Congressional No. 17641

In the Court of Claims of the United States

THE CHOCTAW AND CHICKASAW NATIONS

v.

THE UNITED STATES OF AMERICA

OBJECTIONS TO PLAINTIFFS' REQUESTED FINDINGS OF FACT, BRIEF, AND ARGUMENT

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OBJECTIONS TO FINDINGS OF FACT REQUESTED ON BEHALF OF THE CHICKASAW NATION

FINDINGS 1 AND 2 (R., P. 146)

No objection.

FINDING 3 (R., P. 146)

This finding is objected to because it contradicts the decision of the Supreme Court in the case of *United States* v. *Choctaw &c. Nations* (179 U. S. 494, 536) wherein the Court said:

> Looking now at the treaty of 1866, we are unable to concur in the interpretation placed upon it by the Court of Claims. In our opinion its words plainly and obviously import a cession to the United States of the territory constituting the Leased District

> unaccompanied by any condition in the nature of a trust, express or implied, except that the *money* to be paid by the United States in consideration of the cession was to be invested and held by the United States "in trust" for certain specified objects.

The court will observe, upon a review of the decision of the Supreme Court in the foregoing case, that the Supreme Court not only held that under the treaty of 1866 (14 Stat. 769) a cession of the lands known as the "Leased District" was consummated, but that the sum of $300,000 was named therein as the consideration moving to the Indian Nations.

The finding is objectionable in that it sets forth in part the resolution of the Senate, which undertakes to confer jurisdiction upon the court. This court has frequently held that a resolution of one of the branches of the Congress referring a bill to this court under section 14 of the Tucker Act (Section 151, Judicial Code) has no further office than that of a reference. (*Sampson* v. *United States,* 42 C. Cls. 378, 385.)

FINDING 4 (R., P. 147)

This finding is objected to because the court is asked to fix the net value of plaintiffs' interest in the lands in exact conformity with the provisions of Senate Bill 3163, 71st Congress, 2nd Session, and without regard to any evidence tending to establish the value of said interest.

This request is plainly indicative of the lack of the court's jurisdiction to entertain this reference.

It has been decided by the Supreme Court (*United States* v. *Choctaw &c Nations,* 179 U. S. 494), and plaintiffs now admit that no legal or equitable claim exists in favor of plaintiffs arising out of the cession of the "Leased District." If Congress should make an appropriation to pay plaintiffs an additional amount for the lands, the payment would be a gratuity. When, therefore, it appears to the court that the "pending bill" appropriates for the payment of a gratuity, the report of the court will not make a recommendation with respect to the amount appropriated, neither will the court undertake to advise Congress what would be fair and just.

In the *Widmayer case* (42 C. Cls. 519, 524) this court said:

> Precluded as the court is from deciding issues of law pertaining to liability, this report can neither be taken as a judgment nor as an award. Neither is it a recommendation for the payment of anything. It is merely a recital of the proven facts. These facts in their relation to the law only constitute material to enable Congress to create a liability by way of gift at discretion. Consequently, no vested right can be considered as acquired by the recital of the facts. As the matter before us is not a legal or equitable demand against the District of Columbia or the General Government, it is for

> Congress to proceed with the matter as an act of charity, if at all, and by way of exception to the policy of the Government in such cases. The amount of an appropriation, if any shall be made, also rests with Congress. For this reason and because the demand is not a legal or equitable claim, the court can not estimate an amount.

Section 151 of the Judicial Code confers authority on the court to report on pending bills of two classes, viz: (1) claims against the United States, legal or equitable; (2) for the payment of a grant, gift, or bounty (gratuities).

When the court has determined that the bill provides for the payment of a claim, legal or equitable, and that there is no law preventing the court from entering judgment thereon, then "it shall proceed to do so", but if there is a law preventing the court from entering judgment, the court will report the "facts in the case and the amount, where the same can be liquidated."

If the court should conclude that the bill provides for the payment of a grant, gift, or bounty, then the Congress alone is the judge of the extent of its grace, and as was held in the Widmayer case (supra) "the court can not estimate an amount."

If, therefore, the court should conclude that it has jurisdiction of the matter, and further concludes that the "pending bill" does not provide for the "payment of a claim, legal or equitable", but for a gratuity, then it is submitted that the report

should omit any statement or recommendation relating to the fairness or justness of the action proposed in the "pending bill" or the amount which should be appropriated.

The finding is objected to for the further reason that it ignores the value of the interest which the plaintiff nations had in the lands involved at the time of the cession under the treaty of 1866.

Under the treaty of 1855 (11 Stat. 611), the United States procured a permanent lease covering the lands, paying the entire consideration therefor at the time of the treaty. Under the lease the United States acquired "all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein." It will be seen, therefore, that the finding does not take into consideration the value of the lands to the plaintiffs at the time of the treaty of 1866. In the opinion in the case of *United States* v. *Choctaw &c. Nations* (179 U. S. 494, 522), it was said:

> After the treaty of 1855 it was not possible for the Choctaws to assert any claim to lands west of the 100th degree west longitude, and as to the lands between that and the 98th degree west longitude, the United States held them under a permanent lease given in 1855, *which practically divested the Choctaws* [*and Chickasaws*] *of all interest*

in the territory constituting the Leased District, except that they could settle in it if they so desired. [Italics ours.]

FINDINGS 5 AND 6 (R., P. 149)

These requested findings are not statements of fact. Furthermore, there is no authority in the court to do the things which it is proposed the court shall do in the requested findings.

OBJECTIONS TO FINDINGS OF FACT REQUESTED ON BEHALF OF THE CHOCTAW NATION

FINDING 1 (R., p. 423)

This finding is objectionable because it contradicts the decision of the Supreme Court in the case of *United States* v. *Choctaw &c. Nations* (179 U. S. 494) in that it declares that the Leased District lands were "taken" by the United States. The Supreme Court in the case named held that the lands were ceded to the United States pursuant to a treaty stipulation upon the payment of a consideration.

FINDING 2 (R., P. 423)

This finding is objectionable because it is not a statement of a fact. It is more in the nature of a lecture addressed to the Congress advising Congress what it should "in fairness and in justice" do. Such a procedure as is proposed in the finding is plainly foreign to the authority of the court in reference cases. The court is by law (Sec. 151 Judicial Code) authorized to find the facts and report the same to Congress "together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, *legally or equitably* due from the United States to the claimant." (Italics ours.)

FINDING 3 (R., P. 424)

This finding is objectionable because it also undertakes to advise Congress with respect to the duty of Congress in matters of grace. The matter before the court is not a claim, legal or equitable, but a plea for a gratuity. As heretofore said, the court will not undertake to advise Congress what Congress should pay these Indians "in fairness and in justice" (*Widmayer case,* 42 C. Cls. 519, 524).

If on the other hand the court should hold that it has jurisdiction of this reference and that the value of plaintiffs' interest in the lands as of the date of the cession (1866) is a matter that should be included in its report of facts, then defendant submits that there is not a scintilla of evidence in the record upon which such a finding may be predicated. The value of the lands as of 1866 is not sufficient for the purpose, because at that time plaintiffs had parted with such an interest in said lands, as was held by the Supreme Court in the case of *United States* v. *Choctaw &c. Nations* (p. 522), as "practically divested the Choctaws of all interest in the territory constituting the

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Leased District, except that they could settle in it if they so desired."

FINDING 4 (R., P. 424)

This finding is objectionable because it undertakes to advise Congress what its duty is with respect to a gratuity.

BRIEF

JURISDICTION OF THE COURT

During the 71st Congress, 3rd Session, Senate Resolution 478 was considered and agreed to. Said resolution is as follows:

> *Resolved,* That the claim of the Choctaw and Chickasaw Nations of Indians for compensation from the United States for the remainder of their "leased district" lands acquired by the United States under article 3 of the treaty of 1866 (14 Stat. L. 769), not including the Cheyenne and Arapahoe lands for which compensation was made to the Choctaw and Chickasaw Nations by the Act of Congress approved March 3, 1891 (26 Stat. L. 989), be, and the same is, hereby referred to the Court of Claims in accordance with the provisions of section 151 of the Judicial Code (U. S. C., sec. 257; 44 Stat. 898); and the said court is authorized and directed, notwithstanding the lapse of time or the statutes of limitation and irrespective of any former adjudication upon title and ownership, or release, to inquire into the claim of the said Indian nations for just

> compensation for said lands and to report the amount which in fairness and justice and under all the facts and circumstances the United States should pay to the Choctaw and Chickasaw Nations of Indians, as fair compensation for said lands, and to report its findings of fact and conclusions to the Congress, taking into consideration the circumstances and conditions under which said lands were acquired and the purposes for which they were used and the final disposition thereof.

Prior to the foregoing resolution and during the 2nd session of the 71st Congress, a bill was introduced in the Senate (S. 3163) entitled "A Bill For the relief of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, and for other purposes", which provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and hereby is, authorized and directed to certify to the Secretary of the Treasury, an account of the proceeds derived from the sale of the territory in Oklahoma, known as the Leased District, including the territory known as Greer County, and excluding what was formerly the Cheyenne and Arapahoe Reservation, deducting therefrom the cost of survey and sale and for allotments of Indians therein at the rate of $1.25 per acre, and there is hereby authorized to be appropriated the

> amount so certified to the Secretary of the Treasury for the purpose of placing the same to the credit of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, upon the books of the Treasury, the balance shown by said account, to be disbursed in accordance with existing law.

Upon the theory that the foregoing bill is a "bill * * * providing for the payment of a claim" and that the Senate resolution has referred the same to the Court of Claims for action pursuant to the authority of section 151 of the Judicial Code (44 Stat. Part 1, p. 898), plaintiffs have filed their petition herein.

Numerous allegations are made in the briefs filed on behalf of the plaintiffs to the effect that the Senate resolution has not only conferred jurisdiction upon the court but that it has also directed the court to make a report on particular matters, which under the resolution it is asserted the court is required to do. It is needless to enter upon an extended discussion to establish plaintiff's misconception of the force of a resolution of one branch of the Congress referring a matter to this court. Such a resolution does not confer jurisdiction, neither can it direct the court how it should proceed or what subjects its report to Congress should cover. The jurisdiction of the court in such cases, as also the scope and subject matter of its report to Congress, is set forth and defined in the law (Sec. 151 Judicial Code).

In the case of *Sampson* v. *United States* (42 C. Cls. 378, 385), where a bill was referred by resolution of the Senate under section 14 of the Tucker Act, now section 151 of the Judicial Code, this Court disposed of this question and said:

> It is urgently contended by the claimant that the resolution of reference in this case broadens the jurisdiction of this court in making up its findings, and should be looked to for that purpose. We do not agree with this contention. This court gets its jurisdiction in this class of cases from the Tucker Act, and from that alone. The resolution of reference is but the vehicle by which the bill comes to this court and serves no other purpose; otherwise one branch of Congress alone would be enabled to enlarge the jurisdiction of this court. When the case is in this court we look to the bill referred to us, and no further, to determine the matter before the court for investigation and report.

In a later case, *State of Missouri* v. *United States* (43 C. Cls. 327, 329), the court said:

> The resolution is the medium or vehicle by which the bill is transmitted to the court, and performs no other office.
>
> *The section under which the reference is made prescribes the duty of the court in respect thereto, i. e., to find by judicial methods the facts respecting the claim for which the bill provides payment, if it does so provide.* [Italics ours.]

Defendant contends that the court is without jurisdiction of the reference or the matters set forth in the Senate bill or the petition filed herein for the following reasons:

A. The bill claimed by the plaintiffs to have been referred by the Senate resolution is not a "bill * * * providing for the payment of a claim against the United States, legal or equitable."

B. The claim presented in the petition and covered by Senate bill S. 3163 is barred by reason of the provisions of section 153 of the Judicial Code which provides, "The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December 1, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes" (44 Stat. 51, p. 898).

C. The matter presented in the petition and covered by the Senate bill aforesaid, being res judicata, is barred by reason of the provisions of section 5 of the Omnibus Claims Act of March 4, 1915 (38 Stat. 962, 996), commonly known as the Crawford Amendment.

A

The bill referred does not provide for the payment of a claim, gift, or bounty

A. In the case of *Creek Nation* v. *United States,* Congressional No. 17640 (74 C. Cls. 663), the identical question was passed upon by this court. In

that case a Senate bill had been referred by resolution of the Senate to the Court of Claims. The bill provided as follows:

> * * * That the Secretary of the Interior be, and he is hereby, authorized and directed to certify to the Secretary of the Treasury an account of the proceeds derived from the sale of the territory in Georgia and Alabama, ceded to the United States by Article 1 of the treaty of August 9, 1814, between the United States of America and the Creek Nation of Indians, deducting therefrom the cost of survey and sale, and there is hereby authorized to be appropriated the amount so certified to the Secretary of the Treasury for the purpose of placing the same to the credit of the Creek Nation of Indians of Oklahoma upon the books of the Treasurer to be disbursed in accordance with existing law.

Pursuant to the reference a petition was filed by plaintiff seeking the action of the court under the authority of Section 151 of the Judicial Code. It will be noted that the Senate bill in the Creek case and the instant Senate bill are identical save only with respect to the description of lands.

The court sustained a motion to dismiss the petition in the Creek case upon the ground that the bill referred was not a bill for the payment of a claim, grant, gift, or bounty within the meaning of Section 151 of the Judicial Code and that, therefore, the court was without jurisdiction.

In view of the fact that the question involved and decided by the court in the Creek case is in all respects identical with the question here under consideration, defendant quotes at length from the opinion (74 C. Cls. 663, 665–668) as follows:

> * * * The extent of the court's jurisdiction under section 151, herein quoted, has been many times adjudicated. The issue of jurisdiction, aside from its importance, has generally arisen with respect to bills referred, no two of which have been precisely similar in verbiage. It is conceded that the resolution referring the bill is of consequence only as evidence of legislative action affecting the transfer of the bill from the Senate to this court. *State of Missouri* v. *United States,* 43 C. Cls. 327. The jurisdiction of the court is dependent exclusively upon the bill referred, and from its terms the imperative duty is cast upon the court to ascertain whether it is a bill providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty. If it is not such a bill the jurisdiction of the court under section 151 clearly does not attach. The manifest intent of section 151 of the Judicial Code as frequently held by this court, is to enable either House of Congress to send to this court a bill of the character mentioned for this court to find the facts involved in accord with judicial methods, and report the same to the House, referring the bill for such further action as may be deemed appropriate. Bills of the character comprehended by section 151 originate either because of claimed legal or equitable rights incapable of enforcement by any other remedy, or equitable rights dependent upon a gift or bounty. Congress in the enactment of the section indicated a distinct purpose to remove from its operation all claims cognizable by the court under its general jurisdictional statute, and thereby conferred upon the suitor a right to procure a judgment in the event the claim is established according to existing law, even though the claim came to the court by way of a reference under section 151. The effect of the proviso to the section, taken into consideration with the Crawford amendment to section 151 (38 Stat. 962, 996), is to limit the court's jurisdiction to bills for the payment of claims, legal or equitable, or for gifts, grants, or bounty, to which the statute of limitations — section 156 of the Judicial Code—is inapplicable, and which do not fall within the court's general jurisdiction under the other provisions of the Tucker Act. * * * A claim is, "in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." *Prigg* v. *Commonwealth of Pennsylvania,* 16 Pet. 539. The bill here in issue lacks the essential element of a "demand"; from its language, whatever controversy existed as to the right of

the Indians to the proceeds derived from the sale of the lands described in the treaty of August 9, 1814, is by the bill resolved in favor of the Indians, and the Secretary of the Interior is not only authorized but directed to ascertain the amount due the Indians and certify the same to the Secretary of the Treasury for payment. Obviously, if the bill had passed, all controversy over respective rights would have ceased and ministerial functions alone called into action. No single provision of the bill enables the United States to defend against a demand. The claim that perhaps once existed has, according to the terms of the bill, ceased to exist, the demand involved in its presentation to Congress merged into a proposed granted right, and all that remained was an accounting and the vitalization of the demand by congressional action.

* * * The only facts which this court could report to Congress under the reference would be such facts as constitute a mere matter of accounting. *Cahalan* v. *United States,* 42 C. Cls. 280; *White River Utes* v. *United States,* 43 C. Cls. 260; *Meeha* v. *United States,* 48 C. Cls. 258.

In the case of *White River Utes* v. *United States,* 43 C. Cls. 260, the court also had a similar question, and in its opinion (pp. 264–265), the court said:

Thus it will be seen that the bill seeks to confer upon the Secretary of the Interior judicial powers; that is to say, the construction of treaties and agreements, and the determination of the amount due for use and occupation, etc. In other words, it makes the Department of the Interior a court in which is to be settled and adjudicated the matters in difference between the Indians and the Government, and calls upon the Secretary of that department for something more than the mere exercise of his present duty which would have been needless. The bill does not call for the "payment of a claim" within the meaning of the fourteenth section of the Tucker Act, but directs the Secretary of the Interior to adjudicate this claim in the manner provided by the bill, and upon such adjudication it is to be paid.

If the bill had become a law the Secretary of the Treasury could have made no payment thereunder until the Secretary of the Interior had determined what amount was due the claimants, because his action would have been a condition precedent to any action on the part of the Secretary of the Treasury. And in that event neither could this court have taken jurisdiction thereunder until the Secretary of the Interior had ascertained the amount due, and payment thereof had been refused by the Secretary of the Treasury, in which case it is probable that a suit would lie here on the amount reported by the Secretary of the Interior as an award authorized by Congress.

When is it correct to refer to a bill as "a bill for the payment of a claim?" A bill appropriat-

ing a definite sum of money for the purpose of paying a claim would be such a bill. If upon its passage the proper executive department of the Government should fail and refuse to make payment of the sum appropriated in compliance with the act, an action in this court would lie based upon a liability arising out of an act of Congress. If the bill under consideration had become a law and the Secretary of the Interior had failed and refused to audit the account, or having audited the same had found no balance due the plaintiffs, this court would be without authority to grant relief because the act fails to create a liability. Therefore, a bill cannot be correctly called "a bill for the payment of a claim" unless upon its passage a liability in a definite and certain amount becomes fixed.

Furthermore, the bill does not make an appropriation for the payment of a claim. The bill says, "* * * and there is hereby authorized to be appropriated." To be appropriated by whom, and when, and from what funds?

A bill providing for the payment of a claim must of necessity carry an appropriation for that purpose. When such a bill is enacted into law the money *has been* appropriated. In other words, the appropriation must be an accomplished thing. An authority to pay money which is "to be appropriated" in the future is not sufficient.

With respect to the construction of appropriation acts, Congress has provided in the act of June 30, 1906 (34 Stat. 697, 764), as follows:

> No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, *unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed.* [Italics ours.]

The instant bill does not "in specific terms declare an appropriation to be made."

Applying that rule of construction, it is plain that the pending bill does not appropriate money to be paid out of the Treasury of the United States because it fails to declare in specific terms that an appropriation is thereby made. The language of the bill that "there is hereby authorized to be appropriated" is not sufficient to meet the requirements of the rule as declared by Congress. As heretofore said, the bill must make the appropriation rather than authorize an appropriation to be made.

The Constitution provides (Art. 1, Sec. 9) that Congress alone may appropriate money to be paid out of the Treasury of the United States. The delegation of such authority is not possible.

In addition to the cases heretofore cited, the defendant's position on this point is supported by the following cases:

> *Cahalan* v. *United States,* 42 C. Cls. 280.
> *State of Missouri* v. *United States,* 43 C. Cls. 327.

> Congress to proceed with the matter as an act of charity, if at all, and by way of exception to the policy of the Government in such cases. The amount of an appropriation, if any shall be made, also rests with Congress. For this reason and because the demand is not a legal or equitable claim, the court can not estimate an amount.

Section 151 of the Judicial Code confers authority on the court to report on pending bills of two classes, viz: (1) claims against the United States, legal or equitable; (2) for the payment of a grant, gift, or bounty (gratuities).

When the court has determined that the bill provides for the payment of a claim, legal or equitable, and that there is no law preventing the court from entering judgment thereon, then "it shall proceed to do so", but if there is a law preventing the court from entering judgment, the court will report the "facts in the case and the amount, where the same can be liquidated."

If the court should conclude that the bill provides for the payment of a grant, gift, or bounty, then the Congress alone is the judge of the extent of its grace, and as was held in the Widmayer case (supra) "the court can not estimate an amount."

If, therefore, the court should conclude that it has jurisdiction of the matter, and further concludes that the "pending bill" does not provide for the "payment of a claim, legal or equitable", but for a gratuity, then it is submitted that the report

should omit any statement or recommendation relating to the fairness or justness of the action proposed in the "pending bill" or the amount which should be appropriated.

The finding is objected to for the further reason that it ignores the value of the interest which the plaintiff nations had in the lands involved at the time of the cession under the treaty of 1866.

Under the treaty of 1855 (11 Stat. 611), the United States procured a permanent lease covering the lands, paying the entire consideration therefor at the time of the treaty. Under the lease the United States acquired "all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein." It will be seen, therefore, that the finding does not take into consideration the value of the lands to the plaintiffs at the time of the treaty of 1866. In the opinion in the case of *United States* v. *Choctaw &c. Nations* (179 U. S. 494, 522), it was said:

> After the treaty of 1855 it was not possible for the Choctaws to assert any claim to lands west of the 100th degree west longitude, and as to the lands between that and the 98th degree west longitude, the United States held them under a permanent lease given in 1855, *which practically divested the Choctaws* [*and Chickasaws*] *of all interest*

C

The claim attempted to be referred, being res judicata, is barred by reason of the provisions of section 5 of the Omnibus Claims Act of March 4, 1915 (38 Stat. 962, 996) commonly known as the Crawford amendment

A claim based upon the theory that the treaty of 1866 (14 Stat. 769) did not accomplish a cession of the lands composing the leased district and that there was a "taking" of said land by the United States, has been before this court (34 C. Cls. 17) and the Supreme Court (179 U. S. 494) upon appeal. The jurisdictional act authorizing said suit provided among other things as follows (28 Stat. 876, 898):

> * * * jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw Nations, and the Wichita and affiliated bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; * * *.

The Supreme Court held that the treaty did accomplish a cession of the land and that the consideration agreed upon in the treaty had been paid. There being no authority under the jurisdictional

act to disregard the finality of the treaty, the Supreme Court held that there was no jurisdiction to grant the relief sought. The Supreme Court therefore decided that the treaty of 1866 not only passed all title to the lands from the Indians to the United States, but that it fixed the compensation which the United States was legally and equitably obligated to pay therefor. The decree of the court in that case is *res judicata* on the question of the "legal and equitable" liability of the United States for compensation for the lands ceded, as well as on the question of the character of the interest in the lands acquired by the United States.

The Crawford amendment of section 151 of the Judicial Code places a bar on the authority of the court to entertain a reference of a claim which has been barred by "the provisions of any law of the United States."

The effect of the Crawford amendment was carefully and exhaustively considered by this court in the *Chase case* (50 C. Cls. 293). There the court, having shown that the Crawford amendment was practically a reenactment of section 3 of the Bowman Act (22 Stat. 485), at page 303 held:

> * * * It is a general rule that where the same terms are used in a subsequent statute which were used in a former statute, and as there used had received a judicial interpretation, they are to be understood in the same sense unless the intention to use them in the subsequent statute in a different sense clearly appears. *Logan* v.

United States, 144 U. S., 263, 301; *The Abbotsford,* 98 U. S., 440–444. This rule is applicable to the words in the Crawford amendment which were taken from the Bowman Act, and as there used had been construed. In construing an act it is the court's duty to ascertain the intention of the law-making power, and when that intention is discovered it must prevail. Where the statute is clear and unambiguous, there is no room for construction, and the language of the act must prevail.

The attention of the court is further invited to section 179 of the Judicial Code which provides as follows:

> Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy (Rev. Stat., Sec. 1093).

In the case of *Heflebower* v. *United States* (21 C. Cls. 228), in passing upon a claim before the court under the Bowman act, the court on page 239 said:

> And these conclusions lead to the following practical results:
>
> The court is prohibited from exercising jurisdiction of cases transmitted under the first section of the Bowman Act in the following instances:
>
> 1. Of cases within the general or special jurisdiction of this court which were prosecuted to judgment and determined upon the merits (Rev. Stat., Sec. 1092, 1093).
>
> 2. Of cases within the general jurisdiction of the court which, if now prosecuted therein, would be barred by the statute of limitations (Rev. Stat., Sec. 1069).

In the case of *Chieves* v. *United States* (42 C. Cls. 21), the court had before it a Senate resolution referring a bill for the payment of a claim, and in its opinion the court in part said, page 28:

> Where the court has already taken jurisdiction and proceeded to judgment under the terms of some general law, new jurisdiction cannot be acquired for the purpose of an investigation and a report of the facts pursuant to resolution under the fourteenth section of the Tucker Act transmitting a bill providing for an appropriation of "a claim", legal or equitable, against the United States. (*Vincent* v. *United States,* 39 C. Cls. R., 456.) Nor can renewed references under any act invest the court with jurisdiction to consider matters of fact where the report appears to be final under previous reference on the same issues, except as it shall be made to appear on the second reference that competent testimony has been overlooked, or the findings are shown to have been based on false or fraudulent testimony, or were procured through the misconduct of either party. (*Rymarkiewicz* v. *United States, ante,* p. 1.) We can not attribute to Congress the intent to

assume judicial power. Nor can we attribute to Congress the intent to permit either House to burden the court with subsequent references where it appears that the jurisdiction has once been exercised and where the findings appear to be final, except as stated.

In the case of *Daigle et al.* v. *United States* (42 C. Cls. 124), speaking on the same question, the court said, on page 133:

> When a claimant has had his day in court under either the Bowman or the Tucker act and his rights have been determined by the methods of a judicial proceeding conforming to the established rules of procedure and evidence and the result so reached is free from fraud or false testimony, there is no reason in law, justice, or good morals why the proceeding should not be deemed closed.

The court will observe that prior to the decision of this court in the *Missouri case* (43 C. Cls. 327) there had been much confusion with respect to the jurisdiction of the court under the acts conferring jurisdiction, and especially that part of the court's authority to find facts and report the same to the Congress. So when the court came to decide the *Missouri case* (*supra*) the court took occasion in its opinion to say on page 331:

> This question of jurisdiction in Tucker Act cases has been repeatedly brought before the court and has caused not a little expenditure of time both on the part of the bar as well as on the part of the bench. With so many cases coming before the court for adjudication, presenting so many questions which must necessarily be decided, neither the bar nor the bench have time to waste in needless discussion. It must now be considered as settled that when a bill is referred by one of the Houses of Congress under section 14 of the Tucker Act it must be expressly and explicitly for a grant, gift, or bounty or for the payment of a claim, and nothing else, which claim must be legal or equitable. The only exception to this is the exception presented by the *Leahy case, supra.* The court upheld jurisdiction in that case because it was an exception only in form and not in substance. The bill provided that the claim should be referred to the court for adjudication under section 14 of this act, and that was but a roundabout way of saying that the claim intended to be referred was a legal or equitable one requiring no other solution than payment.

In view of the similarity between the instant case and the *Creek case* (74 C. Cls. 663) and of the decisions in the cases hereinbefore cited, it is respectfully submitted that if the court should take jurisdiction of the instant case, it will result in a return to the confusion and uncertainty in this class of cases which existed prior to the decision in the *Missouri case.*

For the reasons stated, it is submitted: (first) that the court is without jurisdiction of this refer-

that reason did not relinquish a right thereto and received nothing on account of such relinquishment.

The court will observe that under the treaty of 1837 (11 Stat. 573) the members of the Choctaw and Chickasaw tribes were to share equally in the lands. Upon the bases of population the compensation received by the tribes has been divided as follows: three parts to the Choctaws, and one part to the Chickasaws. When, therefore, it was agreed by the treaty of 1855 that the Chickasaws were to receive $200,000 out of the $800,000 paid for both the relinquishment of lands west of the 100° West longitude and also for the lease, it is plain that the parties allocated the entire $800,000 as money paid for the lease.

If it should be proper under any view of the case to report to Congress the value of the lands in question either as of 1855 or as of 1866, defendant submits that the most convincing evidence at hand is to be found in the treaty of 1837 (11 Stat. 573) wherein it appears that, upon the basis of the population of the respective tribes, the Chickasaws purchased a one-fourth interest in approximately 19,000,000 acres of land (34 C. Cls. 17, 107) for a consideration of $530,000, that being at the rate of about eleven and one half cents per acre.

The appropriation by Congress under the act of March 3, 1891 (26 Stat. 989), to pay to plaintiff nations $2,991,450 for all their title and interest in

and to that part of the Leased District occupied by the Cheyenne and Arapahoe Tribes, has no value as evidence to prove that the treaty of 1866 was not intended to effect a cession of the lands, or that the consideration paid for such cession was not reasonable, because the act was passed prior to the adjudication of these questions by the Supreme Court (179 U. S. 494). With respect to that appropriation, this court in the same case (34 C. Cls. 17, 127) said:

> The action of the Fifty-second Congress affirming their declaration of the trust was qualified by a proviso to the resolution declaring that neither the passage of the original act carrying the appropriation to pay the Choctaws and Chickasaws for their interest in the lands of the Cheyenne and Arapahoe Reservation, nor of the resolution affirming the act, should be held in any way to commit the Government to the payment of any further sum for any interest alleged by the claimants in the remaining lands of the leased district (Joint Res. Jan. 18, 1893, 27 Stat. L. 753). Following this came the jurisdictional act in the Fifty-third Congress, that as to the best lands nothing contained in the jurisdictional act shall be construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands (28 Stat. L. 898). Thus Con-

gress was tenacious of the legislative interpretation of the treaty and unwilling to recede from that view as it related to the lands seized, but for any lands thereafter claimed to be taken in violation of the trust the claimants were to be held in abeyance, according to circumstances. The agreement between the United States and the defendant Indians raised the issue in such form Congress chose to send the whole matter here for investigation in connection with the claim of the Wichitas as first occupants.

III

DEFENDANT'S SUGGESTIONS WITH RESPECT TO CONTENTS OF REPORT TO CONGRESS

Should the court decide that it has authority to make a report to the Congress on the claim here asserted, the defendant requests that such report show as a conclusion of law that the pending bill does not provide for the payment of a claim, legal or equitable.

Upon the same conditions defendant further requests the court that such report contain a statement showing the following facts:

1. That under the treaty of 1855 (11 Stat. 611), the plaintiff nations leased to defendant in perpetuity the lands known as the "Leased District" and thereupon defendant paid to plaintiff nations the entire consideration therefor.

2. That in 1866 the plaintiff nations entered into a treaty with the United States (14 Stat. 769)

whereby the plaintiff nations ceded to the United States all their right, title, and interest in and to the lands composing the leased district for a consideration in the sum of $300,000 (179 U. S. 494).

3. That thereafter plaintiff nations asserted a claim based upon the idea that the treaty of 1866 did not accomplish an absolute cession of the lands composing the leased district and that the conveyance was in the nature of a trust. Following the assertion of said claim, Congress passed the act of March 2, 1895 (28 Stat. 876, 898), conferring jurisdiction on the Court of Claims to adjudicate said claim. From the decree of the Court of Claims in the cause brought pursuant to said act, the United States appealed to the Supreme Court and upon said appeal the Supreme Court in its opinion (179 U. S. 494), after quoting from the jurisdictional act as follows:

> * * * jurisdiction be and is hereby conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw Nations and the Wichita and Affiliated Bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that

> may arise on behalf of either party in the hearing of said claim; * * * (p. 498).

said at page 522:

> After the treaty of 1855 it was not possible for the Choctaws to assert any claim to lands west of the 100th degree of west longitude, and as to the lands between that and the 98th degree of west longitude, the United States held them under a permanent lease given in 1855, which practically divested the Choctaws of all interest in the territory constituting the Leased District, except that they could settle in it if they so desired. * * *

4. The record before the court fails to disclose any evidence upon which the court is able to fix the value of the interest remaining in the plaintiff nations in the lands composing the Leased District at the time of the cession thereof under the treaty of 1866.

CONCLUSION

For the reasons hereinbefore stated, defendant submits that the court is without jurisdiction of the instant reference; second, if the court should take jurisdiction of the reference and thereupon make a report to Congress, the court is unable to state the value of the plaintiff nations' interest in the lands involved as of the date of the treaty for 1866; third, that if the "pending bill" is for the payment of a gift, grant, or bounty, it is not within the jurisdiction of the court in any way to suggest to Congress the amount of such gift, grant, or bounty.

Respectfully submitted.

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