IN THE

United States Court of Claims.

No. 12,742.

CHOCTAW NATION

vs.

THE UNITED STATES.

Brief on behalf of the Claimant in the Matter raised by the Demurrer filed in the case December, 1883.

JOHN B. LUCE,
Attorney for Petitioner.

SHELLABARGER & WILSON,
JOHN J. WEED,
J. W. DENVER,
F. P. CUPPY,
Of Counsel.

THOMAS McGILL & CO., PRINTERS, WASHINGTON, D. C.

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vs.
THE UNITED STATES. } No. 12,742.

Counsel in behalf of the claimant in this case now come and beg leave to submit to the court upon the question raised by the demurrer filed in this case the following. That demurrer is in the following words:

In the Court of Claims of the United States.

December term, 1883.

CHOCTAW NATION OF INDIANS
vs.
THE UNITED STATES. } No. 12,742.

And now comes the Attorney-General and says that as to so much of the petition of the claimant filed June 13, 1881, and of the amendments thereto filed January 23, 1882, as sets forth an alleged cause of action against the defendants based upon certain alleged award of the Senate of the United States, (referring especially to articles 18, 19, 20, 21, 23, and 27, and schedules A and B of article 31 of the said petition, and of article 2 of the said amendments to the said petition,) the same does not allege facts sufficient to constitute a cause of action.

THOMAS SIMONS,
Ass't Att'y-General.

The articles of the petition to which the demurrer applies are 18, 19, 20, 21, 23, and 27, and schedules A and B of article 31 of the said petition, and of article 2 of the amended petition, the demurrer alleging that these do not set forth facts sufficient to constitute a cause of action. The following is the substance of these articles referred to in the demurrer:

Article 18 of the petition is one alleging the Choctaws to be dissatisfied with the manner in which the treaty of the 27th of September, 1830, had been forced upon them, and with the grievances suffered at the hands of the United States in non-fulfillment of that treaty, and had hence always made efforts to secure from the United States compensation for losses received from such non-fulfillment; and owing to such dissatisfaction and grievances they sent delegates to Washington under resolutions set forth on pages 26 aud 27 of the petition, the object expressed in the resolution being to institute on behalf of the Choctaw people a claim upon the United States for pay and remuneration for the country which they ceded to the United States Government east of the Mississippi, and protect and defend all and every right and interest of the Choctaws arising under treaty stipulations. The resolutions also gave power to settle and dispose of, by treaty or otherwise, all and every claim and interest of the Choctaw people against the Government of the United States, etc. Such 18th article also recites the act of the Choctaw Assembly, dated 10th of November, 1854, instructing the delegates to continue to press for settlement all claims and unsettled business of the Choctaws with the Government, and to bring to a final and satisfactory settlement all claims or demands whatsoever which the Choctaw tribe or any member thereof have against the United States, by treaty or otherwise.

Article 19 of the petition, page 28, alleges that on the 22d day of June, 1855, the United States entered into a treaty with the Choctaws, with full knowledge of all the grievances and claims mentioned in the 18th article of the petition. It sets forth the preamble to that treaty of the 22d of June, 1855, (11th Statutes, p. 611,) and also sets forth in full article 11 of the treaty. (See page 29 of the petition, 11 Stats., 613.) Article 19 of the petition further sets forth, pages 29 and 30, an averment that in order to

provide for a settlement of the claims of individual members of the Choctaw Nation upon the adjudication and adjustment of the claims, by virtue of the two proposed methods stated in article 11, and to leave no doubt as to the conclusiveness and finality of the adjudication and decision of the United States Senate upon such question submitted to it by article 11, it was provided in article 12 as below set forth.

And then it sets forth article 12 of said treaty, page 30. This article 11 is as follows:

"The Government of the United States not being prepared to assent to the claim set up under the treaty of 27th of September, 1830, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw people, and being desirous that their rights and claims against the United States shall receive a *just, fair, and liberal consideration*, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States by treaty of September 27, 1830, deducting therefrom the cost of their survey and sale, and all just and proper expenditures and payments under the provisions of said treaty; and if so, what price per acre shall be allowed to the Choctaws for the land remaining unsold, in order that a final settlement with them may be promptly effected; or

"Secondly. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims, national and individual, against the United States; and if so, how much."

Article 12 of the treaty is as follows:

"In case the Senate shall award to the Choctaws the net proceeds of the lands ceded as aforesaid, the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the tribe to be equitable and just, the settlement and payment to be made with the advice and under the direction of the United States agent for the tribe; and so much of the fund awarded by the Senate to the Choctaws as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the tribe, shall on their requisition be paid over to them by the United States; but should the Senate allow a gross sum in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for and bound to pay all the individual claims as aforesaid, *it being expressly understood that the adjudication and decision of the Senate shall be final.*"

Article 20 of the petition sets forth the fact that the Senate did take jurisdiction of the subject matter submitted by article 11 of the treaty; that they gave it careful examination and consideration, and on the 9th of March, 1859, came to a conclusion and decided the same, and adopted and entered upon its journal its decision of said question, and then sets forth the award of the Senate in full. After setting forth the preamble, the award is set forth in these words:

"*Resolved*, That the Choctaws be allowed the proceeds of the sale of such lands as have been sold by the United States, on the first day of January last, deducting therefrom the costs of their survey and sale, and all proper expenditures and payments under the said treaty, excluding the reservations allowed and secured, and estimating the scrip issued in lieu of reservations at the rate of $1.25 per acre; and, further, that they be also allowed twelve and a-half cents per acre for the residue of said lands.

"*Resolved*, That the Secretary of the Interior cause an account to be stated, with the Choctaws, showing what amount is due them according to the above prescribed principles of settlement, and report the same to Congress." (See pages 30, 31 and 32 of the petition.)

Article 21 of the petition alleges that the Secretary of the Interior, in obedience to the mandates and requirement of the Senate in said decision, caused an account to be stated between the United States and the Choctaws, and the Secretary certified and declared that "the United States owed and was indebted to the petitioner for and on account of net proceeds of the lands ceded by the treaty of 27th of September, 1830, in the sum of $2,981,247.30," and that this was transmited by the Secretary to Congress on the 8th of June, 1860, and the same was printed and is set forth in Exhibit A.

Article 23 of the petition is one in substance claiming that should the court hold that the award of the Senate and the Secretary's accounting thereunder ought to be set aside and the accounts readjusted by the court, then that the accounting by the Secretary was erroneous in the particulars set forth in said 23d article.

Article 27 of the petition (p. 39,) is one alleging that

there remains due and payable to your petitioner from the United States on account of the said award, after deducting the $500,000 directed to be paid by the act of second March, 1861, the sum of $2,981,013.39, and demands and claims interest at 5 per cent. on the unpaid balance of the said award, after deducting said $500,000; and then sets forth the reasons why interest is demandable on said award.

Article 31 is one alleging that the questions of difference arising from the non-fulfillment of treaty stipulations under the treaties, as embodied in schedules A and B, set forth in said article 31. Schedule A is a summary of "claims against the United States upon the basis of the award of the Senate and the correctness of the account stated by the Secretary of the Interior under said award;" and schedule B is a statement of "amount due under the award of the Senate after correcting the errors committed by the Secretary of the Interior in the statement of the said account."

Article 2 of the amended petition filed 23d of January, 1882, is one substituting the amendment for article 23 in the original petition. In this amended 23d article it is in substance averred that if the court, under the act conferring jurisdiction in this case, should decide the award of the Senate ought to be set aside, then that the account stated by the Secretary should be reconsidered by the court, and the Secretary's errors in the statement of the account be corrected and the balance due under the award determined in conformity with the principles of adjustment fixed and determined by the Senate in the award; and then the article 23 proceeds to state the manifest and unjust errors committed against the claimant by the Secretary.

In his brief the Attorney-General seeks to sustain this demurrer upon two grounds: first, as he claims, because the act of Congress by its terms excludes the award from the consideration of the court; second, as he claims, because the action of the Senate under the submission is in-

complete, and therefore does not constitute an award. We will, for the sake of convenience, first consider his second proposition. He says "the first resolve was manifestly insufficient to constitute an award since it contained no judgment of the amount of net proceeds, and so did not end the dispute nor shut out litigation on that point."

To this proposition we reply that by the submission (article 11 of the treaty) the Senate was to determine upon which of two *principles* settlement should be made with the Choctaws. They were, first, whether the Choctaws "are entitled to, or shall be allowed" the net proceeds of the sales of lands, and if so, the price per acre to be allowed them for unsold lands; or, second, whether the Choctaws shall be allowed a gross sum in satisfaction of all their claims, and if so, "*how much?*"

These two constitute the entire submission. The Senate was not by the terms of the submission to adjudicate as to amount, except in the event it should allow a gross sum pursuant to the second proposition. If the Senate adopted the second principle, to wit, the gross sum, then it was required to find the amount. But it was not so required if the first principle of settlement was adopted.

It seems, therefore, to be quite apparent that the subject of the amount was in the minds of the makers of this treaty, and the fact that the Senate was directed to find the amount in the one case, and there was an omission to give any such direction in the other case, is quite conclusive that in the latter case the Senate was not to find the amount. If the Senate had found the amount in adopting the principle of net proceeds as the one upon which settlement was to be made, it might then with much force have been argued that the award was invalid because of having exceeded the submission. Turning to what the Senate did do, it will be seen that it kept strictly within the terms of the submission. It adjudged that the Choctaws be allowed the proceeds of the sale, &c., following the precise words

of the submission, and fixed the price per acre to be allowed for unsold land, as the submission required. It did not go beyond, nor did it stop short of, the requirements of the submission. The second resolve of the Senate was only a step towards the execution of this award. It called upon the Secretary of the Interior to state the account and report the same not to the Senate, but to Congress, and this for the obvious purpose of enabling Congress to make the proper appropriation.

If, instead of an award, this had been a decree of a court of equity in respect of these matters of difference, it would be a final decree from which an appeal would lie to the Supreme Court, although the final accounting had only been directed and not actually made.

Again, the Attorney-General on this branch of the case contends that this award is incomplete and therefore invalid because the Senate did not determine what were "proper expenditures and payments," and to this we reply, quoting from the 11th article of the treaty (which constitutes the submission.)

"It is therefore stipulated that the following *questions* be submitted for adjudication to the Senate of the United States.

"First, whether the Choctaws are entitled to or shall be allowed the net proceeds of the lands ceded by them to the United States by treaty of September 27, 1830, deducting therefrom the cost of their survey and sale and all just and proper expenditures and payments under the provisions of said treaty.

"Secondly, whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims," &c.

Now, the court will observe that what the Senate was to determine was one of these "two *questions*." The Senate by this submission was required to answer this question, Shall the Choctaws be allowed the proceeds of the sale, * * * * deducting therefrom the cost of their survey

and sale and all just and proper expenditures and payments? That was the question that the Senate had to decide. It did not have to decide what were proper expenditures and payments, but it simply had to decide whether they were to be allowed the net proceeds after deducting all proper expenditures, &c., and that is exactly what the Senate did do. If it had gone beyond that it would have exceeded the submission. That question being answered, then the matter of accounting came afterwards, and, as above stated, this second resolve of the Senate was simply a preliminary step towards that accounting. Not doubting that the court will take the view of this branch of the case that we have been suggesting, we will assume that the Senate made the award in question in accordance strictly with the submission, and that it is to have full force and effect unless it is excluded from the case by the act under which the court is proceeding. The Attorney-General contends that it is so excluded, and therefore should be eliminated from the petition which is his first proposition above stated.

Before proceeding to examine the phraseology of this statute, we submit to the court the following points and propositions:

I. It is obvious that the substance and effect of all the parts of the petition covered by the demurrer are, that they set forth articles of a treaty providing for submitting for adjudication to the Senate certain questions of difference and claim existing between the claimant and the defendant, and providing that such "adjudication and decision of the Senate should be final;" also, setting forth the award of the Senate under the submission made by the treaty; also, setting forth the account made by the Secretary of Interior, and claiming that such adjudication or award of the Senate is final and binding, and that a recovery in this case ought to be had according to the terms of the award.

II. We suppose that it cannot, with any show of success, be claimed that in the present case this award can be ignored by the court and held for naught, unless the act of Congress creating the jurisdiction of the court, in the present case, is such as to blot out the award wholly, and to deprive it of all force as making or sustain ing a claim.

In other words, the averments covered by the demurrer set forth facts which show a valid award, and unless the act of Congress giving jurisdiction in this case compels the court to wholly ignore the award, then the award gives a right of recovery according to its terms.

It is the commonest and most familiar principle of law that an action of debt or assumpsit may be sustained upon an award made pursuant to a valid submission, (see Caldwell on Arbitration, p. 387 *et seq.*) And besides this, this award is the product of a treaty stipulation found in articles 11 and 12 of the treaty of 1855, and the great and all-embracing difference between the government and the Choctaw Nation, at the date of the act giving jurisdiction in the present case, to wit, the 3d of March, 1881, was the claim, on the one side, by the Choctaws, that the award ought to be paid and was final, and on the other, the defendant's part, that it ought not to be paid. Such difference being in existence at the date of this act, the terms of the act are express and unequivocal, requiring this court to "try all questions of difference arising out of treaty stipulations with the Choctaw Nation and render a judgment thereon." It is therefore utterly plain that unless there be something else in this act of Congress which blots out this award, and shuts the eyes of the court to it, as a ground of recovery, then there is a ground of recovery set forth in the articles of the petition covered by the demurrer.

But if the award in and of itself does not give a right of recovery, (we will attempt to show that it does), then—

III. It cannot be stricken out of this petition nor ignored

by the court, because it must be taken, even if alone it did not constitute technically a cause of action, along with all the facts in the case; and since the award is a creature of treaty stipulations, and since its payment is made binding by treaty stipulations, therefore this court is bound to consider it and give it weight along with the other facts in the case, just because such treaty stipulations make it binding and final, and create an obligation which in justice and equity ought to be enforced and must, by this court, be taken jurisdiction of and tried under the provisions of the act of the 3d of March, 1881, even though, as we have said, it might not, taken by itself, constitute technically a ground of recovery between private parties. Hence we shall insist, and do insist, that even if the court should not find, in the averments covered by the demurrer, that which, at common law and as between man and man, would furnish a technical right of action, yet in the present case the court cannot ignore these parts of the petition demurred to, but must give them the weight, to which they are entitled in virtue of the fact that the award is the result of treaty stipulations, and that its finality and its payment are secured by treaty stipulations, and in virtue of the further fact that the payment of this award is one of the matters of difference which the act of Congress expressly requires this court to take jurisdiction of and try and render judgment upon. Stated in another way, our contention is, and will be, that the court cannot ignore the facts set forth in the parts of the petition demurred to, and cannot, in ruling upon this demurrer, exclude them or their consideration from the record in the present case, although taken alone these would not show a technical right of recovery—and this because of the following considerations:

First. That the second section of the act requires that the petition shall be one "stating the facts on which the said Nation claims to recover, and the amount of its claim."

Second. That said act requires the court to "take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render a judgment thereon."

Third. And since these averments covered by the demurrer are a part of the facts required by the act to be set forth; and since the court must consider them along with the other facts, because the award and its finality are matters arising out of treaty stipulations which the act commands the court to consider, therefore the court must consider these facts demurred to as a part of the case, and must give to the award that force which the treaty stipulations entitle it to receive, and the court cannot therefore ignore these facts, even, though taken by themselves, they might not be, technically, a cause of action in an ordinary case. We shall below, and under another head, state and consider what force they shall have in this trial, even if the court shall be of opinion that the award alone gives no right of recovery.

For these reasons, we insist that a demurrer is not proper as interposed in the present case. The parts demurred to are not relied upon nor set forth in the petition as a separate and distinct cause of action, although, as a matter of *law and fact, we think they might be so relied upon in a case not brought under a special act like the present, but brought by a citizen against a citizen on similar facts.* The requirements of this act of Congress of the 3d of March, 1881, did not contemplate, nor, as we think, permit us to set forth the facts demurred to by themselves and alone, as a separate and distinct cause of action. On the contrary, the scheme and design of the act creating the jurisdiction was one requiring us to set forth all the facts on which the Nation claims to recover, not as they might be set forth in an ordinary case between two citizens. For these reasons we insist that the demurrer cannot be prop-

erly interposed as it is, nor be made to strike from the record a portion of the facts which the act of Congress required us to set forth as some of the facts supporting our claim.

Construction of the Act.

In considering the language of this statute, and determining the force to be given to it, there are three propositions which we wish preliminarily to state:

I.

There was no power reposed anywhere to review the award. This, of itself, made the award final; and, superadded to this, the treaty made it final. In that award the Choctaws and the individuals of the nation had vested rights. It was not in the power of Congress to impair or destroy those vested rights.

The presumption, therefore, in construing this act must be indulged that Congress did not intend to do what it clearly had no power to do; and, therefore, that the act is not to be construed to be an abrogation of the award, and a virtual repeal of the treaty stipulation declaring that it should be final, unless the language of the act will not admit of any other reasonable interpretation.

II.

In construing this act the court must, we submit, keep in view the fact that this treaty is a compact between two nations. The Choctaws are a nation—so recognized by the United States. The court will take notice of the fact that they have an independent government—a constitution, a legislature that enacts the laws by which that people are governed, an executive and a judiciary of their own.

In this capacity they treated with the United States, and in this capacity this award was made in their favor.

When they made application for its payment it was in a national capacity by memorializing the President of the United States as one nation addresses another; the President communicated to Congress on the subject; Congress sent the case here. This was the action of one party, not the joint action of both, and the court will not, unless the language of the act compels it, so construe it as to strike down an award made pursuant to a treaty which declared that it should be final, and thereby destroy vested rights.

Such legislation is to be construed favorably to the Choctaws.

5 Wall., 737.
6 Pet., 582.

III.

We state here as a proposition having relation to the matter of the construction of the act, to be considered more in detail hereafter, this, to wit:

The act requires the court "to try all questions of difference arising out of treaty stipulations." One of the treaty stipulations is that this award shall be final. By the averments of the petition it appears that one question of difference is that the United States has not complied with this award. By the terms of the act that question of difference is to be tried by the court. This is absolutely inconsistent with the contention of the Attorney General that the award is to be ignored. If it is to be tried it cannot be ignored, and if tried it must be upon the same principles that any other award would be tried, and it is therefore to stand or fall after a full inquiry into all the facts which the United States may offer in the regular legal way to impeach it, and upon the same legal principles that any other award would be impeached.

IV. This brings us to the direct question whether there is anything in the language of this act of Congress creating the present jurisdiction which deprives the award of *all* force and efficacy in the present case. That act of Congress creating this jurisdiction is in the following words:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon; *power is hereby granted the said court to review the entire question of differences* de novo, *and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the treaty of eighteen hundred and fifty-five;* and the Attorney-General is hereby directed to appear in behalf of the Government; and if said court shall decide against the United States, the Attorney-General shall, within thirty days from the rendition of judgment, appeal the cause to the Supreme Court of the United States; and from any judgment that may be rendered, the said Choctaw Nation may also appeal to said Supreme Court: *Provided*, The appeal of said Choctaw Nation shall be taken within sixty days after the rendition of said judgment, and the said courts shall give such cause precedence.

"SEC. 2. Said action shall be commenced by a petition stating the facts on which said Nation claims to recover and the amount of its claim; and said petition may be verified by either of the authorized delegates of said Nation as to the existence of such facts, and no other statements need be contained in said petition or verification."

The claim of the government is that the words "power is hereby granted the said court to review the entire question of difference *de novo*, and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the treaty of 1855," have the effect of rendering wholly insignificant the award of the Senate for the purposes of this trial, and deprive the court of power to give such award any force whatever. To this proposition we now make reply.

First. The first and principal and controlling provision of this act of third of March, 1881, creating the present jurisdiction, provides that "the Court of Claims is hereby authorized to take jurisdiction of and try *all* questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render a judgment thereon."

This clause is one which expressly and peremptorily compels the court to take notice of and try everything *that is a question of difference arising out of treaty stipulations.* The court cannot, acting under the authority of this law, ignore or shut its eyes to anything that is a question of difference arising out of a treaty stipulation between the defendant and the claimant. We therefore turn to this treaty of 1855 to see what treaty stipulations forbid the ignoring of this award, and also what stipulations exist, furnishing a rule of interpretation, etc., to the court in the trial of these questions of difference. In article 11 of the treaty of June, 1855, is a treaty stipulation which has here a very important bearing upon the present question and the entire case, and which furnishes the rule by which all questions shall be solved that are submitted to the court. That article 11 contains these words:

"The Government of the United States not being prepared to assent to the claim set up under the treaty of September 27th, 1830, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw people, and being desirous that their rights and claims against the United States shall receive a *just, fair, and liberal consideration*, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States."

When this act of the third of March, 1881, requires this court to give the Choctaws the benefit of all treaty stipulations, it thereby compels this court to give them the benefit of this treaty stipulation, and says to the court that in deciding questions the claim of the Choctaws "*shall receive a just, fair, and liberal consideration.*" Thus the court is, by the act creating the jurisdiction, compelled to not only be *fair and just*, but to be *liberal* in deciding all controverted questions. In determining, therefore, the question whether this award shall be wholly ignored, this court is required to resolve any doubts upon that subject upon just and fair and, beyond this, upon liberal principles. In other words, to resolve doubts in favor of liberality as well as of justice and fairness.

This, we submit, is a treaty stipulation which the act of Congress expressly and unmistakably secures to this claimant.

So much for the rule of interpretation and for resolving questions of doubt, regarding all questions raised by this demurrer, as well as all other questions that may hereafter arise in the case. If it were conceded to be doubtful, therefore, whether the award shall have the force and effect of awards generally for the purposes of the present trial, then that doubt must be resolved upon principles liberal to the claimant, as well as just and fair.

Second. As the above quoted first clause of this act, creating the present jurisdiction, requires the court "to take jurisdiction of and try all questions of difference arising out of treaty stipulations," therefore the Choctaws are entitled to have this court try everything that was a difference arising out of treaty stipulations.

And now it is undeniably true that at the passage of this act the one great and all-embracing question of difference between the Choctaws and the government was, Shall the award be treated as a finality and be paid? This question of finality of the award as well as the making of the award were matters arising out of treaty stipulations. Article 11 of the treaty of June 22, 1855, expressly provided for the award and the subject-matter thereof; and article 12 of said treaty provides in these words: "It being expressly understood that the adjudication and decision of the Senate shall be final." Therefore it is express and undeniable by the very letter of the treaty that the award should be *made* covering the subject-matter which the award set forth in the parts of the petition demurred to does cover; and also that it should be a determination having the nature of an adjudication and decision, and also that this adjudication and decision should be a finality and not open to review by any other tribunal. Hence the claim set forth

in this petition, that this award is final and shall be held to be final and to be paid, according to its terms, is one of the claims and the principal claim made by and in this petition. The petition is based upon this idea of the finality of the award and claims a recovery according to its principles, and the petition expressly denies in article 22, p. 35, and also otherwise denies, the power or right to ignore this award and insists upon this finality. Therefore, we have here unquestionably a question of difference between the government and the Choctaws which arises out of these treaty stipulations authorizing the award, making it have the force of an adjudication and the further force of a final adjudication; and we have in this act of Congress creating this jurisdiction the unambiguous requirement that this court shall try all questions of difference so arising out of treaty stipulations. The present demurrer proposes to withdraw this question of difference, to wit, the force of the award and its finality, and to take away from the court the power to give to this treaty stipulation, making this award and making it final, any force whatever. In other words, this demurrer proposes to have the court ignore this chief question of difference arising out of the treaty stipulations, which are, of all others in the case, the most important. To so withdraw this question of difference arising upon treaty stipulations is to simply defy the express and most important, and we insist the controlling term of the act creating this jurisdiction. Surely this is impossible.

Third. We submit that there is nothing in the succeeding clause of the act of Congress creating this jurisdiction requiring this court to ignore the first clause of the act, and deprive that first clause of its efficacy. In support of this we submit, first, that that succeeding or second clause is one which simply confers *power* upon the court to review the entire question *de novo* and prevents the technical estoppel, in making this review, which the award might oth-

erwise accomplish. In exercising this discretion or power the court is bound to do it under that treaty stipulation which says that the consideration of the question shall be conducted upon just, fair, and liberal principles. Without this power to review, the Court of Claims could not exercise any reviewing powers whatever as against the finality of the award.

After empowering the court to review the entire question of difference *de novo*, it says the court shall not be "estopped by any action had or award made by the Senate of the United States." Surely this language, especially when construed in the liberal spirit required by article 11 of the treaty, is language which not only does not strip the award of all significance, but which at the most simply takes from the award the conclusive and absolute estoppel which it might otherwise work.

Fifth. Now, what efficacy or force can be given to this award, and yet it be less than an estoppel? Plainly and manifestly it can have the force which a decree has in the courts which is subject and open to a bill of review. This clause uses the word "review." When a law term is used in an instrument or act, the law sense of the word so used shall be given to it. See the following cases:

1 Kent's Com., 462.
Sedgwick's Statutes, 221, and cases in note.
Merchants' Bank *v.* Cook, 4 Pick., 405.
Snell *v.* Bridgewater Cotton Co., 24 Pick., 294.
Macy *v.* Raymond, 9 Pick., 289.
U. S. *v.* Jones, 3 Wash. C. C. R., 209.
McCool *v.* Smith, 1 Black, 459.

It is in this sense that this word "review" is used in this law, and this court is empowered to "review" all questions, including the question of the force of this award as one *made final by treaty stipulation*, and if, in the "review *de*

novo," the court should find that which would destroy a decree of a court, under the operation of the bill of review, then this act suffers you to destroy the force of this award, as the result of the review it authorizes you to make. To overthrow and ignore this award so made final by treaty stipulation without any reason found in justice, fairness, or liberality of consideration, is not only to deny the claimant the benefit of a treaty stipulation of supreme importance, and which the first clause of the act of 1881 compels you to try, but is to trample upon and defy the rule of interpretation and consideration which said article 11 expressly secures to the claimant, and is to do so without any authority whatever for doing it. The utmost power given to you by the clause of the act in question, authorizing a review, is a power to review freed from the restraint of a conclusive estoppel. To suffer you to make this review as courts of equity review decrees under a bill of review, is a view which satisfies every word found in this act, even under the extremest view against the claimant which the words employed permit. When a court of equity sits in trial of the *bill of review*, and all bills in the nature of bills of review, they are not estopped by the decree which they are reviewing in the technical signification of the word "estoppel." Their review is one that is conducted on legal principles, known and well defined, and they set aside the decree they are reviewing for errors apparent on the face of the record, either for the want of equity to support the original bill, or on account of defect of parties, and for various other grounds well defined in the law. In other words, that the law of estoppel, technically so called, has no application in cases where courts are trying bills of review, bills in the nature of bills of review, or motions for new trials, or to set aside verdicts.

The estoppel mentioned in this act of Congress is one known to the law as *res adjudicata*. This estoppel is defined in Bigelow on Estoppels, p. 8, in these words:

"Res adjudicata are those judgments of the Supreme Courts which have become final, and which are held conclusively to settle the question discussed, so as to prevent the parties or their representative from afterwards raising an action founded on the same cause of action. The judgment of an inferior court does not fall under the description of *res adjudicata*."

Here is the definition of that estoppel which the act of Congress mentions, and the act of Congress simply declares thereof that this award of the Senate being an award of a Supreme Court whose jurisdiction was made final, shall not have the effect which *res adjudicata* has as applied to the judgments of such Supreme Courts, to wit, that it shall not be "*held* conclusively to settle the question discussed so as to prevent the parties or their representatives from afterwards raising" a question about it. We do not claim that the award of the Senate shall be held in this court as *res adjudicata* in the absolute and technical sense of estoppel as here defined and as universally understood. But we do claim that the award shall have all the effect that it can have, short of operating as such absolute estoppel. It can have such effect when it is allowed to stand as a decree of a court which is subject to being set aside for fraud or by a bill of review.

We are, as already remarked, brought, by this clause relating to the award not being an "estoppel" in this "review," to the question *what effect* can this court give to the award, as one made "final" by treaty, and which question of *finality* was and is one of the matters of difference which the first clause of section 1 compels you to try, and yet not give to the award the effect of an "estoppel"?

Our contention is that the design of this clause, relating to this "power of review," is that it was designed, not to repeal or abolish the provision of the treaty making it final in the true legal sense of word "final" in such instruments. To give this provision the sense of an abolishment of one of the most important and explicit treaty provisions, and the effect of a *repudiation* of vested rights, resulting from a

solemn and legal "adjudication" thereunder, is a construction utterly untenable for the following reasons:

(A.) It attributes to a statute, which on its face is expressly designed to *enforce* instead of repudiate all treaty stipulations, the purpose of trampling upon and repudiating one of the most important treaty stipulations ever made with the tribe, *and this without the assignment or pretense of a reason.*

(B.) It not only makes the statute to mean to trample upon a treaty without reason, but it makes it repudiate a solemn "*adjudication*" which worked an actual vesting of legal rights just as judgments do; and this, also, without assigning any reason!

(C.) It makes this clause, about no "estoppel," to work a repeal of not only that clause of section 12 of the treaty of 1855 which makes the award "final," but also makes it abolish the first clause of the section, in which this "estoppel" clause is found. This is so, because this first clause says, in effect, that you shall try *that* question of difference which is expressed on one side (the claimant's) by asserting the validity, finality, and right to be paid the award; and which, on the other side, (the defendant's,) is denied; and it makes this estoppel clause so work this repeal, although it is settled law that, to here adopt the words of the Supreme Court, (22 Howard, 311,) "repeals by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, *is not favored in any* case; but where the repeal would operate to reopen accounts at the Treasury Department, long since settled and closed," (in our case the effect of dishonoring the nation by repudiating its solemn treaty obligations and reopening accounts long since *honestly* and solemnly settled by a solemn award made by the Senate of one party to the

submission,) "the supposed repugnance ought to be *clear and controlling* before it can be held to have that effect."

Stated in other words by this court, (16 Pet., 363,) this rule, regarding repeals by implication, is thus laid down: "There must be a *positive* repugnance between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnance."

This language is again repeated in

Fabbri *v.* Murphey, 95 U. S. R., 196, and in

Arthur *v.* Homer, 96 U. S. R., 140,

where the court repeats the same thing as in the above-cited cases, and then adds what is the accepted *test and formula* expressive of the rule regarding implied repeals. The court says: "There must be such a *positive repugnance between the two statutes that they cannot stand together*."

McCool *v.* Smith, 1 Black, 459.

U. S. *v.* Tynan, 11 Wall., 88.

Thus we are conduced, by a most important and *settled* canon of interpretation, to the interpretation of this second clause of section 1 of this act of March 3, 1881, and are commanded by this rule not to allow this second clause, regarding "review" and the award being no "estoppel," to repeal the treaty making the award "final," &c., if it can be possibly avoided and if the two laws "*can stand together*." And more than this, you are required to resolve all doubts regarding this on principles "*liberal*" to the Choctaws.

Coming thus to this interpretation of this clause about "review" and "estoppel," we enquire, *can* the provisions of the treaty about "finality" of the award stand, and yet the provision about "power to review the entire question of difference *de novo* and that the court shall not be estopped by any action had or award made by the Senate," &c., be also allowed to stand and receive *any* resonable construction and operation?

To this question we reply that only can they by possibility "stand together" and be executed, but there is in fact *no* repugnance between the clause about "review" and no "estoppel," and the provision making the award "final" in the sense of the word "final" in such laws.

This we make appear as follows:

First of all this word "final," in such connection as it is found in here, never means that the foundations of the award cannot be reviewed and the award overthrown, for the reasons defined by the law, in a *direct* proceeding for that purpose. And the award never operates as an "estoppel" as against the "review," which is so directed to overthrow the award according to such legal principles. And the "review" here meant, by this second clause of section 1, is a "review" of all the facts, *de novo*, conducted (as one end or aim of the "review") to ascertain whether, according to the principles of law applicable to the question of the validity and finality of such awards, when assailed by a direct proceeding trying its validity, such award shall stand or not?

In other words, all judgments and awards may be "reviewed" by competent jurisdiction, and may be set aside for causes known to the law. For example, judgments may be set aside although they are "*final*" judgments for extrinsic fraud in their procurement.

U. S. *v.* Throckmorton, 98 U. S. R., 61.

And so may awards. Says Vattel, regarding final awards, (pp. 277–278:)

"If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They cannot say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators. Before they can pretend to evade such a sentence they should prove by incontestible facts that it was the offspring *of corruption or flagrant partiality*."

This second clause of section one can, therefore, have its *true, full, and complete effect* and *operation given to it* by saying that it recognizes and *creates*, in the Court of Claims, a "power to review" the award; and says that this court shall not be "estopped" from setting aside the award if this court finds that it was procured by extrinsic fraud; or that it is "proved by incontestable facts that it was the offspring of corruption or of flagrant partiality."

Giving this second clause this sense does not make the award an "estoppel." It gives full effect to the words, "power is granted to the court to review the entire questions," &c.; and, at the same time, it does not repeal the finality clause of the said article 12 of said treaty of 1855—does not stamp upon this act of 3rd of March, 1881, the dishonor of meaning to repeal and repudiate a treaty and an award—a just debt—does not trample on the requirement of the first sentence in the same act, which, in effect, says you shall try the question of difference as to the binding force of the award.

Sixth. But suppose the court should not give this award such degree of strength as a decree which can be set aside by a bill of review or for fraud, yet we insist that it can be allowed and must be allowed to have *at least* the weight and effect which courts give to the verdicts of juries and to the decisions of the courts when such verdicts or decisions are impeached by a motion for a new trial. When a motion for a new trial assails a verdict, or assails a decision of a court, there is no estoppel of any kind standing between the motion for a new trial and the decision or verdict assailed by the motion. In such case, a motion for a new trial, for example, the verdict is always in the courts allowed to have great weight, or as stated in our brief in this case, at page 364. In such cases, to quote from the highest authority, the force and conclusiveness of the verdict and decree are recognized as remaining, and are of very great weight, and these are overthrown only when shown to be palpably

wrong, so wrong that it is apparent to every impartial mind that there has been some mistake, and this so apparent that it is seen without labored examination.

We therefore submit to the court, in view of all the foregoing considerations, that it is utterly impossible to sustain this demurrer and strike out the parts of the petition demurred to without disregarding the following provisions of the law:

First. The treaty requires you to resolve all questions of difference on principles *fair, just, and liberal* towards the claimant.

Second. The act of Congress requires us to set out all the facts upon which we base our claim, and does not contemplate nor permit ordinary and technical pleadings by setting forth distinct causes of action in distinct paragraphs, or parts or separately, and the parts assailed by the demurrer were not intended to present by themselves, and stripped of all the other facts in the petition, our entire grounds of action or claim; but, on the contrary, our claim is based upon all the averments of the petition, including those covered by the demurrer. And although we claim that the averments covered by the demurrer do constitute a ground of recovery to the extent of the award and interest even taken by themselves, yet they have in the case great force and effect when taken in connection with the other parts of the petition, although they might not be sufficient to make out a claim if nothing else were in the petition than the parts demurred to.

Third. The act of Congress does not command the court to ignore the award of the Senate, but simply gives the court the *power* to review the foundations on which that award rests.

Fourth. This power to review is one that is subject to the limitations contained in the first clause of the act, to wit, that the court shall give the claimant the benefit of a trial

of all questions or differences arising out of treaty stipulations. One of the questions arising out of treaty stipulations, and the great and all-embracing one, was at the date of the said act in 1881, and is the question, shall the award be treated as valid and final, and, as such, paid? And this was resisted and denied by the government. This question of difference is one which the first clause of the act expressly and peremptorily compels this court to try, and to now strike out the parts of the petition demurred to and to ignore the award, is to ignore that question of difference so commanded by the first clause of the act to be tried, and is to strike out of the statute that important first provision of the act.

Fifth. The word "review" as used in this act is used in its legal sense, to examine and to see if there was error in the award of the Senate, and to overthrow it, if, on the principles applicable to awards and their binding force, or to bills of review, it could be in law overthrown, but not otherwise.

Sixth. Even if not so much efficacy is to be given to the award as is given to a decree, as one assailed by a bill of review, yet, at least, so much shall be given to it as is given by the courts to a judgment of the court, or the verdict of a jury, when these are assailed by a motion for a new trial, and in such cases the judgment or verdict is suffered to stand, unless error in law, or gross or shocking mistake of fact, is found in the judgment, or in the verdict, by the court trying the motion for a new trial.

Seventh. The word "estoppel" in this act is used in its technical sense as a law term, and here means the *res adjudicata* worked by the judgment or award of the Senate as a thing which is "held conclusively to settle the question discussed so as to prevent the parties or their representatives from afterwards raising an action founded on the same cause of action," and this court can give to the award of the Senate all the force which a decree has when assailed by a bill of review, or which a verdict or judgment has when assailed by a motion for a new trial, and yet not give to the decree of the Senate the effect of an "estoppel."

We submit with great confidence and very respectfully that it is impossible for the court, acting under the mandatory provisions creating the present jurisdiction, to strike out the parts of the petition demurred to, or to sustain this demurrer, in view of the considerations which we have now presented.

The Attorney General quotes that part of the statute which provides that the court shall "try all questions of difference arising out of treaty stipulations," etc., and claims that the other language, "power is hereby granted the said court to review the entire question of difference *de novo*," evinces an intention on the part of Congress to modify the substance of the preceding clause. The language in question rather enlarges than modifies the preceding clause. In the absence of the last quoted provision of the statute, this court could have made no inquiry at all behind this award for any purpose, nor could it inquire into the award itself in any way. In the absence of this provision that award would have been absolutely conclusive, and our contention is, as hereinbefore stated, that the act of Congress by this second provision gave to the court the power to "review," a power that it would not have had but for this provision. That power to review is absolutely inconsistent with an abrogation of the award by Congress or any intention to abrogate it.

It is therefore an enlargement of the first quoted language of the act to the extent that the court should not be required to render judgment on this award if it should find that the award was obnoxious to any of the principles of law required to sustain an award, or that it had been procured by means for which an award would be set aside by a court that had the power to review it.

Again, the Attorney General claims that the language,

"shall not be estopped by any action had or award made," etc., is a command to the court to ignore the action of the Senate and, by consequence, any question as to its validity or invalidity. We contend that this means simply that the court shall not be prohibited from inquiring into the validity or invalidity of the award for any cause for which an award could be held invalid. The court is simply *not estopped* from making such an inquiry. When judges review a decree or a verdict they are not estopped by the decree or the verdict from making such review. They do not ignore the decree or the verdict. Here the court is required to review and not to ignore.

Again, the Attorney General insists that our contention is fatally defective in its inability to be harmonious with a direct mandate of Congress touching the award. He says of this: "By it (claimant's construction) the mandate has to be taken as referring to the trial of the award alone, as if it read the court shall not be estopped by any action had or award made by the Senate, etc., from reviewing the award *de novo*, so far as to ascertain whether it is invalid for reasons which would set aside any other award," etc.

In respect to this we have to say that our position on this subject is here inaccurately stated, in this, that we say that the act suffers the court to try that question of the validity or invalidity of the award, and to try the question upon the same principles that the validity or invalidity of any other award would be tried. If, upon being subjected to such legal tests, the award cannot stand, then the court may ignore it or set it aside and proceed to try the claims of the Choctaws "*de novo*." In attempting to enforce his views on this subject the Attorney General further insists that our position is incompatible with the reasonable effect which the court is required to give to the legislative expression, and says, "the power and duty of the court to review any question of difference that may have been submitted to the Senate, and try it anew, *without regard to the*

action of that body in the premises, must be taken to be established, and by necessary consequence that in executing the authority conferred by the act the proceedings of the Senate and everything pertaining thereto are to be treated as if they had never existed."

But the court will observe that the act does not say that the court shall proceed "without regard to," but only says that "it shall not be estopped by any action had or award made by the Senate." The court, therefore, is not to proceed *without* regard to the award, but is to *have* regard to the award; it is not to be estopped by the award from inquiring into the question of its validity or invalidity.

V. If this construction cannot be sustained there is left no other possible construction which will not so invade the domain of the judicial power as to render the provision null and void. Congress has no more power, by direct enactment, to abrogate the decision and award of the Senate than it has to annul or reverse a decision and judgment of this court, or the court of last resort.

If Congress has no power to abrogate the award, it is equally powerless to annul any part of it, or in any way to modify or change its legal effect.

In this respect this award rests upon the same principles which protect a judgment of a court of last resort from being assailed in any other way than by a direct judicial proceeding, instituted and prosecuted in a strictly judicial manner.

Freeman on Judgments, sec. 320.
Brazill *vs.* Isham, 12 N. Y., 9.
Judson *vs.* Corcoran, 17 Howard, 612.
Comegys *vs.* Vasse, 1 Peters, 212.
Meade *vs.* The United States, 2 Court of Claims R., 277.
United States *vs.* Arredondo, 6 Peters, 728.
Lytle *vs.* The State of Arkansas, 9 Howard, 333.

Kendall *vs.* The United States, 12 Peters, 524.
Dash *vs.* Van Kleek, 7 Johns., 477, 498.
Seibert *vs.* Linton, 5th W. Va., 57.
McDaniel *vs.* Correll, 19 Ill., 226.
State *vs.* Hooper, 71 Mo., 425.
Governor *vs.* Porter, 5 Humph., 165.
People *vs.* Supervisors, &c., 16 N. Y., 424.
Reiser *vs.* Tel. Association, 39 Penn. St., 137.
Dupy *vs.* Wickwire, 1 D. Chip., 237.
S. C, 6 Am. Dec., 729.
Lewis *vs.* Webb, 3 Me., 326.
Dorsey *vs.* Dorsey, 37 Md., 64.
Oliver *vs.* McClure, 28 Ark., 555.
Griffin's Ex. *vs.* Cunningham, 20 Gratt., 31.
Hooker *vs.* Hooker, 18 Miss., 599.

If the legislature cannot abrogate and set aside judgments by direct enactment, it cannot do so indirectly by directing the courts to disregard them in the progress of a judicial inquiry.

Opinions of the Judges on the Dorr Case, 3d R. I., 299.
State *vs.* Hopper, 71 Mo., 425.
Picquet, Appellant, 5 Pick., 64.
Bradford *vs.* Brooks, 2 Aik., 284.
Birch *vs.* Newberry, 10 N. Y., 374.
Burt *vs.* Williams, 24 Ark., 91.

For the reasons here given and upon the authorities here cited it follows:

I.

That in the clause under discussion the intent of Congress was to grant to this court a power of review to be exercised in a strictly judicial manner; or if it cannot be held that such was the legislative intent, then:

II.

That the provision in question must be taken and held to be null and void.

III.

That in the event that either of these views shall be held to be correct, the allegations setting forth a cause of action under the award of the Senate are sufficient, and the demurrer to the same should be overruled.

If the construction for which we have been contending be not the true construction, and if the construction contended for by the Attorney-General is adopted, then the act would be unconstitutional, because Congress has no power to set aside this final award, and to destroy the rights vested under it. That it cannot do this directly is so thoroughly settled by the decisions of the Supreme Court as to be no longer a matter of controversy.

If this cannot be done directly, it cannot be done by indirection. This, too, as we have shown, is well-settled law; and therefore it is plain that Congress could not overthrow this award and these vested rights by sending the case to this court and directing the court as to the manner of its procedure. If Congress could not itself destroy this award, it cannot do it by the indirect method of sending the case to this court and directing the court to ignore or destroy the award; and so much of said act, therefore, as would attempt to do this unlawful thing would be regarded as beyond the constitutional power of Congress. To do this will not be imputed to Congress. The act will bear a wholly different construction—a construction consistent with the rights of both parties—a construction which gives to the United States the opportunity which otherwise it did not have, of having this award reviewed upon the principles applicable to such cases, and to be righted

if that award would not stand the test of such review; and it preserves to the Choctaws the right to have the full benefit of this award unless it shall be found to have been tainted with the infirmities which would make it unjust to give the Choctaws any benefit on account of it. For this construction, which works no injustice to either party, and saves the rights of both parties, we contend.

JOHN B. LUCE,
Attorney for Claimant.

SHELLABARGER & WILSON,
JOHN J. WEED,
J. W. DENVER,
F. P. CUPPY,
Of Counsel.