In the Court of Claims.

No. 12,742.

THE CHOCTAW NATION

vs.

THE UNITED STATES.

ORAL ARGUMENTS

OF

SAMUEL SHELLABARGER AND F. P. CUPPY,

On behalf of the Choctaw Nation,

On the Matter of the Force, in this Cause, of the Adjudication of the Senate of 9th of March, A. D. 1859.

Delivered on the 12th of February, 1884.

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List of References made in the Argument of Mr. Shellabarger, delivered Orally in the Court of Claims in this Case.

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3 Otto, 196.

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DELIVERED ON THE 12TH OF FEBRUARY, 1884.

Mr. SHELLABARGER said:

May it please the Court: In the argument I am about to submit I shall introduce some authorities and possibly some points not contained in the brief, and hence, as a matter of convenience, shall present to the court, with the leave of the court, a written statement of these authorities and points.

And in beginning I beg leave to restate, in a condensed and carefully-considered form, the single proposition which I attempted to submit yesterday.

It is this: Assuming, for the sake of argument, that

this alleged award is, as we assert it to be, valid and binding, and further assuming that this court is not allowed to ignore that "question of difference" as to the validity and finality of the award, but is, on the other hand, to try it, yet the claimant is not permitted, under the scheme of this act, to present and plead this claim, that the award is valid and creates in this court a binding obligation to pay it, by simply setting out the submission, the award and its non-payment, as would be sufficient ordinarily in suing on an award. But, on the contrary, in relying on the award under this act as a ground of recovery, the claimant is required to go further and to set forth, not only the submission, the award and its non-payment, but also all those other facts which enter into and make up those questions of difference which this court is empowered to review *de novo*, and which made the foundation of the award—that these facts must be so set forth in this petition, to the end that this court may, in its judicially exercised power and discretion to review *de novo*, have the means, before it in the record, to make the review, and thus determine whether the award had and hath, when viewed judicially and in the light of all the law, such foundations in the law as entitles it to the force which the treaty gives to it in its 12th article, to wit, that of finality.

Since these facts showing the foundation of this award, must, under this act, be pleaded along with the submission and the award, therefore the facts of the petition covered by the demurrer are not all the facts relied on in this petition as showing that the claimant is entitled to recover on the award; but they are those facts covered by the demurrer and all the other averments showing that the award had lawful and sufficient foundations; and hence a motion to strike out all averments about the award, and not a demurrer, would be the proper mode of presenting the point that this act commands

you to ignore the existence of the award. Now this last is the practical result of what I have just stated, and all of it.

THE AWARD NOT ABOLISHED.

And now, may it please the court, proceeding from that step I go to the next, and it will, perhaps, be as convenient a way to conduct this discussion as any other for me to present here, and read a set of preliminary propositions which have their bearing upon the various questions which I shall discuss as I proceed, and their application will appear as I go forward.

My first proposition is one which relates to the rule or canon of construction, or interpretation, which belongs to the subject-matter which is now before the court, that subject-matter being the interpretation of acts of Congress and of treaties relating to the rights of the Indian tribes; and I go at once to a statement of that canon of interpretation as I find it in the decisions of the Supreme Court of the United States.

The first case that I cite is the case of Worcester *v.* The State of Georgia, in 6 Peters, 582.

The CHIEF JUSTICE: Are those authorities cited in your brief?

Mr. SHELLABARGER: Some of them are and some others are not; but I will hand all of them to the court, if the court please, so that they will not be troubled with keeping a minute of the authorities; and I will also hand them to all the members of the court, probably in the shape of print.

Now, here is that canon of interpretation which has become a rule of construction, not a mere sentiment, not a mere outcry in regard to the poor Indian, but a settled and fixed rule of construction, sanctioned by fifty years or more of adjudication in the highest courts of this country.

The Supreme Court expresses that rule in these words here:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

Now, to the same point I cite the case of the Kansas Indians, in the 5th of Wallace, 760, when the court, again coming in contact with this question of doubtful construction, goes back to it in this way:

"It is argued that these words (in a certain treaty) refer to a levy and sale under judicial proceedings, but such a construction would be an exceedingly narrow one; whereas enlarged rules of construction are adopted in reference to Indian treaties. In speaking of these rules Chief Justice Marshall says, (now quoting from the case that I have just read, of Worcester *v.* The State of Georgia,) 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of their treaty.'"

Now, once more, in regard to that same proposition, I call the attention of the court to the language of this treaty of 1855, the very one under consideration, which by express provision entitles these Indians, in all controversies growing out of this treaty, to the rule of interpretation which I have just read from the Supreme Court. It is the preamble of the treaty of 1855, and is found on page 3 of the claimant's brief in the present case:

"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."

"*Just, fair, and liberal consideration.*" Now, that is all we desire to submit upon that preliminary proposition.

I go now, may it please the court, to another preliminary point. It is this: That in construing a statute or a treaty, where there is opportunity for construction or room for doubt, the rule is that you will never give to the statute a construction, if you can avoid it, which will result in injustice, inequity, or a violation of vested rights.

I know it seems to require an apology for presenting matters so familiar and plain, but the fact is, may may it please the court, that my observation has taught me that it is the elementary and axiomatic principles of the law which are of every-day application, and which we are most called upon to be reminding ourselves of. In the case of Rutherford *v.* Greene's Heirs, 2d Wheaton, 203, I cite these words:

"Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property to which they may be fairly applicable, and not particularly applied by the legislature—no silent, implied, and constructive repeals—ought ever to be so understood as to divest a vested right."

Now these, may it please the court, are the preliminary propositions I wish to present on the head to which I am now about to proceed, which is the consideration of the main question discussed by my learned friend, the Assistant Attorney-General, yesterday, to wit, the question whether the act of Congress under which you sit, and

acquire your jurisdiction to-day, is one that commands you to ignore this treaty, and, to adopt his own words, to treat the award as if it had never been made?

Now, that contention I deny utterly as one subversive of the designs of this act, and as one which violates, in reaching it, the rules of interpretation to which I have just appealed.

Now let me endeavor to state, in my own way, what I claim to be the true signification of this act, so far as it relates to the point under consideration, taken in all its parts, and then proceed to an analysis, to see whether my view can be sustained. I say that the true meaning of this act is "that this court shall try *all*, not a part, but *all* questions of differences, between the Government and this claimant, arising out of treaty stipulations; and that, in proceeding to make that trial, you are empowered to take within the scope of your vision and review all the questions of difference between the two parties and out of which the award grew; and in that scrutiny and review you are to proceed by the lights of the law. You are to come to the review guided, in your judicial discussion, by those rules which belong to and inhere in the subject-matter which you are reviewing; and if, in the review of the facts *de novo*, you shall encounter, as set forth in the petition, an award, then you shall dispose of the questions of difference relating to the results of that award, guided by the law; and if you find in that review *de novo* that which shows you that the award cannot stand, then you are commanded to overthrow it and to decide the questions as the Senate did originally.

But if, on the other hand, in that review, taking in all the facts *de novo*, and giving to the award whatever efficacy its face and the law entitle it to, you find it still has the force of finality given to it by the twelfth article of the Treaty of 1855, then that force you are bound here to give it in this judgment. That is my interpretation of

this statute. That is, I think, the substance of the third alternative view, of which the statute was said to be capable, in the excellent remarks of my friend, as made yesterday.

Now, his contention is, on the other hand, that you can give no force to this award under this law; that whether the award be in your judgment valid or invalid, as an original question, yet you are required, by the terms of this act of Congress, to wholly ignore the award. That is his contention. It requires you to wholly ignore the award and to treat it as non-existent. That is the difference between us.

The CHIEF JUSTICE: I do not understand that; that is, I do not understand the difference between you as thus stated.

Mr. SHELLABARGER: Well, let me restate it. I understand, and it is so expressly stated in the brief of the other side, that he insists that this act commands you to treat the award as if it had never been made. Now, it is easy to understand that position. The difficulty of understanding may be in my position. My position is that the law commands you to give to this award whatever force, as an award, it is entitled to, when viewed in the light of those other facts to which you are allowed to go *de novo;* and if the award, taken on its face and associated with all the facts reviewed *de novo*, still has left in it life, that question being decided by the rules of law, then the award stands and has the force of an award, under the scheme of this statute.

The CHIEF JUSTICE: Yes, I understand that; but I don't understand what you said before about estoppel.

Mr. SHELLABARGER: I will come to that presently, thank you. I will come to that and show that your not being estopped comes *far short* of saying to you that you shall ignore this award.

Now I turn to the text itself, and it will be found on

page 14 of the opening brief. The first clause reads—"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." There is a semi-colon. Now, stopping there, my friend, the Attorney-General *concedes*, not only in his remarks yesterday, but also in his printed brief, *concedes* and insists that stopping there this question, which we say you must try, would be required to be tried by you, to wit, the question, is the award valid, ought it to be paid, that being one of the differences, amongst the other differences, which the act says in the first clause you shall try.

The CHIEF JUSTICE: Would not the first question be then, sir, whether there was any award?

Mr. SHELLABARGER: Certainly; that would be one of the questions.

The CHIEF JUSTICE: Would not it be the first question?

Mr. SHELLABARGER: Probably the first question; that is, as a question of order in considering the matter, it would probably be the first question.

The CHIEF JUSTICE: How can you pass upon the effect of the award unless you find that there was an award?

Mr. SHELLABARGER: Undoubtedly, and I am coming to that, may it please the court. I am coming to the question whether there is an award, and that I shall carefully consider in time. I say that that is a question which you are to consider; whereas my friend says you are not to consider it at all, except in the alternative view presented in Mr. Simons' opening argument, to wit, that if this act of Congress suffers you to try the validity of the award, then he alleges the award bad for want of finality and want of certainty.

Now, my point is, and I wish to be careful all the way through and make myself understood—my point is that

the Attorney-General insists, as I insist, that this first clause is one which peremptorily commands you to try the question of the validity of that award and the obligation to pay it. That is one amongst the differences, or questions of difference. Nay, it is, as Mr. Simons said yesterday, and as we say in our brief, not only one of the differences that you are now to try, as required by this first clause, but it is the all-embracing difference. It was the great overmastering and overshadowing difference which brought about the enactment of this law, to wit, the assertion on one side of the validity and finality and obligatory force of the award, and on the other side its denial. That difference is one of the differences which the first clause plainly, taken by itself, requires you to try. So Mr. Simons says; so we say; so the act says; and thus far we are surely not in trouble or in debatable ground.

Next, the Attorney-General says that the effect of the second clause is to limit or narrow the broad and general requirements of the first clause; in other words, whilst the first clause would, he asserts, require you to try this question of the validity of the award, yet the second clause is a limitation upon that—reduces its generality, and excludes from the "questions of difference," that you are to try, this *supreme difference*. Now, I deny, with the utmost deference and respect, that that is the meaning and design of this second clause; and why?

Well, in the first place, I come to another preliminary proposition. Mr. Simons reads this statute as if this second clause were in the nature of a "limitation" or an "exception." He makes it to be a "proviso." He makes it to accomplish the office of a proviso by saying that, whilst the first clause would authorize and require you to try, as one treaty difference, the question of the validity of this award, yet the effect of the second clause is to limit and wholly overthrow this requirement, which he insists is contained in the first clause when taken alone.

He asserts that this second clause cannot be accorded its true and necessary sense, as a limitation upon the broadness of the first clause, and yet leave in this court the power to give any significance or force to the award.

This contention, I, with unfeigned deference, deny; and on the contrary, I say that the second clause is not in the nature of a "limitation," but is in the nature of an "enlargement" or extension of the provisions of the first clause. But let me first consider, for the sake of the argument, that it *is* in the nature of a proviso or a limitation. And, I turn now to the question of interpretation of this second clause, treating it, as Mr. Simons does, as an exception or as a "proviso."

In the case of The United States *v.* Dickson, 15 Peters, 165, I find an authoritative announcememt of the rule of interpretation which is applied to these exceptions or provisos alleged to be limitations upon the *generality* of an enacting clause. The court says on page 165:

"Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below, we are led to the general rule of law which has always prevailed, *and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects*" (that is the case at the bar) "*and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms.* In short, a proviso covers special exceptions only out of the enacting clause, and those who set up any such exceptions *must establish it as being within the words as well as within the reason thereof.*"

Now, the result of this rule (and about its applicability there can be no question, if you treat this second clause as a proviso or an exception instead of an enlargement) is to bring us to the inquiry whether the second clause can be *satisfied*, and yet stand along with the broadness of the

first clause? In other words, is there any sensible and fair view in which you can give force to the second clause, and yet try that which the first clause requires you to try, as Mr. Simons insists, to wit, the question of the finality of, and the obligation to pay, the award? Can that stand in its entire breadth, and yet you give their full force to all the parts of the second clause? If that be possible, then you are commanded by the rule of interpretation that I have just read from 15 Peters, to let the full force of this first clause stand and operate.

Now, may it please the court, I insist that not only *can* the second clause stand along with the first, but that there is absolutely, when fairly reviewed, *no repugnance* between the broadness of the first clause, as we insist upon it, and the full and entire effect designed by the second clause.

And, first, let me say and insist that this second clause is not, as is insisted, in the nature of an "*exception*" or proviso, but is an amplification or an enlargement of the provisions of the first clause, or the powers conferred by the first clause. If the second clause had the purpose that is attributed to it by the Attorney-General, then I insist that several things would have been expected to have appeared in it which do not appear. One would be that it would be preceded by *some* expression or language indicating that it *was* an "exception;" something saying that it *is* excepted, or is "provided always," or some expression equivalent, and which is so universal where the object of a clause is to accomplish the purpose of an *exception*, or of a proviso, or of a narrowing of a preceding part of the section.

Second. I insist that you would expect in this act some *explicit* language, of unmistakable import, abolishing the award, if that were designed. Especially would this be so when the matter was of such supreme magnitude, and when it went (as Mr. Simons asserts that it does go) to the very substance of the entire act, as the matters cov-

ered by the award in fact are. He says that there are only $900,000 outside of this award, whereas the award, as he says, includes about $8,000,000. Now, when that was the magnitude of the thing to be abolished utterly by the act, to wit, the award, you would naturally expect, in framing an exception which was to accomplish such abolishment and to prevent this court from giving any power or effect to the award, Congress would express that design unmistakably in so framing the exception.

Instead of finding any words saying that the court shall not give any validity to the award, the law proceeds to say that "power is hereby granted to said court to review the entire question of difference *de novo*, and it shall," etc. Now, stopping there. To "review" the entire question of difference *de novo*, that again takes in and includes the award's finality, and brings the award, for trial, again before the court, because that was the great difference. You, by the first clause of this excepting clause, are authorized to review the *entire* question of difference *de novo*, including, of course, the question of the award's finality under article 12 of the treaty of 1855.

I now go on further with the second clause: "And it shall not be estopped by any action had or award made by the Senate."

Now, that brings me to the question of the meaning, in this act, of the word "estopped." The estoppel here alluded to is the one called, in the law, *res judicata*.

Now, then, may it please the court, how can you give force to the provision of this second clause, where it says you shall not be "*estopped*," and yet give *some* effect to the award—that *degree* of effect which we claim the award is to have in your review.

How, I repeat, can you give that degree of effect to the award, and yet the award not accomplish the office of an "estoppel?" I answer, by first reading one of the best definitions of an "estoppel" that I have been able to

find, being the estoppel called *res judicata*, which I take from "Bigelow on Estoppels," p. 8. It is as follows:

"*Res judicata* are those judgments of the Supreme Court which have become final, and which are 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. The judgment of an inferior court does not fall under the description of *res judicata*."

Now, then, the thing that this act says that this award shall, in this court, *not* accomplish is this, to wit: It shall not be final in such sense as that it shall be held to have conclusively settled the question discussed, so as to prevent this court from trying its validity or questioning its final and conclusive force. In other words, you can allow this award to have the force of an *award* and not, at the same time, give it the force of an estoppel, which precludes all question, inquiry, and "review." When you, in this "review" *de novo*, shall say that if I find in the review *de novo* that the award was founded in fraud, in corruption, in gross partiality or gross mistake, or that it was not "final," then I may set it aside; you are depriving it of the force of an estoppel completely. Now, please mark what I am saying. If you find that it was not "final," that it did not settle the questions that were submitted to the arbitrators, or that it was "uncertain," then you can disregard it under the provisions of *this* law, and at the same time, thereby and therein, you are giving force and full effect to the definition of the word "estoppel," as used in this law, where it says the award shall not estop. Let me repeat—because this is a point which I wish to impress upon the recollection of the Court—that when you sit as a "*reviewing*" court, with power to deprive this action of the Senate of the force of an award, provided that, looking at it as a "reviewing" *court* and not as an arbitrary and lawless body, you *judicially* see

that it lacks the elements of "finality" or any other quality of a valid award, then you *can* disregard and set it aside. This we concede; and hence, in so conceding, we are saying that you are not "estopped;" and thus *you have given full force to the second clause*, and at the same time have left "stand" the first clause of the act, which commands you to try *all* questions of difference, including the paramount one of the validity and obligation of the award.

Now, with confidence, but with the utmost deference, I do submit that this, the great and paramount requirement which this first and enacting clause, taken by itself, contains, commanding you to try, what force shall be given to the award, "*can stand*" along with the second clause, which is one requiring you to make this review of the award *judicially* and not estopped by the award. This is so, because this view makes the award only *prima facie* valid in this court. You must read this second clause in the light of the law which I have cited, to wit, that all doubts are to be resolved in favor of the Indians; that you are to give this treaty a "*liberal*" construction; that a proviso is never allowed to repeal the enacting clause where such meaning is not plain; that you will not make it a clause repealing vested rights if that can be avoided; that you will not "stick in the bark" or "pettifog" this treaty and award out of existence; but that you will go over the subject-matter in the enlightened and "liberal" view which is required, not only by the 11th article of the treaty but by the line of decisions which I have read as to the interpretation of such treaties and the statutes thereabouts; and then you will proceed with these views and guided by these lights, to review an award *prima facie* valid. You, in reviewing, will obey the rule which says that the "exceptions" to the enacting clause are to be "strictly construed," and that you are not to narrow the enacting clause unless you are forced to it.

I think it safe to say that it thus becomes demonstration, as near as is attainable in the law, that the first clause, requiring you to try this great, paramount "difference," "can stand" along with the second clause, which requires you to try the award as one *prima facie* good, and which you can "review," but must review "judicially; not estopped by it. You are to try it as a "reviewing" court does when it is sitting as "a court of review" in trying, for example, a bill of review; you are to give the treaty and award the force which, looked at as an award or as a supposed award, they are entitled to have in a "*reviewing*" court. In such a review the award is not to operate as an "estoppel," but must operate as adjudications do, or as alleged awards do; that is, the alleged award is to be reviewed, as to its validity, in the lights of the LAW, as *prima facie* binding, and to be overthrown by means of the review, only in the ways defined by the law; and in *such* a "review you 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.

Now, may it please the court, I have given you the interpretation of the second clause, which I insist is the one that is perfectly consistent with the breadth of the first clause, and yet is natural, fair, and just. This interpretation does not go beyond that "liberality" which the 11th article of the treaty of 1855 says shall be the rule of interpretation, nor beyond that "liberality" which the decision of the Supreme Court, which I have read, requires at your hands. It is an interpretation that you will give to it if you *can*. I say if you *can*, because this court is, as all other enlightened courts are, ever delighted to do *justice*, and not to strike down the rights of people, and especially these wards of the nation, if they can help it. If you *can*, I say, for another reason, because it is the command of the *law*, in its imperial majesty, that you shall

allow *every part* of an act "to stand" and operate *if you can.* Mr. Simons says that the first clause of this law, taken by itself, *commands you to try the validity of this award.* You should let *that* command "stand," if you can consistently with any possible and reasonable view of what is required in the second clause. That both can stand I have shown; nay, that there is no repugnance I have shown.

Now, I take another step, and it is this: That there is no *reason* suggested, there is no reason even hinted, I submit, why it should have been the design of this act to stamp upon this national character of ours the damning stain of repudiation. Why, may it please the Court, in the Sinking-fund Cases, 9 Otto, 718, the question was regarding the powers of Congress over vested contract rights; and on that point the Chief Justice, with great clearness and excellence of statement, thus announces the law:

"The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not within the constitutional prohibition which prevents States from passing laws impairing the obligations of contracts, *but equally with the States they are prohibited from depriving persons or corporations of property without due process of law.* They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel this corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that behalf. The United States are as much bound by their contracts as individuals. If they *repudiate their obligation it is just as much repudiation, with all the wrong and reproach which that term implies,* as it would be if the repudiator had been a State or a municipality or a citizen. *No change can be made in the title created by the grant of the lands* or in the contract for the subsidy bonds *without the consent of the corporation.* All this is indisputable."

Now, here is an act of Congress which, if rightly interpreted by my friend, does infinitely more than that, to wit, to repudiate a contract or a treaty. It attempts to repudiate, if the construction contended for be correct, a contract passed into solemn judgment, and a judgment pronounced, too, by the Senate, the great legislative head of this nation, and virtually by one of the parties to the submission. These Indians were required to and did allow one of the parties to the contract to be the arbitrator—to be the trier of the Indians' rights; and, so suffering the trier to be one party to the submission, they submitted for judgment this, the most momentous question of difference which ever arose in the history of the nation, and the Senate passed upon it. Now, here comes an act of Congress to which the position of my learned friend attributes the bad *purpose*—and that without reason and without *hint* of reason—without suggestion even of apology—of the *repudiation*, not only of a treaty, but of a judgment of the Senate of the United States made under that treaty! Now, that is an interpretation you will not give to this law *if you can help it.*

The CHIEF JUSTICE: Nor did I understand the Attorney-General to make any such interpretation.

Mr. SHELLABARGER: Then the interpretation of the Attorney-General must exclude the idea that this law *intends that you shall not give any force to that award, although you may consider the award was a valid one!* In other words, this trial under this act of 1881 was intended to be a *final* settlement of the question. Was it not? When this cause goes to the Supreme Court of the United States this great "difference" was by this act intended to receive, in the decree of that court, its eternal settlement. That decree was intended to be the "be all and the end of all" this controversy. Now, in and over that controversy, my learned friend says you are *to give this act of Congress a sense that shall deprive the courts of the right*

to give any force *whatever* to the *award.* If that was not the position of the Attorney-General, then I am incapable of understanding English words. This is *exactly* what he says, namely, that *throughout this controversy* you shall, in obedience to this act of Congress, treat this solemn judgment as *non-existent.* When the judgment of the Supreme Court settles forever the rights of these Indians under that treaty and this award, this finality clause of Art. 12, and also the award, are to be *ignored* absolutely and the case eternally ended, in utter disregard of the judgment of the Senate making the award, although it be a valid one on its face; and this, too, in flagrant disregard of the first clause of the law commanding you to try this award as one of the "differences."

Now, *that* interpretation you will not give to it if you *can help it.* But more than that. I now come to another set of authorities. This interpretation, which says that you shall *ignore* the award, is one which manifestly invites you to treat as "*repealed*" the last clause of Article 12 of this treaty of 1855, which you will find at the bottom of page 3, and which reads: "IT BEING EXPRESSLY UNDERSTOOD THAT THE ADJUDICATION AND DECISION OF THE SENATE SHALL BE FINAL."

If the contention of the other side is to prevail, then the act giving you jurisdiction is to operate as a repeal of that clause which says that the award of the Senate shall be final. I am now assuming that the award is valid, that it is valid in form and substance, and is not open to the criticisms that were made yesterday as to its want of finality, &c. Therefore—now mark this, please—therefore if that contention is to prevail, it is to operate as a repeal of the treaty wherein it says that the award shall be "final."

The position here taken by Mr. Simons is that this act of Congress says that the award shall not, in this trial, be final, or of any force whatever, but *is hereby*

repealed and required to be ignored. That is the sense that he gives to the act that sends this case to this court. In other words, he makes that act of Congress *repeal the treaty!* But he also makes it do infinitely more, and worse. As I said a moment ago he makes it go a whole bow-shot farther than that. He not only makes it repeal the treaty, as a matter yet "*in fieri*," but he makes it set aside *vested rights*, acquired through a solemn judgment, by the individuals of the tribe as well as by the tribe, *under a treaty which has*, owing to this judgment, *passed from the class "in fieri"* into the class "accomplished."

Now I come, in finding out whether *that* sense shall be given to that act or not, to the authorities again.

First, let me call the court's attention to the case of the United States *v.* Walker, in 22d Howard, 311, where the court say:

"Repeal by implication upon the ground that the subsequent provision on the same subject is repugnant to the prior law, is not favored in any case; but when such repeal would operate to reopen accounts at the Treasury Department, long since settled and closed, *the supposed repugnancy ought to be clear and controlling before it can be held to have that effect.* Such was the doctrine substantially laid down by this court in Wood *v.* United States, 16 Pet., 363; and we have no hesitation in reaffirming it as applicable in the present case."

There is no pretense that in this act of Congress, sending this case to this court, there is any *express* provision that you shall ignore the award. There is no express provision saying that the last clause of Article 12 of the treaty of 1855 "is hereby repealed." There is nothing saying that the award of the Senate is abolished. There is *nothing* of that kind *expressed*, and my friend, if he gets it there, must get it *by implication.*

I now am on the point—when will the law allow an

implied repeal, not only of a treaty, but a repeal of the enacting clause of the repealing act, and also of a judgment, and all by implication, and make it work the destruction of *vested rights* under an award? When will the law allow *such* things to be accomplished by mere *implication?* The language of the Supreme Court which we have just read answers that question when it says that "*the supposed repugnancy ought to be clear and controlling before it can be held to have that effect.*"

Now, I have selected this case as one out of a great number, because of the fact that in it the Supreme Court held, in the language which I have just quoted, that a repeal by implication was not allowed, because it would "reopen accounts long since settled by the Treasury Department," and I add, nor should a repeal, by implication, in the case at bar, be allowed to reopen accounts settled in 1859 by a solemn adjudication of the Senate, unless the intention of the legislature be "*clear and controlling*" that such a repeal was intended.

Again, let me refer the court to the case of Fabbri *v.* Murphy, 95 U. S., 196. There the language of the court is this, so far as this point is concerned:

"Authorities to show that there must be *positive*"——

Not imaginary, or supposititious, or possible, but there must be——

"*a positive* repugnancy between the provisions of the new law and the old, to work a repeal of the old law by implication, and that even then the old law is only repealed to the extent of the repugnancy, are very numerous and decisive."

Again, take the case, in the 96th U. S., of Arthur *v.* Horner. On page 140 the court says this, and I have selected this because of the language that I used a while ago, to wit, that "where the two provisions can stand together, this should always be allowed."

"To induce a repeal of a statute by the implication or inconsistency with a later statute, there must be such a *positive* repugnancy between the two statutes that *they cannot stand together.*" 1 Black., 459; 16 Pet., 342; 11 Wall., 88

Now, can the first clause of section one of this statute and the second stand together? I think I have shown you not only that they "can stand together," but that there is absolutely no repugnance between them.

But I go on. Take the case of McCool *v.* Smith, (1 Black, 470.) In that case the court refused to consider a prior statute repealed by an *implication* arising out of a subsequent statute, because they held that it was "*possible* to reconcile the two acts." The language of the court is:

"If the plaintiff below can succeed in this action, it must be because the act of 1857 impliedly repeals this provision, as to this case. If there were no such statutory provision, the act of 1857, being in derogation of the common law, would be construed strictly. 'A repeal by implication is not favored.' The leaning of the courts is against the doctrine, if it be * * * *possible* to reconcile the two acts of the legislature together."

Then there is cited a large number of authorities.

The case of U. S. *v.* Tynan, in 11th Wallace, 88, is similar.

Now, I have sought to give emphasis to this particular element of the discussion, because of its close and direct pertinency to the present point. I think these cases are conclusive of the interpretation of this statute. My friend, the Attorney-General, as I have repeatedly had occasion to remark, insists, with me, that the *first* clause of this act *requires* you to try this question as to the validity and finality of the award; and if this first clause

stood alone it would compel you to give the award due force.

Then he says that the *second* clause, by implication, *repeals* the first—or virtually repeals it—by wholly depriving you of all power to try or even know of that supreme difference's existence. He says this second clause does this by shutting your eyes to the question of that all-embracing "difference," to wit, whether the award should be paid or should not be paid, but repudiated. He therefore makes this second clause do this: First, repeal the first clause; then he makes it repeal the provision of the treaty which says that the award shall be final. Then he makes it divest vested rights if the award be a valid award. He makes it thus crush through all that is sacred in vested rights, makes it break down all that is included in that principle of law which says that you shall allow all parts of a statute to have their full force if you can. He makes it break down that maxim, so well set forth in the opinion of the Supreme Court, which I read from 15th Peters, that a proviso, or limiting clause, shall *never* be allowed to cut down the broadness of an enacting clause if the two can stand together. And he makes it override those provisions of the law that are as old and fixed as any principle of the common law, which say that repeals by implication are not favored, and never allowed when avoidable. And then, above all, he, by this alleged constructive repeal, strikes down treaties, judgments, vested rights, and all else that is sacred under Magna Charta and all other charters protective of property! He does all this when it is perfectly manifest, as it seems to me, that the second clause can have its *full* operation, of not making the award an estoppel, by allowing you to "review" the difference *de novo*, and to sit as a court of review, giving the treaty and the award due force, and making the award to be *prima facie* valid, and you to try whether the award ought to be overthrown, because

it lacks *in law* the elements of "finality, or any other quality" requisite to entitle it to be treated as an award.

IS THE AWARD BAD ON ITS FACE?

Now, may it please the court, I have got through with all that I propose to say, regarding your power to review the award, in my part of the discussion. I shall leave what I omit to the abler and better discussion of my associate, Mr. Cuppy, who will follow me, and I now go to the question whether this award is or is not upon its face a "final" one or a "certain" one? Has it the elements of certainty and of finality, which are requisite in order to make it stand the test of judicial scrutiny, which we confess, in the position we take about it, that you have the "power" in making your "review" to give to it.

I go now to that question with a single introductory observation. I read from 2 Parsons on Contracts, sixth edition, side page 697, et seq. This relates to the "intendments" and rules of "interpretation," with which the court comes to the question of the validity and signification of awards. I read:

"Generally, in the construction of awards, they are favored and enforced wherever this can properly be done. If the intention of the arbitrators can be ascertained from the award with reasonable certainty, and this intention is open to no objection, a very liberal construction will be allowed as to form, or rather a very liberal indulgence as to matters of form and expression.

If it be necessary to make a presumption on the one side or the other, to give full force and significance to an award, the court will incline to make that presumption which gives effect to the award rather than one which avoids it. Thus it has been laid down, almost as a rule, and certainly as a maxim, that where the words of an award extend beyond those of the submission, it shall be understood that they are mere surplusage, because there is nothing between the parties more than was submitted; and if the words of the award be less comprehensive [and

that is what is said here] than those of the submission, it shall be understood that what is omitted was not controverted unless, in either case, the contrary is expressly shown. And if the submission be in the most general terms, and the award equally so, covering 'all demands and questions,' &c., between the parties, yet either party may show that a particular demand either did not exist or was not known to exist when the submission was entered into, or that it was not brought before the notice of the arbitrators or considered by them. And equity will correct a mistake if the facts before the court permit it; and, generally, an award will not be set aside for defects curable by amendment."

Now here is set forth the whole spirit and breadth and substance of the modern law as to the intendments and presumptions with which you will come to the consideration of the question as to whether this award, or adjudication, is not good, and the authorities are collected with great fullness by this admirable author in the footnotes.

The submission to the Senate is in the following words:

"ARTICLE XI. 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:

"First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the land ceded by them to the United States by the treaty of September 27, 1830, deducting therefrom the costs 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:

ARTICLE XII. "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."

The award is in the following words:

"Whereas the eleventh article of the treaty of June 22, 1855, with the Choctaw and Chickasaw Indians provides that the following questions be submitted for decision to the Senate of the United States:

"1st. 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 the treaty of September 27, 1830, deducting therefrom the costs 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

lands remaining unsold, in order that a final settlement with them may be promptly effected ; or, second, 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 ''—

"*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 described principles of settlement, and report the same to Congress." (See pages 30, 31, and 32 of the petition.)

I now come to the question whether this award has the defect or the defects which the Attorney-General attributes to it, to wit, the lack of "finality," and also the lack of "certainty."

Notice the last language of the preamble ; and that language I wish to especially emphasize. It reads : "It is therefore stipulated that the following"——

What? Not "things ;" not "subject-matter ;" not "controversies ;" not "points ;" but "QUESTIONS," (interrogations) be submitted for adjudication to the Senate of the United States.

Now, where in this "submission" does the first "question go down to? End? It goes down to the word "treaty," where the semicolon is, in the third line from the bottom of what is there marked "first" question. That is the end of the "first" question embraced in clause "first." What does that question take in? Manifestly it takes in all that is expressed in the words following, to-wit:

"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 27th, 1830, deducting therefrom the cost of their survey and sale, and all just and proper expenditures and payments under the provisions of said treaty."

That is the end of question number one. That could be answered by the Senate "yes," "no," and it would have been a perfect answer; a complete award.

The CHIEF JUSTICE: Well, but then about the price?

Mr. SHELLABARGER: Now I am dealing, may it please the court, with one thing at a time. There are a number of things submitted. The price comes in afterwards. Down to the word "*treaty*," is the first question embraced in that first question: Shall these people "be allowed the proceeds of the sale of the lands ceded by them to the United States by treaty of September the 27th, 1830, deducting therefrom the cost of their survey and sale and all just and proper expenditures and payments under the provisions of said treaty," is all one indivisible "question. It is an integer—a unit—a whole. All the parts of it make but one thing ; and it may be answered "yes" or "no," and it includes the subject-matter that was so much dwelt upon yesterday, namely, the matter of "just and proper expenditures and payments," leaving a judicial matter undetermined. May it please the court, this submission did not *permit* much less *require* the Senate to sit in judgment as to what were "proper expenditures and payments, or what the cost of surveys." These were things which the treaty very properly left to be determined by the accounting officers, who alone could tell what payments and expenditures had been made. The treaty called upon the Senate to decide the *principles* upon which the settlement should be made. That is what they let out. They did not let out the mere "arithmetic" of the matter. I mean now under this, the first clause; but they

did require arithmetic when it came to the last, or alternative one—that as to allowing "a gross sum." I will come to that presently. But if they took the view that they should be allowed the "net proceeds of the lands," then they put together in one question all these elements: Whether the Choctaws were entitled to or should be allowed the net proceeds of the lands, deducting the cost of their survey and sale, and all just and proper expenditures and payments. They did not *allow* the Senate to sit upon the question whether that deduction should be made or not, nor on the amount thereof.

The treaty expressly and palpably so puts its "question" to the Senate that they could allow or refuse to allow the net proceeds, and so put it that if they did allow such proceeds, that carried with it, as inseparable, the deductions named. They were not called upon to sit in arbitration at all upon the question of allowing expenses or costs or payments. But they said if you do allow the net proceeds, then there shall be deducted therefrom the expenses, payments, and cost of survey. The Senate was not allowed to try the question as to whether these should be allowed or not, nor to try the amount thereof. But, when they answered the question in the affirmative—"Yes, they shall be allowed the net proceeds,"—then the *treaty* decided the balance and deducted the expenses, payments, &c., and the Senate was not required to sit upon and answer as to that, to wit, what are proper expenses?—what do they amount to, or shall they be allowed? This brings me to the next question.

The CHIEF JUSTICE: Will you please, before you leave this first question, sir, direct your attention to the last line as it appears here in your brief, "in order that a final settlement with them may be promptly effected."

Mr. SHELLABARGER: I am going to that. I have only got down to the semi-colon after the word "treaty" in the first question.

The CHIEF JUSTICE: You said you were going to the second question.

Mr. SHELLABARGER: I should have said the second proposition or inquiry embraced in the "first" question as the questions are marked in the submission contained in Art. XI. The Senate was simply obliged to answer that question "yes, they shall be allowed," or "no, they shall not be allowed the net proceeds."

Now, I come to the second question contained in the first inquiry submitted to the Senate. It reads:

"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."

Now, that question can be answered also, not by "yes" or "no," but by the answer that was given, to wit, "twelve and a half cents an acre.

Then, coming now to the language to which the Chief Justice has just pointed me, to wit, "that a final settlement with them may be promptly effected," I state that so far as the language points to promptness of settlement, such promptness is as fully secured by the Senate settling the principle of making up the account and allowing the executive to state such account as by requiring the Senate to state it.

This award settled the principle upon which the Interior Department is to make up the account, and wisely the treaty allowed the Executive to make it up, and did not impose that duty on the Senate, which could make it up only by calling on the Executive.

Here, lest I forget, let me say, once for all, that the Senate has acted upon that view of the matter. It did not send the request for making up the account to the Secretary of the Interior, in its capacity of an arbitrating court, at all. It was, in so sending, acting in its capacity as a Senate. Having made its final award, when the Senate

said that the Choctaws shall be allowed the net proceeds, deducting the expenses, etc., it was as arbitrators *functus officio*. Their mission is then accomplished, and then the Senate takes the matter up as a Senate, and sends the matter to the place to which it should go—to the accounting officers—to be there settled according to the answer to the question which the submission asked of the Senate. Please remember, the second resolve of the Senate shows that it, in passing that second resolve, was acting in its character as a Senate, not as an arbitrating body. Notice this second resolve of the Senate; it requires that the Secretary of the Interior shall return his findings, to whom? Why, *not to the Senate*, not to the arbitrator, in order to enable it to consider and approve, and thus make the award final, but to *Congress;* and it *was* sent to Congress. So that that Senate, made largely up of as good lawyers as ever sat in the Senate, knew what they were doing; they knew what a final award is; what a submission is, and what this one meant, and they stopped and abided, literally, *within* terms of the submission. They did not go one hair's-breadth outside of the submission, nor did they stop one iota short of it. Had they done what my friend insists they should have done—find amount of net proceeds or of the expenses, &c., &c.—they would, most palpably, have exceeded the submission, and have rendered their award void by going beyond it—void, that is to say, if going beyond it would render it void. I think the going beyond would have been treated as a surplusage under the authorities I have just read from Parsons.

The CHIEF JUSTICE: That is not an award; it is a judicial determination of a question; and I think you have complicated this case, probably unnecessarily, by talking about an award. That is my present impression, Mr. Shellabarger.

Mr. SHELLABARGER: Of course, the lawyer is always to submit to the suggestions of the court.

The CHIEF JUSTICE: This is not a suggestion of the court. It is my own, sir. As I look at these words now, it seems to me that you have complicated this matter unnecessarily by talking about an award, because the moment you talk about an award then you come within the region of the law on the subject of arbitration and award.

Mr. SHELLABARGER: Exactly; and therefore, if it will please the Court, I will substitute for the word "award," all through my argument, the words of the submission and of the treaty, and these are the words—"adjudication" and "decision," and in Article 12 of the treaty it is called "*award.*"

The CHIEF JUSTICE: It is expressly stated in your treaty, sir, that the question to is be submitted for adjudication——

Mr. SHELLABARGER: Exactly, for adjudication and——

The CHIEF JUSTICE: The question is to be submitted for adjudication.

Mr. SHELLABARGER: Yes; for "adjudication and decision" is the language of the preamble to the submission. Now, if an "adjudication" is not an *award*, then it is an "*adjudication,*" and that is good enough for all the purposes I am arguing.

The CHIEF JUSTICE: An award is a thing which orders a certain thing to be done or a certain sum of money to be paid. An "adjudication" of a question is a thing which answers it yes or no.

Mr. SHELLABARGER: Very well. I do not know what is in the mind of the Chief Justice as to the consequence of the distinction between an "award" and an "adjudication," but I don't care to dwell upon a matter of mere terms.

If you look at the end of Article 12 you will see that it is there called "adjudication and decision;" so that it was manifestly designed to have the office or result of of *res judicata*, whether it is to be called an "award" or

a "decree," or an adjudication, or what not. An "award" is, as I did suppose, the better word, because you cannot turn the Senate into a "court," properly so-called.

The CHIEF JUSTICE: How can you make the Senate an arbitrator if you cannot make it a court?

Mr. SHELLABARGER: I mean you cannot make the Senate a court, may it please the Court, and the Chief Justice, in the constitutional sense of a "court," whose members hold their office during good behavior, and on whose judgments executions, &c., go out. But you can make the Senate technically and fully arbitrators.

Now I return to the language of the submission, "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." I return to it, may it please the court, simply for purpose of making a little more emphatic and conclusive this, to wit, that the first question in the submission was one that did not contemplate or permit the Senate's going into arithmetic," and finding *amounts*. This is further made plain because this first question carefully leaves out any requirement to find amounts, but in the second it is required. The very fact that it is omitted in the one and is required in the other makes it plain that the submission had in its mind this very matter as to finding amounts. It omitted this in one, and put it in the other. Not only that, but now turn to the 12th article of the treaty, and you will find that when they came to provide for the disposition of the arbitration, or adjudication, they did not call it an "*amount*," or "sum," or anything meaning an exact number, but they called it a "*fund*," something indefinite in its magnitude, undetermined. It reads:

"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* and *awarded*"——

There, by the way, this word "*award*" is used.

"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."

All the facts point to the conclusion that no sum was to be ascertained by the Senate if they adoptod the plan allowing them net proceeds.

Another criticism of the award by the Attorney-General is that this is not a "final" award, or a good award, because they have not found whether or not the tribe was "*entitled*." They have only found that they shall be "*allowed*," whereas the submission is "whether the Choctaws *are entitled to, or shall be allowed.*" Now, it is enough for the purposes of this point, (if Mr. Simons really relies upon it as a point,) that I say that it was submitted to the Senate in the alternative, "are entitled to *or* shall be allowed." The conjunction is not "*and*"—it is "*or*"—"are entitled to *or* shall be allowed."

Now, in reply to Mr. Simons, right here, I ought to notice what he said about the Senate committee having reported to the Senate that the Choctaws were not entitled to the net proceeds. Mr. Simons says that the committee said they were not *entitled*, but that they would *allow* it. Allow me to state just what that committee *did* say about that. I read from volume 2, page 1396, of the Record, where the committee of the Senate, in speaking of this very matter, said:

"And while, on the one hand, to award to the tribe the net proceeds of their lands would surely be no more than just to them, because, practically, no regard is paid to actual value by the United States in the sales of public lands; and undeniably the real market value of these lands, which the Indians might have realized if protected in their possession, was far greater than the price for which they actually sold,—on the other hand, the United States would neither have lost, paid, nor expended anything whatever, but would only have refunded to the Choctaws the surplus remaining on hand of the proceeds of their own lands, after having repaid themselves every dollar expended for the benefit of the Choctaws; and that after having had the use of this surplus for many years without interest, and when, according to the estimates of the General Land Office, it would really amount to little more than half of what might be recovered in a court of equity, if the case were one between individuals, as will appear by comparative statement, hereto appended."

The committee does not think their award exceeds one-half what was justly due.

It is enough, therefore, in responding to the first question in the submission, for the Senate to say that the Choctaws *shall be* "*allowed.*" The Senate, in responding to this question and in "allowing" the net proceeds, have fully satisfied the requirements of the submission, because this submission did not require them to find that they were "*entitled*" and *also* that they should be "allowed;" but by finding *either* that they were "entitled" *or* should be allowed, the submission was satisfied. And more than that, I repeat, what is thoroughly settled law, that *every intendment* is made in favor of supporting an award. Now, the "intendment" is simply inevitable, to wit, that when the Senate found that the Choctaws should be "allowed," they have *thereby* found that they are "entitled." Viewed in the spirit of fairness—which this treaty, in its 12th Article, requires—I submit that when they find that they shall be "allowed," it is found also that they are "entitled." And it would be a most marvellous perversion of that rule of interpretation of these Indian treaties which says that they shall be dealt with *liberally*, for you to say that when they found that they should be "*allowed*," that then and thereby they are not also found to be "entitled."

In conclusion, it is said it lacks the element of "certainty;" that by arithmetic you cannot compute or get at the sum of this award. The answer to that is *included* in what I have said. The submission is one requiring the Senate to answer the "question," to wit, whether they shall be allowed the net proceeds after deducting the cost, payments and proper expenditures. They are *not* required or *permitted* to estimate the proper expenditures. They are to answer the "question" and settle the principle, and then to quit. Then their duties are ended.

Now then, may it please the Court, thanking you for the singular kindness and patience with which I have been heard, I leave the case, so far as I am concerned.

APPENDIX.

Mr. Simons made, in his closing argument, much more prominent than he did in the opening, the point that the treaty of 1855 is invalid, as beyond the power of the President and Senate to make it.

Partly owing to the want of prominence, in the opening, of this point, we did not give to it, in argument, any special attention, though we did present what is below given from 6th Peters, 582.

We beg leave herewith to file the following additional authorities and suggestions on that point, along with our consent that Mr. Simons may reply, or that the Court may disregard this appendix.

Something was said, in his opening, by the Attorney-General about the treaty of 1855 and the alleged award of the Senate being invalid, because it is an attempt to "allow" or appropriate money, which a treaty, it is said, cannot do. I do not know that I fully understood the ground on which the Attorney-General based this attack upon the treaty; but it was based on *some* defect in the power of the President and Senate to make such a treaty; and he thought that the words "action had or award made," in the act of 1881 sending the case here, show that Congress had doubts regarding the power to make such a treaty.

Whatever may be the grounds on which the Attorney-General rests the lack of power to make the treaty, there are to this position conclusive replies.

1. One is that this very act, sending the case to this Court, is one recognizing, ratifying, and affirming the force and validity of the treaties involved, this being done by commanding you "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."

Certainly this does not mean to say to you there are no treaty stipulations, and that you are to treat all these treaties void, as beyond the power of the Senate to confirm! It means to command you to treat the *"treaty stipulations"* as your guide in rendering judgment thereon.

2. Another answer is that the 2079th section of the Revised Statutes, in effect, gives the ratification of Congress to all Indian treaties made prior to 3d March, 1871.

3. A third reply to this point is that it is thoroughly settled law that such Indian treaties as this, and which come as near appropriating money as does this of 1855, are not beyond the treaty-making power, but are valid. Says Chief Justice Marshall, in Worcester *v.* State of Georgia, (6 Pet., 582:)

"The question may be asked, Is no distinction to be made between a civilized and a savage people? * * * We have made treaties with them. Are these treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of these people to bind themselves and to impose obligations on us? * * * This power has been uniformly exercised in forming treaties with the Indians. * * *

"After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the General Government, it is too late to deny their binding force."

In Fellows *v.* Blacksmith, (19 How., 372,) the validity of an Indian treaty was questioned, and to that the Court replied:

"But the answer to this is, that the treaty, after it is executed and ratified by the proper authorities of the

Government, *becomes the supreme law of the land, and the courts can no more go behind it, for the purpose of annuling its effect and operation, than they can go behind an act of Congress,"* (citing 1 Cr., 103; 6 Pet., 735; 10 How., 442; 2 Pet., 307, 309, 314; 3 Story Const. Law, p. 695.)

The same thing is repeated in 3 Otto, 196.

4. Still another reply is that the *practice* of the Government, from the beginning to the present moment, hath been and is to make and enforce treaties for the ascertainment and liquidation of debts and claims as between the two nations and their respective citizens; and these have never been held to be either invalid or to be appropriations, *per se*, of money.

Commissions settling claims under such treaties are, in this city, in nearly perpetual session; and two such are in session now.

But we hardly think this pretension is seriously made.

CLOSING ARGUMENT

BY

F. P. CUPPY.

Mr. CUPPY said:

If your honors please, the argument to which you have just given such kindly attention has been so exhaustive, and has so well covered nearly all of the ground to which we felt it our duty to invite the attention of the court, that there would seem to be but little left to add, without repetition, or without a waste of the valuable time of the court. I will state my view of this case very briefly, and while it will propably go beyond, to some extent, the views maintained in the argument of my associate, it will not in anywise conflict with those views.

The view which we have of this act is this, viz.: that by its title it purports to be, and by its terms it is, an act granting to this tribunal jurisdiction to examine and determine two things in a general way. One is, sitting as a court for the examination of the differences that may grow out of treaty stipulations between the United States and the Choctaw Nation; to examine and render a judgment for some amount, if any amount shall be found due, arising out of those differences. Another power, which it is claimed by my brother, the Attorney-General, here conferred, in the first part of the act, was the power to examine into the award or decision of the Senate. I think the legislature, under the provisions of the first section, submitting to this tribunal the determination of the questions of difference and authorizing this tribunal to render a judgment thereon, does not clearly give to

this court that power of review, as a court of review, which the legislature intended to give to it in the clause which follows, and which has given rise to the principal controversy between the Government and the Choctaws.

If the act had stopped at that point in which it submitted questions of difference to this court, then this court, if this award be good on its face, would not have been permitted to go into an examination of the facts and circumstances which led to the award, or scrutinize what was done by the Senate as it traveled towards the conclusion which it has embodied in its decision, but that decision would have been final, and would have been so accepted by this court, if it had not been for the words granting this power of review. Here was a *question* submitted to a tribunal—an independent tribunal—from which, by the terms of the 11th and 12th articles of the treaty, and by the terms of the submission, there was no right of appeal from the decision at which the Senate might arrive. And now Congress, thinking that it was eminently wise to grant this court a jurisdiction to examine into this case and finally determine it, under the rules which always govern the investigations of judicial bodies—Congress thought it eminently wise to give to this court a power to review what had been done by the Senate. That is our view. The view of the Government is that it does not give power to review what the Senate did, but that it sets aside and abrogates all that the Senate did, and this is the difference between us, as I understand it.

Mr. Justice WELDEN: Mr. Simons, is that your position?

The CHIEF JUSTICE: I so understand it by his brief, which says that the act which gives jurisdiction requires the court to disregard the action or award of the Senate, under the treaty of 1855, in rendering judgment on any question of difference presented wherein such action or award might otherwise have effect, and therefore deprive

the claimant of any right of action based directly or indirectly on such action or award of the Senate.

Mr. SIMONS: That is my position; that proposition states it.

Mr. CUPPY: That is the position, as I understand it. Now, I contend for a different, and I think a fairer and better construction of the two clauses. The one giving the general jurisdiction to try the questions of difference might not, in the mind of the legislature, have been sufficient to have given this tribunal a power or right of review. The word "*trial*" is used in the first clause; in the other clause which, as I say, is not a limitation but an enlarging clause, in order to give the power of review which it was the intent of the legislature to grant, the language is "power is hereby granted to *review.*" It is a grant of power to this court not to "*try*" but to "*review*" the questions of difference *de novo;* and for what purpose? Why, for the purposes that lie within the sphere of the action of a court of review. And in a court of review, the "review," that word being taken in its technical, legal sense, is predicated upon the very assumption that there is a final judgment in some other tribunal. There can be no review by an appellate jurisdiction without a final judgment or decision of some sort in an inferior tribunal. Now, all that Congress intended was to sweep away any doubt as to this power of review, and it therefore did not put out of existence the award of the Senate itself. It does not say that we repeal the award of the Senate; it does not say that we, in any way, touch the decision of the Senate upon the questions submitted by the treaty; but it gives a power to this court to make that review. Now, how is this court to review? In two ways, manifestly, and only two; both of which are strictly judicial in their nature. One is by looking at the face of the award itself, and if upon its face it betrays such imperfections that it does not amount to a decision

of the question submitted, then as a question of law it is to be set aside and disposed of, and goes for nought.

There is one other way, and that is by impeaching this decision. That is a mode which sounds in fact, that is a mode which calls for proof tending to show either fraud or collusion, or such gross mistake upon the part of the court having original jurisdiction, that it is vitiated in point of fact. That branch of the inquiry is excluded from this contention. The only question that is raised by this demurrer is a question as to the validity of the award upon its face. Behind that, on this issue of law, we cannot go in this discussion. If the Government sees fit to invite us to go into that other question when the facts of this case come to be presented to this court, we shall be most happy to meet it upon that issue.

There is another suggestion which I beg leave to present as my view of this case, and which I think will enable the court, and all of us, to strip this case of much that has tended to confuse, and that is this: That the first resolution of the Senate, which decides that the Choctaws shall be allowed the net proceeds of their land, *is the award;* that the second resolution, which calls upon the Secretary of the Interior to state an account and to report to Congress how much these net proceeds are, is *ultra vires.* The Senate made it no part of this award. The Senate was duly and profoundly impressed with the duty of a speedy settlement of the claims under the award, which is contained exclusively in the first resolution of the Senate, in which it is held that they shall be allowed the net proceeds of their lands.

The other resolution, and what was done under that resolution, was not within the terms of the submission, and was a voluntary, though a most praiseworthy act on the part of the Senate, calling upon the executive branch of the Government, in the interval between the close of the session of the Senate on the 9th of March and the meeting of the next Congress, to address himself to the work of putting before Congress such facts as would enable Congress to make an appropriation of the net proceeds as they might be found to be due under the decision of the Senate. That is all. All this controversy about whether the report of the Secretary is right, or whether it is wrong; whether it be too much or whether it be too little, is entirely out of the discussion of this case. What I contend for is this: that the Senate having settled the principle; having decided, after an adjudication, to use the words of the submission; having judicially determined that the Choctaws shall be allowed the net proceeds of their lands—it was left for the Government of the United States, in such form as it might choose, to make an investigation and determine how much the net proceeds are. And Congress has been attempting to do that for years; but, as your Honors well understand, it is a body but ill-suited to the investigation of the details involved in the statement of accounts. And after trying for years to determine how much is due, under the award of the Senate, Congress has concluded, and wisely concluded, that this tribunal is better adapted to investigate and determine, and, after both parties shall have been heard, to give a fair, just, and conclusive determination of the question as to how much is due under the award. That is my view of this case.

This discussion has gone forward to this point without any suggestion coming from anybody as to whether or not Congress had any power to set aside this judgment of the Senate; and the statement of the proposition, it seems to me, carries with it its answer. Mr. Shellabarger has purposely left this branch of the discussion to me. Now, if the construction which is contended for by the Government be true, it amounts to an annulment and an abrogation of the judgment, the solemn judgment, of a wise body, to which both parties submitted a particular ques-

tion, which question it has determined strictly within the terms of the submission.

The CHIEF JUSTICE: Has not it been decided, sir, that Congress can repeal a treaty?

Mr. CUPPY: Oh, yes, your Honor; but never a judgment—never.

The CHIEF JUSTICE: Can a judgment, an adjudication such as this of the Senate, stand on a higher ground than a solemn treaty?

Mr. CUPPY: I think it can, under the decisions of the Supreme Court of the United States. I think so, because, in two instances, as your Honor well knows, Congress has repealed treaties, but has never undertaken to abrogate judgments. And it will be an unhappy day for this country, in the security of private rights, if there ever shall be a concession anywhere that the legislative branch of the Government has a right to abrogate and set aside the final judgments of the courts.

The CHIEF JUSTICE: Well, sir, let me understand one thing about this matter. Does the thread of your argument lead to your denying the constitutional power of Congress to pass this act under which you invoke the jurisdiction of this court?

Mr. CUPPY: Oh no, your Honor, I don't claim that. I don't claim that there is any want of power on the part of Congress to clothe this court with jurisdiction to hear and determine this case. But I say that the construction contended for by the Government, of these words about which there has been so much controversy, leads, in the end, to the result that Congress has either repealed this award, or it has granted power to this court to repeal it.

Mr. Justice WELDEN: If I understand you, sir, you don't question the right of this court under this act to examine *de novo* every matter of difference between the United States and Choctaw nation of Indians?

Mr. CUPPY: No, your honor; we don't question that

right. We say that this court *may;* and yet about that I have very great doubts; but as the construction contended for by the Attorney-General gives rise to the implication that there was something wrong, may be upon our part, in the procurement of that award, it appeals to our sense of honor as a Nation, and we respond by saying that we waive any and all objections to the fullest and most complete investigation by this court in a judicial way to test the validity of that award; but what I mean to say is that Congress has no power by direct act to set aside a judgment of an award like this.

Mr. Justice RICHARDSON: I don't understand that it is claimed that Congress has done that.

Mr. CUPPY: Then, if the award had not been set aside, in whole or in part, and if it be fair and true upon its face, this tribunal cannot, under this demurrer, hold that it is invalid? It is remitted, then, to that investigation, which we invite, as to the manner in which it was procured, the groundwork upon which its rests, its rightfulness, its justice, its equity.

Mr. Justice WELDEN: And you don't dispute the right of the court under this act to go into that question?

Mr. CUPPY: No; I don't mean to dispute that, although the general rule is, with reference to judgments *inter partes*, that they are conclusive at all times, and there may be very grave and serious doubts as to whether or not there was any power on the part of the legislature to grant a review after the lapse of the years that have gone by since the Senate award was made, there being no provision in the original submission for any appeal or for a review; but I waive all that.

Mr. Justice WELDEN: Mr. Cuppy, don't you concede that every court has a right to go back of an award for fraud or mistake?

Mr. CUPPY: Well, that has been questioned as *inter partes*. The rule, as I understand it, is this——

Mr. Justice WELDEN: Well, I understand you, under this law, to admit that we may inquire into this award upon grounds of gross mistake or fraud?

Mr. CUPPY: Yes, we concede that; that is our view, but that question is not in this discussion. That is a question which sounds *in fact*, and must be examined when we come to consider the testimony. The only question, it seems to me, that is in issue here under this issue of law, is whether or not this award in form is valid; that is all.

The CHIEF JUSTICE: Now, before you go further, sir, will you allow me to just read to you what I have written here, as it seems to me, the section would be if your view were right?

Mr. CUPPY: Yes, your Honor.

The CHIEF JUSTICE: The words are transposed, as you at once see. "The Court of Claims is authorized to review *de novo* the entire question of differences, and to try *de novo* all questions of difference arising out of treaty stipulations, and render judgment thereon; and it, the court, shall not be estopped from reviewing and retrying *de novo* all questions of difference by any action had or award made by the Senate."

Mr. CUPPY: Yes, your Honor.

The CHIEF JUSTICE: Would not that section be written that way to express your view?

Mr. CUPPY: I cannot see how the transposition of any of the sentences or parts of sentences can, in any way, alter the construction for which we contend. Our view is the same, whether it be read the one way or the other, our view being that after Congress had committed to this court the questions of difference, as provided for in the first part of the act, it occurred to the mind of Congress that it had only provided for *existing* questions of difference, and Congress wishing the validity of this award tested as a matter of law and as a matter of fact, it for

that purpose added the further provision, granting to this court, not a power to *try* but a power to *review;* and if upon a review it shall find that the things which constitute the groundwork of the decision of the Senate are such that they do not faithfully and firmly support the conclusion reached by the Senate, that then your Honors may set it aside; and then your Honors may inquire into all of the antecedent things which were considered by the Senate in reaching the conclusion at which it arrived.

Mr. Justice WELDEN: Your position is that this award is *prima facie* good?

Mr. CUPPY: Precisely that.

Mr. Justice WELDEN: But may be wiped out?

Mr. CUPPY: Yes, your Honor.

Upon the first proposition suggested by his Honor, the Chief Justice, and which we waive, I simply call the attention of your Honors to the chapter upon the conclusiveness of judicial decisions, and will read a section from Cooley's very able work upon Constitutional Limitations.

The CHIEF JUSTICE: Yes, but I understand you, sir, to be perfectly willing to throw open the doors here——

Mr. CUPPY: I mean——

The CHIEF JUSTICE: Then what is the use of reading a decision?

Mr. CUPPY: Well, as prefatory to something which is to follow, and that is, the proposition that awards stand upon the same basis as judgments.

The CHIEF JUSTICE: Well, sir, true; but then why read that, when you say that you are perfectly willing that the whole question of the validity of this award shall be thrown wide open for investigation?

Mr. CUPPY: Only because, if your Honor please, it is prefatory to some comments and some authorities which I propose to present, showing that when a question is submitted to a judicial tribunal it is not within the sphere

or domain of the legislative power to direct the court as to how it shall decide the case. Now, my brother, the Attorney-General, has from beginning to end designated this clause in controversy as a mandate to this court; as a direction to this court.

Mr. Justice WELDEN: Do you think that discussion tends to construe this latter part of the statute?

Mr. CUPPY: Yes, sir; and for that purpose, and that only, do I use it. Our position is that the contention of the Attorney-General is erroneous in this, that it is a construction which leads to a violation of a well-settled principle growing out of the manner in which in our government the sovereign power of the government is distributed, and that it is not within the domain of the legislative power to say to this or any other judicial tribunal, when submitting to it, either by general or special act, judicial questions to be determined—to say to it that you must determine them in a particular way, or that in the progress of your investigation as you go forward you shall be guided by the judgment of the Legislature as to what you will consider and what you will not consider.

In other words, that this is held to be a direction to this court that it shall set aside this decision of the Senate; that it shall ignore it; that it shall not in any way enter into the consideration of this court in the determination of this question, but that it is to be arbitrarily set aside without investigation for the purpose of determining whether or not there were in it elements of impeachment; that it is an invasion of the judicial power, which is in contravention of those well-settled principles growing out of the division of the powers of sovereignty as we find them under our Constitution. And I will come to that at once.

After full discussion, and after citing numerous cases upon the proposition that the Legislature cannot set aside judgments and awards, the author goes on to say further, and I have not referred to this in my brief, but take it as a

more convenient way of presenting the law rather than citing numerous cases.

I read from the last edition of Cooley's Constitutional Limitations, pages 47, 48, 49, 114, and 115:

"In some cases and for some purposes the conclusiveness of a judicial determination is beyond question final and absolute. A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and their privies, and they are not allowed afterwards to revive the controversy in a new proceeding for the purpose of raising the same or any other questions. The matter in dispute has become *res judicata*—a thing definitely settled by judicial decision; and the judgment of the court imports absolute verity. Whatever the question involved—whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment—the rule of finality is the same, the controversy has been adjudged; and, once finally passed upon, it is never to be renewed. It must frequently happen, therefore, that a question of constitutional law will be decided in a private litigation, and the parties to the controversy and all others subsequently acquiring rights under them, in the subject matter of the suit, will thereby become absolutely and forever precluded from renewing the question in respect to the matter there involved. The rule of exclusiveness to this extent is one of the most inflexible principles of the law; insomuch that even if it were subsequently held by the courts that the decision in the particular case was erroneous, such holding would not authorize the reopening of the old controversy in order that the final conclusion might be applied thereto."

Now, it is contended by the Attorney-General that "the particular steps to be taken by this court in the progress of this judicial inquiry," which is here submitted, are to be controlled and governed, I mean the judicial steps are to be controlled and governed by the provision in controversy, and that construction I hold to be bad, because it imputes to the legislative branch of the government an in-

vasion of the domain of the judicial power, and that it is our duty in considering this statute and in construing it, if it be in our power to so construe it, to accord to the legislative department action, full and valid action, within its own sphere, and avoid the implication of an invasion of the powers which belong exclusively to judicial tribunals; and hence that is one of the considerations which I think ought to have much weight in leading your honors to adopt the construction for which my learned brother contended, rather than the one which will lead to such consequences as I have just stated.

To illustrate what I have already said, and to which I propose to add but little, I beg leave to read from the 5th of Pickering, pages 64, 67, and 68, and it is so much like the case at bar that I ask your honors' special attention to it. This was a case which, under the general law of the State of Massachusetts, it was the duty of the probate judge, in probating a will or granting letters testamentary, to require that such reasonable security as in his judgment was necessary to protect the rights of all parties should be taken in the way of bondsmen who were citizens of the commonwealth. The executor who had been named in the will was not able to give bond, but the principal legatees, living in Paris, France, and non-residents of the commonwealth of Massachusetts, offered to go upon the bond. He refused to take them, and the Legislature passed a resolution "empowering" the judge of probate to take an administration bond in a mode differing from that prescribed by the general law of the commonwealth, to allow him to take and accept these non-residents, living in Paris, who were the principal legatees, as bondsmen.

Now, the language of the resolution was that the probate judge be "empowered," and the language here is a "power of review granted." Now, so far as it grants that power of review in a judicial way we concede it and invite it. But if it is to direct this court to set aside the usual

course of procedure in a case of review; to arbitrarily set it aside without examination to see whether it is right and just and equitable, or without examination to see whether on its face it is good, why then we enter our solemn protest; and we are sustained, as I take it, by the case to which I have referred. The probate judge refused to be controlled by the resolution, and an appeal was taken, and the court of last resort said this:

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A RESOLVE of the legislature "empowering" a judge of probate to take an administration bond in a mode differing from that prescribed by the general laws of the commonwealth, is not imperative, and if it were it would be unconstitutional.

The language of the resolve does not import a command or direction to him to execute the will of the legislature in relation to a subject of judicial cognizance placed by the laws under his authority and jurisdiction. It would be doing violence to the language and the intentions of the legislature to suppose that it meant to dictate to a judicial tribunal the course of its proceedings in a particular case. We do not think the legislature would have passed a resolve requiring and directing the judge of probate to do what by this resolve they intended only to empower him to do. The wise provision of the constitution, which restrains each department of the government within its appointed sphere, would have prevented a measure like that. We must suppose from the language used, viz., "that the judge of probate be empowered," that doubts existed as to the power of the judge of probate to depart from the provisions of the standing laws of the commonwealth in regard to granting administrations, and that it was intended to give him the authority specified in the resolve, if in his discretion he should see fit to exercise it in the manner therein proposed; like some cases where the legislature have authorized the doing of particular acts, or the making of deeds or other instruments, without any design to deprive the judicial power of its constitutional authority to determine the validity of such acts or deeds. We suppose, therefore, that the judicial discretion vested in the judge of probate by the standing laws of the commonwealth, on all subjects within his jurisdiction, was

left unimpaired by this resolve, and that he had the right, as before, to determine the penalty of the bond, judge of the sufficiency of the sureties, and decline substituting other security to the bond, if he should be of opinion that, by the general laws, he was not at liberty to take a security in a particular case different from that which he should feel obliged to require in all others. And we think he judged wisely in this particular, for he might well doubt of the legality of taking any security but that which the general laws of the land made the condition on which letters of administration should be granted, and he had reason to question the sufficiency of a surety living in a foreign country, over whose property or person the laws of this commonwealth had no control or jurisdiction; and he might well decline to take, as a substitute for the bond, choses in action which he would be unable to make available for the benefit of those whose interests he felt bound to protect.

This resolve has been viewed by the counsel of the appellant as suspending the operation of the statute of 1817 so far as that statute makes the giving of a bond, with surety at the discretion of the judge, a condition precedent to the power of administration, as prescribed by the 14th section. We cannot view it in that light, for it ought not to be presumed that the legislature intended to do what by the constitution they have no authority to do, and we think it very clear that they have no authority by the constitution to suspend any of the general laws, limiting the suspension to an individual person, and leaving the law still in force in regard to every one else. This would not be suspending a law by virtue of their constitutional power to do so in cases of emergency, but it would be to dispense with the law in favor of an individual, leaving all other subjects of the government under obligation to obey it; and we do not find any such dispensing power in the constitution.

Mr. Justice RICHARDSON: What county was that in, Suffolk?

Mr. CUPPY: Yes, your Honor; Suffolk and Nantucket.

I call attention to the case of Burt et al. *v.* Williams, reported in 24th Ark., pp. 91, 94.

I read first the syllabus:

So much of the act, approved 1st December, 1862, as provides "that all suits at law or equity, now pending, or hereafter to be commenced in any of the courts of this State, shall be continued until after the ratification of peace between the United States and the Confederate States," is unconstitutional—the continuance of criminal suits, directed by the act, being in violation of the constitutional right of the accused to a speedy trial, (Cons., Art. II, sec. 11,) and the continuance of all civil suits being in violation of the constitution, (Ib., sec. 18,) prohibiting the passage of any law impairing the obligation of contracts. Granting a continuance is exclusively a judicial act, and is not a proper subject or legitimate use of legislative authority.

The court then say:

It may further be enquired whether the law is valid to require the continuance of any suit in any court of the State. And this is not, if, instead of being an act of legislative authority, it is an exercise of judicial power.

Granting a continuance is either an exercise of judicial discretion upon particular facts, or an application of legal rules to them, the facts being ascertained by the court, and the discretion used, or application of law made by the court; and in either case is exclusively a judicial act. A legislative act is an annunciation by the legislative authority that certain results shall follow particular actions or conditions; but the ascertainment of the act or condition and the application of the consequences belong to the courts.

But by this law the General Assembly, from the fact of war existing between the United States and the Confederate States, has directed that all suits in law and equity in any of the courts of the State shall be continued until the war is ended, till the hostile nations have made a peace, till a treaty of peace shall be ratified. No fact is to be ascertained by the courts; no application of legal principle is to be made to the fact that the Legislature has ascertained, but the courts, as registers of the legislative will, are to record its edict, closing indefinitely the temple of Justice to all its suitors.

This is not the manner in which courts exercise judicial functions, is not a proper subject or legitimate use of legislative authority, inasmuch as the powers of the government of this State are divided by the constitution into distinct departments, each of which is confided to a separate magistracy, the legislative powers to the General Assembly, the judicial powers to the judiciary.

So we say here that the construction contended for by the Government ought not to be adopted in this case, because it necessarily implies, if it sets aside this award arbitrarily and without examination, that Congress has encroached upon the domain of judicial power, wherein alone there rests the power and the authority to examine into and impeach judgments and awards, either from defects on their face or for fraud or collusion in their procurement. Now, I have numerous authorities on that point, but I will not weary your honors by reading them. They are referred to in our brief. Many of them relate to the proposition that this award would be final under any circumstances. Those you need not read, because, as I say, we waive all that.

What we ask and all we ask is that if this award which was made in 1859, which has been recognized by the Government of the United States and payment made under it, which has been the subject of legislation in the way of recognition as late as 1874; and, by the by, I will read that to you. It is this, section 3, volume 18, Statutes at Large, page 230. It reads as follows:

"That the Secretary of the Treasury is hereby directed to inquire into the amounts of liabilities due from the Choctaw tribe of Indians to individuals, as referred to in articles 12 and 13 of the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians, and to report the same to the next session of Congress, with a view of ascertaining what amounts, if any, should be deducted from the sum due from the United States to said Choctaw tribe, for the purpose of enabling the said tribe to pay its liabilities, and thereby to enable Congress to provide a fund to be held for educational and other purposes for said tribe, as provided for in article 13 of the treaty aforesaid."

Now, there was recognition of the treaty which did provide that if the Choctaws should be allowed the net proceeds of their lands ceded by the treaty of 1830, that then

and in that event they should become liable for all of the individual claims of the Indians against the Government of the United States. When the decision of the Senate was rendered the burden of these individual claims was shifted from the shoulders of the United States and put upon the Choctaw Nation, and while it does not illustrate this issue, the fact is that a court was immediately established by the Choctaws for the hearing of these claims. They have gone on with the adjudication of them, and the Secretary of the Treasury, in response to this very act, states that the amount stated by the Secretary of the Interior, as to what was due the Choctaws ($2,981,000) under the award, was $116,000 less than the amount of the individual claims with which they became burdened by the decision of the Senate.

Mr. Justice NOTT: Give the book and page of that statute.

Mr. CUPPY: It is volume 18, page 230, section 3, Stat. at Large.

Mr. Justice NOTT: Will you please repeat what you said about those amounts.

Mr. CUPPY: This is a statute calling upon the Secretary of the Treasury for the amount due the individual Choctaws under the treaty, the treaty providing that as to all that was left after paying the individual claims which the Choctaws assumed under the treaty of 1855 and the decision of the Senate—this statute directed that an inquiry should be made, under direction of the Secretary of the Treasury, to find out how much these individual claims were, because what was left was to be funded under the provisions of the treaty and was to constitute a fund for educational purposes in the interest of the Nation; and in his response to that inquiry the Secretary of the Treasury not only says that nothing will be left, but that the Choctaws will be $116,000 in debt!

Now, these are the vested rights; these are the obligations

which have been imposed on us; these are the obligations which we have assumed; these are the obligations which we are bound, according to the principles of our Nation, to discharge; and yet, at this late day we hear the Government contending for a construction which will break down and sweep out of existence all the rights which have been vested—which have been vested and recognized time and again. Yet we do say, and we say it most cheerfully and most cordially, that if, in the groundwork of that decision of the Senate, by which we were awarded the net proceeds of our lands, there is any taint of fraud, whether it originated in the Senate, or whether the simple people whom we represent imposed upon and misled the Senate, if they made such gross mistake that it vitiates the award, let it fall; but let the investigation be that kind of investigation which belongs to a court of justice—an investigation looking to its impeachment, or an investigation which finds the award to be invalid on its face for want of form. If we must fall at all, let us fall smitten by the Sword of Justice and not by the Sword of Arbitrary Power; the Sword of Justice that is never drawn until there is a hearing, until there is consideration, until there is wise, judicial conclusion.

The Attorney-General has referred to a case reported in 5th of Wallace, the United States *v.* De Groot, page 417, as a case analogous to this, and as a case supporting the view which he has advanced.

That was a case in which the plaintiff had been a Government contractor. He had entered into a contract to make and furnish to the Government a certain amount of bricks. He purchased real estate in the State of New Jersey, I believe, and purchased all the necessary appliances for executing his contract and went forward in the execution of it. Before it had been completely executed the Government, for some good reason, annulled the contract and passed a resolution authorizing the Secretary of the Treasury to determine what damage should be allowed him

for loss sustained in consequence of annulling his contract. He surrendered all his personal property, and the submission in terms made provision that he should be indemnified for the losses occasioned to his "personal property." The Secretary of the Treasury went forward and authorized the payment of seven thousand and some hundreds of dollars, which was paid him. He was not satisfied with that, (that resolution was passed in 1857,) but he procured the passage of another resolution in 1860, authorizing the Secretary of War to re-examine the case and determine what additional amount was due him. The Secretary of War went on and examined the case and determined not only that he should be paid for the amount of his personal estate, which was described under the original submission, but also awarded to him some sum, not separately stated, as the value of his real estate. That award by this court was held to be bad on its face, because it commingled an element, that is, the value of the real estate with the damage, which was properly within the submission that was made. He came into this court and he stood upon his award before any valid action had been taken by the Secretary of War. He never took any valid action. Before any valid action was taken Congress in 1861 referred his case here to this court, and directed the Secretary of War to turn over all the papers. When he got into this court he stood upon the award made by the Secretary of War. This court decided—and very properly, it seems to me—

> "First. That by including in the award the value or price of the real estate upon which the brickyard was located, Floyd exceeded the powers conferred upon him by the joint resolutions of Congress.
>
> "Second. That having commingled such allowances with the general finding in such manner as to be incapable of separation, it thereby vitiated the whole award."

Congress had repealed the resolution under which the Secretary of War acted before any valid action had been

taken on it, and that, too, in plain and unmistakable language—not by implication. It needed no argument to show what was the legislative intent. It simply declared that the resolution of such a date in 1860 "*is hereby repealed.*"

Now, where is the analogy between the two cases? There was no repeal of the submission in this case before final action; there has never been any repeal of this submission. I grant you that a serious question might be made if, before the Senate had acted, Congress had passed a law repealing the treaty under which the submission was made. But after the submission was made and action had, and that action had ripened into a judicial decision, then, I say, that in construing this act we must construe it in such a way as not to attribute to the legislative branch of the Government any disposition to overstep the boundaries fixed by the constitution and limiting their sphere of action. And this case, too, differs very much from the case for which the Attorney-General contends, in this: that there your honors did sit upon the award; there your honors did find that the award was bad upon its face and for the best of reasons, and the Supreme Court affirmed that decision upon the very grounds stated by this court.

Now, if your honors please, much more might be said, and while we might extend this argument and multiply our authorities, illustrating and confirming those which we have been allowed to present, I will not longer weary your patience, and only add, that if upon the questions to which I have invited your attention, your honors have any doubts, I do ask your attention to the authorities cited, and such examination as you may regard it to be your duty to make concerning the principles which they elaborate and settle.

For your kindly attention you have my thanks.