

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

 *
 THE UNITED STATES OF AMERICA, *
 *
 Plaintiff in Error, *
 *
 -VS- *
 *
 FREDERICK A. BEE, et al., *
 *
 Defendant in Error. *
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Writ of error to the Circuit Court for the
Northern District of California.

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Charles A. Garter and W. G. Witter, Esqs., for Plaintiff
in Error;

Thomas D. Riordan, Esquire, for Defendant in Error.

Before
McKENNA and GILBERT, Circuit Judges, and HAWLEY
District Judge.

By the Court,

G I L B E R T, Circuit Judge:

This case involves the construction of Section 1740, of the Revised Statutes of the United States, which reads as follows:-

"Sec. 1740. No Ambassador, Envoy Extraordinary,
"Minister Plenipotentiary, Minister Resident, Commissioner,
"Charge d'Affairs, Secretary of Legation, Assistant Secretary
"of Legation, Interpreter to any Legation, or Consulate, or
"Consul-General, Consul, or Commercial Agent, mentioned in
"schedules B and C, shall be entitled to compensation for
"his services, except from the time when he reaches his post
"and enters upon his official duties, to the time when he
"ceases to hold such office and for such time as is actually
"and necessarily occupied in receiving his instructions, not
"to exceed thirty days, and in making the direct transit be-
"tween the place of residence, when appointed, and his post
"of duty, at the commencement and termination of the period
"of his official service, for which he shall in all cases
"be allowed and paid, except as hereinafter mentioned. And
"no person shall be deemed to hold any such office after his
"successor is appointed and actually enters upon the duties
"of his office at his post of duty, nor after his official
"residence at such post has terminated, if not so relieved.
"But no such allowance or payment shall be made to any Con-
"sul-General, Consul, or Commercial Agent, not embraced in
"Schedules B and C, or to any vice-Consul, Vice-Commercial
"Agent, Deputy Consular, or Consular Agent, for the time so
"occupied in receiving instructions, or in such transit as

"aforesaid; nor shall any such officer as is referred to in
 "this section be allowed compensation for the time so occupied
 "in such transit, at the termination of the period of his of-
 "ficial service if he has resigned or been recalled there-
 "from for any malfeasance."

In June 1874, S. A. Foster, who was residing at Apia, in the Friendly Navigators Islands, received notice from the Department of State to proceed to San Francisco and there to await his instructions and commission as consul at Apia. He left Apia on July 3rd, 1874, and arrived in San Francisco August 21st, 1874. On Sept. 14, 1874, he received notice of his appointment as consul and took his oath of office, executed his bond and on the following day forwarded the same to Washington. On Nov. 18th, he sailed for Apia where he arrived on Jan. 1st, 1875. He immediately entered upon the discharge of his duties as consul and continued to act as such until Sept. 28th, 1876.

On July 3rd 1875, he notified the Department that he had drawn ^{for} ~~from~~ one years salary from July 1st, 1874 to July 1st, 1875 at \$1,000. per annum. The draft was forwarded to the Secretary and was paid. In Sept. 1875 on an adjustment of his accounts the department decided that he was not entitled to salary prior to January 1st, 1875 except for the time he was awaiting instructions to-wit: from Sept. 15th, 1874 to Oct. 14th, 1874, and for the time occupied in transit from Nov. 14th, 1874 to Jan. 1st, 1875 and fixed the amount due from him on account of over payment at \$298.93. After this adjustment Foster continued to make drafts for his salary and the drafts were regularly paid without deduction of the

of the amount which was claimed to be due. Foster's term expired in September 1876 and he died in 1877. The matter rested thus for twelve years, when the account was again adjusted and Foster was allowed a credit of \$85. for errors made by himself in drawing his drafts, and this action was commenced in the District Court against Foster's bondsmen to recover \$213. A judgment was rendered in the District Court in favor of the United States for that amount and on writ of error to the Circuit Court that judgment was reversed. Whereupon the cause was brought on writ of error to this Court.

The case is presented on an agreed statement of facts. The defenses ~~is~~ made to the action are threefold; first that Foster was entitled to all the money paid him, second that the terms of the bond do not render the sureties liable for the money, third that the negligence of the Treasury Department was of such a character as to release ~~them~~ ^{sureties}. So far as the first defense is concerned it is sufficient to say, the statute is plain and susceptible of but one interpretation, ^{and the stipulated facts.} under its provisions there can be no question that Foster was overpaid, ~~to~~ the full amount sued for.

Does the bond by its terms hold the defendants liable for this money? Their undertaking was that Foster should "truly and faithfully discharge the duties of his said office according to law and truly and faithfully pay over and deliver up all moneys etc., which shall come into his hands".

It would be a narrow and unreasonnable interpretation of this instrument to say that it held the bondsmen liable for moneys that came into Foster's hands from without holding the defendants liable. The money having other sources, but that it did not hold them liable for moneys that the Government might overpay him for salary.

The money having

been received by Foster in excess of the salary then justly due him, it was his duty to repay the excess to the Government. The performance of that duty and the accounting for this money ~~was~~ ^{were} just as fully secured to the United States by the terms of the ~~en~~ bond as was the discharge of any ~~other~~

duty pertaining to his office. *or the payment of any other money that might come into his hands as such officer*

neither

~~does~~ The negligence of the Treasury Department ~~does not~~ release the sureties. It is true, as urged, that the officers of the Government might have refused to pay the overdraft in the first instance, and it was their duty to have deducted the over payment from ^{the} his subsequent ^{drafts for} salary. If the obligee in the bond were any other than the Government this defense ~~would~~ ^{might} avail in behalf of the sureties. But the neglect

of the United States officials does not excuse Foster's wrong in the first instance in drawing for more money than was due him or his subsequent failure to refund the same.

All the property of the United States is held in trust for the people and it is now well settled ~~by numerous decisions of the Supreme Court~~ upon grounds of public policy that the public interests shall not be prejudiced by ^{the neglect of} the officers or agents to whose care they are confided.

United States -vs- Nashville Railway Co., 118 U.S. 120.
Van Brocklin -vs- Tennessee 117 U. S., 151. United States
-vs-Insley 130 U. S. 263.

The judgment of the Circuit Court is reversed with instructions to enter judgment for plaintiff and for costs.