# UNITED STATES v. QUANTITY OP MANUFACTURED TOBACCO.

Case No. 16,102.

{10 Ben. 9.}[1]

District Court, S. D. New York. June, 1878.

BONDS—SURETY—NOTICE OF DECREE—APPROVAL OF SECURITY ON APPEAL.

In an action against property for violation of the internal revenue laws, L. appeared as claimant of the property seized and gave a stipulation with O. as surety in which L. was named as proctor of the claimant. The decree in the district court being in favor of the United States, L. took the case by writ of error to the circuit court, and gave his own personal bond on the writ of error, which was approved by the judge in the usual form. The decree was affirmed by the circuit court and a writ of error was taken to the supreme court, on which L. again gave his personal bond without surety by consent of the district attorney; and this bond was also approved by the judge in the usual form. The supreme court affirmed that decree and a final decree was entered, and an order was made that notice be given to the sureties on the first stipulation to perform their stipulation or show cause why execution should not issue against them. Other proctors had during the progress of the cause been substituted for S. and this notice was served on such other proctors, who had agreed to notify O. of the entry of any decree. They failed to do so, however, and O. had in fact no notice, and an order was made by default that execution issue and it was issued accordingly. O. thereupon applied to open the default and to be allowed to come in and show cause and that the execution be set aside, claiming that the taking of the bonds on the appeals without surety and with the approval of the district attorney had discharged him, and that L. had given to the plaintiff $75,000 in government bonds as further security, which bonds it was alleged had been stolen: *Held,* that the default against the surety might be opened if he had shown any meritorious defence, but that the facts put forward by him furnished no defence against his liability on the stipulation.

D. McMahon, for petitioner.

Mr. Hill, Asst. U. S. Dist. Atty.

CHOATE, District Judge. This was an information for violation of the internal revenue laws. The claimant, C. N. Lilienthal, gave a stipulation for value with one Olwell as one of his securities in the sum of $104,000. The stipulation was in the usual form and named Stephen D. Stephens, Jr., as proctor for the claimants, to whom notice of the order or decree of this court or the appellate court was to be given. The decree in this court being for the plaintiff, the claimant took the case by writ of error to the circuit court and gave his own personal bond on the writ of error, which was approved by the judge in the usual form, he being then responsible for the amount. The decree in the circuit court was for the plaintiff and the claimant took the ease on writ of error to the supreme court and gave his own personal bond on the writ of error without surety. {Case unreported.} On this bond the district attorney made the following endorsement: "I agree to accept the foregoing bond of the claimant without sureties as a sufficient bond to secure costs in the supreme court on a writ of error to the circuit court in this action and as establishing the present sufficiency of the claimant and his responsibility for the amount of the value of the property condemned secured by bond in the district court, but not to affect the

obligation of such bond on the claimant and sureties thereon." And the attorneys for the claimant wrote under this endorsement: "The foregoing bond is understood by the obligor to be given on the terms and with the effect mentioned in the foregoing acceptance of the United States attorney." This bond was also approved by the judge in the usual form.

The supreme court affirmed the decree below and a final decree was entered and an order was made that notice be given to the stipulators in the stipulation given in this court to perform their stipulation or to show cause why execution should not issue against them. The notice was given, not to Stephens, who is named as proctor for the claimants in the stipulation, but to other proctors who had been substituted for him as proctors for the claimants and had carried on the defence of the subsequent proceedings.

It appears by the affidavit of Olwell that he had made an arrangement with these substituted proctors to be notified by them whenever they received notice of the entry of the decree, but they failed to give him notice and he had no notice in fact, and the substituted attorneys of the claimant did not attend upon the return of the order to show cause.

Olwell, one of the sureties in the stipulation, now moves to open the default and to be allowed to come in and show cause why execution should not issue against him, and he also moves that the execution be set aside. If the surety showed any meritorious grounds on which if the default were opened he could be relieved, it would be proper to grant the motion to open the default, as it appears that he had no notice in fact. There was no irregularity in serving the notice on the substituted proctors for claimants. They were the proper persons to receive the notice. The surety so understood it himself, as is shown by the arrangement made with them for notice from them to him.

The only grounds on which upon the merits the surety claims to be relieved are:

that the plaintiff by taking the bonds of the claimant without sureties on the appeals discharged the sureties in the stipulation; secondly, that the qualified consent or acceptance endorsed by the district attorney on the bond given on error to the circuit court discharged the sureties in the stipulation; and thirdly, that the giving by the claimant to the plaintiff of $75,000 in government bonds as further security after the execution of the stipulation, which further security it is alleged was exacted by the plaintiffs as a condition to their giving their consent to the claimant's continuing his business, discharged the sureties in the stipulation.

As to the first and second grounds it is clear that the bonds taken complied with the statute, which provides that "every justice or judge signing a citation or any writ of error, shall, except, etc., take good and sufficient security." Rev. St. § 1000. The question of the sufficiency of the security must be determined by the judge. Brockett v. Brockett, 2 How. [43 U. S.] 258. There is no statute requiring one or more sureties if the bond offered is approved as sufficient. And if the bond is approved as sufficient it is immaterial that the district attorney may have assented to it, or may have given a qualified or restricted assent.

The position taken by Olwell is that by taking bonds without sureties and bonds thus assented to by the district attorney without his (Olwell's) assent, the terms of the undertaking in which he was bound as surety were altered, or at least that there was an implied covenant on the part of the United States with him that they would not take any proceedings with the principal which would increase the risks of the sureties or affect their remedy against the principal; that when Olwell entered into the stipulation for value it contemplated that he must pay when the district court rendered judgment of condemnation, or when the appellate court so ordered, if any appeal intervened;—that the appeal contemplated was the usual appeal with the usual security to stay the judgment, if there should be a stay, as provided for under existing laws; that it contemplated the giving of bonds on appeal with sufficient sureties, whose obligations would enure to the benefit of the sureties in the stipulation given below as between, them and the principal.

If the petitioner were entirely correct in his view of the rights of the surety as to the implied covenant that the bond on appeal should be a proper, bond according to existing law, it is entirely clear that the appeal was in the usual form and the security taken on appeal was such as existing laws provided for. It is not necessary therefore to consider whether the mere neglect of the government to enforce the decree below pending the appeals would have discharged the surety if it had appeared hat one of the bonds given on appeal had been defective and such as would not operate as a supersedeas.

As to the alleged deposit of bonds, if it was made and the bonds were afterwards stolen, as the affidavits tend to show, it is not perceived that the deposit or the loss of the bonds can have had any effect upon the obligation of the sureties in this stipulation.

Motion denied.

[1] {Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.}