No. 1101.

In the Supreme Court of the United States

OCTOBER TERM, 1926.

J. F. McMURRAY, PETITIONER,

VS.

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

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO REVIEW THE RECORD CERTIFIED BY THE COURT OF CLAIMS; AND FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

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Cases—

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Opinion and Judgment of Court Below.

The opinion and judgment of the court of claims, which this court is asked to review is officially reported in the United States Court of Claims Report (62 Ct. Cls. 458).

It was rendered on July 1, 1926; and is set out in the printed record at pages 94 to 152, inclusive.

Claims Advanced and Rulings Made.

The specific claims advanced and the rulings made, in the court of claims, which are relied upon as a basis

for the jurisdiction of this court, are set out, in full, in the petition to this court and in the special findings of fact and opinion and judgment of the court of claims, as follows:

> "For legal services in 'The Chickasaw Freedmen Case';
>
> (Petition, R. 3-4; Special Findings of Fact XII, R. 103-5; Opinion, R. 134-5.)
>
> For 'Expenses incident to Court Claimant Cases';
>
> (Petition, R. 4-5; Special Findings of Fact XIV, XV, XVI and XVII, R. 105-14; Opinion, R. 136-40.)
>
> For legal services in 'The J. Hale Sypher Case';
>
> (Petition, R. 9-11; Special Finding of Fact XIII, R. 114-15; Opinion, R. 141-2.)
>
> For legal services in 'The Eli Ayres Claim';
>
> (Petition, R. 11-12; Special Finding of Fact XIX, R. 115-16; Opinion, R. 142.)
>
> For legal services in 'The Incompetent Fund';
>
> (Petition, R. 12; Special Finding of Fact XX, R. 116-18; Opinion, R. 142-3.)
>
> For legal services in the collection of 'Tribal Taxes';
>
> Petition, R. 13-14; Special Finding of Fact XXI, R. 118-19; Opinion, R. 143-4.)
>
> For legal services in 'The Bonaparte Opinion'; and
>
> (Petition, R. 14-15; Special Finding of Fact XI, R. 101-2 and Special Finding of Fact XXII, R. 119-20; Opinion, R. 144.)
>
> For cancellation of 'Coal Mining Leases' and for relief from payment of advance royalty thereon.
>
> (Petition, R. 6-8; Special Findings of Fact XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, and XXIX, R. 120-6; Opinion, R. 144-8.)

Jurisdiction of This Court.

The statutory provision under which the jurisdiction of this court is invoked is contained in the Act of Congress approved February 13, 1925 (43 Stat., 936-8) and is as follows:

> "In any case in the court of claims, including those begun under Section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the same had been brought there by appeal."

Statement of the Case.

A concise statement of the case containing all that is material to a consideration of the questions presented is contained in the petition to this court; and such "statement of the case" is set out in the printed record at pages 3 to 15, inclusive.

SPECIFICATION OF ERRORS AND ARGUMENT.

THE CHICKASAW FREEDMEN CASE.

The Court of Claims erred in refusing to enter judgment for interest from February 23, 1904, upon the fee allowed.

ARGUMENT.

The legal services of petitioner's firm were performed when the decision of the supreme court was rendered, on February 23, 1904, fixing the liability of the United States to pay for the lands allotted Chickasaw Freedmen. The preparation of the rolls and the determination of the number of acres so allotted and the value thereof was wholly in the hands of the officers of the United States. These officers would have brooked no interference by the attorneys, in the discharge of their official and administrative duties.

Employment was under Section 39 of the act of July 1, 1902 (32 Stat., 641), which is as follows:

> "The Choctaw and Chickasaw Nations, respectively, may * * * employ counsel to represent them in such suit and to protect their interests therein. * * *"

They did represent the Choctaw and Chickasaw Nations in *such suit* and did protect their interests *therein* by procuring the final judgment of the supreme court. If six years elapsed before information regarding acres and values were available it was through no fault or neglect of the attorneys. Their

services ended and their fee was earned when the litigation ended on February 23, 1904.

The jurisdictional act of May 25, 1918 (40 Stat., 561; also R. 96-8) provided for judgment in such amount or amounts as may, by the court of claims, be found due, upon the claims presented

> "* * * together with interest from the date of such services * * *"

It is respectfully submitted that interest upon the fee allowed should run from February 23, 1904, the date of the final judgment of the supreme court.

EXPENSES INCIDENT TO COURT CLAIMANT CASES.

The Court of Claims erred in not allowing all expenses shown to have been incurred and paid in the trial of these cases.

ARGUMENT.

These expenses were incurred and paid under Section 33 of the act of July 1, 1902 (32 Stat., 641; also, R. 4,) which reads as follows:

> "All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the secretary of the interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any joint funds of said nations in the treasury of the United States."

All expenses necessary to the *proper conduct* of such cases *shall* be incurred under the direction of the executives of the nations; and the secretary of the interior is *authorized* to pay the same, says the law.

The accounts which were submitted to the secretary of the interior did not meet his entire approval. However, if certiorari for diminution of the record be granted, under the second prayer of the petition to this court, "Appendix A" (R. 23-48), thereto attached, will show:

> "That the attorneys made application to the secretary of the interior, on September 17, 1902, for instructions governing these expenses (R. 27-8).
>
> That, notwithstanding the fact that the life of the citizenship court expired, under the law, on December 31, 1903, rules and regulations to govern these expenditures were not prescribed and promulgated until March 18, 1903, eight months and eighteen days after the passage of the law and six months and twenty-four days after its ratification by the Indians (R. 28-9).
>
> That, in the trial of such cases, expenses had been incurred and paid for the months of October, November and December, 1902, and January, February and the first eighteen days of March, 1903, before such rules and regulations were prescribed and promulgated (R. 29); and
>
> That the moneys for such expenses were borrowed, upon notes signed by the attorneys and the chief executives, with the understanding that such notes would be retired when such accounts were paid under Section 33 of the law" (R. 24-27).

While the action of the Secretary of the Interior, upon the accounts submitted is not now important, in view of the later legislation conferring jurisdiction

upon the court of claims, the circumstances and conditions under which these moneys were expended are referred to for the purpose of showing that the attorneys cannot be charged with any willful violation of departmental instructions, but were endeavoring, as best they could, to carry forward to completion, the great work entrusted to them, within the very limited time allowed by the law.

The jurisdictional Act of May 25, 1918 (40 Stat., 561; also, R. 96-8) authorizes the court of claims to

> "* * * hear, consider and adjudicate"

this particular claim for expenses incurred in court claimant cases; and the second jurisdictional Act of July 19, 1919 (41 Stat., 163; also, R. 99-100) authorizes it to dispose of all claims presented

> "* * * to the end that a complete and final adjustment may be had between said parties. * * *"

The court of claims found (Special Finding of Fact XVII, R. 111-14) that such expenses were actually incurred and paid and such finding sets forth the purposes for which the moneys were expended and the magnitude of the undertaking.

In its opinion (R. 136-40) it held that only those expenses necessary to

> "* * * to set in motion the machinery of the court"

were allowable; and refused to allow the other items of expense which had been incurred and paid, in the trial of such cases, such as, using the language of the finding

> "* * * traveling and subsistence expenses and various other expenses incident to the securing of evidence and the preparation for trial and the trial of such cases."

As bearing upon the proper construction of the law, under which these expenses were incurred and paid, we deem it proper to refer to the conditions attending its passage, as set forth in the special findings of fact and opinion of the court of claims (R. 94-152).

The Indians contended that several thousand persons had been improperly admitted to citizenship and were in the wrongful possession of tribal property of the value of many millions of dollars. The Act of July 1, 1902, was a solemn treaty or agreement between the Indians and the Government, as shown by its title, as follows:

> "An act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes" (32 Stat., 641).

The most important provision, perhaps, of this agreement, was the creation of the Choctaw and Chickasaw Citizenship Court for the retrial of court claimant citizenship cases. It was thus agreed by the Government that the contentions of the Indians possessed sufficient merit to justify corrective action.

It may be fairly assumed that both the Indians and officials of the Government were well aware of the magnitude of the undertaking and of the vastness of the value of tribal property which was at stake. Would the Indians, possessed of sufficient means, and insistent upon the righting of wrongs and the recovery of a large portion of their tribal estate; and, would the officials

of the Government, jealous of the integrity of the administration of Indian affairs, been willing to stand by and to stake it all upon the ability or inability of the attorneys to provide the necessary expenses for the proper conduct of these cases?

There is nothing in the history of the whole transaction, as shown by the record, to justify this conclusion. The Indians were amply able to provide the necessary expense money for the proper conduct of these cases and the officials of the Government were willing for them to thus make use of their own money for their own protection. And, accordingly, it was written into the law that *all expenses* necessary to the *proper conduct* of these cases be provided and made available. It was also written into the law that such expenses *"shall be incurred"* under the direction of the chief executives; and they were incurred and paid upon the certificates of approval of such chief executives.

It is respectfully submitted that the court of claims should have allowed all expenses shown to have been incurred and paid in the trial of these cases.

THE J. HALE SYPHER CASE.

The Court of Claims erred in holding that it was without jurisdiction to entertain and pass upon the claim; and in refusing to enter judgment for the fair value of the services rendered.

ARGUMENT.

Jurisdiction was conferred on the court of claims by act of July 19, 1919 (41 Stat., 163; also, R. 99-100), which reads as follows:

> "And with jurisdiction to hear, consider, and adjudicate any and all other claims and demands by or against either party to said litigation, to the end that a complete and final adjustment may be had between said parties as to outstanding matters of controversy or account between them * * *: *Provided further,* That the said J. F. McMurray shall be limited in presenting such additional claim to such matters as may have or shall hereafter be set up by way of set-off or counterclaim by the defendants."

The court of claims held (Opinion, R. 142) that it was without jurisdiction to entertain the claim because, said the court, the plaintiff had failed to establish that his firm had incurred expenses, in connection with this case, which had been paid by warrants included in the counterclaim of defendant. In thus holding, it said:

> "The record, in so far as itemization of expense account covered by the counterclaim, sustains the defendant's contentions. We are unable to find more in the record than the general statement of the plaintiff, unsupported by any specific account or amount. * * *"

"Appendix A" (R. 32-6) and "Appendix B" (R. 52-3) which are attached to and made a part of the petition to this court, if admitted to the record by writ of certiorari for diminution of the record, as prayed for, conclusively show that expenses were incurred, in connection with the J. Hale Sypher case, which were paid by warrants sued upon in the counterclaim of the defendants, and that there was ample "itemization of expense accounts" and that such expenses are supported by specific accounts and amounts; and that, therefore, the jurisdiction of the court of claims is established,

even to the extent of a compliance with the exacting formula which it has laid down.

In its opinion (R. 141) the court also held:

> "The petition in the Sypher case was filed in this court on April 28, 1904. On that date the firm of Mansfield, McMurray & Cornish was under contract to render professional services to the Choctaw Indians. * * *"

That part of "Appendix A" which refers to the Sypher case (R. 32-5) shows conclusively that the firm was *never* under contract to render legal services to the Choctaw Nation, at an annual salary; but that, when directed by the Principal Chief, it performed definite and specific services and, upon the presentation of itemized accounts, was paid therefor.

The Sypher case was finally decided by the court of claims on February 20, 1905, (R. 114-15). At that time all payments to the firm had ceased. "Appendix A" (R. 35) refers to "Plaintiff's Exhibit 5" which is a list of Choctaw Warrants sued upon in defendants' counterclaim; and this list shows the last warrants issued to the firm, for legal services and expenses, to have been dated on September 30, 1904.

The court of claims finds (Special Finding of Fact XVIII, R. 114-15) that legal services were rendered by the firm, in the Sypher case which were of value to the Choctaw Nation; and also that

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

It is well established that Indian tribes are liable for payment for legal services rendered which has resulted to their benefit. The holding of this court in *Winton* v. *Amos,* (255 U. S., 373) and of the court of claims in *Butler & Vale* v. *United States,* (43 Ct., Cls., 520) are applicable.

The court of claims relies upon these and similar cases in support of the conclusions reached by it in that part of its opinion which precedes a consideration of these particular claims in this case. In its opinion (R. 131-3) it reached the conclusion that Section 2103, revised statutes, regarding contracts with Indian tribes, had no application to the services rendered in connection with these claims, in the following language:

> "A distinct recognition of the apparent fact that the state of controversy, old and complicated as it was, involved, as the jurisdictional acts attest, a final adjustment of all claims and demands predicated upon actual and beneficial service rendered and furnished the defendant Indians. We have heretofore had cases of a similar nature. *Ute Indians,* 46 C. Cls. 225; *Eastern Cherokees,* 45 C. Cls. 104; *Ottawa* and *Chippewa Indians,* 42 C. Cls. 518; *Butler & Vale* case, 43 C. Cls. 497; *Winton* v. *Amos,* 51 C. Cls. 284; Sisseton & *Wahpeton Indians,* 58 C. Cls. 302."

Legal services were rendered, in the Sypher case, which were of benefit to the Choctaw Nation and it is, therefore, liable for the payment of reasonable compensation therefor.

It is respectfully submitted that the court of claims had jurisdiction to entertain and pass upon this claim; and that it should have rendered judgment for the fair value of the legal services performed.

THE ELI AYRES CLAIM.

The Court of Claims erred in holding that the jurisdictional act precluded the allowance of this claim; and in refusing to enter judgment for the fair value of the services rendered.

Argument.

The jurisdiction of the court of claims, in this case, is the same, in all respects, as in "The J. Hale Sypher case."

In holding that it was without jurisdiction the court said (Opinion R. 142):

> "What has been said as to the J. Hale Sypher claim applies with equal force to this item. The jurisdictional act precludes its allowance."

In its special finding of fact XIX (R. 115-16) the court of claims establishes its jurisdiction over this claim, as follows:

> "All expenses incurred and paid by said firm in connection with such services were refunded and paid to the firm by the nation. * * *"

In addition, "Appendix A" (R. 38-40) and "Appendix B," (R. 53) if admitted to the record by writ of certiorari for diminution of the record, show that expenses incurred, in connection with this claim, were paid by warrants sued upon in the counterclaim of defendants and that, therefore, the jurisdiction of the court of claims is established.

In its special finding of fact XIX (R. 115-16) the court of claims finds that this claim was referred to the court of claims by act of February 24, 1905 and was con-

cluded, by final judgment, on December 14, 1908. It also holds that services were rendered by the firm which were of value to the Chickasaw Nation; and that no compensation has been received, independent of compensation received as general counsel.

"Appendix A," (R. 37) if admitted to the record, will show that the firm was never in the employ of the Chickasaw Nation, at an annual salary, but that specific legal services were directed by the governor and, when performed, were paid for upon itemized account. "Appendix A" (R. 38) will also show that the legal services in the Ayres case, before the court of claims were performed after all payments by the Chickasaw Nation had ceased, except payment under the regular citizenship contract. The Ayres case was referred to the court of claims on February 24, 1905, whereas the last Chickasaw warrant issued to the firm for legal services, other than citizenship, was dated February 14, 1905. In other words, no services, in the Ayres case, could have *begun,* in the court of claims, until ten days after all payments had ceased.

It therefore appears that, irrespective of any relations which the firm may have previously sustained to the Chickasaw Nation, all payments for legal services had ceased prior to the beginning of their services in the Ayres case in the court of claims; and that, from February 24, 1905 to December 14, 1908, the case was carried forward to a successful conclusion and that services were performed which were of value to the Chickasaw Nation and for which no compensation has been received.

What has been said, in connection with "The J. Hale Sypher case," regarding the liability of Indian tribes for legal services beneficially performed, applies, with equal force, to this claim.

We respectfully submit that the court of claims had jurisdiction to entertain and pass upon this claim; and that judgment should have been rendered for the fair value for the services performed.

THE INCOMPETENT FUND.

This claim is submitted, upon the statement contained in the petition to this court (R. 12) for such relief as the petitioner may be found entitled to receive.

TRIBAL TAXES.

The Court of Claims erred in holding that it was without jurisdiction to entertain and pass upon this claim; and in refusing to enter judgment for the fair value of the services rendered.

ARGUMENT.

The jurisdiction of the court of claims is conferred by the Act of July 19, 1919, which has been set out in connection with the J. Hale Sypher case.

In declining jurisdiction the court of claims (Opinion, R. 143-4) held:

> "As in the Sypher and Ayres cases no set-off is preferred with reference to this item and we are without jurisdiction to consider it."

The holding of the court of claims, in dismissing the second counterclaim of the defendants, is amply

sufficient to establish its jurisdiction over this claim. In its opinion (R. 150) it says:

> "* * * The record sustains the contention that the services rendered in connection with the expenses set up as a counterclaim were incurred, were completed and resulted to the benefit of the Indians. The greater portion of the amount paid out was disbursed as incidental to the attorneys' efforts in enforcing the collection of tribal taxes. * * *"

"Appendix A" (R. 42-5) and "Appendix B" (R. 53-7), if admitted to the record, will show, with great particularity, that expenses were incurred in connection with the collection of tribal taxes and paid by warrants sued upon in the counterclaim of defendants; and the itemized accounts therein referred to show the definite sums of money expended, from time to time, in connection with tribal taxes; and that, therefore, the court of claims had jurisdiction over the claim.

It will also appear from "Appendix A" (R. 32-5 and R. 37-8) that the firm was never in the employ of the Choctaw or Chickasaw Nation as general counsel, at an annual salary, but that definite and specific legal services were performed, from time to time, as directed by the chief executives, and paid for, upon itemized accounts.

In its Special Finding of Fact XXI (R. 118-19) the court of claims found that legal services were performed, in connection with the collection of tribal taxes, which were of value to the Choctaw and Chickasaw Nations, as follows:

> "The firm rendered active and valuable services in the work of collecting said taxes, representing the nations in various suits and proceedings for the enforcement of the tax laws, it being at the time suggested by the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation, and hoped by the firm, that said nations might make some general provision for further compensation for such services."

The argument made, in connection with "The J. Hale Sypher Case," regarding the liability of Indian tribes for payment for legal services benefically performed, applies, with equal force, to "Tribal Taxes."

We respectfully submit that the court of claims had jurisdiction to entertain and pass upon this claim; and that judgment should have been entered for the fair value of the legal services performed.

BONAPARTE OPINION.

The Court of Claims erred in holding that it was without jurisdiction to entertain and pass upon this claim; and in refusing to enter judgment for the fair value of the legal services rendered.

ARGUMENT.

The jurisdiction of the court of claims is conferred by the act of July 19, 1919, set out in connection with "The J. Hale Sypher case."

It declined jurisdiction (Opinion, R. 144) in the following language:

> "This claim is governed by what was said with reference to tribal taxes. No warrants for expenses were issued and paid by the tribes with

reference thereto, and it is not a part of defendant's counterclaim."

As in the preceding claims the language of the court of claims is amply sufficient to establish its jurisdiction.

In its Special Finding of Fact XI (R. 101-2) it finds:

> "Pursuant to said act, the principal chief of the nation, by contract, employed the firm of Mansfield, McMurray & Cornish as attorney for the nation, at a salary of $5000 per year, under which contract of employment the firm was paid for services and for expenses incurred therewith up to May 23, 1905, as hereinafter more fully set forth."

In its Special Finding of Fact XXII (R. 119-20) it found:

> "* * * 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."

"Appendix A" (R. 46-7) and "Appendix B" (R. 57-8), if admitted to the record, will amply show, by itemization of account and references to particular items and warrants, that expenses were incurred by the firm in connection with this claim which were paid by warrants sued upon in the counterclaim of defendant; and that, therefore, the court of claims had jurisdiction to entertain and pass upon the claim.

In its Special Findings of Fact XI (R. 101-2) and XXII (R. 119-20) the court of claims found that the

firm was duly employed, as citizenship attorneys for the Choctaw Nation, and was paid therefor, at a salary of $5000 per year, to May 23, 1905, and that, after such employment had been discontinued, the firm was requested by the principal chief to continue such services, with the statement that they would be paid for; and that such services were performed up to the closing of the citizenship rolls on March 4, 1907, and culminated in the opinion of the attorney general of February 19, 1907, (known as "The Bonaparte Opinion") under which a large number of persons were denied enrollment who would have otherwise been eligible for enrollment; and that such services were of value to the Choctaw Nation.

"* * * but no payment for said services has been made."

The argument made and the cases cited, in connection with "The J. Hale Sypher case," regarding the liability of Indian tribes for payment for legal services beneficially performed, applies, with equal force, to "The Bonaparte Opinion."

It is respectfully submitted that the court of claims had jurisdiction to entertain and pass upon this claim; and that judgment should have been entered for the fair value of the legal services performed.

COAL MINING LEASES.

The Court of Claims erred in allowing an offset, in favor of the defendants, of the sum of $25,668.74, against the judgment in favor of the plaintiff.

ARGUMENT.

That part of the petition to this court (R. 6-8) relating to "Defendants' First Counterclaim: Coal Mining Leases" fully sets forth the grounds relied upon in support of the contention that the court of claims erred in allowing the offset.

CERTIORARI FOR DIMINUTION OF THE RECORD.

The second prayer of the petition to this court is for diminution of the record to require the court of claims to certify to this court two motions for new trial (leave to file having been denied) which are attached to the petition, as "Appendix A" and "Appendix B."

The Act of February 13, 1925 (43 Stat. 936-8), under which the jurisdiction of this court is invoked, has heretofore been set out and provides that the *cause, including* the findings of fact and the judgment or decree of the lower court shall be certified to it for review and determination.

Rule 38, paragraph 4, of the supreme court, relating to court of claims cases, provides:

> "A petition to this court for writ of certiorari to review a judgment of the court of claims shall be accompanied by certified transcript of the record in that court, consisting of the pleadings, findings of fact, judgment and opinion of the court, but not the evidence * * *."

but the same rule (paragraph 6) goes on to say:

> "The same general consideration shall control in respect of writs of certiorari to review judgments of the court of claims as are applied to applications for such writs to other courts."

Rule 35 governs writs of certiorari to "other courts" and provides (paragraph 1):

> "A petition for review on writ of certiorari * * * shall be accompanied by a transcript of the record in the case including the *proceedings in the court* to which the writ is asked to be directed" (italics ours).

The "Rules of the Supreme Court of the United States relating to appeals from the Court of Claims" (Appendix to "Rules of the United States Court of Claims," January 1, 1916) provide:

> "In all cases hereafter decided in the court of claims, in which, by act of Congress, such appeals are allowable, they shall be heard in the supreme court upon the following record and none other:
>
> "A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a *proper review* of the case" (italics ours).

It seems, therefore, to be established that the supreme court will not review, by writ of certiorari (the writ once having been granted) under the act of February 13, 1925, court of claims cases "with the same power and authority and with like effect as if the cause had been brought there by *appeal.*" The only difference, as regards court of claims cases reaching the supreme court before and after the passage of the act of February 13, 1925, is as to the manner of lodging such cases in the supreme court for review and determination. Prior to the passage of this law appeals were taken, as a matter of right, where the right of appeal was granted by law. Since the passage of the law such cases may be lodged in the supreme court only

by having granted a petition for writ of certiorari. This petition is addressed to the sound discretion of the supreme court and may or may not be granted. Once granted, the supreme court will review and determine the case with the same power and authority and with like effect as if brought there by appeal. It would seem to follow, therefore, that the transcript of record made use of by the supreme court, for the purpose of review and determination, would be the same, both prior to the passage of the act of February 13, 1925, upon appeal, and after the passage of such act, upon petition for writ of certiorari.

The *law* says that the *cause, including* certain other things shall be certified to it for review and determination; and that it will review and determine the case as if brought there by appeal.

The rules of the supreme court, relating to cases *appealed* from the court of claims, provide that the record shall contain all things necessary to a *proper review* of the case.

The rules of the supreme court, relating to writs of certiorari to the court of claims, provide that the same general consideration will control as are applied to applications for such writs to *other courts.*

The rules of the supreme court, relating to writs of certiorari to *other courts,* provide that the record shall include the *proceedings in the court* to which the writ is directed.

It is the contention of the petitioner:

First: That the court of claims erred, in law, in its opinion of July 1, 1926, in disposing of the claims presented; and

Second: That the case should be reversed and remanded because of the omission of essential findings of fact.

In order that these contentions may be fairly and fully presented to this court, it is necessary for the motions for new trial (referred to as "Appendix A" and "Appendix B") be made a part of the record; and it is respectfully submitted that the second prayer of his petition to this court, for writ of certiorari for diminution of the record, should be granted.

GENERAL CONTENTIONS.

It is contended by the petitioner that the case should be reversed and remanded upon the following grounds:

First: Omission of essential findings of fact; and

Second: Refusal of leave to file plaintiff's motions for new trial (attached to his petition to this court as "Appendix A" and "Appendix B").

First, Omission of Essential Findings of Fact.

It is well established that this court will grant the relief sought where it is shown that essential findings of fact have been omitted. It was so held in *Winton* v. *Amos,* (255 U. S. 373) and other cases cited.

In that case the motion for new trial, suggesting the omission of essential findings of fact, was filed after the expiration of sixty days after judgment. The court of claims refused leave to file, in the following language:

> "The motion for leave to file said motions will be overruled" (*Winton* v. *Amos,* 52 Ct. Cls. 90-133).

In the present case, the motion for leave to file the accompanying motion for new trial ("Appendix A," attached to the Petition) was also filed after the expiration of the sixty day period and was likewise overruled. The sum total of the action of the court of claims, in the *Winton* v. *Amos case,* and in the present case, was the same.

In the *Winton* v. *Amos case,* however, the motion for new trial was discussed by the court of claims, in an opinion giving its reasons for refusing leave to file. That opinion was sent up to this court as a part of the record. It was not the opinion in the case, that having been previously rendered. It was, solely and only, a discussion of the motion for new trial and was not the "Judgment and Opinion" of the court, referred to as a necessary part of the record to be certified, by the court of claims, in Paragraph 4 of Rule 38 of this court. It was, no more than the motion itself and served only to transmit the motion to this court. The substance of the motion thus reached this court, with the result that the case was reversed and remanded upon the ground that such motion for new trial showed that essential findings of fact had been omitted.

In the present case the motion for new trial, suggesting the omission of essential findings of fact, was not discussed by the court of claims, as was done in the *Winton* v. *Amos case,* but leave to file was refused without comment. It could not, therefore, and did not, reach this court through the same medium that conveyed the motion for new trial in the *Winton* v. *Amos case.*

The motion for new trial in the present case, alleging the omission of the essential findings of fact, is now sought to be brought to the attention of this court, by writ of certiorari for diminution of the record, as prayed for in the second prayer of the petition.

If granted, and such motion is thus admitted to the record, it will, we contend, be clearly shown that

proposed Findings of Fact 1 to 15, inclusive (R. 24-48), are essential to a fair and final determination of the case; and that an examination of the "Special Findings of Fact" (R. 94-128) will show that such essential findings of fact were omitted.

Second, Refusal to Grant Leave to File Motions for New Trial.

In support of this proposition we can make no argument stronger than a quotation from sub-division "b" of paragraph 5 of rule 35 of this court, as follows:

> "* * * or has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision."

We are aware that the supervisory powers of this court will not be applied to lower courts, in matters which appear to involve the exercise of their discretion, unless the circumstances clearly justify it.

In the present instance, by the arbitrary exercise of its discretionary powers, the court of claims refuse leave to file motions which, because of their substances and purposes, had a most direct and powerful bearing upon the vital issues in the case.

These motions (referred to as "Appendix A" and "Appendix B") sought to establish the jurisdiction of the court of claims to consider and pass upon various claims, after it had held that it was without such jurisdiction.

The first motion ("Appendix A") set forth the evidence contained in the record which bears directly

upon the jurisdiction of the court; and the second motion ("Appendix B") proposed to furnish newly discovered evidence which would add to and strengthen that contained in the record.

In the "usual course of judicial proceedings" the petitioner should have been permitted to call to the attention of the court of claims the evidence contained in the voluminous record, comprising several thousand pages, bearing upon the court's jurisdiction, which according to his contention, had been overlooked; and he should have been permitted to offer the newly discovered evidence which, according to his contention, supplied, in a most overwhelming and convincing manner, that which the court said was lacking.

If, after presentation, the evidence in the record which he proposed to point out and the newly discovered evidence which he proposed to furnish, was still unconvincing to the court of claims, in the matter of jurisdiction, then he would have no cause to complain.

The arbitrary action of the court of claims, in refusing leave to file, under the circumstances which have been pointed out, was, it is respectfully submitted, a substantial violation of his rights. The considerations involved are primary and fundamental; and this action of the court of claims, we believe, constitutes such a departure from the usual and accepted course of judicial proceedings as to call for an exercise of this court's power of supervision.

Respectfully submitted,

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