No. 236.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

J. F. McMURRAY, PETITIONER,

VS.

THE CHOCTAW NATION OF INDIANS AND THE CHICKASAW NATION OF INDIANS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Petitioner and respondents have heretofore filed briefs in conformity to Rule 25 of this court; and this is in reply to the brief for respondents.

In its "Special Findings of Fact" and "Opinion" the court of claims has arranged and passed upon the claims of petitioner and the counterclaim of respondents in the following order:

The Chickasaw Freedmen Case,
Expenses Incident to Court Claimant Cases,

The J. Hale Sypher Case,
The Eli Ayres Claim,
The Incompetent Fund,
Tribal Taxes,
The Bonaparte Opinion and
Coal Mining Leases,

and the briefs heretofore filed, by both petitioner and respondents, have conformed to this arrangement.

This reply brief will, therefore, conform to the same arrangement; and it will set forth only what is deemed necessary in reply to the brief for respondents.

The Chickasaw Freedmen Case.

Petitioner's brief, heretofore filed, fully sets forth the contentions upon which he relies; and no reply to the brief of respondents is deemed necessary.

Expenses Incident to Court Claimant Cases.

The law (Sec. 33 of the Act of July 1, 1902, 32 Stat. 641 R. 4) is relied upon as decisive of what Congress and the Indians intended regarding the payment of these expenses; and petitioner's contentions as to its proper construction are fully set forth in his brief heretofore filed.

The "Special Findings of Fact" and "Opinion" of the Court of Claims (Finding XIV, R. 105-6; Finding XVII, R. 111; Opinion, R. 136-40; Opinion, R. 149-50) make plain the conditions and circumstances under which this great undertaking was entered upon and consummated. The Indians contended that some four thousand adventurers were in wrongful possession of their tribal property of the value of many millions of dollars. Naturally, they were anxious to upset them and regain the property. The Government cooperated by creating the Choctaw and Chickasaw Citizenship Court. The cases were retried and won and the property thus regained was restored to the tribes.

Section 33 of the Act of July 1, 1902, was the joint expression of both the Government and the Indians as to what expenses should be incurred and paid in the trial of these cases. It was passed by Congress and ratified by a vote of the Indians; and it thus became what is known as the "Choctaw and Chickasaw Supplementary Agreement."

The wording of this law would seem to be clear and susceptible of no misconstruction. It *says* that "*all expenses* necessary to the proper conduct, on behalf of the Nations, of the suits and proceedings * * * *shall be incurred* under the direction of the executives of the two said Nations* * *" (Italics ours).

Now, after a lapse of more than twenty years, during which these expenses have remained unpaid, it is easy for those who have no understanding of the problems and difficulties of those trying times to theorize and speculate upon what usages and customs might or might not exist elsewhere regarding expenses payable by attorneys and clients under other conditions and in other jurisdictions.

The question here is, what does the law *say*, which was agreed upon and passed by the interested and re-

sponsible parties; and what is the fair construction of this law, in the light of what the record shows of the intention of these parties regarding the payment of these expenses.

The intention of the Indians (who were the owners of the property sought to be recovered and restored) is shown by the action of their Chief Executives in directing that these expenses be incurred and in approving the accounts for payment (Finding XVII, R. 111).

Their intention is further shown by the action of the Chief Executives in signing notes upon which the moneys for these expenses were temporarily provided. The loans thus made were carried with the understanding that they would be paid when the accounts were approved and paid, under the law. When payment was delayed and the loans became due they were paid by the attorneys (R. 25-27).

The Choctaw and Chickasaw Citizenship Court was the special tribunal of the Government, created by the Act of July 1, 1902, and appointed by the President. What was its understanding regarding the payment of these expenses? The record clearly shows the intention and understanding of the Citizenship Court; and that, in fixing the fee of the attorneys and in saying that the fee allowed was "in lieu of all expenses save and except such as are provided by law, as set out in Section 33 of the Act of July 1, 1902," it had in mind the expenses incurred by the attorneys *before* the passage of the legislation and *before* its creation; and not to the expenses incurred *after* its creation, in the trial of the cases. An examination of this record leaves no doubt

that the Citizenship Court had in mind that all expenses incurred by petitioner's firm in the trial of Court Claimant Citizenship cases were to be paid *under the law* (R. 30-32).

The J. Hale Sypher Case.

Petitioner's brief, heretofore filed, fully answers the contentions of respondents regarding the jurisdiction of the court of claims and no further reply is deemed necessary.

Respondents assert that the court of claims has held that this claim is without merit. Finding XVIII (R. 114-15) contains the following:

> "* * * The firm of Mansfield, McMurray & Cornish was verbally requested by the Principal Chief of the Choctaw Nation to look after the matter and make the proper defense against the claim, the said Principal Chief stating at the time that he had no definite authority to pay for such services, but that said Nation would pay reasonable compensation for the services rendered;"

and also

> "* * * The fair value of the services of the firm of Mansfield, McMurray & Cornish to the Choctaw Nation in connection with the said Sypher claim was $3000.00, which with interest thereon at the legal rate of 6% per annum to July 1, 1926, would amount to $6,845.00;"

and also

> "No payment has been received by said firm or by the plaintiff, McMurray, on account of said services by the firm."

The contentions of respondents regarding the alleged general attorneyship status of petitioner's firm are fully answered in petitioner's brief heretofore filed.

Irrespective of what relations existed between petitioner's firm and the Choctaw Nation, the legal services rendered in the Sypher case were concluded by the final decision of the Court of Claims on February 20, 1905 (R. 114-15), after all payments to the firm had ceased.

Respondents assert that this claim and other claims included in this suit were not presented for payment until many years after the services were rendered; and they imply, thereby, that the petitioner should be penalized. The petitioner was active, throughout the years, in his efforts to collect these claims as best he could, and the Court of Claims so holds in its Opinion (R. 132) as follows:

> "* * * taking the transaction as it took shape before Congress and the Interior Department before the Acts were passed, it is manifest that the plaintiff was seeking to collect what he believed he was entitled to receive, but without the right to assert his claims in a court. The controversy between him and the defendant Indians was an old and prolonged one, the Indians disavowing any indebtedness at all, and refusing until this suit was brought to pay a single one of his many claims;"

and also

> "The Secretary of the Interior declined to intervene and attempt any adjustment of the difference. Congress with plenary authority over Indian tribal lands and funds, with full knowledge of the status of affairs, sends the controversy to this court to adjudicate upon the basis of 'such amount or amounts as may be found to be due thereon' * * *."

There were substantial reasons why compensation for these later services could not be collected from the Indians. Questions arose as to the regularity of issuance of tribal warrants and investigations were made by the Government which resulted in bringing the administration of financial affairs, by the tribes, to an end. This is set forth by the Court of Claims, in its Opinion (R. 149-50) as follows:

> "* * * This event (fixing the fee of petitioner's firm in Court Claimant Citizenship cases) following a protracted and acrimonious contest for the right of enrollment and participation in the allotment of the Indians' vast and rich estate which the attorneys mentioned had most successfully defended, seems to have furnished an occasion for an attack upon the lawyers from almost every angle of their activity. First, agents of the Indian office were dispatched in 1905 to Oklahoma charged with investigating alleged irregularities in issuance of tribal warrants. Then following resort to the criminal courts. A grand jury indicted the firm of lawyers and the Governors of the two Nations. Investigations looking toward a prosecution of the indictments were made by eminent representatives of the Department of Justice, and finally by the Hon. Charles Nagel, of St. Louis, chosen as special in-

vestigator, resulting in an express order from the Department of Justice to *nolle* the same. On November 16, 1907, civil proceedings were instituted in the United States District Court for the central district of Indian Territory to recover from Mansfield, McMurray & Cornish all sums theretofore paid the firms under the circumstances put in issue in this case by the counterclaim. This case, after remaining for almost two years on the court's dockets, was finally dismissed by the plaintiff, the Department conceding inability to recover. On April 24, 1911, Attorney-General Wickersham advised the Secretary of the Interior against preferring as a counterclaim the identical sums herein involved as a set-off against the plaintiff's demand for payment of certain other sums claimed as legitimate expenses due. The House of Representatives appointed a special committee to investigate Indians' contracts on June 25, 1910, and every detail of these transactions relied upon in this case was carefully gone over and full report thereon duly made. Considering the fact that the services of Mansfield, McMurray & Cornish, rendered for the benefit of the Indians, terminated in March, 1907, nineteen years ago, during which period every available resource of the government and the Indians was employed in a joint effort to attach illegality to the transaction involved, it seems almost incredible to find the identical contentions again raised in an effort to defeat the claim for attorney's fees which the defendants conceded to be legal and allowable and in opposition to another which the defendants paid in cash while this suit was pending. We refer to the unpaid Chickasaw warrants paid after the institution of this suit and eliminated herefrom. Whatever of doubt existed as to the legality of the payments made in accord with Indian acts not approved by the President seems to have been resolved in favor of the firm of attorneys receiv-

ing the same by the governmental agencies clothed with power and authority to investigate, and conducting the investigation at a time substantially contemporaneous with the transactions involved."

Petitioner could take no steps toward enforcing payment of these claims, by suit, until Congress saw fit, in its wisdom and own good time, to grant him the right to sue; and this right was first granted by the jurisdictional acts of May 25, 1918 (R. 96-98) and July 19, 1919 (R. 99-100). Under these acts this suit was promptly filed.

Upon this state of facts it would seem, therefore, that the case of *Winton* v. *Amos,* (255 U. S. 373) and other cases therein cited, would be decisive of the contention that legal services were rendered which resulted to the benefit of the Indians and for which they are liable for payment. This contention and the application of the cases cited are fully set out in plaintiff's brief heretofore filed.

The Eli Ayres Claim.

Petitioner's brief, heretofore filed, fully answers the contentions of respondents regarding jurisdiction; and the same is also true as to the alleged general attorneyship status of petitioner's firm.

Respondents assert that the Court of Claims has held that this claim is without merit. Finding XIX (R. 115-16) contains the following:

"* * * in 1902 or 1903 the Governor of the Chickasaw Nation, upon being notified of the

pendency of said claim before Congress, verbally requested the firm of Mansfield, McMurray & Cornish to investigate the claim and protect the interests of the Chickasaw Nation in the matter, stating that the firm would be paid for such service";

and also:

"Pursuant to said request the firm of Mansfield, McMurray & Cornish appeared before committees of Congress in which the claim was pending in defense of the Chickasaw Nation against the claim, and upon the reference of the claim by Congress to the Court of Claims by Act of February 24, 1905, said firm represented the Chickasaw Nation in the trial of the case in said court, which was concluded by the judgment of the court rendered December 14, 1908, holding the plaintiffs in the case not entitled to recover against either the Chickasaw Nation or the United States";

and also:

"The value of said services of the firm of Mansfield, McMurray & Cornish was $4000.00, which, with interest thereon at the legal rate of 6% per annum to July 1, 1926, would amount to $8,211.33."

Irrespective of whatever relations existed between petitioner's firm and the Chickasaw Nation, the services rendered in the Ayres claim were concluded on December 14, 1908, long after all payments by the Chickasaw Nations had ceased.

Respondents assert that petitioner made no effort to collect this claim until many years after the services were rendered and imply, thereby, that he should

be penalized. Answering this assertion reference is made to what has been said, above, on that subject, in connection with "The J. Hale Sypher case."

The facts, in this claim, are practically the same as in the "The J. Hale Sypher case" and the holding of this court in the case of *Winton* v. *Amos*, (255 U. S. 373) and other cases therein cited, regarding the liability of Indian tribes for payment for services beneficially performed, would apply with equal force.

The Incompetent Fund.

No Reply.

Tribal Taxes.

Petitioner's brief, heretofore filed, fully sets forth his contentions regarding jurisdiction; and no further reply to the brief for respondents is deemed necessary. The same is also true regarding the alleged general attorneyship status of petitioner's firm.

Answering the assertion of respondents that this claim was "first asserted after this suit was commenced and in an attempt to meet the counterclaims of the Nations" reference is made to what has been said, above, on that subject, in connection with "The J. Hale Sypher case."

Petitioner's contentions that valuable services were rendered and the liability of the Indians for payment for services beneficially received are fully set out in his brief heretofore filed.

The Bonaparte Opinion.

The contentions of respondents regarding jurisdiction are fully answered in petitioner's brief heretofore filed.

Respondents assert that the services of petitioner's firm were of little value. Finding XXII of the Court of Claims (R. 119-20) contains the following:

> "* * * Under direction of the executives of said Nations the firm of Mansfield, McMurray and Cornish contested said opinions and rulings, and finally secured their reference to the Attorney-General of the United States for his opinion thereon, upon which opinion they were subsequently reversed by the Interior Department";

and also:

> "During the time said services were being rendered by Mansfield, McMurray & Cornish said firm was in the regular employ and pay, at $5000 per year, of the Chickasaw Nation as its attorney in citizenship matters, such employment being under contract with the Nation authorized by an act of the Chickasaw counsel approved by the President of the United States, and no claim is made by the plaintiff for further compensation from said Nation. At the time said services began, about June 1, 1905, the employment and pay of said firm as citizenship attorney for the Choctaw Nation had been discontinued, and the only authority the firm had for the rendition of such services for the Choctaw National was a request by the Principal Chief of said National therefor, with his statement that the services would be paid for. The expenses of the firm incident to the rendition of said services were paid by the Choctaw Nation, but no payment for said services has been made. The officers of the Interior Department had knowledge at the time of the performance of these services by the firm, but no written contract was ever entered into by the parties for such services either with or without the approval of the Commissioner of Indian Affairs and the Secretary of the Interior";

and also:

> "Said services terminated on March 4, 1907, and were of a fair and reasonable value of $8,770.00, which with interest thereon at the legal rate of 6% per annum to July 1, 1926, would amount to $18,938.82."

Answering the assertion of respondents that "petitioner's firm never presented any claim to the Nations for compensation for more than eleven years and then only in an effort to meet the counterclaims of the Nations asserted in this suit" reference is made to what has been said, above, on that subject, in connection with "The J. Hale Sypher case."

These services were concluded on March 4, 1907, long after all payments to the firm, by the Choctaw Nation, had ceased. They resulted to the benefit of the Indians and should be paid for, under the holdings of this court, in the *Winton* v. *Amos* case and other cases therein cited, above referred to, and more fully referred to in petitioner's brief heretofore filed.

Coal Mining Leases.

The contentions of petitioner regarding this counterclaim are fully set out in his petition and brief, heretofore filed.

Certiorari for Diminution of the Record.

Respondents assert that petitioner's motion for new trial ("Appendix A," R. 23-48) seeks only to have this court decide that the conclusion of the Court of Claims should have been otherwise, upon the facts; and they cite cases decided by this court in support of that contention. That is not the contention of the petitioner. His contention is that the Court of Claims *omitted* to find *essential* facts necessary to a fair and final determination of the case; and that, therefore, the case should be reversed and remanded. The motion speaks for itself and contains the following:

> "* * * that the Special Findings of Fact heretofore made omit certain Findings of Fact which are deemed essential to a fair and final determination of the case * * *"

and the case of *Winton* v. *Amos,* (255 U. S. 373) and other cases therein cited, are relied upon.

An examination of the proposed Findings 1 to 15, inclusive, contained in said motion, will show that *essential* findings were *omitted* by the Court of Claims in its "Special Findings of Fact" (R. 94-129).

We are well aware that this court will not take the place of the Court of Claims for the purpose of weighing the evidence and determining whether the Findings of Fact of that court were correct or should have been otherwise; and there is ample authority, in the cases cited by respondents, in support of such a

contention. But the contention of petition that *essential facts* have been *omitted* is an entirely different contention; and petitioner confidently relies upon an examination and analysis of his motion for new trial, above referred to, and upon an application of the cases cited, of which *Winton* v. *Amos* is the leading case.

We are also well aware that both motions for new trial ("Appendix A," R. 23-48; and "Appendix B," R. 48-61) were addressed to the discretion of the Court of Claims, having been filed out of time; and that this court will not intervene unless there are substantial grounds for such intervention. Petitioner has endeavored to make plain that this case, in so far as the motions for new trial are concerned, parallels, in all respects, the *Winton* v. *Amos* case; and it is his contention that this case should, likewise, be reversed and remanded because the Court of Claims has *omitted* to find facts which are essential to a fair and final determination.

The motions for new trial, as shown in petitioner's brief heretofore filed, have a most powerful bearing upon the most vital questions in the case. Those questions are whether the jurisdiction of the Court of Claims has or has not been established and whether essential facts have or have not been omitted in its findings. We believe the arbitrary action of the Court of Claims in refusing leave to file these motions war-

rants this court in exercising its supervisory powers. That part of Rule 35 which this court is asked to apply, together with the reasons urged for its application, are fully set out in petitioner's brief heretofore filed.

Respectfully submitted,

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