

Case No. 15,587.

UNITED STATES V. LEE.

{1 Hayw. & H. 208.}¹

Circuit Court, District of Columbia.

Dec 21, 1844.

ARMY OFFICER—PAY—VOLUNTEER COMMISSION.

An officer of the regular army of the United States was ordered, during the Florida war, to command a company of Indians, and was commissioned as captain of volunteers, for which he received pay as such captain. On his return to his regiment, he received full pay for the time he was absent in command of the Indians. He refunded all but the difference between his pay as a regular army officer and the pay he received as an officer of volunteers. The United States claimed that he was only entitled to his pay as a volunteer officer. *Held*, that he was not barred from claiming the pay proper annexed by law to his commission in the regular army.

{This was an action by the United States against John F. Lee.}

P. R. Fendall, for the United States.

J. M. Carlisle, for defendant.

This suit is docketed by consent, to try the right of the defendant to certain pay claimed by him as hereinafter set forth.

The said claim of army pay is agreed to depend upon the following facts, to wit: (1) On and prior to the 1st day of December, 1836, the defendant was a second lieutenant in the first regiment of artillery in the army of the United States and was serving with his said regiment in Florida in the Indian war. (2) On the 22d day of February, 1837, he received a commission of first lieutenant of said regiment, making him such first lieutenant by relation from the 17th day of December, 1836, prout the said commission exhibited. (3) On the 23d day of August, 1842, he received the brevet exhibited, conferring on him as such first lieutenant the brevet rank of captain to take rank as such from the 27th day of January, 1837, for gallantry and good conduct in the war against the Florida Indians. (4) He has received no pay as an officer of the army from December 1, 1836, to September 17, 1837, nor any pay, whatever, for that period out of the army appropriations, or out of any fund applicable to pay off the army. (5) On the said 1st day of December, 1836, he was permitted by the commanding general in the field to leave his company and to join a regiment of Creek Indians under the circumstances and in the manner stated by the said commanding general and of the adjutant general of the army. That such absence from his company was of the nature and under the circumstances set forth in such statement and continued the same from said 1st day of December, 1836, to said 17th day of September, 1837, at which latter date he was recalled to his regiment and served therein as first lieutenant, he having been in the meantime promoted as aforesaid to be such first lieutenant (6) That he was

UNITED STATES v. LEE.

paid from said 1st of December, 1836, to the 17th day of September, 1837, with the Indians, and volunteers according to the rank which he temporarily exercised there as a volunteer captain of Creek Indians, which special pay was allowed to him by the executive and which said special appropriation was not applicable to the pay of the army proper, and that he also for the same period drew in the regular way his army pay, but he refunded the same, holding the sum of \$55.37 upon the account filed to try in this action his right to said army pay, the same having been disallowed by the accounting officers of the treasury. (7) And it is agreed that during the said period, from 1st of December, 1836. to 17th of September, 1837, he was not under suspension or other legal disability, but continued on the rolls of the regular army, and held the said commissions hereinbefore referred to respectively and none other, but rendered no actual service under such commissions, and that he is entitled to the pay annexed by law thereto respectively unless the court shall be of opinion that by reason of his absence from his regiment under the circumstances stated, and his having earned and received the special pay aforesaid by the said voluntary duty, he is legally barred from claiming the pay proper, annexed by law to his said commissions respectively in the army of the United States.

It is agreed that judgment be entered for the United States for the sum of \$55.37, if the court shall be of the opinion that the defendant is not legally entitled to the army pay claimed by him, otherwise, judgment for the defendant.

Judgment for defendant on case stated.

¹ [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]