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Report : The Court of Claims

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IN THE SENATE OF THE UNITED STATES.

FEBRUARY 3, 1859.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

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

The Court of Claims respectfully presents the following documents as the report in the case of

GEORGE McDOUGALL *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Depositions filed in the case numbered 1 and 2, transmitted to the House of Representatives.
3. Letter from Commissioner of Indian Affairs, transmitted to the House of Representatives.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington, this third day of February, [L .] A. D., 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

To the Judges of the Court of Claims of the United States of America, established by act of Congress approved 24th of February, in the year 1855 :

Your petitioner, George McDougall, a citizen of the State of California, and therein residing, most respectfully represents to this court :

That in the year 1850 the white men had overspread the greater part of the State of California ; had intruded upon the lands occupied by the Indians ; had driven them from their dwellings, hunting-

grounds, valleys, and fisheries, into the barren mountains, where even the resource of acorns was wanting to satisfy their craving appetites. By reason whereof the Indians became exceedingly hostile, robbing and murdering the whites, which caused the whites to retaliate, and thus a predatory, sanguinary warfare between the Indians and the white men was raging.

Your petitioner begs leave to refer the court to the documents published by order of the Senate, of April 15, 1852—32d Congress, 1st session, Senate Ex. Doc. No. 61—Report of the Secretary of the Interior.

Under these circumstances the government of the United States was called to perform its moral duties of protecting and feeding the Indians over whom the United States claimed the jurisdiction and authority of a guardian over his ward, and of preventing the whites from obtruding upon lands to which the Indian right of occupancy had not been extinguished, neither to the United States nor to any other government; and also of producing a state of peace between the Indians within the bounds of the State of California and the whites who were attracted from all parts of the United States, and from foreign lands, in search of gold, which was abundant in the lands occupied by the Indians.

Therefore, the Congress of the United States, by act approved September 30, 1850, (9 Statutes at Large, by L. & B., p. 558,) appropriated money "to enable the President to hold treaties with the various Indian tribes in the State of California," and President Fillmore appointed three commissioners, viz., Redick McKee, G. W. Barbour, and O. M. Wozencraft, to hold treaties with the various tribes of Indians in the State of California. The instructions to these commissioners have not been made public, but it is to be presumed that the commissioners had discretionary powers and trusts commensurate with the exigencies, whereby to bring the Indians into a mood to treat, and to pacify them until the President and Senate should approve or disapprove the treaties which should be made.

These commissioners (as your petitioner is informed and believes, and so believing charges) arrived in California early in January, 1851, and entered upon their duties. The Indians would not consent to treat unless their pressing necessities for food were at once relieved and promises given of future supplies. The commissioners soon dissolved the board wherein they were acting jointly, and divided the State into three districts, in which they acted separately. Numerous treaties were made in these districts by the commissioners, jointly and separately, with the various tribes or bands of Indians within the said districts, in each of which cases the Indians were not only furnished with food during the time of treating, but the treaties stipulated for further and future supplies in time to come. These very numerous treaties were, as it is understood, rejected by the Senate, and so they have never been published; wherefore your petitioner cannot now speak of their contents with any greater certainty.

On the 26th day of May, 1852, O. M. Wozencraft, who was one of the commissioners aforesaid, (also an Indian agent,) using the discretionary powers in him vested as commissioner, and by the provisions

of the treaties, and by the pressing wants of the Indians for food, and to prevent them from choosing between starvation or robbery, plunder, and warfare upon the white men, purchased of your petitioner, for the feeding of the Indians in the southern agency of California, six hundred and fifty thousand pounds of beef, at twelve and a half cents per pound, to be paid for in bills to be drawn by the said Wozencraft in his official capacity on the Indian bureau or Secretary of the Interior, at the city of Washington; and it was then and there further agreed that in the event that Congress should make no appropriation in the year 1852 for payment of the bills, that then your petitioner should have and receive at the rate of fifteen and a half cents per pound for the said beef, inasmuch as the said price of twelve and a half cents was below the usual market price at that time and place, by three cents per pound; your petitioner being induced to sell at a reduced price for the sake of money in the city of Washington, the rate of exchange between San Francisco and the city of Washington being at that time very high, and bills of approved character on the city of Washington commanded in the city of San Francisco a high premium. This transaction was at the time executed by writings in the words and figures following, viz:

“ *United States to George McDougall, Dr.*

“ 1852. May 26.—To 650,000 lbs. beef furnished Indians
in southern agency, at 12½ cts. per lb., \$81,250 00

“ I certify that the above is just and correct, and that the supplies were for the use of the United States.

“ O. M. WOZENCRAFT,
“ *U. S. Indian Agent.*”

“ Received, San Francisco, May 26, 1852, of O. M. Wozencraft, United States Indian agent, eighty-one thousand two hundred and fifty dollars, (\$81,250,) in full, by drafts on the Indian bureau, for the above account.

“ GEORGE M^CDOUGALL.”

Which writings were signed in duplicate and delivered to said Wozencraft; one of which duplicates was (as your petitioner is informed and believes, and so believing charges) transmitted by said Wozencraft to the Indian bureau, in the city of Washington, and is therein now remaining.

Your petitioner avers that the said quantity of beef was by him actually delivered to said Wozencraft, and thereupon and thereafter the said agent drew the several bills in said receipt alluded to, bearing date on said 26th May, 1852, at San Francisco, in California, and made payable to the order of your petitioner one day after sight; the several bills, at that time so drawn, amounting together to the said sum of eighty-one thousand two hundred and fifty dollars, (\$81,250,) were presented for payment to the Secretary of the Department of the Interior, who refused to pay the same; and as your petitioner is informed and believes, the refusal was for want of an appropriation of

money by the Congress wherewith to pay said bills; whereupon the said bills were, in the same year of 1852, viz: on the — day of —, protested by a notary public for non-payment.

Your petitioner states that after the said bills were so protested, the Congress not having made any appropriation for that object, the said Wozencraft, in pursuance of the original agreement, drew another bill in favor of your petitioner, on the Indian bureau, for the sum of nineteen thousand dollars, (\$19,000,) to make up the difference between twelve-and-a-half cents and fifteen-and-a-half cents per pound in the price of said beef, which said last bill was likewise refused to be paid at the Department of the Interior. As to this last bill, your petitioner has been advised by counsel that it cannot be recovered from the United States; that it is in nature of a penalty, (*nomine pœnæ*,) according to the opinion of Lord Chancellor Hardwicke on the petition of Powis, (3 Atk. 520, case 184,) and according to 16 Viner, title Mortgage, letter (M), page 452. But as to this matter your petitioner most respectfully asks the opinion and judgment of this Court.

Your petitioner is advised by counsel learned in the law, that, having delivered the beef to the agent of the government, it was not incumbent on him, the vendor and deliverer, to look to its future faithful application to the use of the United States and distribution among the Indians, nevertheless, your petitioner has heard and believes, and so being informed charges, that the said beef, so sold and delivered by him to said Wozencraft, was faithfully applied to the use of the Indians and to the use of the United States.

In order to set forth more fully and particularly his claim above-mentioned, and the action of the department thereupon, your petitioner (by his attorneys) made an application, on the 5th October, 1855, to the Department of the Interior and office of Indian affairs, for copies of the papers on file in that office relating to said claim, or to withdraw the originals, but received for answer thereto a letter from the Commissioner of Indian Affairs, (Manypenny,) bearing date October 17, 1855, "that the Secretary of the Interior has decided that papers on file here, or copies thereof, intended to be laid before the Court of Claims, can be furnished only under an order of the Court, as provided by the law creating it."

Now, your petitioner is advised to say, that, under the Constitution of the United States, ordained to establish justice, it is the duty of public officers, the servants and not the masters of the people, to afford to every citizen, on application, having a claim on the United States, such information as the records, books, and papers of the office contain, to facilitate the citizen in prosecuting his claim in proper and lawful manner to obtain justice; that the government can intend no wrong to a citizen, does not desire to evade its obligations and duties to its citizens, or any one of them, by concealment of the truth or withholding the evidence of facts; that public officers who withhold information whereby a citizen is hindered, delayed, or embarrassed in the pursuit of his right, mistake the character, spirit, intent, and honor of the government, and tarnish its credit, reputation, and dignity.

Your petitioner therefore prays the Court to make an order upon the Secretary of the Department of the Interior, that he furnish to this

Court all the information and papers in the department relating to this claim, herein before mentioned, in full and without reservation.

Your petitioner avers that the price of twelve-and-a-half cents per pound for the beef aforesaid by him sold and delivered to the said agent of the government, was, at the time and place, reasonable, and, in truth, below the price usually paid to other vendors, and by purchasers of large quantities of beef; that the usual price was not less than fifteen cents per pound for supplies for the vessels of the United States and private vessels in the port of San Francisco; and that the usual price was, in small quantities or for a single beef, from eighteen to twenty-five cents per pound.

Your petitioner states that similar purchases by the said commissioners, sent to treat with the Indians in California, were made at fifteen cents per pound, for which bills were drawn on the Department of the Interior, and all protested for want of appropriations. The treaties being all rejected by the Senate, no appropriations were asked for to carry them into execution. But in the case of Colonel Frémont, who sold a large quantity of beef at fifteen cents per pound to Commissioner Barbour, for the supply of food to the Indians, and whose bills were likewise protested, the Congress of the United States, before this court was established, viz: in the year 1854, ordered payment of the said protested bills. Upon this subject your petitioner refers to Senate documents, 33d Congress 1st session, 1853-'54, Doc. No. 69; 32d Congress 1st session, Docs. No. 61-'5, and 14, 15, and 16; and the act for paying Colonel Frémont, approved July 9, 1854.—(Stat. at Large, by Little & Brown, private acts, page 80, chapter 165.)

Your petitioner avers that he has as yet received no payment whatever for any part of the beef so sold and delivered; that all the said bills remain unpaid; and that he is the sole owner thereof.

He relies—

1st. Upon the necessity of the supply aforesaid to the Indians.

2d. Upon the contract and delivery of the beef, and bills drawn by the agent of the United States.

3d. Upon the social duties and moral obligations of the United States to the said Indians, arising out of the political connexion and relations between the United States and the tribes of Indians within the boundaries of the United States, as explained in the case of the Cherokee Nation *vs.* The State of Georgia, (5 Peters, 17.)

4th. Upon the implied sense and assumpsit of the United States arising out of the report of the committee in Colonel Frémont's case, and the adoption of the principles of that report by Congress in the passage of the act for paying Colonel Frémont before referred to.

Upon the premises, your petitioner prays for general relief and decree as he may, in the opinion of this honorable Court, be entitled to have upon the final hearing of his case.

ROBERT ROSE and
GEORGE M. BIBB,
For petitioner, GEORGE M^cDOUGALL.

Affidavit to petition.

DISIRICT OF COLUMBIA, CITY OF WASHINGTON,
February 15, 1856.

Before me, the undersigned, one of the justices of the peace of the United States, in and for the city of Washington aforesaid, duly commissioned, sworn and acting as such, this day came _____, and made oath that, from inspection of public documents and other writings and information, he verily believes that the statements in the foregoing petition of George McDougall, as therein alleged, are true in substance and fact.

ROBERT ROSE.

Subscribed and sworn to before me on the day, year, and place stated in the caption.

N. CALLAN, J. P., [L. s.]
Washington city, D. C.

IN THE COURT OF CLAIMS.—No. 503.

GEORGE MCDUGALL vs. THE UNITED STATES.

Brief of the United States Solicitor.

Besides the testimony taken in this case, and yet unprinted, the following public documents of Congress will be referred to, viz:

Doc. 1, Senate, 2d session 31st Congress, Annual Rep. Sec. Int.
61, Senate, 1st session 32d Congress, Debts contracted by Indian Agents, &c.

4, Senate, sp. sess. 1853, Correspondence with Indian Agents.
Which will be hereafter briefly designated as documents 1, 61, 4.

On or before the 14th of October, 1849, Adam Johnston was appointed sub-Indian agent on the Sacramento and San Joaquin rivers, in California, to include the Indians at or in the vicinity of those places, and any others to be subsequently designated by the Indian Department.—(Com. Ind. Aff. to Johnston, Oct. 14, 1849, Doc. 4, p. 2.) This sub-agency was subsequently restricted to the Indians "in the valley of San Joaquin."—(Com. Ind. Aff. to Johnston, November 24, 1849, Doc. 4, p. 5; also pp. 4, 6.)

It seems this appointment was made under the 5th section of the act organizing the department of Indian Affairs, approved June 30, 1834.—(4 Stat., 735.)

By act of September 28, 1850, (9 Stat., 519,) the President was authorized to appoint three Indian agents for California, and by an act approved September 30, 1850, (9 Stat., 558,) an appropriation of \$25,000 was made, "to enable the President to hold treaties with the various Indian tribes in the State of California."

George W. Barbour, Redick McKee, and O. M. Wozencraft were appointed agents under the act of September 28, 1850, but it being soon discovered that no appropriation had been made for their salaries, their functions and salaries as Indian agents for California were suspended; and they were appointed, under act of September 30, commissioners to treat with the Indians.—(Doc. 1, p. 29.) The instructions to them, dated October 15, 1850, as commissioners, are printed in Doc. 4, p. 8. The appropriation of \$25,000 was then remitted them.

By an act approved February 27, 1851, sec. 3, (9 Stat., 586,) it was enacted, that “hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose.” The provisions of this act were communicated to the commissioners by the Commissioner of Indian Affairs, in a letter dated April 12, 1851, (Doc. 4, p. 14,) whereby they were informed that their offices and functions as commissioners were abrogated and annulled; they were, however, directed not to suspend negotiations, but to enter upon their appointments as agents, and were, *as such*, designated [under the act of 1851] to negotiate with the Indians of California, under the instructions already given.

This letter was received by the commissioners in San Francisco, early in June, 1851.—(Doc. 4, p. 130.)

By act of March 3, 1851, (9 Stat., 572,) a further appropriation of \$25,000 was made for expenses of treating with Indians in California, which was remitted to them by the Commissioner of Indian Affairs, June 25, 1851.—(Doc. 4, p. 17.)

On the 27th of June, 1851, (Doc. 4, p. 17,) the Commissioner of Indian Affairs wrote to the commissioners, that the two appropriations of \$25,000 each constituted all the money applicable to the negotiation of treaties in California; and he said, “when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress.” This letter reached McKee September 14, near Humboldt river, (p. 186,) Barbour, at San Francisco, in September, (p. 260,) and Wozencraft, on the Sacramento river, September 2.—(p. 180.)

The commissioners arrived at San Francisco between the 27th of December, 1850, and January 8, 1851, (Doc. 4, p. 53,) and soon after started southward up the valley of the San Joaquin, meeting and treating with the Indian tribes of the valley.—(Doc. 4, pp. 54 to 76.) Arrived near the head of the valley, at Camp Barbour, May 1, (Doc. 4, p. 76,) they concluded to separate and act individually in their several districts, which had been determined by lot. Barbour took the southern district, Wozencraft the middle district, and McKee the northern district.

This division was communicated to the Commissioner of Indian Affairs, by letters of May 1 and 13, 1851, (Doc. 4, p. 77,) and approved by him June 27, 1851.—(Doc. 4, p. 17.)

From Camp Barbour Wozencraft returned to San Francisco, May 13,

and on the 24th left again to visit and treat with the Indians in the northern part of his district. From this he returned to San Francisco on or before the 30th of September.—(Doc. 4, p. 187.) Besides what cash he had expended, he had incurred debts for provisions furnished to Indians, up to September 16, to the amount of \$60,060.—(Doc. 4, p. 189.)

This sum alone exceeded the whole appropriation, and he had previously, as above shown, received the letter of the Commissioner of Indian Affairs, of June 27, 1851, directing him in that event to cease negotiation. From this date forward, therefore, September 16, 1851, he had no authority except as "agent simply."

The claim of McDougall arose long after this date.

The claimant produces a receipt of Puckett & Henderson, Indian traders at Tulare lake, for 1,000 head of cattle, averaging 650 pounds, delivered for the use of certain tribes of Indians. This receipt is dated May 17, 1852; and on the 26th of the same month McDougall stated an account against the United States for that quantity of beef, amounting, at 12½ cents, to \$81,250, which Wozencraft, at San Francisco, certified to be correct, and for which he drew drafts upon the Secretary of the Interior. Those drafts are not produced.

No previous contract or understanding in regard to the beef is alleged in the petition or disclosed in the evidence; nor is there any evidence that it was ever issued to the Indians, except Wozencraft's statement that it was so reported to him by his subordinates, who were, no doubt, the traders in question.

This beef, however, certainly was not delivered in May, for in Wozencraft's report of June 23, 1852, (Doc. 4, p. 339,) he speaks of the cattle "being delivered by Colonel George McDougall in the south." The allegations in the petition, as to price and other particulars, identify these as the cattle in question.—(See, also, Doc. 4, p. 398.)

The southern Indians were not in Wozencraft's agency, but in Barbour's. Wozencraft indeed claims, in his correspondence, that Barbour, on returning to the east, had left him in charge of it; but Barbour could not delegate his authority.

It is not proven that the Indians were entitled to receive this supply of beef under any agreement made with them by the commissioners or either of them; but even if they were, it is contended that no authority was given to the commissioners to do more than was necessary to conclude treaties; that this authority did not extend beyond the conclusion of the treaties—*i. e.*, the commissioners could not, under the authority to conclude the treaties, agree with the Indians, as an inducement to accept terms, that the treaties themselves should be fulfilled before being ratified by the Senate, or even being forwarded to the President.—(See letters of Commissioner of Indian Affairs to them, June 25, 1851, and July 16, 1851; Doc. 4, pp. 17 and 18.)

The solicitor maintains that the commissioners had no authority to make contracts beyond what was expressly or impliedly given in their written instructions.

That if they had any such authority as commissioners, it was taken away by the act of February 27, 1851.

Or, if not by that act, then by the instructions of April 12, 1851, even if given under an erroneous construction of the act, (*U. S. vs. Eliason*, 16 Pet., 291:)

And that all authority to negotiate treaties ceased under instructions of June 27, 1851, on or before September 30, 1851.

It is further contended that the contract with McDougall is void, being made contrary to the act of May 1, 1820, (sec. 6, 3 Stat., 568,) which prohibits any contracts, except such as are made under a law authorizing the same, or where there are appropriations adequate to their fulfillment.

And again: being made contrary to the provisions of the act of June 30, 1834, (sec. 13, 4 Stat., 757,) which prescribes the mode of purchasing goods for indians.

And again: if these acts should not be held to apply, objection is further made for non conformity to the act of March 3, 1809, (2 Stat., 536,) as construed by Attorney General Berrien, August 29, 1829.

It is claimed by the petitioners that the relation of the government to the Indians is similar to that of guardian to his ward; and it is, therefore, bound for necessaries furnished. If so, those who claim to have furnished necessaries must prove the necessity, (*Chitty Cont.*, 117, and cases there cited,) and that the government has funds of these wards in possession to pay the debt. But we deny the existence of that relation, and contend that the duty of the government to the Indians is one of imperfect obligation, and one which Congress only can acknowledge and discharge.

The solicitor denies that Wozencraft had authority to purchase the cattle from McDougall.

He denies that the Indians for whom it was purchased needed the beef for their subsistence.

He denies that all the beef was delivered according to contract.

And he denies that any of it ever came into the possession of any officer or agent of the United States.

JNO. D. McPHERSON,
Deputy solicitor.

IN THE COURT OF CLAIMS.

GEORGE MCDOUGALL *vs.* THE UNITED STATES.

George McDougall claims upon a contract made with him by M. O. Wozencraft, on the part of the United States, in May, 1852, for supplies of beef to be furnished to the Indians in the lower part or southern agency of the State of California, at twelve and a half cents per pound, if paid for at the then ensuing session of Congress; if not then, at fifteen and a half cents per pound, payment to be made by bills drawn by M. O. Wozencraft on the Indian Bureau or Secretary of the Interior at Washington.

The petitioner then alleged that under this contract six hundred and fifty thousand pounds of beef were furnished and delivered by him to M. O. Wozencraft, for which that gentleman drew bills on the

department, first, for \$81,250, the price of the beef at twelve and a half cents per pound, and afterward for \$1,900 more to make up the price at fifteen cents per pound; all of which bills the department refused to pay.

From the evidence (the receipts of Ruckel and Hutchinson prefixed to Mr. Wozencraft's deposition, taken 3d of April, 1856,) it appears that the beef is claimed as furnished to Cow-we-has, San Louis, and Dieganian Indians. But Mr. Wozencraft's report to the department, (Doc. 4, pp. 285-288,) shows that the treaty with those Indians was made after 25th December, 1851, and therefore after Mr. Wozencraft knew, (as appears by his letter, December 1, 1851, Doc. 4, pp. 229, 230,) that the appropriation of \$50,000 had been exhausted, and that consequently his power "to hold treaties" was annulled by the instructions from the department, dated June 27, 1850, which he had received September 2, 1850, (Doc. 4, p. 180.) So that the treaty, for the fulfilment of which these supplies are claimed, was made against the most explicit instructions.

The evidence of the delivery of the beef under the contract is—

1st. Mr. Wozencraft's receipt, (Exhibit X, prefixed to his deposition of April 3, 1856,) of 650,000 pounds of beef, at \$81,250; and his answer to the twelfth direct interrogatory in his deposition, marked O. M. W., No. 1. But the force of this testimony is entirely destroyed by his answer to the fourth cross-interrogatory in that deposition, to the effect that he had no personal knowledge of the delivery, and by his answers to Lieutenant Beale.—(Doc. 4, p. 368.)

The other evidence of the delivery of the beef is a receipt of Ruckel and Hutchinson, (Exhibit Z,) as follows:

LOS ANGELOS, *May 17, 1852.*

Received of George McDougall, the contracting party for supplying the Cow-we-has, San Louis and Dieganian tribes of Indians with beef cattle, one thousand head of cattle, averaging six hundred and fifty pounds weight each.

J. S. RUCKEL,

U. S. Indian trader for the San Louis and Dieganian Indians.

STEPHEN HUTCHINSON,

U. S. Indian trader for the Cow-we-has tribe of Indians.

As the testimony of witnesses this receipt is not evidence, for it is not testimony under oath. And as an admission it is not efficient, for there is no evidence in the case that Ruckel and Hutchinson were authorized to receive or receipt for the beef for the United States; and there is nothing in the case from which this can be inferred, except that Mr. Wozencraft, in 1856, four years after the transaction, verifies their signatures, and *does no more.*

By the receipt Ruckel and Hutchinson are traders for different tribes; yet the receipt does not exhibit any appropriation or quotas for these tribes, but purports that these traders, jointly, received the whole quantity of beef claimed for, 650,000 pounds, at one time, *May 17, 1852*; while Mr. Wozencraft's report, *June 23, 1852*, (Doc. 4,

339,) shows that McDougall was then delivering the beef under this contract.

The receipt also states that the delivery was of "one thousand head of cattle, averaging six hundred and fifty pounds weight each;" while other evidence tends to show that the average weight of cattle in California did not exceed five hundred pounds weight each, on the largest estimate.—(Doc. 61, pp. 6, 11, 17; Doc. 4, p. 341.)

Then the petitioner in his petition and evidence, (Exhibit X,) sets forth a receipt given by him to Mr. Wozencraft, thus:

"Received, San Francisco, May 26th, 1852, of O. M. Wozencraft, United States Indian agent, eighty-one thousand two hundred and fifty dollars, (\$81,250,) in full by drafts on the Indian Bureau for the above account.

"GEORGE MCDOUGALL."

By this document the "account" was settled by the bills given for it, and by the arrangement between the parties those bills or drafts were to be the ground of claim. They were negotiable, for they were payable to Mr. McDougall's order, (petition, p. 3,) and their negotiation by him would transfer his interest in the claim. The bills are not produced, nor are they accounted for, except by the averment, (petition 5,) "that he is the sole owner thereof," and of this averment there is no proof.

This case is the same in principle as the case of Samuel J. Hensley, heretofore decided by this Court, and for the reasons and considerations therein stated, we are of opinion that the petitioner is not entitled to the relief he prays for.