PETITION

OF

JOHN ROBERTS,

PRAYING

To be released from liability as surety of Morrison and Wheeler, under a contract with the Government for a supply of arms.

DECEMBER 28, 1838.

Referred to the Committee of Claims, and ordered to be printed.

To the Senate and House of Representatives of the United States of America in Congress assembled:

Your petitioner, John Roberts, of the county of Rappahannock, in the State of Virginia, represents to your honorable body,

That more than thirty years past he became bound as one of the sureties of Caleb Morrison and —— Wheeler, contractors with Tench Coxe, purveyor of public supplies, for the manufacture of 2,500 stand of arms; that he entered into that security with reluctance, and undertook only the legal liabilities which the bond itself called for and imposed. These were distinctly set forth in the contract itself, for the execution of which, bond was given in the usual penalty in like cases; that in violation of the terms of the contract, and in departure from it, heavy advances were made to the said contractors, Morrison and Wheeler, by the agent of the Government, without the privity, consent, or knowledge of the sureties to the bond aforesaid. And after such advances in money were so made, the said contractors delivered a parcel of arms, in part execution of their undertaking; when, instead of applying the proceeds of the contract value of such delivery, in part extinction of the advance, for which the sureties were said to be liable, the said agents of the Government not only made the contractors payment for said arms so delivered, but augmented the advance to them, and devolved a responsibility upon the said sureties, of which they were utterly ignorant, and to which they would never have assented had they known it.

When, however, the failure of the said contractors in this proceeding between the agents of the United States and themselves was made known to the sureties aforesaid, your petitioner, uninformed of the facts which would, in operation of law, have released the said sureties, called on the then Secretary of War, (Dr. Eustis,) and, demanding to know what was neces-

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sary to be done, was answered, that the Government wanted the arms, and that the sureties must go and make them or have them made. Hard as was this demand, they resolved to fulfil and perform it. They returned home, employed an artisan skilled in the making of arms, went into the money market, borrowed a sum of money ($2,000) at heavy interest; put the same into that artisan's hands, and incurred other expenses in putting his labors into effective operation. The papers were necessary to fix the calibre, size, shape, form, fashion, and finish of the arms, with their accoutrements; and application after application was in succession made and repeated to the officers of the Government at Washington, and, by their request, to the law officers at Richmond, the seat of the federal court, (whither they had been sent for suit,) all of which was abortive and fruitless, and until their sub-contractor, wearied of delay and disappointment, abandoned the attempt, left the country, defied the demand of the sureties for the return of the $2,000; insisting, with truth, that the delinquency was not in him, but in the sureties, and indirectly in the Government itself or its functionaries. Thus this effort to obey the rescript of the War Department cost them considerably more than the said $2,0000, all of which they have lost. The sureties then resolved to make their defence at law to the suit of the Government, then pending; and one of them, namely, this petitioner, made a call on George Hay, Esq., then United States attorney for the district of Virginia, for the papers, and likewise to the clerk, (for the writ was all that could be seen in the archives of that court.) Mr. Hay promised them to be forwarded by mail to the address of this petitioner, which he failed to do; and this failure provoked and induced another trip on his part from the mountains to the seat of Government; and when he was at Richmond, upon his last call, he was referred by Mr. Hay to William Marshall, Esq., clerk of that court, when he was told by Mr. Marshall that he was luckily out of the scrape; that the papers were all lost, and that he never would hear again of it. Thus lulled into security by the failure in all the promises of the agents of the United States, and especially by the assurance of Mr. Hay and Mr. Marshall, and, subsequently, upon a casual inquiry by the late Mr. Wirt, then United States attorney for the same district, the sureties gave entire credence to the declarations of these agents, and believed they were rid forever of all the troubles, perplexities, and vexations, with all liabilities or perils of loss of every kind whatsoever. Many years after, by the misapplied zeal and assiduity of an able law officer of that Government, the papers were regained; and without notice to any one, when even the attorney of the sureties, originally relied upon, had gone down into his grave, a judgment was most wrongfully obtained on the bond. They went into a court of equity, under the conditions that are imposed on all parties going as plaintiffs into chancery, and the injunction was perpetuated, except as to the amount of such advances, which it seemed the United States determined to wring from them at every hazard, and in manifest violation of that enlarged equity which rests in the moral stability of justice, and which should be the rule for action with all sovereignty. Even after this, the delay of the Government in its most unwarrantable procrastination and indulgence, disarmed this petitioner of his main defence from harm and injury.

When this petitioner entered into this engagement, with that reluctance which he has heretofore expressed, it was upon condition that he should be indemnified by one John Morrison, (the brother of the contractor, Caleb

Morrison,) which said John Morrison was then a man of large estate, free from incumbrance of debt and embarrassment. The records of the courts exhibited no proof of the least indebtedness on his part; and his opulence had rung into proverb, from the rumors of the neighborhood in which he dwelt.

This shield of defence for the estate and responsibility of your petitioner, was guarantied by instrument of writing, subscribed by said John Morrison, so as to place it beyond all reach for legal cavil or quibble. It was, moreover, acknowledged on oath by said Morrison, near twenty years ago, in a suit where the United States, the sureties of Morrison and Wheeler, and many others, were parties; *and that acknowledgment was notice to the United States* that its duties (as founded in justice and confirmed by law) called for all zeal and diligence, in prosecuting its claim to a full and speedy recovery. Now it has happened, in the reverses of fortune, that the opulence of the said John Morrison is all gone; that his riches have disappeared, in the delays and procrastinations of the United States; whilst that Government holds and seeks to enforce against this petitioner a demand—wrong in its inception, for the advances are not within the purview of the bond—wrong in its delinquency to supply the papers to execute the contract—wrong it its failure to exhibit its pretensions in its own court, where it had called, by peremptory invitation, the sureties to meet and receive justice—wrong in the delusion (however honest) put upon the parties by its own attorney and its own clerk, in imparting the belief that the cause was forever at an end by the loss of the papers, which delusion influenced and prevailed over the defendants, until two attorneys (Hay and Wirt) had passed into and out of office, and until the hand of death had removed the attorney of these parties from the post where he might have warned them of their danger—and to all these may now be added the multiplied and crowning wrong, to make innocent and unoffending parties pay for a misdeed claimed, (as sounding in *tort*,) when they have alone been vigilant and active, and torpor and inertion have been the mischievous handmaids of a plaintiff, who must succeed, if success now awaits him, from his own negligence and default.

Your petitioner will add, in conclusion, that he never was a party to the petition of Messrs. Ward and Ficklen, before the House of Representatives, and to whom many years of indulgence have been given, at their solicitation and request. But he does think, that the judgment now subsisting against all the parties, is in such striking and manifest dereliction of justice, honor, and good faith, that it will never be enforced against those who have done no wrong, and have known no wrong, by a Government against its own citizens, who are more, and much more, "sinned against than sinning."

That provision may be made, by law or resolution, releasing and discharging the judgment in the premises mentioned, your petitioner now asks; and he, as in duty bound, will ever pray.

JOHN ROBERTS.

First. Major Roberts is released from all liability to the United States, because, without his consent, indulgence has been given, in the case of Morrison and Wheeler, upon the application of Messrs. Ward and Ficklen, for nine years, in which application Roberts was no party. The delay was in pursuance of a report of the Judiciary Committee of the House of

Representatives, and in the letter of the chairman of that committee to the Solicitor of the Treasury, Morrison and Wheeler were the contractors and debtors to the Government. John Morrison, the brother, by instrument of writing, was to stand in advance of Roberts, should there be liability or loss, and the delay now in the prosecution of the debt to its recovery, is at the instance, and in the petition, of Ward and Ficklen, who hold by purchase immediately under and through the same John Morrison. The leading case in Virginia, which assures the irresponsibility by release (in this indulgence to Ward and Ficklen) of Major Roberts, is that of Baird and Rice in one of the volumes of Call's reports; the last I have seen is that in a late volume of Leigh, Vass *versus* Ward.

Secondly. The lapse of time between the defalcation of the contractors (Col. Morrison and Wheeler) and any notice to the sureties that there was any demand made or to be made on them for reimbursement or indemnity, is in itself enough to claim an *exoneration* from the Government; nearly a tenth of a century had passed away in which the securities were ignorant of any default in their principals, (if there were default at all;) and it may be seen, in a communication from Postmaster General McLean to the Senate, as well as I remember, in 1827–'28 a principle is there laid down, which is founded in justice, and was sanctioned by the Senate, that securities (unless notified thereof) ought never to be held liable to the Government more than two years after the defalcation of any agent or contractor. The fact of the default was known to the United States and the contractors only. The secret is locked up in their breasts; no disclosure is made to the sureties, who little dream, in their sleep of confidence and ignorance, that they are liable for large amounts clandestinely withheld from their knowledge by the culpable silence of the Government, and the guilty suppression of truth by both Government and parties.

The report from the Judiciary Committee to the Senate reassured this just principle of Postmaster McLean, and that report, I believe, was enacted into law for future cases, and I know that it was the work of Mr. Van Buren, then chairman of that committee, and now President of the United States.

Thirdly. The loss by this delay, should any part of it fall on Major Roberts, would be fraught with greater injustice, as he had the indemnity, before alluded to, in the written guarantee of John Morrison, who was opulent (and responsible in his opulence) for twenty years after the default of the contractors to the Government, the torper and inertion of whose officers should, in themselves and for this cause alone, absolve Roberts from all liability, but the facts asserted will carry the responsibility of that inertion into a deed of possible wrong, should his, Roberts's, liability be pressed and sustained. In 1809 or '10, when the spell of confident security was broken, in which Roberts remained till then, he travelled to Richmond on two several occasions to see the United States attorney for the Virginia district, (George Hay, Esq.,) to know from him how far he was bound for any money in this behalf, to the end that he might protect himself from loss by the active use of the guarantee he held, and which was then good. The said attorney repeatedly promised to let him see the papers, but never fulfilled that promise further than to assure Major Roberts that he would place them in the hands of the clerk where he (Roberts) might call the next day and see them, thus interposing the agency of the clerk of the court to bear him good or ill tidings in reply to the inquiries

he was prosecuting. Major Roberts called on the clerk, who was Mr. William Marshall, a most estimable and honorable man, in conformity with Mr. Hay's suggestion, and was told by him (Mr. Marshall) that he, Roberts, was luckily released from loss or trouble about it; that the papers were lost, and that he would never again hear any thing of the case. Thus confident in these assurances, more than another tenth of a century rolled by before he learned accidently, through a friend in Richmond, (*after judgment* had and execution issued,) of the delusion in what he had reposed, and which had been put over him by the United States and its agents, that he was in the most serious peril of heavy loss by the rendition of this judgment against him. An application for information was also made to Mr. Wirt, which was answered, that he, Mr. Wirt, knew nothing about it.

Fourthly: After more than twenty years of supineness and neglect in the creditor party; after death and insolvency had closed in on the contractors and most of the sureties; the vigilance and zeal of a late United States attorney for the eastern district of Virginia, regained the papers and prosecuted the suit to judgment without notice to the defendants. No lawyer is better skilled than he in the rules of those courts where sloth, by one of its maxims, can receive no favor, and where the flush and pride of triumph ought not to overthrow the justice and good sense embodied in the rule *vigilantibus non dormientibus leges subvenient:* and there cannot be a case where justice will be served more truly than by adhering to this maxim.

Fifthly: The only property responsible to execution, in real estate, in the hands of persons who are innocent purchasers without notice, or such as are implicated by the culpable delay and concealment of the United States: and this remark is repeated, only to advance a principle of law founded in ancient practice. To charge the lands, the plaintiff should, within a year, have entered his election to do so on the records of that court in which judgment was rendered; and this is in coherence with that equity and fair dealing which required this notice to be waived that the estate of the defendant was liable to the debt by writ of *elegit;* the rule in this country as in England, where like usage and law prevailed, would have said to the buyer of such lands *caveat emptor:* and this was laid down by the supreme court of appeals to be law in the case of Eppes and Randolph in Henning and Munford, or Munford's reports, which rule made the law of this identical case, when decided by the late Chief Justice Marshall, in the circuit court of Virginia; reversed, however, upon a later decision of the Virginia court of appeals, in a question of *elegit*, in which that is asserted to be, and is set forth, *as law*, which had not before been known to be law. This novel decision was made between the judgment of Chief Justice Marshall, in the Virginia circuit, and that of the Supreme Court, at Washington, upon an appeal. It is now believed, (with some color for probability to this belief,) that the Virginia court of appeals is hastening back to the law, in like cases, as expounded and adjudged in the case of Randolph and Eppes, and retracting its judgment to the ancient practice. It ought not, however, to avail the United States, as this would be giving a bounty to its own *laches*, and thus conflict with another *settled, and as yet unsettled*, rule of law. For, had the United States prosecuted its recovery in any reasonable time, (less than a quarter of a century,) the law, as known from the judgment of the highest State court, would have exonerated the liability of the lands, unless the election of the creditor, to charge them, had been made by

him matter of record within his year, and, therefore, notice to the world. But, as it is, the United States (whether from supineness or fault) lie by in ambush until death and insolvency overtake the real delinquents, and until, by judicial legislation, under the mask and name of construction, new law is made for the case; and then the United States briskly pounce upon parties, (ignorant of danger through the acts of their adversary,) and attempt their ruin and destruction. Justice forbids it, and provision to forbid it should be made by law.

Sixthly. If critically scanned, there is nothing in the words of the bond itself, subscribed by the sureties, which can or ought to fix their liability in this case.

Morrison & Wheeler contracted with the purveyor of public supplies to make 2,500 stand of arms, to be inspected by some proper officer of the United States when made, and to be paid for when delivered, inspected, and received. The sureties are bound in bond with collateral conditions for the execution of this contract only. There is no language in the bond nor contract that points to or justifies the contractors in demanding any advance of money, and the United States, in making such advance, did so on its own responsibility. So far as the sureties are concerned, neither the letter nor tenor of their bond justify, sanction, or require it. So for from it, the United States contract only to pay for the arms, after a fixed rate of price, when those arms have passed both inspection and delivery. Yet, without the consent or knowledge of the sureties, and without a stipulation to warrant it in the bond, a heavy advance of money is made; and when a portion of the arms were delivered after this advance, (as is said and believed,) instead of applying the amount in value of the arms so delivered in liquidation and discharge of such advance, the Government paid them for the arms then inspected and delivered, in money, leaving the advance still due and unsatisfied, and now endeavor to bind, not the contractors only, but their uninformed securities, who remained for years in ignorance of this fact.

Had defence been made at law, judgment could never have gone against the sureties; and it was not made because the public officers, speaking the voice (and it should be presumed the will) of the Government, said to one of the defendants, near thirty years ago, that the papers were lost; that he was luckily out of the scrape; and that he would never hear of it again.

Mr. Hay, the attorney, and Mr. Marshall, the clerk, of the United States court, have been already referred to, and to these may be added the name of the late Attorney General, Mr. Wirt, then attorney for the district of Virginia, who, on inquiring, confirmed this impression in the mind of Major Roberts.

The highest immunity which belongs to sovereignty is that of never doing wrong. Privilege and duty are, in this particular, wedded into one. And that which would be gross injustice between individuals, becomes a more aggravated wrong when practised by any Government upon its own citizens, to whom it must always owe the obligation of protection and defence.