

Gratitot Vs. United States

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Appeal No. : 45 U.S. 80

Appellant : Gratitot

Respondent : United States

Judgement :

Gratitot v. United States - 45 U.S. 80 (1846)

U.S. Supreme Court Gratitot v. United States, 45 U.S. 4 How. 80 80 (1846)

Gratitot v. United States

45 U.S. (4 How.) 80

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF MISSOURI

SYLLABUS

The 67th article of the general regulations of the army, published in 1821, recognizes two disbursing officers upon fortifications -- namely the agent of fortifications and the superintending engineer. Where there is no agent, the

superintending engineer can be required to perform his duty for a compensation which is fixed by the army regulations. The receipt of a sum of money by the superintending engineer, and custody of it until it could be turned over to the agent, will not justify a charge of two and one-half percent commission. And in case of such a charge, there is no foundation for a question of usage to be left to the jury.

In this particular case, the charges made by General Gratiot for collecting money (as stated in the sixth, seventh, and eighth items of his account) were already included in his charge for disbursing, contained in the second item, because when disbursing these sums he was acting as agent for fortifications as well as superintending engineer, which duty the department had a right to require him to perform at a fixed compensation, which had already been allowed. The court below was right in refusing to permit evidence in support of these charges to go to the jury, because the only evidence was the transcript, which was not sufficient in law.

The charge of two and one-half percent, as contained in the second item of the account, was unauthorized by law because it consisted either of charges of commission upon money which had come into his hands for stoppages or for remittances made to him as disbursing agent, as above described.

The charge of a commission of two and one-half percent for disbursements other than those on Forts Monroe and Calhoun, as contained in the third item of his account, was a charge for disbursing in the character of superintending engineer, acting also as agent for fortifications, and is not allowed by law.

The charge for extra official services, as contained in the fourteenth item of the account, is the same which this Court substantially rejected when this case was formerly under consideration, reported in 15 Peters, except the charge for superintendence relative to the northern boundary of Ohio. Excepting this, the other services were within the ordinary special duties of chief engineer, and there being

no proof of what these extra official services had been except the account itself, the court below did not err in excluding it from the jury.

The charge for extra official services was against law, because the duties performed necessarily belonged to the office of chief engineer, and if any services were performed beyond the duties of that office, it was necessary that evidence should be introduced to show what had been the chief engineer's personal as well as official agency.

It was the province of the court below to decide as matter of law what were the duties of the chief engineer, and to judge whether any evidence had been introduced tending to show that General Gratiot had performed any services not appertaining to his station as chief engineer.

The army regulations under which General Gratiot was removed from West Point to Washington were authorized by law, and his brevet rank did not release him from discharging the duties of his commission proper.

This was the same case which was before this Court at January term, 1841, which is reported in [40 U. S. 15](#) Pet. 336. Being sent back to the circuit court, it came up for trial, after sundry preliminary proceedings which it is not important to state, on 25 April, 1843. On the trial, the United States produced and gave in evidence to the jury two transcripts from the books and proceedings of the Treasury Department, which were the same as those produced upon the former trial. The plaintiff also gave in evidence an original account, rendered by the defendant Gratiot to the plaintiff, signed by the defendant, showing a balance in his hands of \$35,000 due on account of the appropriation for a fort at Grand Terre, Louisiana.

The plaintiff's case being here closed, the defendant produced his account against the United States, and proved, by a transcript from the books and proceedings of the Treasury Department, that each and every item of his account had been duly presented to the accounting officers of the Treasury Department for allowance against the United States, and had been by the said officers disallowed; which

account was in the words and figures following, to-wit:

" *Report of Auditor on General Gratiot's Account* "

"Report of the Third Auditor of the Treasury on the accounts and claims of General Charles Gratiot, late chief engineer, transmitted to him by the Solicitor of the Treasury on 25 March, 1841, for the decision of the accounting officers thereon."

"No 1. For the safekeeping of and responsibility for the following sums placed in the custody of Charles Gratiot, from 27 August up to 7 and 20 September, 1821, the dates of their being turned over to James Maurice, as shown on the credit side of the Treasury transcript admitted in evidence in the Circuit Court of Missouri in the case of United States v. Charles Gratiot,

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during the April term of 1840, this during a period of time that he was not a disbursing agent, viz.: "

On account of Fort Calhoun \$19,500.00

On account of Fort Monroe. 26,550.00

Making the aggregate sum of. \$46,050.00

Commission on \$46,050, according to usage

in like cases, at 2 1/2 percent. . . . \$ 1,151.25

"2. For disbursing, from 20 May, 1822, to 30 of September, 1829, both inclusive, \$84,325.58, on account of the appropriations for fortifications, other than those on Forts Monroe and Calhoun, for which a separate and distinct accountability was imposed by law, and, according to the decision of the Supreme Court of the United States, as also that of the Secretary of War of 26 May, 1831, in the case of Tuttle, constituted a separate agency. Vide opinion of the Supreme Court of 1841, on the

subject, and accounts of Tuttle, on file in the Third Auditor's Office, by which latter it is shown that although he (Tuttle) received compensation for the construction or repairs of a fort, he was entitled to, and did receive, an additional compensation for disbursing, at the same time and place, the funds for other and distinct appropriations, and that he also received, at the same time, a like compensation for disbursing the funds of each separate appropriation for piers at New Castle and Marcus Hook."

Commission on \$84,325.58, at 2 1/2

percent, as allowed by general

regulations of the army. \$ 2,108.14

"3. For disbursing \$30,531.60, on account of the appropriation for the repairs and contingencies of fortifications, from 1st November, 1823, to 30 September, 1829, both days included, as shown by Treasury transcript referred to above, which disbursements were other than those on Forts Monroe and Calhoun, it having been the usage of the department to make the like compensation for disbursements under the like circumstances."

Commissions on \$30,531.60, at 2 1/2

percent, being less than \$2 per day. . . \$ 763.29

"4. For disbursing \$591,039 00, on account of the appropriations for Fort Calhoun, from 13 November, 1821, to 30 September, 1829, both days included, 2,879 days, at \$2 per day, being less than 2 1/2 percent, as allowed by general regulations of the army."

Account before rendered \$ 5,758.00

"5. For disbursing \$819,677.64, on account of the appropriations for Fort Monroe from the 13th of November, 1821, to the 30th of September, 1829, both days included, 2,879 days, at \$2 per day, as allowed by general regulations of the army."

Account before rendered \$ 5,758.00

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"6. For collections of money made for the United States from Jacob Lewis & Co., as per accompanying abstract, marked A, which service did not, under the regulations, enter into or form any part of the duties of a 'disbursing agent.'"

Commissions on the sums collected, viz.,

\$24,335.81, at 2 1/2 percent, according

to usage in similar cases \$608.39

"7. For ditto, ditto, from Samuel Cooper, as per accompanying abstract, marked B."

Commissions on the same collected,

viz., \$3,233.62, at 2 1/2 percent \$80.84

"8. For ditto, ditto, for sales of public property &c.;, as per accompanying abstract, marked C."

Commissions on sums collected,

viz., \$16,150.81, at 2 1/2 percent. . \$403.77

"9. For 480 barrels cement, account rendered and admitted to his credit"

in former settlement \$1,404.00

"10. For quarters furnished Lieuts. Dutten and Mordecai, on account of Forts Monroe and Calhoun."

Accounts heretofore rendered \$40.00

"11. For this amount paid to Robert Archer, for medical attendance on persons employed at Forts Monroe and Calhoun."

Accounts before rendered \$ 552.00

"12. For this amount expended on account of repairs and contingencies of fortifications, \$345.59. Account before rendered and passed to the credit of General Gratiot in former settlement."

"13. For the following sums withhold by the Treasury officers, viz.: "

Pay and emoluments from 1 April, 1836,

to the 6 December, 1838, both days

included \$10,763.99

Allowance for fuel and quarters for same

period. 905.80

Transportation of officers' baggage . . 618.77

\$12,284.46

"14. For certain extra official services, as more fully set forth in the accompanying account marked D, viz.: for his extra official services in conducting the affairs connected with the civil works of internal improvement carried on by the United States; and in conducting also the affairs connected with the execution of the Act of Congress of July 14, 1832, 'to provide for the taking of certain observations preparatory to the adjustment of the northern boundary line of the State of Ohio,' referred to the Engineer Bureau for execution by the executive of the United States, and other extra official services connected with the aforesaid items of charge, and which did not constitute any part of his duties as a military officer, but which properly appertained to the duties and functions of civil engineering, and

were performed under an understood or implied

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contract with the War Department, under the sanction and authority of the President of the United States, to be compensated therefor, over and above my official pay and emoluments, at a reasonable rate of compensation, according to the established usage of the department in analogous cases, from 30 July, 1828, to 6 December, 1838, both days included, 10 years and 130 days, at \$3,600 per annum, that being the pay granted to John S. Sullivan, David Shriver, James Geddes, and Nathan S. Roberts, Esqrs., civil engineers employed under the act of 30 April, 1824, entitled an act to procure the necessary surveys, plans, and estimates upon the subject of roads and canals, and less than the extra pay of Captain Andrew Talcott, of the Corps of Engineers, while he was employed under the orders of the Engineer bureau, in executing the act of 14 July, 1832, above referred to \$37,282.19."

"15. For certain extra official services, specified in the items of charge contained in accompanying account marked E, none of which services constituted any part or parcel of the duties or services appertaining to the office or functions of any engineer, civil or military, nor of the proper business of civil or military engineering, nor of any of the legal or prescribed duties or functions of my office of chief engineer, or colonel of engineers, nor in any manner included in my official compensation as chief engineer, colonel of engineers, or brigade general by brevet in the Army of the United States, but all of which services were extra official in relation to each and every of my said official capacities, and were performed under an understood or implied contract with the War Department, under the sanction and authority of the President of the United States, to be compensated therefor over and above my official pay and emoluments at a reasonable rate of compensation, according to the established usage of the department in analogous cases. For the specification of all which services, I refer to the items in my said account E, all of which I am prepared to show, and prove, were in fact such extra official services, and entitled me, under such understood or implied contract, to such reasonable compensation over and above my official pay and emoluments

as aforesaid, viz.: "

" *The United States to Charles Gratiot, Dr.* "

" *Items* "

"No. 1. For his extra official services at one of the desks or bureaux of the War Department, from 30 of July, 1828, to 6 December, 1838, both days included, 10 years and 130 days, in receiving, acting on, and causing to be filed for safekeeping, in the archives of said desk or bureau, 23,408 letters and other papers (not accounts), 10 years and 130 days."

"2. For his entire official services at one of the desks or bureaux of the War Department, from 30 July, 1828, to 6

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December, 1838, both days included, responding to the letters or other communications addressed to, or referred by, the Secretary of War to said desk on business pertaining properly to the administrative branch of the War Department, which responses have in the aggregate filled 10,003 pages of folio-post record, 10 years and 130 days."

"3. For ditto, ditto, ditto, during the same period of time as the preceding, in examining and causing to be filed, and preservation of, the returns of property received from the agents acting under the orders of said desk or bureau, say about 10 agents in number on an average, 10 years and 130 days."

"4. For ditto, ditto, ditto, during the same period as the preceding, in examining the estimates for funds yearly, quarterly, and monthly, from the disbursing agents in correspondence with said desk or bureau, about 100 agents on an average; making requisitions on the Secretary of War, for the funds to be remitted to said agents by the Treasury Department; directing the mode of applying and accounting for the funds so remitted; keeping the account with the Treasury for such remittances; examining the vouchers rendered by the said disbursing agents in reference to price and application of the articles and labor paid for, and finally

transmitting the said accounts to the Auditor for settlement, 10 years and 130 days."

"NOTE. The amount disbursed by said agents, and accounted for to the Treasury during the time specified, was:"

For fortifications \$ 7,899,571.75

" internal improvement. 10,242,425.42

" lighthouses and beacons 91,842.77

" Military Academy. 344,411.75

" lithographic piers. 2,057.20

" N.W. executive building 3,120.59

" northern boundary of Ohio . . . 25,674.63

\$18,609,104.11

"5. For his extra official services at one of the desks or bureaux of the War Department, from 30 July, 1828, to 6 December, 1838, both days included, in making weekly reports to the Secretary of War of the proceedings in said bureau in relation to each letter or other paper referred from him, or written by direction of the War Department, 10 years and 130 days, per annum."

"6. For ditto, ditto, ditto, in causing all letters and other papers prepared at said desk or bureau to be recorded in books procured for that purpose. Term of service, from 30 July, 1828, to 6 December, 1838, both days included, 10 years and 130 days. "

"7. For his extra official services at one of the desks or bureaux of the War Department, from 30 July, 1828, to 6 December, 1838, both days included, in examination and approval, or return to the agent or party to the contract; for correction or alteration of all contracts appertaining to works to be executed under the direction of the said desk or bureau, and their (the contract) subsequent transmission to the Second Comptroller of the Treasury for file, 10 years and 130 days."

"8. For his extra official services at one of the desks or bureaux of the War Department, from 30 July, 1828, to 6 December, 1838, both days included, in examination of, and reporting upon, all doubtful or disputed claims under contracts executed under the supervision of said desk or bureaux, and in making special reports on cases of claims referred to the War Department, by resolution of either branch of national legislature, or in reply to calls from committees, or individual members of Congress, governors of states and Secretary of War, on application made to Secretary of War, or directly to said desk or bureau, or in obedience to legislative enactment. Of these the following may be cited in part, *viz.*: [Then followed a specification of twenty-two reports made on various subjects]."

"9. For his extra official services at one of the desks or bureaux of the War Department from 30 July, 1828, to 6 December, 1838, both days included, in causing to be registered, in appropriate books of record procured for the purpose, the letters and all other papers relating to the current business of said desk or bureau; to accountability generally, and to other matters &c.;, 10 years and 130 days."

"10. For his extra official services at one of the desks or bureaux of the War Department from the 30 July, 1828, to 6 December, 1838, both days included, in making quarter-yearly reports to the proper accounting officer of the Treasury of the agents connected with said desk or bureau who had rendered their accounts, and of those who had failed to do so, 10 years and 130 days."

"11. For his extra official services at one of the desks or bureaux of the War Department from 30 July, 1828, to 6 December, 1838, both days included, in

carrying on the correspondence in relation to the Military Academy, and forwarding to parents and guardians of the cadets circulars, numbering monthly on an average 338 communications, inclusive of the correspondence of the desks or bureaux before charged, item 2, 10 years and 130 days."

"12. For his extra official services at one of the desks or bureaux of the War Department, from 25 November, 1832, to 30 June, 1835, both days included, in causing to be executed, by executive order, the provision of the Act of 14 July, 1832, entitled, 'An act to provide for the Taking of certain Observations preparatory

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to the Adjustment of the Northern Boundary of the State of Ohio,' 948 days, or 2 years and 218 days."

"For all which extra official services, I charge in the aggregate \$37,127.42"

"PETER HAGNER, *Auditor* "

" *Treasury Department* "

" *Third Auditor's Office, April 5, 1841.*"

"To ALBION K. PARRIS, Esq."

" *Second Comptroller of the Treasury* "

" *Treasury Department* "

" *Second Comptroller's Office, 19 April, 1841* "

"I have examined the several claims of General Charles Gratiot against the United States, as particularly set forth and described in the foregoing report, together with all the evidence, and am of opinion that the said claims are not admissible against the Treasury."

"ALBION K. PARRIS, *Comptroller* "

The defendant, Gratiot, then gave evidence sundry depositions, which occupy nearly one hundred pages of the printed record, and of which it is impossible to give any other than a condensed and summary account.

Benjamin Fowler, clerk in the Engineer's Department. He testified that the services mentioned in the above account were rendered by Gratiot; that the office styled the Engineer Department was always considered as a bureau of the Department of War, to which were referred letters, memorials, petitions, and other papers, to be replied to directly from the Engineer Department or reported on to the Secretary of War for his action; that from July 30, 1828, to December 6, 1838, the number of disbursing agents whose accounts passed through, and were examined in conformity to regulations in, said department was two hundred and five, whose disbursements involved the keeping of three hundred and seventy-nine separate and distinct accounts.

J. G. Swift, who was an officer of the Corps of Engineers from the year 1802 to 1818, and colonel and chief engineer from July, 1812, to November, 1818. He testified that the usage of the government had been to compensate officers of engineers, over and above their pay and emoluments, for services, mentioning his own case and two others.

Major William Gibbs McNeill, who was an officer in the Army of the United States from 1814 to within the preceding four years, during which last four years he was a civil engineer. He stated that whilst an officer of the army, he received extra compensation when put on extraordinary duty or service; that the services charged in Gratiot's account did not belong to the duties of the engineer, either civil or military.

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Captain Talcott, who held a commission in the United States Corps of Engineers from August, 1818, to September, 1836, and in that interval was advanced from the rank of second lieutenant to that of captain in said corps. Afterwards he became a civil engineer. He stated that he had received from the United States

extra allowances for extra services, specifying the cases, and that the services charged for by Gratiot in his account did not appertain to either military or civil engineering.

Thomas L. Smith, Register of the Treasury, who furnished certified copies of certain accounts in which officers had extra allowances.

Major J. D. Graham, a major of Topographical Engineers since August, 1840, and commissioner for the survey and exploration of the Northeastern Boundary of the United States, stating the amount of his pay and emoluments.

Colonel Cross, Assistant Quartermaster General in the Army of the United States, with the rank of colonel, also stating the amount of pay which he had received at sundry times.

Colonel Joseph G. Totten, colonel of the Corps of Engineers and chief engineer. His deposition contained, amongst other matters, the following interrogatory and answer, *viz.:*

"Interrogatory 2. Examine the records and other documents belonging to, and now on file or otherwise in, the Engineer Department, and state therefrom, as nearly as you can, what were the affairs or business committed by executive authority, or otherwise, to the said Engineer Department, to the ministered and administered by Charles Gratiot, then the colonel of the Corps of Engineers, and brigadier general by brevet in the Army of the United States, from 30 July, 1828, to 6 December, 1838, inclusive."

"Answer. It appears from the records of the Engineer Department that the affairs or business committed to the general direction, supervision, and management of the said department, during the period stated in the interrogatory, were the following, namely:"

"1. *Military Engineering* -- Reconnoitering and surveying for military purposes, with the collection and preservation of topographical and geographical memoirs and drawings referring to those objects; the selection of sites; the formation of plans

and estimates; and the construction, repairs, and inspection of fortifications, constituted affairs and business committed to the general direction, supervision, and management of the said Engineer Department, and there appears to have been disbursed for the fulfillment of those objects, and to have been accounted for to the Treasury Department, through the said Engineer Department, during the period the said Gratiot was chief engineer, about \$7,537,675."

"II. *Civil Engineering* -- First, reconnoitering and surveying &c.;, under the provisions of the Act of the 30 April, 1824, entitled, 'An act to procure the necessary Surveys, Plans, and Estimates

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upon the subject of Roads and Canals,' constituted affairs and business committed to the same general direction, supervision, and management; for the fulfillment of these objects, there appears to have been disbursed and accounted for to the Treasury, through the said Engineer Department, during and for the period stated above, about \$67,980."

"Second. The superintendence of the execution of the acts of Congress in relation to internal improvements, by roads, canals, the navigation of rivers, and repairs and improvements connected with the harbors of the United States, or the entrance into the same, with the execution of which the War Department was charged, and the inspection of the operations for the execution thereof constituted affairs and business committed to the same general direction, supervision, and management, and for the fulfillment of these objects there appears to have been disbursed and accounted for to the Treasury, through the Engineer Department, during and for the period stated above, about \$10,032,870."

"Third. Construction of lighthouses and beacons constituted affairs and business committed in the same way, and for which objects there appears to have been expended and accounted for to the Treasury through said Engineer Department during the period stated in the interrogatory the sum of about \$96,625."

"III. *Military Academy* -- During the period stated above, the then colonel of the Corps of Engineers was the inspector of said academy, and was charged by executive order with the correspondence relating to it. There appears to have been expended for the support of that institution, and accounted for to the Treasury, through the Engineer Department, and for the same period, the sum of about \$323,263."

"IV. *Lithographic Press of the War Department* -- This establishment was placed, during the period of its existence, under the control of the Engineer Department; the sum which appears to have been expended in its support, and accounted for to the Treasury Department, through the Engineer Department, amounted to about \$2,057."

" *Northwest Executive Building* -- The execution of the work 'for fitting up the basement rooms of the executive building, occupied by the War Department' was also placed under the direction of the Engineer Department. The amount expended and accounted for to the Treasury through said department appears to have amounted to about \$3,120."

"VI. *Northern Boundary of the State of Ohio* -- The operations in fulfillment of the provisions of the Act of 14 July, 1832, entitled, 'An act to provide for the Taking of certain Observations preparatory to the Adjustment of the Northern Boundary of the State of Ohio,' were under the general direction of this department.

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The amount expended in this service, and accounted for to the Treasury, through the Engineer Department, appears to have been about \$35,474."

"VII. *Ministerial and Administrative Duties* -- Receiving, acting on, and causing to be filed in the archives of the Engineer Department, all the letters and other papers, not accounts, thereto referred or received at said department. Responding to the letters or other communications addressed directly to it, or referred to it by the Secretary of War, examining and causing to be filed all returns of property transmitted by the subordinate agents, examining the estimates, yearly, quarterly,

and monthly, transmitted by the disbursing agents of the department, making requisitions on the Secretary of War for the funds to be remitted in fulfillment of said estimates when approved; directing the mode of applying and accounting for such remittances; keeping an account with the secretary for said remittances; examining the vouchers rendered by said Treasury disbursing agents for settlement through the Engineer Department, and finally transmitting the said accounts to the Auditor of the Treasury for settlement, constituted affairs and business committed to the general direction, supervision, and management of the said Engineer Department. These disbursements appear to have amounted, during the period stated in the interrogatory, to about \$18,089,067. Making for a portion of the time weekly reports to the Secretary of War of the proceedings in said department, in relation to each letter or paper referred to or written by direction of the War Department; causing all letters and other papers prepared in said department to be duly recorded; examining and approving, or returning for correction or amendment, contracts for works or supplies required for the prosecution of the operations carried on under the superintendence of the said department, and transmitting said contracts subsequently to the Second Comptroller for file; examining and reporting upon doubtful or disputed claims on contracts executed under the superintendence of said department; making, when required, special reports on cases of claims referred to the War Department by resolution of either branch of the national legislature, or in replies to calls from committees, or members of Congress, or Secretary of War, or on applications made to the Secretary of War, or directly to said department; causing to be recorded the substance of the letters and other papers received at the Engineer Department which related to its current business; and making quarterly reports, to the proper accounting officer of the Treasury, of such disbursing agents of said department as had rendered their accounts for settlement, and of those who had failed in that particular, constituted affairs and business committed to the same general direction, supervision, and management."

This witness also stated that in 1838, all the works of internal improvement, with the exception of the Cumberland Road, were

transferred to the Topographical bureau and furnished a list of sixty-eight works which were thus transferred.

The defendant, Gratiot, also gave in evidence a printed document of Congress, being document number six of the House of Representatives, of the third session of the Twenty-Seventh Congress, which it was agreed might be used in all courts in which this cause might be pending, as if spread upon the record.

The defendant, Gratiot, further gave in evidence the depositions of witnesses and documents, spread upon the record of the former case.

James C. Wilson, a clerk in the Engineer Department. He testified that Gratiot performed the services presented in the twelve items of the account.

John C. Spencer, then Secretary of War, who testified that the Engineer Department was a bureau of the War Department, charged with such ministerial and administrative duties as might be assigned to it by the Secretary of War. He also furnished certified copies of the following papers, *viz.:*

1. A Regulation dated 10 August, 1818.
2. A Regulation dated 27 July, 1821.
3. Letters from the War Department to Colonel McRee and to Major Thayer, allowing them to go to Europe, with extra pay and rations.
4. The decision of President Monroe allowing brevet pay to General Macomb, the predecessor of General Gratiot.
5. An order of the War Department fixing the Engineer Department at the seat of government.
6. An order from the War Department, dated April 7, 1818, prescribing the duties of the Engineer Department, and also one dated on 1 August, 1828, allowing double rations to each officer of the Corps of Engineers charged with the

construction of a fortification or having a separate command.

Mr. Spencer also stated in his evidence that he had directed the records and files of the Department of War to be searched for any evidence of any contract, express or implied, that General Gratiot was to receive extra compensation for the services charged by him, and that the proper officers reported that no such evidence was to be found except what might be derived from the papers furnished above, which report he (Spencer) believed to be true, and adopted as his answer to the interrogatory.

William B. Lewis, then Second Auditor of the Treasury, who furnished copies of Gratiot's accounts, with the accounts of other officers of the Engineer Corps who had received extra allowances.

Albion K. Parris, then Second Comptroller of the Treasury, who testified that the number of contracts transmitted from the Engineer Department to the office of the Second Comptroller between

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July 30, 1828, and December 6, 1838, amounted to about two thousand eight hundred and thirty.

General Towson, Paymaster General of the army, who testified as to the time when Gratiot received the pay of his brevet rank and when it was stopped.

Asbury Dickens, Secretary of the Senate, who furnished a copy of a report made by Gratiot to the Secretary of War upon a claim pending before the Senate.

Many of the witnesses above mentioned were cross-questioned on the part of the United States.

The defendant, Gratiot, further gave in evidence the following printed papers, which, it was agreed, might he used as if spread upon the record, *viz.:*

1. Congressional Document No. 78, of the 2d session, 23d Congress.

2. Reports No. 449, 455, 456, 1st session, 23d Congress.

3. Extracts from the Army Regulations revised conformably to the Act of 24 April, 1816. War Office, September, 1816, pages 96, 97, 98.

The defendant, Gratiot, having here closed his evidence, the counsel on the part of the United States gave in evidence to the jury:

1. The deposition of John C. Calhoun, formerly Secretary of War, who testified that he established what is known as the present bureau system of the War Department, of which the Engineer Department constituted a part, and that he had no recollection of any intention or expectation, in establishing the bureau system, that the chief of the Corps of Engineers should receive for his services, as the officer in charge of that bureau, any compensation over and above his pay and emoluments as an officer of the army.

2. Colonel J. J. Abert, colonel of the Corps of Topographical Engineers, who testified that he had never received or claimed any extra compensation for official services at one of the desks or bureaux of the War Department while at the head of said bureau; that he had received extra compensation, but was not, during the time, in the direction of the bureau; that in his opinion, any duties of an engineer character, assigned by the Regulations, or by direction of the War Department, to either corps of engineers become the proper and legitimate duties of that corps.

3. Thomas S. Jesup, major general by brevet, and Quartermaster General of the army, who explained why the colonel of engineers and other officers stationed at the seat of government were allowed double rations, and testified that he considered the services charged for in Gratiot's accounts as the legitimate and proper duties of the chief engineer.

4. John H. Eaton, formerly Secretary of War, who testified that he was in office during a part of the time mentioned in Gratiot's

accounts, and that no contract or engagement was ever entered into by him with General Gratiot as to the services to be performed by Gratiot.

The evidence being closed on both sides, the following agreement was filed.

Facts admitted by parties -- It is admitted by the parties, that the account referred to in the depositions of Colonel J. J. Abert and General Jesup is the same attached to the deposition of Benjamin Fowler.

The United States, by the district attorney, admitted that the defendant should received credit for the sum of \$5,758, being the fifth item of his account, to be deducted from the balance found due from him to the United States on the Treasury transcripts given in evidence; and also that the sum of \$276, being one-half of the eleventh item in his account, should, in like manner, be credited to him against the balance on said transcripts.

The defendant withdrew his claim for the fourth, ninth, tenth, twelfth, and thirteenth, and one-half of the eleventh items in his account, the same having been allowed him in former settlements.

Whereupon the court instructed the jury, on the part of the United States, as follows:

" *Instructions given* -- 1st. That the defendant is not entitled to any commission on the sums by him turned over to James Maurice, charged by him on account of Fort Calhoun and Fort Monroe and rejected by the accounting officers of the Treasury; (1) because defendant received four dollars each day for his attendance upon the above works, by a former allowance, and by the one now ordered; (2) because the only evidence is what the transcript introduced by the plaintiff furnishes; and such evidence is not sufficient to authorize any commission to be allowed merely for turning over to an accounting officer the moneys."

"2d. Nor is the defendant entitled to any credit for commissions or disbursements on account of appropriations for fortifications as charged by him. Of this item, the only evidence in the cause is that furnished by the transcript introduced by the

United States, as the principal evidence on which the defendant is charged, and the evidence thereby furnished, is not sufficient to authorize the jury to allow the defendant the credit claimed."

"3d. Nor is the defendant entitled to commissions for disbursements on account of contingencies and repairs of fortifications as charged by him, there being no evidence on this item of charge except the above-named transcript, which evidence is not sufficient to authorize the jury to allow any credit for this item."

"4th. Nor is the defendant entitled to any credit for commissions, as charged, upon any moneys collected of Jacob Lewis & Co.

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and Samuel Cooper, or either of them; because the above-named transcript is the only evidence in the cause to establish this charge against the United States, and such evidence is not sufficient."

"5th. Nor is the defendant entitled to commissions as charged by him on account of sales of public property, there being no evidence but the foregoing transcript to establish the charge, which evidence is not sufficient."

"In the five cases above, there is no evidence to warrant the credit claimed in either case."

"6th. The services of the defendant, while chief engineer, charged with the duties of the Engineer Department, in conducting the affairs connected with the civil works of internal improvement carried on by the United States, are not extra official services for which he is entitled to credit in this action."

"7th. There is no evidence that the defendant performed any extra official service in conducting the affairs connected with the execution of the Act of Congress of 14 July, 1832, to provide for the taking of certain observations preparatory to the adjustment of the northern boundary line of the State of Ohio."

"8th. The service alleged to have been performed by the defendant at one of the desks or bureaux of the War Department, the claims to which are specified in an account dated March 23, 1841, and appended to Benjamin Fowler's deposition, taken March 16, 1842, if such services were performed at the bureau of the chief engineer, and professedly in that capacity, they were among the duties appertaining to the office, and such as the defendant was bound to perform as chief engineer, without being entitled to any extra compensation above his pay and emoluments as a brigadier general in the Army of the United States. And as to items numbered from one to twenty-two, in the same account, for examining and reporting on various subjects, for which the defendant claims extra official compensation, his evidence, and the evidence of the United States, show them to have been examinations and reports on matters appertaining to the office of chief engineer. So are the reports on their face, so far as they have been given in evidence, nor is there any evidence in any degree to the contrary. To sustain some of them, no evidence whatever is offered; neither for making those in regard to which evidence has been offered, nor for such in regard to which no evidence has been offered, can the defendant claim extra compensation."

" *Exceptions* -- To the giving of the eight instructions above set forth, and to the giving of each of them, the defendant, by his counsel, excepted."

"The defendant, by his counsel, then prayed the court to instruct the jury as follows:"

"1. That under the first count of the declaration, the plaintiff is

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not entitled to recover against the defendant for any money received by him in any office or capacity other than chief engineer. Which instruction was given by the court."

" *Instructions refused:* "

"2. That under the second count of the declaration, the plaintiff is not entitled to recover against the defendant for any money received by him in any office or capacity not mentioned in the bill of particulars of demands, furnished and filed by the plaintiff under that count, nor for any money which may have been received by the defendant at any other time than that mentioned in said bill of particulars, that is, the year 1839."

"This last instruction was refused by the court, because there was no order made by the court on the plaintiff to furnish a bill of particulars, and on the memorandum furnished voluntarily to the defendant's counsel the court did not act, and might not have acted, if required to do so, under the circumstances, this being a matter of discretion."

"3. That if the jury finds from the evidence, that the defendant performed any of the services for which he has charged in the last item of his account under the direction of the President or Secretary of War, and that such services were neither military nor civil engineering, he is entitled to compensation for such services as a setoff in this action. This 1st instruction was refused by the court."

"4. That if the jury find, from the evidence, that the defendant performed any of the services in the item of his account appended to Benjamin Fowler's deposition under the direction of the President or Secretary of War, and that such services were not enjoined by the army regulations, the defendant is entitled to compensation for such services as a setoff in this action."

"This last instruction was refused by the court, and the refusal reduced to writing in the following words:"

"This instruction is refused, and the eighth instruction, given on the part of the United States, is referred to as embracing the whole subject matter. The court is furthermore of opinion that the President or secretary could well refer to the chief engineer any matter for report &c.;, which appertained to the particular service devolving on the Engineer Department, in cases where Congress, or either House, by law or resolution, required information from the President on that particular

subject, aside from any injunction by the army regulations, and therefore he instruction cannot be given in the terms it is asked."

"5. That if the jury find, from the evidence, that the defendant, by the direction of the President or of the Secretary of War, performed any of the services charged for in the last item of his account, being the said item attached to Fowler's deposition, and that the services so rendered were out of the limits of his official

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duties as chief engineer, he is entitled to compensation for such extra services, as a setoff in this action."

"This last instruction was refused by the court, and the refusal was reduced to writing, in the following words:"

"The court refuses this instruction, because the whole evidence in the cause, without any exception, is written evidence, which the court is called on to construe and apply, and not the jury, and from such evidence to ascertain, as matter of law, what were the defendant's duties and acts; and taking all the evidence, and construing it the most favorably for the defendant, none is adduced showing, or tending to show, the defendant performed any service not appertaining to his station as chief engineer, and for the proper instruction on the item referred to, the eighth instruction on part of the United States, on this item, is to govern the jury."

"If for no other reason, this instruction would be refused, because the said eighth instruction concludes the whole matter. There is no fact, therefore, to which this instruction could apply, and it again refers the matters of law to the jury -- what the chief engineer's official duties were -- assuming to withdraw their decision from the court, and out of the previous instruction."

"To all which decisions and opinions of the court in giving the instructions on the part of the United States, and in refusing the instructions which were prayed for by the defendant, and by the court refused, the defendant, by his counsel, excepts, and prays the court to sign and seal this his bill of exceptions, and that the same

be made part of the record, which is done."

"J. CATRON [L.S.]"

To review these instructions and refusals, this writ of error was sued out.

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MR. JUSTICE WAYNE delivered the opinion of the Court.

This case is now before us upon exceptions, taken upon its trial in the circuit court, to the instructions which were given by the court, and such as it refused to give to the jury. We do not think them well founded. When the instructions were given and refused, the only matters in controversy were items 1, 2, 3, 6, 7, 8, 14, 15, in General Gratiot's setoff. The 4th, 9th, 10th, 12th items, and one-half of the 11th, had been withdrawn, having been allowed in former settlements. The other half of 11, and the entire 5th item, were admitted by the district attorney, in the course of the trial, to be audits against the demand of the United States. The instructions then are to be considered in reference to the disputed items 1, 2, 3, 6, 7, 8, 14, 15.

The first instruction was given upon item number 1, the second upon item 2, the third upon item 3, the fourth upon items 6 and 7, the fifth upon the 8th item, the sixth and seventh upon item 14, and the eighth instruction upon item 15, comprehending under the last all the particulars in the account attached to Mr. Benjamin Fowler's deposition.

The instructions were intended by the court to be legal conclusions from all the evidence in the cause. Our inquiries will be are they so? And, as legal conclusions, were they given in such terms as in no way to encroach upon the province of the jury to weigh the evidence as to the facts in the case?

The first instruction denies the right to commissions upon the

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amount turned over to James Maurice. After another reason in no way material to be here noticed, the court gives as a final reason for rejecting the charge, that the only evidence in support of it was the transcript, and that such evidence was not sufficient to authorize any commission to be allowed for turning over the money to an accounting officer.

The transcript alluded to is the account of General Gratiot with the United States. It was a part of the record in the case reported in [40 U. S. 15](#) Pet. 336, and was used again as evidence upon the trial of the cause in the circuit court, with the consent of General Gratiot.

We learn from it, that between 27 August and 20 September, 1821, \$46,050 had been remitted to General Gratiot, then a major in the Corps of Engineers and the superintending engineer of fortifications at Old Point Comfort, and that he, within the dates just mentioned, turned over the money to James Maurice, agent of fortifications, on account of Forts Calhoun and Monroe. This is the only evidence bearing upon the item. It is a charge of a commission of 2 1/2 percent upon the amount, as it is expressed in the setoff, for safekeeping and the responsibility incurred in receiving and turning it over to the agent, when General Gratiot was *not a disbursing agent*. It is then established, that the money was received and turned over to Maurice, when he was the agent; and also what were the relations of General Gratiot and of Maurice to the government at *Old Point Comfort*. Those relations arose from the 67th article of the General Regulations of the Army, published in orders from the War Department in July, 1821. From the detail in that article, particularly that paragraph of it directing in what kind of money the agent should make payments, and in what banks it was to be kept by him, there is no doubt it was intended that he should disburse from remittances made to himself by the government. Such was to be the ordinary nature of remittance. But by another paragraph, the superintending engineer had a general superintendence of the agents' disbursements, and none could be made without his signature. And by a third paragraph in the same article, he could be required to perform the duties of agent, when there was no agent of fortifications, for which service a particular compensation is allowed. Is it not obvious, then, with such a power in the Engineer

Department, in the contingency mentioned, to call upon the superintending engineer to perform the duties of agent, that remittances could be made to him to be disbursed by himself, when at the time of the remittance there was no qualified agent to receive it, or to be turned over to an agent when one became qualified. The exact state of the case in that respect we do not know -- the transcript does not show it; but it is because it does not show it, and because the money was not disbursed by General Gratiot, but was paid over by him to

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the agent in so short a time after it was received, that we are bound to presume there was not an agent at Old Point qualified to receive the remittances made to General Gratiot, and that intermediately, before the money was turned over, the agent who did receive and disburse it became qualified. There were only two officers to whom remittances could be made and by whom they could be disbursed -- the superintending engineer and the agent for fortifications. Such, then, must be the inference, as we have stated it, unless we come to the overstrained conclusion, that the money was remitted to General Gratiot for some other purpose than for disbursement, and that the department was experimenting in a third way, as to the manner of making remittances and of disbursement, contrary to the regulations giving to it the direction of fortifications. The money was clearly sent to be disbursed by General Gratiot, or by an agent. If not for such purpose, it would not have been remitted. But having been remitted to the superintendent of fortifications, and not having been disbursed by him, it could alone have been prevented by the supervision of an agent whose duty it became to do it, the regulation not permitting it to be done by the superintendent, except when there was no agent for fortifications. It is not necessary for us to go out of this course of reasoning for the purpose of confirming it, but it is confirmed by the manner in which the charge is made. It is

"for the safekeeping of and responsibility for the following sums, placed in the custody of C. Gratiot, from 27 August up to 7 and 20 September, 1821, the dates of their being turned over to James Maurice, as shown on the credit side of the transcript &c.;, when General Gratiot *was not a disbursing agent.* "

Why for safekeeping, if at the time the money was remitted James Maurice was a qualified agent to whom the remittance could have been made? Why paid over to him, if between 27 August and 7 and 20 September Maurice had not become so? The terms in which the charge is made disclose the fact to have been as we have inferred it was, and the error in making it has arisen from its having been supposed that the superintending engineer could be the custodian of government money in any other character or purpose than that in which it could be remitted to him by the Engineer Department under the 67th article of the Army Regulations of 1821. In this view of the claim, no case of compensation by way of usage can apply to it. Here is a case of an officer with certain duties, absolute and contingent, well ascertained, with a fixed and equally well ascertained compensation for any and every service which he could be called on to render. Compensation by way of usage has never been sanctioned by the Court in any case, except for extra official service, which was within the equity of the act of 1797, ch. 74, as that act was originally construed and applied in the case of the [United States v. Wilkins](#), 6 Wheat. 135, and subsequently

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the cases of *McDaniel*, *Ripley*, and *Fillebrown*, in 7 Pet. [32 U. S. 1](#) , [32 U. S. 18](#) , [32 U. S. 28](#) . The instance of commissions having been allowed to General J. G. Swift, for money remitted to him and paid over by him to the military agents, certainly does not apply to the case now under consideration. That was done under a very different state of the law and of army regulations -- when there was neither law nor regulation for making an engineer officer a receiving or disbursing agent, when there was no military agent to receive and disburse government funds. We think, then, that the court did not err in instructing the jury, that the only evidence in support of the first item was the transcript, and that such evidence was not sufficient to authorize any commission to be allowed merely for turning over the money to an accounting officer.

The 2d, 6th, 7th, and 8th items in the setoff, and the instructions given upon them, will be considered in connection, because the transcript proves that the 6th, 7th, and 8th items, upon which commissions are a second time charged, though stated

for a different service, are parts of the aggregate of \$84,325.58 upon which commissions are charged in the 2d item. The charge is a commission of 2 1/2 percent upon that amount, for disbursing it "from 20 May, 1822, to 30 September, 1829, on account of the appropriations for fortifications other than those on Forts Monroe and Calhoun." The 6th, 7th, and 8th items are for collections of money made for the United States, from Lewis & Co., Samuel Cooper, and for sales of public property. The first observation which we make here is that the transcript shows that, within two months at furthest after General Gratiot had paid over the sum mentioned in his first item to Maurice, he had been directed, in addition to his duties as superintending engineer, to perform those also of agent for fortifications, and thus became the disbursing officer of all money applied by the Engineer Department to Forts Calhoun and Monroe. For this agency, a specific compensation is given by the 14th paragraph of the 67th article of Army Regulations, and charged by General Gratiot accordingly, in the 4th and 5th items of the setoff, both of which have been allowed to him; the 4th in a former settlement, and the 5th having been admitted, as has been already said, by the district attorney, upon the trial of the cause, as a proper credit against the United States. Our second observation is that the transcript proves that the expenditure of \$84,325.58 was disbursed upon the fortifications of which General Gratiot was the superintending engineer and disbursing agent, and not upon *other fortifications*, as might be inferred from the manner in which the charge is made. The whole sum, except \$16,150.81, was remitted to General Gratiot on account of the fortification of which he was the superintending engineer and disbursing agent, and that amount was turned over to him by the quartermaster to be re-expended upon Forts Calhoun and Monroe upon each in proportion

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to the relation which the sales of public property bore to the sums expended for it out of the specific appropriations made by Congress for those forts distinctively.

Or in other words, the property sold had been bought and paid for out of the specific appropriations for each fort -- was resold on account of each of them respectively -- the amount of sales of the property of each for being kept

separately, and were so handed over to General Gratiot to be disbursed again. The transcript shows it was so disbursed. This sum is the amount upon which a commission is charged in the 8th item of the setoff, and which the court said in its fifth instruction could not be allowed, "there being no evidence but the transcript to establish it, which was not sufficient." The transcript also shows that \$27,699.43 of the amount of the 2d item in the setoff, denominated in the 6th and 7th items collections from Lewis & Co. and from Cooper, were stoppages out of money remitted to General Gratiot, from payments to be made to those persons, on account of advances which the government had made them on their contracts to supply materials for Forts Calhoun and Monroe. Neither the 6th, nor the 7th, nor the 8th items of the setoff were collections of money by General Gratiot, in the proper sense of that term. The 6th and 7th items were money returned by him out of money remitted to be disbursed by him as agent, and the amount of the 8th item was handed over to him in the same character, and for the same purpose. Thus, the manner in which General Gratiot received more than the half of the 2d item of his setoff, upon which a commission is charged for disbursing and afterwards for receiving, has been shown from the transcript itself. It also shows that the residue of the \$84,325.58 were also remittances which had been made to him in his official relation of agent of fortifications. And that the source from which the entire sum was derived was from general appropriations made by Congress for fortifications, which the Engineer Department directed, as it had a right to do, to be applied to Forts Calhoun and Monroe in addition to the sums expended upon each of them out of specific appropriations which had been made for each. The manner of making appropriations had been general, without particularizing the fortification to which the sum was to be applied, and also appropriations for designated fortifications. A specific appropriation could not be diverted from its object, but general appropriations necessarily implied an application according to the discretion of the department which had the direction of fortifications.

A remittance, then, to General Gratiot from a general appropriation, to be applied to the fortifications of which he was superintending engineer and disbursing agent, falls directly within that paragraph of the 67th article by which he was charged with the latter duty. For which, in addition to his pay and other emoluments, he was

entitled to receive two dollars a day for each fortification for the construction

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of which he disbursed funds, provided his *per diem* did not exceed two and a half percent on the sum expended. That sum, as a *per diem*, amounting to more than \$11,000, has been allowed. From this detailed examination of the transcript (and this 2d item is nowhere besides mentioned in the record), it must be obvious that the court did not err in the second, fourth, or fifth instructions which it gave to the jury, by which the 2d, 6th, 7th, and 8th items of the setoff were disallowed. In making the charge, the opinion given by this Court in 15 Peters has been misconceived. The case of Lieutenant Tuttle does not apply. That was disbursing moneys of separate appropriations upon works so distant from each other that the allowance was considered no more than an equitable remuneration for extra official services, which involved personal expenditure in getting to places remote from each other and remote from the locality where he had been detailed for duty.

The third instruction of the court upon the 3d item in the setoff may be briefly disposed of. It will be remembered, that, besides general and specific appropriations for fortifications, Congress made appropriations for the repairs and contingencies of fortifications, and it is for the disbursement of such an appropriation that a commission is charged in the 3d item. It is only necessary to look at the transcript again to see that the remittances which were made to General Gratiot out of the appropriation for repairs and contingencies were to be disbursed by him, and were disbursed by him under that head upon Forts Calhoun and Monroe. We confess our inability to disconnect such incidents from the general duty of the superintending engineer of a fortification, so as to make the service in any way extra official. The disbursement of the money is shown by the transcript, and by the manner in which the charge is made, to have been done in General Gratiot's character of agent of fortifications. In the long list of compensation by way of usage furnished to the court by General Gratiot, we can find no instance of any allowance to an agent of fortifications for paying out such an appropriation, and we will not refrain from saying, if it has ever happened it has been carelessly or inconsiderately made. We think that the court did not err in the

instruction which it gave upon this item of the setoff.

The sixth and seventh instructions will now be considered. They relate to the 14th item in the setoff; substantially the same charge which this Court has said, in 15 Peters had no just foundation in law. It differs from it only in phraseology, and from compensation being claimed for services under the Act of 14 July, 1832, "to provide for taking certain observations preparatory to the adjustment of the northern boundary line of Ohio." It is not necessary to repeat what the court then said upon this charge. But we must say, further examination into the laws and regulations applicable to the subject has strengthened the opinion that all the services for which

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compensation is asked in the 14th item, except that relating to the northern boundary line of Ohio, were the ordinary special duties appertaining to the office of chief engineer. And with respect to this exception, the court did not err in charging the jury that there was no evidence in the cause showing that the defendant had performed any such extra official service. The correctness of every instruction that there is no evidence to prove a fact, whether such an instruction is asked for or has been voluntarily given by the court, must depend upon the correctness of the assertion. The court did not say in this case such services might not have been a proper subject for compensation, but as there was no proof of what they were, none could be given. We think the court did not err either in the sixth or seventh instruction.

The eighth general instruction relates to the 15th and last item in the set off, and was referred to by the court as an answer to all of the instructions which were asked except the first and second. The first was given and the second was rightly refused, not only for the reason given by the court, but because the defendant consented to the introduction of the transcript as evidence, which was a detailed statement of moneys received by General Gratiot before 1839 and could not therefore have been surprised by any item against him or by the proof in support of it. The 8th item is a round charge of \$37,127.42 for what are termed extra

official services, from 30 July, 1828, to 6 December, 1838, being the whole time General Gratiot acted as chief of the Corps of Engineers at Washington. It is not necessary and we refrain from making anyone of the particulars in this item a subject of remark. General Gratiot came to Washington as chief of the Corps of Engineers, with a bureau already organized, in which, by the regulations of the army, his predecessors had performed every service for which an extra compensation is now asked, except those mentioned in the deposition of Colonel Totten, relating to the direction of the lithographic press, repairs on the northwest executive building, and determining the northern boundary line of the State of Ohio. The sums expended for those purposes were made under the control of the Engineer Department, and necessarily involved some superintendence by the chief engineer. But supposing it did so, and that such services cannot be included within any of the regulations by which the Engineer Department was organized, or which determines the official duties of the chief engineer, inasmuch as they are not the subjects of a legal charge, it was necessary, before any compensation could be allowed for them under the equity of the act of 1797, ch. 20, that proofs should have been given of what had been the chief engineer's personal as well as official agency in those matters. Merely the amounts expended could afford no rule by which compensation could be graduated. That such services were not liable to be charged for by a commission upon the amounts expended,

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or by a *per diem* allowance, the defendant himself admits by the way in which he has claimed compensation, the largest expenditure being introduced as one of those particulars in his setoff of extra official services, for all of which he made an aggregate charge of \$37,127.42. But in truth, with the exceptions just spoken of, all of the enumerated services in the 15th item of the setoff called extra official were the proper business of the Engineer Department, to be done by the chief engineer and his assistants in his bureau.

The jury were so instructed by the court.

But it was urged in the argument that the court used expressions, in refusing to give the fifth instruction, which had the effect to take from the jury the consideration of the evidence. If, however, the language complained of is taken in connection with the sentence of which it forms a part, and the whole is viewed with reference to the instruction as that is expressed, it will be found to be only introductory to a denial by the court of what counsel had assumed in the instruction, that it was the province of the jury to expound the law applicable to the facts. The instruction asked is if from the evidence the jury found &c.;, that the services "rendered were out of the limits of the official duties of the chief engineer, that he was entitled to compensation for such extra services." The court answered that it was its duty to construe and apply the evidence, to ascertain as matter of law what were the defendant's duties &c.;, and, taking all the evidence and construing it &c.; none is adduced showing or tending to show that the defendant performed any service not appertaining to his station as chief engineer, and then concludes that the eighth instruction, which it had before given on the 15th item of the setoff, was to govern the jury. In all this we think that the court did not err.

We observe in conclusion that there was much ingenious and able argument to maintain General Gratiot's right to claim compensation for extra services by considering the relations which he had borne to the army in three points of view. First as engineer, then as chief engineer, detached from duty at West Point for service at Washington, and lastly as a brigadier general in the Army of the United States in the line of the army. The whole of the argument, however, was rested upon two misapprehensions. One, that the regulations of the army by which General Gratiot sustained to it the first two relations, and particularly those which had been applied to the second relation, were unauthorized by law. The other misapprehension was that brevet rank, of itself, gave a right to additional pay and command and translated the officer receiving a brevet from the duties of his commission to those of his brevet rank. As to the army regulations, this Court has too repeatedly said that they have the force of law to make it proper to discuss that point anew, and such of them as were assailed in the case by

counsel as not warranted by law the Court thinks are as obligatory as any of the rest. In respect to the promotion of General Gratiot by brevet, it is only necessary for us to say that it did not release him from any duty or service attached by the regulations and by the usages of the office to his place of chief of the Corps of Engineers at Washington.

We order the judgment of the court below to be affirmed.

MR. JUSTICE Mc LEAN dissented.

When the decision in this case was announced, I did not intend to file a written dissent, but as the case is important to the plaintiff in error beyond the damages recovered, and as the counsel desire the views of all the members of the Court of the points ruled, I shall in a very few words state the ground of my dissent.

Many depositions were read in this case to show the usage of the government in regard to pay in the military service for extra services performed, and also as to what constituted the appropriate duties of the chief of the Engineer Department. A great variety of facts were thus proved having a direct bearing upon the duties of the plaintiff and the services stated by him as extra, as not appertaining to his office, and for which he claimed a compensation. A number of instances were referred to where pay had been allowed for extra services under the decisions of this Court, and a much greater number under the general usage of the government. Among other instructions, General Gratiot's counsel asked the court to instruct the jury

"That if they find from the evidence that the defendant, by the direction of the President or Secretary of War, performed any of the services charged for in the last item of his account, being the said item attached to Fowler's deposition, and that the services so rendered were out of the limits of his official duties as chief engineer, he is entitled to compensation for such extra services as a setoff in this action."

"The court refused this instruction because the whole evidence in the cause, without any exception, is written evidence, which the court is called on to construe

and apply, and not the jury, and from such evidence to ascertain as matter of law what were the defendant's duties and acts, and taking all the evidence and construing it the most favorably for the defendant, performed any service showing or tending to show the defendant performed any service not appertaining to his duties as chief engineer, and for the proper instruction on the item referred to, the eighth instruction is to govern the jury."

The eighth instruction need not be repeated, as it asserts the same principles contained above, in which the court left nothing for the jury. When this case was before this Court, [40 U. S. 15](#) Pet. 371, the Court, in referring to the act of 1802, which provided for the organization of the Engineer Corps, cited the 27th section, which declares

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"That the said corps, when so organized, shall be established at West Point, in the State of New York, and shall constitute a military academy, and the engineers, assistant engineers, and cadets of the said corps shall be subject at all times to do duty in such places and on such service as the President of the United States shall direct."

The Court observed

"However broad this enactment is in its language, it never has been supposed to authorize the President to employ the Corps of Engineers upon any other duty except such as belongs either to military engineering or to civil engineering. . . . But assuming the President possessed the fullest power under this enactment from time to time to employ any officers of the corps in the business of civil engineering, still it must be obvious that, as their pay and emoluments were or would be regulated with reference to their ordinary military and other duties, the power of the President to detach them upon other civil services would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may not only be established by proof of some positive regulation, but may also be inferred from the known practice and usage of

the War Department."

Gen. J. G. Swift, who was formerly at the head of the Engineer Corps, in his deposition, which was read as evidence, said

"I have looked over the account hereto attached, amounting to \$37,127.42, and am of opinion that the business or functions therein charged do not pertain to the functions of a civil engineer, nor do they pertain to the functions of a military engineer."

And he states that while chief of the Engineer Corps he received additional compensation for extra services.

Major McNeil, a witness, and who is a civil engineer, states, on being requested

"to look at the account of Charles Gratiot, hereto annexed or appended, and state whether the services therein charged belong to civil engineering or military engineering, or to either,"

answered, "I should say that they would be classed under neither. They do not belong to the duties of the engineer, either civil or military."

Captain Talcott held a commission in the Engineer Corps, from August, 1818, to September, 1836, and he states that while in the corps for extra services he received extra allowances. And he also says, "I have examined the account" (of General Gratiot) "appended, and am of opinion that the several items of services charged for do not appertain to either military or civil engineering." And further, "I do not consider them the appropriate duties of the chief engineer, or of any other engineer."

It is admitted that so far as the duties of the chief of engineers were regulated by law or by regulations of the War Department, they may be considered as matter of law for the court, but much parol evidence was heard as to the appropriate duties of that officer,

and to ascertain what part of the services charged for came within such duties. Now these were matters of fact for the jury, and not for the court. The claim was to be allowed or rejected, according to the usage of the department, and that usage, like every other fact not established by judicial decision, is a subject of proof.

The depositions above referred to were only a part of those which were read in evidence. Other witnesses differed with those I have cited, as to some of the material facts stated, and to determine this conflict was the peculiar province of the jury. But the whole evidence was ruled by the court, and not permitted to be weighed by the jury. On this ground, I think the judgment should be reversed.

This ruling is attempted to be sustained by the view of the Court in the case in 15 Peters above cited.

The third item charged by General Gratiot, in the account then relied on, was as follows:

"For extra services, in conducting the affairs connected with the civil works of internal improvement carried on by the United States, and referred to the Engineer Department for execution, and which did not constitute any part of his duties as a military officer, from 1 August, 1828, to 6 December, 1838, inclusive, ten years and one hundred and twenty-eight days, at \$3,600 per annum, \$37,262.46."

And in their opinion in that case, the Court did say

"As to the 3d item, constituting a charge of \$37,262.46, for extra services, in conducting the affairs connected with the civil works of internal improvement, very different considerations may apply. The court is of opinion that this item has no just foundation in law, and therefore that the evidence which was offered in support of it, if admitted, would not have maintained it."

The reason assigned by the court was that the services specified came within the official and ordinary duties of the office.

Now the account rendered at the last trial differed in amount, though the difference is small, from the one charged in the first account, and to which the above remarks

of the court are applicable. But there is a much greater difference.

The items of service are specified in the last account, spreading over several pages, instead of the general charge cited. And the depositions which I have referred to, and others not named, were taken in the cause subsequently to the delivery of the above opinion. The facts thus thrown into the case gave it a new aspect. They particularized the service, and showed, by distinguished engineers, what did and what did not belong to the duties of General Gratiot, as chief of engineers.

In the opinion of the court, the service, as generalized in the first account, being connected with internal improvements, came within the general regulations of the War Department, and might therefore,

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in their opinion, be decided as matter of law. However this may be, I hold that the new and numerous facts proved as to usage and the extra duties of General Gratiot were matters for the jury and not for the court; consequently that there was error in withholding them from the jury.

In his account, General Gratiot charged the government for the disbursement of upwards of eighteen millions of dollars for

"fortifications, internal improvement, lighthouses and beacons, Military Academy, lithographic piers, northwest executive buildings, and northern boundary of Ohio."

The transcript containing the above charge was regularly certified by the Treasury Department as having been presented by General Gratiot, and disallowed, "as not admissible against the Treasury." That the services charged for were rendered was not disputed.

Benjamin Fowler, a clerk in the Engineer Department, testified that the services, as charged by General Gratiot, had been performed.

In its second instruction, the Court informed the jury that the defendant was not entitled to any credit for commissions on disbursements on account of appropriations for fortifications, as charged by him. Of this item, the only evidence in the cause is that furnished by the transcript introduced by the United States, as the principal evidence on which the defendant is charged, and the evidence thereby furnished, is not sufficient to authorize the jury to allow the defendant the credit claimed. The same instruction was substantially given in regard to disbursements for fortifications, and for other objects, as charged.

Now it would seem that the transcript above stated, certified by the Treasury as containing General Gratiot's account disallowed, proved the services charged were rendered, and they were also proved by Fowler, whose deposition was taken in 1842, since this case was before us on the former writ of error. And whatever part of those disbursements did not appropriately belong to the office of General Gratiot, under the usage of the War Department and the opinion of this Court in the former case, would constitute a fair ground for compensation.

Some of the other instructions might be commented on, in reference to the evidence, but I deem it unnecessary to do so, as in my opinion the judgment should be reversed on the grounds already stated.