

United States Vs. Dashiel

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Court : US Supreme Court

Decided On : 1866

Appeal No. : 71 U.S. 182

Appellant : United States

Respondent : Dashiel

Judgement :

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United States v. Dashiel

71 U.S. (4 Wall.) 182

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF TEXAS

SYLLABUS

1. The loss of public money by a receiver and disburser of it, through felonious taking away, though without fault on his part, does not discharge him or his sureties from obligation on his official bond.

2. Whatever system of pleading may be adopted in a court below, it can hardly justify or require the court to give an instruction contrary to law, especially where the plea relied on as the ground for such instruction constitutes no defense to the action, but is frivolous and would be stricken from the record on motion.

3. Where a plea in answer is but notice of special matter by way of abatement of the amount claimed, and so goes to but part of the cause of action, it cannot be relied on as a plea in bar.

4. A motion for a new trial is not a waiver of exceptions.

The suit was brought on the official bond of Dashiel, a paymaster in the army of the United States, and Paschall, one of his sureties, for breach of the condition in not paying over or accounting for public money that come into his hands.

The only defense set up was by way of plea or answer, and in substance is that Dashiel received of the government \$28,000 in gold, at Charleston, S.C., 15 June, 1857, for the purpose of paying off the troops at Forts Dallas and Capron, in Florida, and being compelled to stop at Pilatka several days, some \$13,000 of the money were stolen from him -- \$3,320 of which were afterwards recovered -- and insists that he is not liable for the remaining \$9,675 so lost.

On the trial the government gave in evidence properly authenticated transcripts, from the books and proceedings at the Treasury, of the account of Dashiel showing a balance against him on the 15th of September, 1858, of \$20,085.74 and costs.

The defendant then offered evidence tending to prove the loss of the money set up in the answer or notice, which was objected, to on the part of the government, but admitted by the court, and which is set out in the record.

The court, among other things, instructed the jury that

the theft or robbery, if satisfactorily proved, was a good defense, if it did not occur from any want of proper care and vigilance on the part of the officer, under which instruction the jury found a verdict for the government for the balance due, after deducting the \$9,675.

A motion for a new trial on the part of the plaintiff having failed, the case was now here; the instruction above given being the matter complained of.

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MR. JUSTICE NELSON delivered the opinion of the Court.

The question involved in this case has been already twice decided by this Court, and need not again be examined. The decisions will be found in [44 U. S. 3](#) How. 578 (*United States v. Prescott*) and [52 U. S. 11](#) How. 160 (*Same v. Morgan*).

It is insisted on the part of the defendants that as the plea was not demurred to, but went to issue, the evidence of the robbery supported it, and that the court was therefore right in admitting it and in giving the instructions to the jury. We are not advised as respects the system of pleading that may have been adopted in the court below, but whatever it may be it can hardly justify or require the court to give an instruction to the jury contrary to law, and especially when the plea itself, as it is called, constituted no defense to the action, but was frivolous and would have been stricken from the record as such on a proper motion in the court below. This plea in answer is but a notice of special matter by way of setoff, or abatement of the amount claimed against the defendants. It went only to part of the cause of action. To have constituted it a plea in bar of the action the amount beyond the sum lost should have been tendered and brought into court, setting up the theft as to the balance.

It is urged that no exception was taken to the ruling of the court at the trial, but this is a mistake. It was taken in express terms to the particular instruction in question.

It is also insisted that the motion for a new trial in the court below was a waiver of the exception. The practice is every day otherwise.

Judgment reversed and venire de novo.

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