

JOSIAH F. POLK.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

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

JOSIAH F. POLK *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Report from the Second Auditor filed as evidence by claimant, transmitted to the House of Representatives.
3. Claimant's brief.
4. Opinion of the Court adverse to the claim.
5. Opinion of Judge Scarburgh dissenting.

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 fifth day of December, [L. S.] A. D. 1859.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

Petition.

JOSIAH F. POLK *vs.* THE UNITED STATES.

To the honorable the Judges of the Court of Claims of the United States:

The petition of Josiah F. Polk, of the city of Washington, District of Columbia, respectfully represents:

That while the petitioner was the chief clerk in the office of the Second Auditor of the Treasury, under appointment of the head or

chief officer of the Treasury Department, and in the performance of his duties as chief clerk in said Audito's office, to wit, on the 12th day of May, 1846, he was appointed by the President of the United States "acting Second Auditor of the Treasury," with directions to perform the duties of said Second Auditor during his absence; that he did perform the duties of said Second Auditor from the date of his appointment aforesaid, until the 15th of June following, inclusive, when the Second Auditor returned and resumed the duties of his office; that again, to wit, on the 3d day of April, 1849, and while chief clerk as aforesaid, he received from the President of the United States a similar appointment of "acting Second Auditor of the Treasury" during the absence of the Second Auditor, and performed, as required, the duties of said Auditor until the 8th day, inclusive, of the same month, April, when P. Clayton, esq., was appointed Second Auditor of the Treasury, and entered upon the duties of his office; that during the two periods aforesaid, your petitioner performed, besides the duties of the Second Auditor, his appropriate duties of chief clerk of the office; that the first period, from the 12th of May to the 15th of June, 1846, inclusive, consisted of thirty-five days; and the second, from the 3d to the 8th of April, 1849, consisted of six days; making an aggregate of forty-one days, during which he performed the duties of the Second Auditor of the Treasury, and for which he claims compensation at the rate of pay allowed to an Auditor of the Treasury of the United States, which was three thousand dollars per annum.—(For President's authority, see Stat. at L. v. 1, p. 281.)

And further, the petitioner states that, although he never entertained a doubt of the justness of his claim, and having no recourse, before the organization of this honorable Court, but to the Congress, and learning that claims of the same character were there pending, he determined not to prefer his until those should terminate in favor of the claimants. Some of them having come before the Court of Claims and received favorable decisions, (he refers particularly to the claim of Michael Nourse,) the petitioner now prefers his claim, which is sustained by the same principles, to the same tribunal, and prays a similar decision; and as in duty bound, will pray, &c.

JOSIAH F. POLK,
For himself.

TREASURY DEPARTMENT,
Second Auditor's Office, February 1, 1858.

SIR: I have the honor to return herewith the letter referred to me on the 30th ultimo, from Samuel H. Huntington, chief clerk Court of Claims, containing a certified copy of an order of court asking for certain evidence from the Treasury Department to be used in the case of J. F. Polk *vs.* the United States, *viz.*:

"How many days do the records of the Second Auditor's office show that the petitioner did service as Second Auditor of the Treasury, *ad interim*, or as Acting Second Auditor, in the months of May

and June, 1846, and in April, 1849, designating the beginning and ending of each period of service, together with any other information in your department tending to elucidate said claim?"

In reply I report that the records of this office show that J. F. Polk did service as Acting Second Auditor, from the 12th May to the 15th June, 1846, inclusive, and from the 3d to the 8th April, 1849, inclusive; for which periods J. M. McCalla received the pay as Auditor and J. F. Polk was paid only as chief clerk of this office, as will appear from the accounts of the disbursing agent for salaries (W. Mechlin) for the second quarter of 1846, and the second quarter of 1849, adjusted by the First Auditor of the Treasury, and now on the files of the Register of the Treasury.

Very respectfully, your obedient servant,

T. J. D. FULLER,
Second Auditor.

Hon. HOWELL COBB,
Secretary of the Treasury.

IN THE COURT OF CLAIMS.

No. 1,600.

JOSIAH F. POLK *vs.* THE UNITED STATES.

PETITIONER'S BRIEF.

The fact alledged is, that the claimant " did services as Acting Second Auditor of the Treasury, from the 12th of May to the 15th of June, 1846, inclusive, and from the 3d to the 8th of April, 1849, inclusive," making together 41 days; for which he has received no compensation. (See Record, p. 4.)

The position assumed is, that he is entitled to compensation for the period he rendered said service, at the rate allowed by law to auditors of the Treasury, and he rests his case upon the decisions of the court of claims in the cases of Michael Nourse *vs.* The United States, Asbury Dickins *vs.* The United States, and others, which stand on the same footing precisely.

J. F. POLK,
Counsel for Claimant.

IN THE COURT OF CLAIMS.

DECEMBER 5, 1859.

JOSIAH F. POLK *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

The petitioner was chief clerk in the office of the Second Auditor of the Treasury, and on the 12th day of May, 1846, he was appointed

by the President "acting Second Auditor," with directions to perform the duties of the Second Auditor during his absence. Under this appointment and these directions the petitioner performed the duties of the Second Auditor from the 12th of May, 1846, to the 15th of June, inclusive. On the 3d day of April, 1849, under a similar appointment and direction, and in the absence of the Second Auditor, the petitioner performed the duties of the Second Auditor from said 3d day of April, 1849, until the 8th day, inclusive, of the same month. Thus the petitioner, under these appointments as acting Second Auditor, performed the duties of Second Auditor for forty-one days in all, during which time Mr. McCalla, the Second Auditor, received the appointed salary of his office, and the petitioner received only his regular salary as chief clerk, and he now claims compensation for his services as acting Second Auditor of the Treasury at the rate of three thousand dollars per annum, the pay allowed by law to the Auditor of the Treasury of the United States.

The 12th section of the statute of the 26th of August, 1842, (5 U. S. L.) provides as follows:

"SEC. 12. No allowance or compensation shall be made to any clerk or other officer by reason of a discharge of duties which belong to any other clerk or officer in the same or any other department; and no allowance or compensation shall be made for any extra service whatever which any clerk or other officer may be required to perform."

The principle of this provision we understand to be that the salary of a clerk or other officer, as fixed by law, purchases his whole time for the United States, and that therefore he is not to receive any other compensation than the salary of his proper office because a part of his time is transferred to the duties of another officer. If this is the purpose of the provision, its terms are to be construed in reference to it, and so as to effect it.

The petition sets forth that the petitioner, being chief clerk, performed the duties of the Second Auditor, and there is no averment or proof that he performed any other duties than those of clerk and of Second Auditor. These facts only place him directly within the purview and terms of the statute, and they make the case the statute contemplates, in which no allowance or compensation shall be made.

It was contended for the petitioner that he was appointed "Assistant Second Auditor," and held that office in his own right, and that its duties were his own and not "*those which belong to any other officer*," so that he was not within the statute.

The answer is, that there is no such officer known to the law as "Assistant Second Auditor," and no duties or compensation prescribed or provided for such an officer.

The petitioner was appointed to perform the duties of "Second Auditor" under section 8th of the act of 1792, which is in these words: "In the case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he

shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease."

This act does not authorize the President to create *a new office*, and then to transfer to such office the duties assigned by law to the office of Second Auditor, and no such purpose can be inferred from the fact that the President, in executing the section, pointed to the duties which the appointee was to perform by styling him "Assistant Second Auditor." Giving a significant appellation does not create an office, or make an officer.

Then the only *duties* the President could appoint to under the act of 1792 were the *very duties* of the absent officer, viz: the Second Auditor, and the petitioner was appointed to no other duties, and has performed no other, and these he was, as chief clerk, bound to perform "without allowance or compensation" therefor. And he must show he has performed other duties than those of chief clerk and Second Auditor to entitle himself in law or equity to further compensation; for compensation belongs to the performance of duties and not to mere title or appellation.

We are of opinion that the the petitioner is not entitled to the relief he claims.

IN THE COURT OF CLAIMS.

DECEMBER 5, A. D. 1859.

JOSIAH F. POLK *vs.* THE UNITED STATES.

SCARBURGH, J., dissented.

The principles of this case were adjudicated by this court in the cases of *Asbury Dickins vs. The United States*, *Cornelius Boyle's Administrator vs. The United States*, and *Michael Nourse vs. The United States*.

In the case of *Asbury Dickins vs. The United States* we held that, under the act of April 20, A. D. 1818, (3 Stat. at L., p. 447, ch. 87, § 9,) no clerk in any of the departments shall, *as clerk*, receive any other compensation than is authorized by that act, but that he is not thereby inhibited from receiving compensation for the discharge, whilst holding the office of clerk, of the duties of any other office which may be lawfully conferred on him. We also held that, when the President, under the act of 1792, (1 Stat. at L., p. 281, ch. — § 8,) authorizes any person to perform the duties of Secretary of State or of Secretary of the Treasury, such person is thereby invested with an office, and becomes entitled, during his continuance therein, to the salary provided by law for Secretary of State or Secretary of the Treasury, as the case may be; and that, if such person be a clerk in one of the departments, he is entitled to such salary in addition to his salary as clerk.

In the case of *Cornelius Boyle's Administrator vs. The United States*, it was held that the act of 1792 is applicable to the Department of the Navy, and that a clerk appointed under that act to perform the duties of Secretary of the Navy is entitled, during the continuance in that office, to the salary of the Secretary of the Navy in addition to his salary as clerk.

The case of *Michael Nourse vs. The United States* involved the same principles as the other two cases, and also the construction of the acts of March 3, A. D. 1839, (5 Stat. at L., p. 349, ch. 82, § 3,) of August 23, A. D. 1842, (*ibid.*, p. 510, ch. 183, § 2,) and of August 26, A. D. 1842. It was held that these acts were inapplicable to that case, for the reason that they do not contemplate a case where the same person holds two distinct offices at the same time.

I delivered the opinion of the court in the case of *Cornelius Boyle's Administrator vs. The United States*, and now refer thereto for the reasons on which my opinion in this case, as to the several points there discussed, is founded. As the construction of the acts of 1839 and 1842, just noticed, was not involved in that case, I propose now briefly to notice them.

The act of March 3, A. D. 1839, is as follows: No officer in any branch of the public service, or any other person whose salaries, or whose pay or emolumenesis, is or are fixed by law and regulations, shall receive any *extra* allowance, or compensation, in any form whatever, for the disbursement of public money or the performance of any other service, unless the said *extra* allowance or compensation be authorized by law." It is, in my judgment, so plain that a man holding two offices and receiving the salary of each can in no sense be said to receive an *extra* allowance of compensation, that to state the proposition is sufficient to command universal assent. It cannot be made plainer by argument. It seems to me, therefore, that the act of 1839 has no application to this case.

The act of August 23, A. D. 1842, is as follows: "No officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulation, shall receive any additional pay, *extra* allowance or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, *extra* allowance, or compensation." This is plainly but a re-enactment of the act of 1839, with the addition of the words, "and the appropriation therefor explicitly set forth that it is for such additional pay, *extra* allowance, or compensation." But these words have no reference to the case of a person holding two offices. It seems to me, therefore, that this act can have no application to this case.

The act of August 26, A. D. 1842, is as follows: "No allowance or compensation shall be made to any clerk or other officer by reason of the discharge of duties which belong to any other clerk or officer in the same or any other department; and no allowance or compensation shall be made for any *extra* services whatever which any clerk or other officer may be required to perform." It does not seem to me that this act contemplates the case of a person who holds the office of

clerk and also the office of acting Secretary of the Treasury. When such a person performs the duties of the latter office, he performs his own appropriate duties just as truly as when he performs his duties as clerk. The fact that another officer, the actual Secretary of the Treasury, is clothed by law with the same powers and duties, can make no difference in this respect. Instances of this kind might be cited without number. In the State of Virginia each justice of the peace is invested with the same powers and the same duties in all respects with every other justice in his district; but still each has his own office, his own duties, and his own responsibilities. An acting Secretary of the Treasury performs the duties of the *office* of Secretary of the Treasury, but not the duties of the actual secretary. The latter is in no sense and in no respect responsible for the former. The acting secretary has a special appointment and a special commission. This is a distinct public employment, "coupled with the duty of fulfilling it according to law." His office, his duties, and his responsibilities are his own, and not another's.

My construction of the act of August 26, A. D. 1842, is, it seems to me, sustained by the subsequent legislation of Congress. The act of March 3, A. D. 1849, provides in terms for the case of a clerk holding the office of acting secretary or acting head of a bureau. It is as follows: "No clerk or other officer shall receive the salary of any secretary or head of bureau for acting or having acted in his place or office while said secretary or head of bureau receives such salary." (9 Stat. at L., p. 370, ch.—, § 4.) Now, this act was wholly superfluous if the cases for which it provides were embraced by the act of August 26, A. D. 1842. It will be observed, too, that it inhibits a clerk or other officer from receiving the salary of a secretary or head of bureau only when such secretary or head of bureau receives such salary, but that it contains no such inhibition when such secretary or head of bureau does not receive such salary. This, it seems to me, necessarily implies that it was the legislative understanding, (1) that, prior to the passage of the act of 1849, there was no such inhibition by law as that which is expressly declared by it; and (2) that a clerk or other officer appointed under the act of 1792 to perform the duties of the office of secretary or head of bureau, in case of the *death* of such secretary or head of bureau, is entitled to the salary of such secretary or head of bureau. But this implication is wholly inconsistent with the act of August 26, A. D. 1842, if it applies to such cases as the present.

I cannot concur in the opinion that the principle of the provision in the act of August 26, A. D. 1842, is, that the salary of a clerk or other officer, as fixed by law, purchases his whole time for the United States. An office is a public employment to which certain duties are annexed, and all that the government can require is the fulfilment of those duties. When this is done, the just claims of the public on the officer are satisfied. Hence, where there are two or more offices not incompatible with each other, they may be held by the same person, with the right to take the fees and emoluments of each, unless there be some statutory prohibition.

My opinion is, that the petitioner is entitled to relief.

