treasury to make sales of it for one-fourth of the purchase money in cash, and for the other three-fourths on certain credits and securities specified in said instructions. These sales commenced on 26 November, 1800, and continued until 23 December following.

After 9 January, 1801, and before he went out of office, which was 27 March following, Giles received of the purchasers of Lamb's estate \$1,683.52, and after that day the sum of \$17,191.58, amounting in the whole to \$18,875.10. Deducting the poundage and charges which the special verdict finds to be legally chargeable against this sum, there was left in Giles hands the net sum of \$17,542.25, of the monies received by him after 9 January, 1801. On 13 April, 1803, he paid to E. Livingston who was district attorney, with the assent and approbation of the

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Comptroller of the Treasury, the sum of \$6,238.35.

Before we examine into the deductions claimed by the defendants against the sums received by Giles for cash payments, it will be necessary to settle for what portion of these sums they are chargeable under the condition of their bond.

Of these sums, a majority of the Court thinks they are liable for the sum of \$1,683.52, which was received between its execution and the marshal's

dismissal from office.

Are they also responsible for the sum of \$17,191.50, which was received by Giles after another marshal came into office?

The bond on which this action is brought having been given for the faithful performance of the duties of Giles as marshal during his continuance in office, two of the judges are of opinion that his sureties are not liable for the conversion of the last mentioned sum which took place after he was out of office by not paying it as directed by the Comptroller of the Treasury. Two of the judges do not consider the finding of the jury as fixing upon Giles a conversion of this sum at any time, inasmuch as it does not appear that he was ever demanded to pay the same into court or in any other way. The other two judges are of opinion that the marshal, being authorized to do certain acts even after his removal from office, the condition of the bond embraces defaults committed after such dismissal, as well as before, and that the defendants are therefore liable for the said sum of \$17,191.50, although received by Giles after he ceased to be marshal.

It is however the opinion of a majority of the Court that the defendants are not so liable under this bond.

Another question arises under this opposition of opinion in the circuit court, and that is whether the payment to Edward Livingston in April, 1803, was a payment to the United States.

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It is supposed that this payment, being made contrary to the Comptroller's order of 17 December, 1800, which was to pay all monies received under this execution into the branch bank at New York, cannot be regarded as valid.

It is true such instructions are found by the jury, which certainly do not authorize such payment, yet it is also found, possibly, from some subsequent instructions of the Comptroller, which do not appear, or at any rate from evidence which must have satisfied the jury, that such payment was made with the assent and

approbation of the Comptroller of the Treasury. This finding, correct or not, must conclude the Court, and it has only to say whether a payment be good if made under such authority.

The Comptroller is authorized by law "to direct prosecutions to be commenced for all debts due to the United States." During such prosecutions, he gives directions how they shall be conducted and how the monies recovered shall be paid. If, therefore, he directed or assented to the payment to Livingston, it is difficult to say that Giles erred or was guilty of any fault either in pursuing his instruction or in making a payment with his assent and approbation.

It yet remains to settle, under this branch of the division of the circuit court, how the payment to Livingston is to be applied. For although the sum paid to him is much greater than the sum of \$1,683.52 for which it is decided that the defendants are liable, the benefit which they may derive from such payment will depend in some measure on the manner of its application.

It does not appear that any direction was given by Giles, or that any election was made by either party how it should be applied. Nothing more is known than that Giles, being then indebted to a much larger amount for monies received at different times under the execution against the property of Lamb, made this payment without declaring what particular item in the account of the United States against him should thereby be discharged. If there be no designation how a sum paid on account

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shall be credited, and there be sureties for part of the debt, as was the case here, it seems reasonable to some of the judges to let them have the benefit of it by applying the credit in such a way as to exonerate them so far as the sum paid shall be sufficient for that purpose. If regard be had to the order of time in which the monies were received by Giles, it will be seen that the sum of \$3,763.98, which is the first sum for which he is in arrear, was received by him prior to 9 January, 1801, and the next sum for which he is accountable, to-wit the sum of \$1,683.52,

came into his hands after that day, but previous to 27 March, 1801, and after this other monies were received by him. These two sums together are not equal to the payment which was made to Livingston.

Following this order, the sum for which the defendants are liable being among the first that were received and being recoverable with interest on their bond, would on this principle be extinguished by the first payment if it were sufficient, as was the case here, to discharge all the monies which had been received prior to the receipt of the sum for which the defendants are answerable, and that also. But this is not the opinion of a majority of the judges. They think, and such is the decision of the Court, that the United States has yet a right to apply these payments in a way most beneficial to themselves and so as not to extinguish the sum of \$1,683.52 for which the defendants are accountable.

The Court then is of opinion that judgment must be given for the defendants as to the sum of \$20,613.12, being the first sum assessed as conditional damages upon the second breach.

Judgment must in like manner be given for the defendants as to all the other sums assessed as conditional damages upon the second breach.

It is next to be decided whether the conditional damages of \$5,255.73, assessed on the fourth breach be recoverable against the defendants.

These damages are given in consequence of a supposed

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conversion by Giles of the fourteen bonds mentioned in the special verdict. But it being found that these bonds were delivered to Edward Livingston by and with the assent and approbation of the Comptroller of the Treasury, the Court is unanimously of opinion, for reasons already assigned, that such delivery was no conversion of these bonds by Giles, and that therefore judgment must be rendered for the defendants as to the said sum of \$5,255.73, being the damages assessed as aforesaid on the fourth breach.

The last question which is submitted to us regards the sum of \$309.87, which it appears by the finding under the fifth breach assigned was received by Giles on 1 September, 1800, on an execution at the suit of the United States, against Richard Capes, which was retained by Giles towards satisfaction of an equal sum due to him. This sum being received prior to the execution of the bond, must be regarded within the reasons assigned for not considering the defendants liable for the two sums of \$50 and of \$3,713.98 hereinbefore mentioned, and judgment must accordingly, in the opinion of a majority of the Court, be given for the defendants as to the said sum of \$309.87, being the damages assessed upon the fifth breach.

It will be seen that the Court is of opinion that the defendants are liable under their bond for the sum of \$1,683.52, which was received by the marshal after its execution and before he went out of office, but by not one of the findings on the different breaches assigned does it appear to have been contemplated that this sum alone might be recoverable in this action, and accordingly no conditional damages are assessed to suit that state of the case.

The Court therefore can only give its directions as to the questions submitted to it, which are,

That it must be certified to the circuit court for the District of New York in the second circuit,

1. That judgment must be given for the defendants as to the sum \$3,763.98, being the damages

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assessed upon the first breach of the condition of the bond assigned in the replication of the plaintiffs.

2. That judgment must be given for the defendants as to the several sums of \$20,613.12, of \$14,374.77, of \$9,895.09, of \$10,718.03, of \$16,133.44, of \$6,238.35, and of \$4,479.68, being the several sums assessed as conditional damages on the second breach.

3. That judgment must be given for the defendants for the sum of \$5,255.73, being the damages assessed upon the fourth breach, and
4. That judgment must be given for the defendants for the sum of \$309.87, being the damages assessed upon the fifth breach.

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