

United States Vs. Tingey

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Appellant : United States

Respondent : Tingey

Judgement :

United States v. Tingey - 30 U.S. 115 (1831)

U.S. Supreme Court United States v. Tingey, 30 U.S. 5 Pet. 115 115 (1831)

United States v. Tingey

30 U.S. (5 Pet.) 115

ERROR TO THE CIRCUIT COURT OF THE DISTRICT

OF COLUMBIA FOR THE COUNTY OF WASHINGTON

SYLLABUS

There is no statute of the United States expressly defining the duties of pursers in the navy. What those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to this Court.

If they are regulated by the usage and customs of the navy, or by the official orders of the Navy Department, they properly constitute matters of averment, and should be spread upon the pleadings.

A bond, voluntarily given to the United States and not prescribed by law, is a valid instrument upon the parties to it in point of law. The United States has in its political capacity a right to enter into a contract or to take a bond in cases not previously provided by law. It is an incident to the general right of sovereignty, and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just

exercise of those powers. To adopt a different principle would be to deny the ordinary rights of sovereignty not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine to such an extent is not known to this Court as ever having been sanctioned by any judicial, tribunal.

A voluntary bond taken by authority of the proper officers of the Treasury Department to whom the disbursement of public money is entrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is an incident to the duties belonging to such a department, and the United States being authorized in a political capacity to take it, there is no objection to its validity in a moral or a legal sense.

Where the United States instituted an action for the recovery of a sum of money on a bond given with sureties by a purser in the navy, and the defendants in substance pleaded that the bond, with the condition thereto, was variant from that prescribed by law and was under color of office extorted from the obligor and his sureties contrary to the statute by the then Secretary of the Navy as the condition of the purser's remaining in office and receiving its emoluments, and the United

States demurred to this plea, it was held that the plea constituted a good bar to the action.

No officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of his holding his office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute but to supersede the requisites of the law. It would be very different where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond without any coercion or extortion by color of office.

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This suit was instituted in the circuit court by the United States against Thomas Tingey as one of the sureties of Lewis Deblois, who had been appointed a purser in the Navy of the United States.

The declaration first filed was in the common form of debt on a joint and several bond, and the defendants prayedoyer of the bond and condition, and pleaded eight several pleas. On the first, second, and seventh pleas, issues in fact were joined, and to the other pleas the United States demurred generally. The circuit court overruled the demurrers and gave judgment against the United States, which prosecuted this writ of error.

Pending the pleadings, the district attorney of the United States filed another count to the declaration in which the bond and the condition were set forth with averments that Lewis Deblois was a purser in the Navy of the United States, that he received large sums of money in that capacity, and that he had refused to account for the same according to the provisions of the laws of the United States, &c.; By agreement of counsel, all the pleadings were considered as applicable to this as well as to the first count in the declaration.

The bond was executed on 1 May, 1812, by Lewis Deblois, Thomas Tingey, Franklin Wharton, Elias B. Caldwell, William Brent, and Frederick May, in the sum of \$10,000. The condition was as follows:

"The condition of the above obligation is such that if the said above bound Lewis Deblois shall regularly account when thereunto required for all public moneys received by him from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States as shall be duly authorized to settle and adjust his accounts, and shall moreover pay over, as he may be directed, any sum or sums that may be found due to the United States upon such settlement or settlements, and shall faithfully discharge in every respect the trust reposed in him, then the obligation to be void and of no effect, otherwise to remain in full force and virtue."

The following endorsement was made upon the bond:

"It is expressly understood and agreed between the Secretary of the Navy (acting in behalf of the United States) and the within named obligors, that the said obligors and not to be

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held responsible for any loss that may be sustained in the moneys or public property committed to the care of the within named Lewis Deblois as purser, by any capture, sinking or stranding, or other unavoidable casualty, or if, by any such circumstance or event, the said purser should be deprived of his books and papers, and be thereby rendered incapable of producing the necessary evidence or means of accounting for the public money or property with which he may be charged, the said obligors shall be exonerated on producing satisfactory evidence of the facts, unless it can be shown that the money or public property has been misapplied or diverted from the public service."

The third plea demurred to by the United States set forth that

"Every neglect, failure or omission whatsoever of the said Lewis Deblois regularly to account, as in and by the said condition is required, and to pay over such sum or sums of money as in and by the said condition is also required, or in any other manner or respect whatsoever to discharge the trust reposed in him, as in and by the said condition is also required, was caused by and the direct consequence of

the gross and willful neglect and wrong and illegal acts of the proper officers of the government of the United States, under whose control and direction all the public moneys and public property received by the said Lewis Deblois, and committed to his charge, at any time or times, after the sealing and delivery aforesaid, were placed by the authority of the plaintiffs, and who were duly authorized to settle and adjust his accounts, and to superintend, direct, and control the discharge of the trust reposed in him as aforesaid, to the manifest and grievous injury and defrauding of the said defendant,"

&c.;

The fourth plea alleged that after the 13 March, 1812, and before 1 May in the same year, and before the execution of the bond, Lewis Deblois was duly appointed a purser in the navy and continued in the service until 1 March, 1817, and continued and so continues in the service, and to discharge the duties of purser, and that all the moneys and all public property received by him or for which he was accountable after the execution of the bond, were received by him and committed to his care as such purser in virtue of his said appointment, and in discharge of the

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trust reposed in him as such purser, and not otherwise, and that no money or public property was committed to him but as purser under the said appointment.

The fifth plea alleges

"That the defendant ought not to be charged with the said writing obligatory or anything therein contained, because the Act of Congress of 13 March, 1812 required that the pursers in the Navy of the United States shall be appointed by the President of the United States by and with the advice and consent of the Senate, and from and after 1 May next, no person shall act in the character of purser who shall not have been thus first nominated and appointed, excepting persons on distant service, who shall not remain in service after 1 July next, unless nominated and appointed as aforesaid. And every person, before entering

upon the duties of his office, shall give bond with two or more sufficient sureties, in the penalty of \$10,000, conditioned faithfully to perform all the duties of purser in the Navy of the United States, which said law was in full force and unrepealed on 1 May in the said year, when the said obligation was so as aforesaid executed and delivered. And the said defendant further says that protesting that the said Lewis Deblois was not so appointed by the President of the United States by and with the advice and consent of the Senate, as in and by said act of Congress is required; yet he further says that after the passing of the said act and before the day of the date of the ensealing and delivery of the said writing obligatory, the Navy Department of the United States did cause the said writing obligatory to be prepared, and to be transmitted to the said Lewis Deblois, and did require and demand of him that the said writing obligatory, and the condition thereunder written, should be executed by the said Lewis Deblois, with sufficient sureties, before he should be permitted to remain in the said office of purser or to receive the pay and emoluments attached to said office of purser, and the said defendant further in fact says that the said condition so as aforesaid underwritten is variant and wholly different from the condition required in and by the said act of Congress, and varies and enlarges the duties and responsibilities of the said Lewis Deblois and his sureties, and that the same was under color and

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pretense of said act of Congress and under color of office required and extorted from Lewis Deblois, and from the defendant as one of his sureties, against the form, &c.;, of the statute by the then Secretary of the Navy, wherefore he says the said writing obligatory is void and illegal, and this,"

&c.;

The sixth plea alleges

"That the condition of the bond is wholly variant and different from the condition which by law ought to have been required and imposed other and different responsibilities upon Deblois and on his sureties, and that the said writing

obligatory and the condition was prepared by and under the directions of the Secretary of the Navy of the United States, and was by him transmitted to Deblois, and he, Deblois, was then and there required to execute the same and the illegal condition before he would be deemed and recognized as a purser in the Navy of the United States, or permitted to receive any pay or emoluments as such, under color and pretense of law and under color of the office of the said Secretary of the Navy, whereby, as the defendant averred, the said writing obligatory and the condition there underwritten is wholly void and of no effect. And this"

&c.;

The eighth plea alleges

"That the United States ought not to maintain their action because by the Act of Congress of 13 March, 1812, it was among other things enacted that every purser, before entering upon the duties of his office, shall give bond with two or more sufficient sureties in the penalty of \$10,000 conditioned faithfully to perform all the duties of purser in the Navy of the United States, which said act of Congress was in full force and unrepealed at the time when the said Lewis Deblois was appointed purser in the navy and also at the time when the said writing obligatory was sealed and delivered by this defendant and for a long time thereafter, to-wit until 1817, and the defendant says that the said Deblois, before entering upon the duties of his office or at any time thereafter, was not required to give bond in manner and form as is prescribed as aforesaid, nor did he give such bond, without this that the said Deblois received any funds, property, or money from said plaintiffs in any other right, capacity, or character than as such purser, or was in any other right, capacity, or character bound to keep, preserve, disburse, and account for the same. And this,"

&c.;

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MR. JUSTICE STORY delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the District of Columbia, sitting at Washington. The original action was brought by the United States upon a bond executed by Lewis Deblois, and by Thomas Tingey and others as his sureties, on 1 May, 1812, in the penal sum of \$10,000, upon condition that if Deblois should regularly account, when thereto required, for all public moneys received by him from time to time and for all public property committed to his care with such person or persons, officer, or officers of the government of the United States as should be duly authorized to

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settle and adjust his accounts, and should moreover pay over as might be directed any sum or sums that might be found due to the United States upon any such settlement or settlements, and should also faithfully discharge in every respect the trust reposed in him, then the obligation to be void, &c.; In point of fact, Deblois was at the time a purser in the navy, though not so stated in the condition, and there is an endorsement upon the bond, which is averred in one of the counts of the declaration to have been contemporaneous with the execution of the bond, which recognizes his character as purser and limits his responsibility as such, and the bond was unquestionably taken, as the pleadings show, to secure his fidelity in office as purser.

The declaration contains two counts: one in the common form for the penalty of the bond and a second setting forth the bond, condition and endorsement, and averring the character of Deblois, as purser, his receipt of public moneys, and the refusal to account, &c.;, in the usual form.

Several pleas were pleaded, upon some of which issues in fact were joined. To the third, fourth, fifth, sixth, and eighth pleas the United States demurred, and judgment upon the demurrers was given for the defendant in the circuit court, and the object of the present writ of error is to revise that judgment.

There is no statute of the United States expressly defining the duties of pursers in the navy. What those duties are, except so far as they are incidentally disclosed in

public laws, cannot be judicially known to this Court. If they are regulated by the usages and customs of the navy or by the official orders of the Navy Department, they properly constitute matters of averment, and should be spread upon the pleadings. It may be gathered, however, from some of the public acts regulating the departments that a purser, or as the real name originally was, a burser, is a disbursing officer, and liable to account to the government as such. The Act of 3 March, 1809, ch. 95, sec. 3, provided

"That exclusively of the purveyor of public supplies, paymasters of the army, pursers of the navy, &c., no other permanent agents should be appointed either for the purpose of making contracts or for the purchase of supplies or for the disbursement in any other manner of moneys for the use of the military establishment or

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of the Navy of the United States but such as should be appointed by the President of the United States with the advice and consent of the Senate."

And the next section (s. 4) of the same act provided

"That every such agent and every purser of the navy should give bond with one or more sureties in such sums as the President of the United States should direct for the faithful discharge of the trust reposed in him, and that, whenever practicable, they should keep the public money in their hands in some incorporated bank, to be designated by the President, and should make monthly returns to the Treasury of the moneys received and expended during the preceding month, and of the unexpended balance in their hands."

This act abundantly shows that pursers are contemplated as disbursing officers and receivers of public money, liable to account to the government therefor. The Act of 30 March, 1812, ch. 47, made some alterations in the existing law and required that the pursers in the navy should be appointed by the President, by and with the advice and consent of the Senate, and that from and after 1 May then next, no person should act in the character of purser who should not have been so

nominated and appointed except pursers on distant service, &c.;, and that every purser, before entering upon the duties of his office, should give bond with two or more sufficient sureties, in the penalty of \$10,000 conditioned faithfully to perform all the duties of purser in the Navy of the United States. This act, so far as respects pursers giving bond and the imports of the condition, being *in pari materia*, operates as a virtual repeal of the former act. The subsequent legislation of Congress is unimportant, as it does not apply to the present case.

It is obvious that the condition of the present bond is not in the terms prescribed by the Act of 1812, ch. 47, and it is not limited to the duties or disbursement of Deblois as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser or otherwise.

Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond voluntarily given to the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law; in other

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words, whether the United States has, in its political capacity, a right to enter into a contract or to take a bond in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion that the United States has such a capacity to enter into contracts. It is in our opinion an incident to the general right of sovereignty, and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers. This principle has been already acted on by this Court in the case of [*Dugan v. United States*](#), 3 Wheat. 172, and it is not perceived that there lies any solid objection to it. To adopt a different principle would be to deny the ordinary rights of sovereignty not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine to such an extent is not known to this Court as ever having been sanctioned by any judicial tribunal.

We have stated the general principle only, without attempting to enumerate the limitations and exceptions which may arise from the distribution of powers in our government or from the operation of other provisions in our Constitution and laws. We confine ourselves in the application of the principle to the facts of the present case, leaving other cases to be disposed of as they may arise, and we hold that a voluntary bond taken by authority of the proper officers of the Treasury Department, to whom the disbursement of public moneys is entrusted, to secure the fidelity in official duties of a receiver or an agent for disbursery of public moneys, is a binding contract between him and his sureties, and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is in our view an incident to the duties belonging to such a department, and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view.

Having disposed of this question, which lies at the very threshold of the cause and meets us upon the face of the

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second count in the declaration, it remains to consider whether any one of the pleas demurred to constitutes a good bar to the action.

Without adverting to others, which are open to serious objections on account of the looseness and generality of their texture, we are of opinion that the fifth plea is a complete answer to the action. That plea, after setting forth at large the act of 1812 respecting pursers, proceeds to state that before the execution of the bond, the Navy Department did cause the same to be prepared and transmitted to Deblois, and did require and demand of him that the same, with the condition, should be executed by him with sufficient sureties before he should be permitted to remain in the office of purser or to receive the pay and emoluments attached to the office of purser; that the condition of the bond is variant, and wholly different from the condition required by the said act of Congress, and varies and enlarges the duties and responsibilities of Deblois and his sureties; and

"that the same was under color and pretense of the said act of Congress, and under color of office required and extorted from the said Deblois, and from the defendant, as one of his sureties, against the form, force, and effect of the said statute by the then Secretary of the Navy."

The substance of this plea is that the bond, with the above condition, variant from that prescribed by law, was under color of office extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy as the condition of his remaining in the office of purser and receiving its emoluments. There is no pretense, then, to say that it was a bond voluntarily given or that though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party upon the peril of losing his office; it was extorted under color of office against the requisitions of the statute. It was plainly then an illegal bond, for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute but to supersede the requisitions of law. It would be very different where such a bond was by mistake

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or otherwise voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office.

The judgment of the circuit court is 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 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.