

United States Vs. Jones

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SooperKanoon Citation : sooperkanoon.com/79458

Court : US Supreme Court

Decided On : 1834

Appeal No. : 33 U.S. 399

Appellant : United States

Respondent : Jones

Judgement :

United States v. Jones - 33 U.S. 399 (1834)

U.S. Supreme Court United States v. Jones, 33 U.S. 8 Pet. 399 399 (1834)

United States v. Jones

33 U.S. (8 Pet.) 399

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR

THE COUNTY OF WASHINGTON IN THE DISTRICT OF COLUMBIA

SYLLABUS

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 so to do, 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 it 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 now is whether it ought to have been given.

Held that there was no error in the refusal of the circuit court to give the instructions.

The sureties in the bond of a contractor, given to secure the performance of

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a contract for the supply of 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 both parties and no separate portion had been designated or set apart for the contract of 1818.

To say that the sureties in the bond should be liable for the whole balance would be to say that they should be liable for advances made under any other contracts, and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance.

Each and all of them are blended, *per my et per tout*, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases where a party, bound for the fidelity of a clerk or other agent of A as keeper of his money or accounts, is held not liable for acts done as the keeper of the money of A and B. And in the present suit, there is no difference in point of law between the liability of the principal and that of the sureties upon the bond. It is the same contract as to both, and binds both

or neither. The United States is not, however, without remedy, for there can be no doubt that an action in another form would lie against the contractor for any balance, however received, which remained unexpended in his hands after the termination of the service for which the advances were made.

The receipts of the contractor for moneys paid to him by the United States are *prima facie* evidence that the money was received by him on account of the contract, and it is incumbent, in action on the bond given with sureties for the performance of the contract, for the parties to show that the money was not paid on account of the contract as stated in the receipts, but they are not bound to show that it was so stated by mistake or design on the part of the government and the contractor, and intended to be applicable to some other contract.

The United States instituted actions of debt upon two joint and several bonds dated 9 February, 1818, in the penal sum of \$35,000, conditioned that

"Benjamin G. Orr, his heirs, executors or administrators, or any of them, shall and do in all things well and truly observe, fulfill, accomplish, and keep all and singular the covenants, conditions and agreements whatsoever which, on the part and behalf of the said Benjamin G. Orr, his heirs, executors or administrators, are or ought to be observed, performed, fulfilled, accomplished and kept, comprised, or mentioned in certain articles of agreement or contract bearing date 9 February, 1818,

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made between John C. Calhoun, Secretary of War, and the said Benjamin G. Orr concerning the supply of rations to the troops of the United States within the State of Georgia, including that part of the Creeks' land lying within the territorial limits of said state, according to the true intent, meaning and purport of the said articles of agreement or contract."

The defendant pleaded performance in all things to be done and performed according to the tenor and effect of the condition of the bond.

The replication states

"That the said Benjamin G. Orr, in the said condition mentioned, 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 _____ dollars,"

"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 _____ dollars."

Upon this replication issue was joined and a verdict and judgment rendered in favor of the defendant, and in May, 1831 the plaintiffs prosecuted this writ of error.

The provisions in this contract, made by Benjamin G. Orr and the plaintiffs upon which the breaches were assigned on the part of the United States were the following:

"1st. That the said Benjamin G. Orr, his heirs, executors, or administrators, shall supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him or them for the use of the United States at all and every place or places *where troops are or may be stationed*, marched, or recruited within the limits of the State of Georgia, including that part of the Creeks' land lying within the territorial

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limits of said state, *thirty days' notice being given of the post or place where rations may be wanted*, or the number of troops to be furnished on their march, from 1 June, 1818, until 31 May, 1819, inclusive."

"3d. That supplies shall be furnished by the said Benjamin G. Orr, his heirs, executors, or administrators, at the fortified places and military posts that are or may be established in the limits aforesaid, upon the requisition of the commandant of the army or a post, in such quantities as shall not exceed what is sufficient for the troops to be there stationed, for the space of three months in advance in good wholesome provisions, consisting of due proportions of all the articles forming the ration."

"5th. That the commanding general or person appointed by him at each post or place, in case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued, shall have power to supply the deficiency by purchase at the risk and on account of the said Benjamin G. Orr, his heirs, executors, or administrators."

The breaches assigned were that, although the United States had advanced to Benjamin G. Orr, at several times after the execution of the contract, several sums of money amounting to \$80,000 on account of the contract and agreement entered into by him, yet he had failed to furnish and to supply to the said United States the rations which were required to be furnished by him under the articles of agreement aforesaid or in any manner to account with the said United States for the said sums of money so advanced and furnished to him as aforesaid. And by reason of the said failure, the United States were exposed to great inconvenience and to great and heavy losses, and was compelled to advance large sums of money for the supply of the troops of the United States, stating the several amounts advanced and the places at which the provisions were supplied.

The United States further alleged and charged that the accounts of the said Orr in relation to the contract aforesaid have been duly settled by the accounting officers of the government of the United States, and upon the said settlement there was found to be due from the said Orr to the said United States the sum of \$48,308.48,

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and that the said Orr had notice thereof.

Four bills of exceptions were tendered on the trial by the plaintiffs to the opinion of the court given in charge to the jury, and were respectively sealed by the court.

The first exception set out the evidence given on the part of the United States, consisting of the bond and condition, the contract entered into by Orr, the accounts stated and settled in the proper departments of the government, showing the advances and payments of the sums of money to him, and vouchers and documents in support of the same, and also evidence to show nonperformances of the agreement to deliver the provisions to the troops of the United States at the several posts within the district designated in the contract.

The account current stated by the accounting officers of the United States charged the contractor with three several sums amounting to \$80,000 as follows:

"1818. Feb. 19, for part of warrant No. 1660, for the payment of his drafts in favor of Richard Smith, dated 11 Feb., 1818, \$55,000; March 6, for warrant No. 1733, received by him on account, \$15,000; July 2, for warrant No. 2262, received by him on account, \$10,000\$80,000."

The account also contained other items of debit for the cost and expenses of supplies furnished in consequence of the asserted failure of the contractor, amounting, with the advances stated, to \$106,957.19. Credits where allowed in the account amounting to \$58,648.71. Leaving a balance alleged to be due to the United States of \$48,308.48.

No proof was offered of any requisition or notice to the contractor for the supplies at the posts where the failures were alleged to have occurred.

The plaintiffs showed, however, that on 15 January, 1817, Benjamin G. Orr contracted to supply all rations required for the use of the United States troops within the limits of South Carolina and Georgia from 1 June, 1817, to 31 May, 1818, inclusive, and that in the execution of that contract, he had become acquainted with the number of rations required at the fixed posts, and evidence was also offered to the jury, which was intended to prove to their satisfaction on the one side that the contractor

had dispensed with any special requisition or notice under the last contract, and on the other that he had always insisted on the necessity of notice.

Upon the evidence so given, the counsel for the United States prayed the court to instruct the jury that it was competent for it to infer from the evidence that the said Orr, 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. Which last instruction the court refused to give in relation to any of the charges for failure as aforesaid, being of opinion that the United States was not entitled under the said contract to charge the said Orr for the amount paid by them for provisions upon any supposed case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued by the said Orr unless such failure or deficiency took place after a requisition upon the said Orr (or his agent, duly authorized by him to receive such requisition) made by the commandant of the army of a post in case the provisions were wanted for a fortified place or a military post, and in no case unless such failure or deficiency took place after thirty days' notice had been given to him or his said agent of the post or place where the rations were wanted or of the number of troops to be furnished in case the rations were wanted for marching troops.

To this refusal the counsel of the United States excepted.

The defendant, after giving in evidence the documents and vouchers in support of such of the additional credits claimed by him as had been rejected and remarked upon by the Third Auditor, contended (upon the grounds stated in the foregoing exception and upon the authority of the court's said decision) that all the items of charges against said Orr in said official accounts, under the contract of February 9, 1818, stated, except the three advances from the treasury of \$55,000, \$15,000, and \$10,000, first charged, and insisted upon the rejection of the same, and then

claimed to have set off against the said \$80,000,

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and to be allowed in this suit the several sums of money admitted to the credit of said Orr under said contracts for provisions furnished and expenditures upon abstracts and vouchers by him and his administrator exhibited to the Third Auditor and claimed as credited in said official accounts, disclaiming and deducting from said credits all such as appeared to be mere counter credits or cross-entries dependant upon the corresponding and contested charges in said accounts, and also claimed the allowance of such of the said additional credits as had been rejected and remarked on by the Third Auditor as aforesaid. Whereupon the plaintiffs, by their counsel, made the following prayer to the court:

"That as the defendant has used the account exhibited by the plaintiffs, and has claimed the credits therein stated as allowed to the contractor from the jury without offering any other evidence of its claim to such credits, then the whole of said account is to go to the jury, as well the charges as the credits in the said account, and if the defendant shall offer no evidence to impeach the items charged in the account, they are to be taken as correct, and that the defendant cannot rely on the account for his credits without being bound by such entries of charge as he may be unable to impeach."

Which instruction and opinion the court refused to give, to which refusal the attorney of the United States excepted.

The defendant prayed the court to instruct the jury as follows:

"That if the jury finds and believes from the evidence aforesaid that the three several advances from the War Department to said Orr, in the said first account above charged, to the amount of \$80,000, though appearing in the receipts for the same as made on account of this contract, were nevertheless advanced under an arrangement and understanding between the government and said Orr, to which the sureties in the bond now in suit were in no manner party or privy, that the said sums of money were to be held by the said contractor as a common fund of

supplies, as well for the forts and military posts in Florida, including the subsistence of Indian prisoners there, as of the posts within the State of Georgia and the Creek lands within the territorial limits of that state, and to be indiscriminately applied to all or any of both Georgia and Florida forts and military posts, upon the

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terms and conditions of this contract, as if extended to the Florida posts, and that the said contractor was accordingly called on and required, in the execution of this contract and out of the general fund so advanced nominally under this contract, to furnish subsistence as well for the Florida posts, including Indian prisoners there as for the posts within the proper territorial limits of the contract indiscriminately, and that both branches of supply were blended in debits for alleged failures, &c.;, and credits for supplies in the same official account of advances and expenditures under this contract, as kept at the proper accounting departments of the Treasury and War Departments, without there having been any specific part or portion of the said advances designated and set apart for the two branches of supply and subsistence in Georgia and Florida respectively. Then the obligors in the bond now in suit, or any of them, are not responsible in this action under the tenth article of said contract, for the accounting and paying by said Orr of any balance or surplus of the said advances remaining in his hands unexpended at the time of the expiration of the term of said contract, in the execution of the said contract, and in the supplies of subsistence therein stipulated for, which opinion the court gave as prayed, to which the United States excepted."

The attorney for the United States prayed the following instruction.

"That the receipts of Orr offered in evidence are *prima facie* evidence that he received the \$80,000 under the contract on which this suit is brought, and that it is incumbent on the defendant to satisfy the jury by evidence that the said advances were not made under the said contract, as stated in the said receipts, but that it was so stated by mistake or design on the part of the government and said Orr, and intended to be applicable to some other contract."

Which the court refused to give as prayed, but instructed the jury that the receipts of Orr aforesaid are *prima facie* evidence that he received the \$80,000 under the contract on which this suit is brought, and that it is incumbent on the defendant to satisfy the jury by evidence that the said advances were not made under the said contract as stated in said receipts.

To which refusal the United States excepted.

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MR. JUSTICE STORY delivered the opinion of the Court.

The original suit was brought on a bond given by Orr and certain persons as his sureties to the United States on 9 February, 1818, for the penal sum of \$35,000 upon condition well and truly to perform, &c.; certain articles of agreement dated the same day, &c.;

"made between John C. Calhoun, Secretary of War, and the said Orr concerning the supply of rations to the troops of the United States within the State of Georgia, including that part of the Creeks' lands within the territorial limits of said state, according to the true intent and purport"

thereof. The defendant Orr died pending the suit, and it being revived against his administrator, the latter, after oyer of the bond and condition and articles of agreement, pleaded a general performance of the condition by Orr, and the replication assigned for breach that although the United States did advance and furnish to Orr divers large sums of money at divers times on account of and to enable him to carry into effect the articles of agreement, and although the accounts of Orr in relation to the articles of agreement had been finally settled by the accounting officers of the government, and upon the settlement there was found due to the United States the sum, &c.;, yet he had not paid the same, &c.; Upon this replication issue was joined, and the cause being tried, a verdict was found for the administrator upon which judgment was afterwards given by the court in his favor.

At the trial, several bills of exceptions were taken on behalf of the United States, and the validity of these exceptions constitutes the matter now in controversy before this Court.

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The first article of the articles of agreement above referred to is to this effect.

"That the said Orr, his heirs, &c., shall supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him or them for the use of the United States at all and every place or places *where troops are or may be stationed*, marched, or recruited within the limits of the State of Georgia, including that part of the Creeks' land lying within the territorial limits of said state, *thirty days' notice being given of the post or place where rations may be wanted* or the number of troops to be furnished on their march, from 1 June, 1818, until 31 May, 1819, inclusive, at the following prices, &c.;"

The tenth article provides

"That all such advances of money as shall be made to the said Orr &c., for or on account of the supplies to be furnished pursuant to this contract, and all such sums of money that the commanding officer of the troops or recruits, &c.; may cause to be disbursed in order to procure supplies in consequence of any failure on the part of the said Orr &c., in complying with the requisitions herein contained shall be accounted for by him or them by way of offset against the amount of such supplies, and the surplus, if any, repaid to the United States immediately after the expiration of the term of this contract, together with interest, &c., and that if any balance shall, on any settlement of the accounts of Orr, &c., be found due by him or them, &c., the same shall be immediately paid."

At the trial, the United States, in support of its suit, introduced certain official accounts and statements of the Third Auditor, duly certified from the Treasury Department, which were read in evidence, saving to the defendant all exceptions to the competency of these accounts to charge him otherwise than as the items of

charges in the same should be supported by proof. The United States also read in evidence a contract made by Orr in January, 1817, for army supplies for the State of South Carolina and Georgia for one year, from 31 May, 1817, the terms of which contract are the same as those of the contract of 1818. Besides evidence to other points, not now material to be stated, 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

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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 so to do; and that special requisitions and notice 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 Orr 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 said Orr, 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 now is whether it ought to have been given.

To the terms in which this instruction is couched, there is certainly a well founded objection. The language used is

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equivocal and admits of various interpretations, and it is certainly the duty of the party asking an instruction to express it with such certainty as may not mislead either the court or the jury. The court was asked to instruct the jury "that it was competent for it to infer from the said evidence, &c.;" Now if by "competent," as here used, it was intended that there was sufficient evidence from which the jury might infer a waiver or dispensation, &c.;, the instruction was manifestly wrong, for it required the court to decide upon the weight of evidence, and to take from the jury the right to ascertain that which is peculiarly within their province for themselves. But if it was only intended to express that there was evidence conducing to prove a waiver, the language was ill adapted to the purpose, for it does not ask whether the evidence introduced on the part of the United States, if believed, conduced to such a purpose, but whether the evidence on both sides conduced to such a purpose, which would require the court to ascertain in like manner the weight of the evidence, for it could not be correctly affirmed that the evidence conduced to such a purpose where there was conflicting evidence unless there was a decided preponderance on that side.

But without dwelling more on the phraseology of this instruction, we are of opinion that the court was correct in refusing it upon the substance of the doctrine asserted in it. The court was required to instruct the jury that it was competent for it to infer that Orr had dispensed with any special requisition and notice in relation to supplies at fixed posts not from the evidence generally, but from two special circumstances in the case -- first, from having supplied the fixed posts, as he had done under his former contract (that is. the contract of the preceding year, 1817), and secondly from thus knowing the number of rations there required. Now the contract of 1817 entitled him to have requisitions and notices of thirty days, precisely in the same manner as the contract of 1818 did, and it was neither proved nor admitted in the case that such requisitions and notices had not been given under the former contract. If they had been given, then certainly there could be no legal inference that they were not to be continued to be given under the contract of 1818. And if they were not given, then the circumstance

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that they had been dispensed with under a former contract, had no legal tendency to establish that they were dispensed with under a new and independent contract. Indeed, the very circumstance that in some new and independent contract they were stipulated for would furnish proof that they were not intended to be dispensed with. Why otherwise should they be again inserted in the contract? Certainly not for the purpose of showing that they were not to be insisted on, but were to be dispensed with.

Besides, the fact of having supplied the fixed posts under a former contract, and knowing thereby the number of rations then required for them, could have no legal tendency to establish the right or duty of the contractor to supply the same posts with the same number of rations in future years. The number of troops might be varied; the importance of those posts might be diminished or increased; and from the nature of the military service, many other circumstances might occur to render a fixed quantity of supply at those posts, incompatible with the public interests or public necessities. The very language of the contract demonstrates that no such fixed quantities could have been contemplated by the parties. The contractor is to

supply and issue all rations, which shall be required of him

"at all and every place or places where troops are or may be stationed, &c.;, thirty days' notice being given of the post or place where the rations may be wanted, or the number of troops to be furnished on their march."

So that the contract not only does not look to any fixed posts in particular, but it carries on its face an implication that the supply required might or would be varied in all posts and places.

Upon these grounds, we are of opinion that the circuit court was right in refusing the instruction prayed for. We give no opinion upon the point whether a parol waiver of the notice stipulated for in the contract would, if proved, have entitled the United States to recover in this suit, it being a suit for a forfeiture for nonfulfillment of the terms of the contract. Even supposing a waiver by parol may discharge the party so as to save a forfeiture of a bond, it does not follow that a waiver by parol is to be admitted to create a forfeiture of a bond. On neither point do we mean to express any opinion.

The next exception involves the same point relative to the

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right of the defendant to have the credits allowed him on the treasury accounts, notwithstanding a rejection of some of the debits, which was involved in another case between the same parties, in which my brother Mc LEAN has already delivered the opinion of the Court.

The next exception is to an instruction of the circuit court, given upon the prayer of the defendant. It is as follows:

"That if the jury find and believe from the evidence aforesaid that the three several advances from the War Department to the said Orr in the said first account above charged, to the amount of \$80,000, though appearing in the receipts for the same as made on account of this contract, were nevertheless advanced under an arrangement and understanding with the government and said Orr, to which the

sureties in the bond now in suit were in no manner party or privy; that the said sums of money were to be held by the said contractor as a common fund of supplies, as well for the forts and military posts in Florida, including the subsistence of the Indian prisoners there, as of the posts within the State of Georgia and the Creek lands within the territorial limits of that state, and to be indiscriminately applied to all or any of both the Georgia and Florida forts and military posts, upon the terms and conditions of this contract, as if extended to the Florida posts, and that the said contractor was accordingly called on and required, in the execution of that contract, and out of the general fund so advanced, nominally, under this contract, to furnish subsistence as well for the Florida posts, including Indian prisoners there, as for the posts within the proper territorial limits of the contract indiscriminately, and that both branches of supply were blended in debits for alleged failures, &c.;, and credits for supplies in the same official account of advances and expenditures under this contract, as kept at the proper accounting departments of the Treasury and War Departments, without there being any specific part or portion of the said advances designated and set apart for the two branches of supply and subsistence in Georgia and Florida respectively, then the obligors in the bond now in suit, nor any of them, are not responsible in this action under the tenth article of said contract, for the accounting and paying by said Orr of any balance or surplus of the said advances remaining

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in his hands, unexpended at the time of the expiration of the term of said contract in the execution of the said contract and in the supplies of subsistence therein stipulated for."

Stripped of the complicated circumstances in which this instruction is involved, it presents the simple question whether, under the tenth article of the contract of 1818, the parties to the bond are in the present action responsible for any balance in the hands of Orr, at the expiration of the same 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 both parties, and no separate portion had been designated or set apart for the contract of 1818. We are of opinion that the question ought to be answered in the negative, and that therefore the instruction given by the circuit court was correct. The tenth article of the contract of 1818 declared that all advances made "for and on account of the supplies to be furnished pursuant to this contract" shall be duly accounted for. Now advances made as a common fund for supplies under that and other contracts, without any discrimination or apportionment for either in particular, can in no just sense be said to be advances made for supplies "pursuant to the contract" of 1818. The whole fund might, if necessary, be rightfully applied for any purpose within the scope of either contract. The unexpended balance is not the balance of any appropriation or advances under any particular contract, but constitutes a common fund for all remaining purposes under any contract. If it were wanted for supplies for the Florida posts, there would be no pretense to say that it was a balance, for which the parties were responsible in the present suit. And if not wanted for such a purpose, still, to fix responsibility upon them according to the terms of their engagement, it must be shown that the balance was a balance, remaining unexpended, of advances under the contract of 1818. But how is that to be shown when no distinct advances were made, no distinct expenditures required, and no distinct accounts kept under that contract? To say that the parties to the present bond should be liable for the whole balance would be to say that they should be liable for advances

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made under any other contracts, and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance. Each and all of them are blended, *per my et per tout*, as a common fund. The case indeed, in the principles which must govern it, ranges itself under that large class of cases where a party, bound for the fidelity of a clerk or other agent of A, as keeper of his money or accounts, is held not liable for acts done as the keeper of the money or accounts of A and B. And in the present suit there is no difference in point of law between the liability of the principal and that of the sureties upon the bond. It is the same contract as to both, and binds both or

neither. The United States is not, however, without remedy, for there can be no doubt that an action in another form would lie against Orr for any balance, however received, which remained unexpended in his hands after the termination of the service, for which the advances were made.

The next exception is to the refusal of the circuit court to instruct the jury

"That the receipts of Benjamin G. Orr offered in evidence are *prima facie* evidence that he received the \$80,000 under the contract on which this suit is brought, and that it is incumbent on the defendants to satisfy the jury by evidence that the said advances were not made under the said contract, as stated in the said receipts, but that it was so stated by mistake or design on the part of the government and said Orr, and intended to be applicable to some other contract."

The court gave the instruction as prayed, omitting only the last clause as to the mistake or design of the parties. And we are of opinion that the instruction as given was all that the United States had a legal right to require. If the advances were not made under the contract, as stated in the receipts, the parties to the bond were not responsible therefor, and it was wholly immaterial to them how it occurred, whether it was by mistake or design or otherwise. The receipts were *prima facie* evidence that the money was received under the contract, and it was incumbent on the defendants to establish the contrary by competent proofs.

Upon the whole, the opinion of the Court is that the judgment of the circuit court ought to be

Affirmed.