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Indian depredation cases. Letter from the Attorney-General, transmitting a list of judgments of the Court of Claims in Indian depredation cases that have been paid under the act of Congress approved August 23, 1894.

53D CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { EX. DOC. No. 245.

INDIAN DEPREDATION CASES.

LETTER

FROM

THE ATTORNEY-GENERAL,

TRANSMITTING

A list of judgments of the Court of Claims in Indian depredation cases that have been paid under the act of Congress approved August 23, 1894.

JANUARY 23, 1895.—Referred to the Committee on Appropriations and ordered to be printed.

DEPARTMENT OF JUSTICE,
Washington, D. C., January 19, 1895.

SIR: The "act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1894, and for prior years, and for other purposes," approved August 23, 1894, contained the following provisions:

For payment of judgments of the Court of Claims in Indian depredation cases in the order in which they are certified to Congress in Senate Executive Documents numbered seven, parts one and two, numbered eighty-two and one hundred and twenty-eight, and Senate Miscellaneous Document numbered two hundred and forty-nine of the present session, one hundred and seventy-five thousand dollars, or so much thereof as may be necessary to pay and discharge such judgments as have been rendered against the United States, after the deductions required to be made under the provisions of section six of the act approved March third, eighteen hundred and ninety-one, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations" shall have been ascertained and fully certified by the Secretary of the Interior to the Secretary of the Treasury, which certification shall be made as soon as practicable after the passage of this act, and such deductions shall be made according to the discretion of the Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected; and the amounts paid shall be reimbursed to the United States at such times and in such proportions as the Secretary of the Interior may decide to be for the interests of the Indian service: *Provided*, That no one of the said judgments shall be paid until the Attorney-General shall have certified to the Secretary of the Treasury that he has caused to be examined the evidence heretofore presented to the Court of Claims in support of said judgment and such other pertinent evidence as he shall be able to procure as to whether fraud, wrong, or injustice has been done to the United States or whether exorbitant sums have been allowed, and finds upon such evidence no grounds sufficient, in his opinion to support a new trial of said case; or until there shall have been filed with said Secretary a duly certified transcript of the proceedings of the Court of Claims denying the motion made by the Attorney-General for a new trial in any one of said judgments: *Provided further*, That any and all judgments included in said documents which the present Attorney-General has already examined, and is willing to certify under the provisions of this act, and any and all judgments rendered during his term of office which he shall be willing to certify under the provisions of this act may be certified, notwithstanding the order of payment herein specified.

For the defense of Indian depredation claims which shall include the investigation and examination, under the direction of the Attorney-General, of judgments of the Court of Claims rendered under the act approved March third, eighteen hundred and ninety-one, entitled "An act to provide for the adjustment and payment of claims arising from Indian depredations," which have not been appropriated for, ten thousand dollars, which sum shall continue available until expended, and the Attorney-General shall report to Congress at its next regular session all of said judgments concerning which, in his opinion, after such investigation and examination, there is no evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

Immediately upon the passage of this act and pursuant thereto the responsibility of examining the judgments as required by the act in question was assigned to Assistant Attorney-General Howry, who at once proceeded to the discharge of his duty in the premises. The schedule of judgments concerning which, in my opinion, after the investigation and examination required under said act, there is no evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States, is set forth in the report of the Assistant Attorney-General herewith annexed, marked Exhibit A.

In view of the scope and character of the work involved in the examination of the judgments directed to be investigated by Congress and the continuous demand upon the time and attention of the Department from sources official and unofficial, to be informed of the results of the investigations with respect to the various cases, and how and in what manner cases not certified for payment depend upon the further action of the Department and the Court of Claims, I herewith submit the exhibit made to me by the Assistant Attorney-General disclosing full Department information relating to the judgments not certified for payment as well as those which have been duly certified by me to the Secretary of the Treasury.

Respectfully,

RICHARD OLNEY,
Attorney-General.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

EXHIBIT A.

DEPARTMENT OF JUSTICE,
Washington, D. C., January 19, 1895.

SIR: The duty assigned to me to investigate the judgments of the Court of Claims in Indian depredation cases set forth in Senate Ex. Doc. No 7, parts 1 and 2, No. 82, and No. 128, and Senate Mis. Doc. No. 249, of the second session of the Fifty-third Congress, under the act entitled "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for prior years, and for other purposes," approved August 23, 1894, has been performed, and I herewith submit to you the result thereof. The requirement of the law that you should report to Congress at the present session all of said judgments in which, in your opinion, after investigation no evidence exists, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States in the rendition of the judgments, or whether exorbitant sums have been allowed, has made difficult the complete disposition of the responsible work assigned to me. Nevertheless, it is believed the examinations have been sufficiently thorough to enable me to say that if in the rendition of any of the judgments any injustice has been done to the United States the Department is in position to present its reasons to the Court of Claims for correcting any errors or irregularities that may appear.

I trust I need not say that though the conditions under which I have proceeded in the very limited time at my command have not been such as to afford me the opportunity to weigh the facts arising in the record of each case with that deliberation which, under other circumstances, I might have done, yet I have appreciated the duty of seeking to interfere with no meritorious claim and facilitating in good faith the payment of every judgment proper to be paid. When it is understood that with a small force at my command examinations have been necessary to be made of

the records of 250 cases; that abstracts have been made of such pertinent matter appearing in the files of each case as would enable me to institute investigations of the facts in the field at points remote from Washington; that the evidence contained in these records in many instances is of such a voluminous character that a careful office examination was necessary; that the witnesses were all unknown to the officers of the Government; that their testimony related to depredations and occurrences from twenty to forty years ago in unsettled parts of the country where the population was not only scant but so transitory as to render it practically difficult to obtain any material evidence in most of the cases on the part of the defense, it will be seen that our difficulties have been such as to impose extraordinary labor in the four months' time in which we have practically done the work. My own personal time and attention have been continuously bestowed upon the examinations since the assignment of the work to me, mainly at the Department, but incidental to certain cases involving large sums, I felt impelled to personally investigate the facts at a few points in some of the Western States.

Part 1 of Senate Ex. Doc. No. 7 contained a list of 209 judgments, aggregating $452,227.83; and part 2 of Senate Ex. Doc. No. 7 contained 2 judgments, aggregating $5,580. Senate Ex. Doc. No. 82 contained, in addition to Ex. Doc. No. 7, parts 1 and 2, 27 other judgments, amounting to $57,117.10; Senate Ex. Doc. No. 128 contained 20 judgments, aggregating $69,665.79; and Senate Mis. Doc. No. 249 contained 1 judgment, aggregating $9,600. All the judgments contained in part 1 of Senate Ex. Doc. No. 7 were taken before I had any connection with the Department, while in a number of those taken after I had become Assistant Attorney-General judgments were rendered upon stipulations filed in the cases by my predecessor, and of which I had no knowledge until the court announced the judgments from the bench.

Pending the action of Congress regarding the investigation of the judgment cases I was not aware of the fact that the very large proportion of the judgments had been rendered upon stipulations filed by my predecessor, the cases having been those in which allowances were claimed to have been made by the Secretary of the Interior. When I came into office in August, 1893, all judgments which I found had been rendered in Indian depredation cases were assumed by me to be correct and were treated by the Department as regular, and were transmitted to Congress in December under the provisions of the eighth section of the act of March 3, 1891, except as hereinafter stated. These exceptions were in cases where notices of appeal had been given, or where motion for new trial seemed necessary in such of the judgments as were rendered within thirty days preceding the adjournment of the court in June, and to which my attention was specially directed by the assistants whom I found in the office. In directing the investigation of these judgments Congress seems to have had in mind the provisions of section 1088 of the Revised Statutes of the United States, which reads as follows:

"The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment the same shall be payable and paid as now provided by law."

Many of the judgments directed to be investigated were taken long enough ago to require almost immediate departmental action to remove any questions that might be raised of the right of the United States to interfere with the judgments independent of the provisions of section 1088, and hence it became necessary to file motions for new trial in the earlier cases in October, if such motions were to be filed at all. Our investigations disclosed that in many of the cases judgment had been rendered in favor of aliens and persons who, according to the decisions of the court in other cases where the fact of citizenship did not appear, were not entitled to judgment, and that in many other cases judgment had also been rendered where the defendant Indians were not in amity with the United States at the time of the alleged depredations, and where the claimants were not entitled to judgment under the act of March 3, 1891, according to the construction given to the act under which the petitions were filed.

With the view of correcting any irregularities and supplying the want of the jurisdictional facts necessary to appear on the face of the records in such cases, and of giving the judgment creditors whom these records did not show to be citizens of the United States the opportunity to prove that they were citizens at the time of the alleged depredations, and were consequently entitled to have their judgment undisturbed, and with the view of looking into the question of the amity or want of amity of the Indian tribes dehors the record in those cases where these jurisdictional questions were doubtful, I availed myself of the right to obtain such ex parte affidavits as could be procured for the purpose of perfecting the records where the same could be done upon the questions of citizenship and amity, not only for the benefit of the claimants where the proper proof could be made, but also for the benefit of the Government where it could not. The plan adopted under the necessities of the

situation for procuring these affidavits, either in support of the necessary jurisdictional facts or as preliminary to the filing of motions for new trial, did not enable me to consult with the counsel representing the various judgments as much as under other circumstances I should have done, but it was generally understood among them that affidavits would be taken wherever they could be obtained, and wherever inquiry was made they were informed that this course would be pursued.

Section 1088 of the Revised Statutes does not limit motions for new trial merely to the ground of newly discovered testimony. Under that section a new trial can be granted also upon cumulative evidence. Affidavits of an ex parte character are therefore not only permissible under the ordinary rules of practice as the basis of motions for new trial, but under the statute authorizing cumulative evidence (Ayers *v.* U. S., 5 C. Cls. Rep., 712) and the exigencies imposed for the prompt investigation of these cases it seemed obligatory to me to obtain them wherever they could be had in support of a prima facie showing. Without considering the question of our right to take testimomy upon notice in advance of the actual filing of motions for new trial, it will readily be seen, I think, that the course adopted had the merit of facilitating the payment of judgments proper to be certified and enabling the department to take the prompt action necessary to comply with the law in making the motions upon any reasonable showing of fraud, wrong, or injustice. Where the affidavits of the claimants themselves were taken, however, each claimant was expressly notified in advance of any declaration from him that whatever statement he should choose to make must be a voluntary statement and not made at all in the absence of his counsel if such claimant preferred to give no further information concerning the matters under inquiry.

All of the judgments directed to be investigated concerning which I have been unable to find any evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States, or in which I have been unable to find any evidence that exorbitant sums were allowed, are herewith set forth in the subjoined list. The number of the case, the name of the claimant, and the amount of the judgment are shown. All of the said judgments have been heretofore, upon my recommendation, duly certified by you to the Secretary of the Treasury for payment. The judgments certified are as follows, viz:

No.	Claimant.	Amount.	No.	Claimant.	Amount.
158	Edson Gerry	$3,830.00	714	Thos. McGlynn	$900.00
1090	James B. Gayton	1,000.00	821	Alvin C. Leighton	1,000.00
1422	Franz Huning	7,050.00	822	....do	5,100.00
30	Samuel D. Evans, administrator	9,120.00	840	Wm. V. F. Earle	455.00
108	John L. Burns	2,300.00	2198	Herman Levi et al	108.50
130	Henderson C. Leach	1,200.00	2320	Desiderio Valdez	40.00
1415	John Bailey, administrator	15,180.00	2344	Chas. H. Peck	11,175.00
1819	Isaac Bailey	3,630.00	2345	Joseph W. Paddock	6,950.00
4948	David T. Chaney	6,000.00	2381	W. B. Stapp	2,595.00
7725	Jacob R. Casselberry	360.00	2825	S. B. Burnett	675.00
9146	Edwin P. Farnam	80.00	3575	Lewis W. Dennen	255.00
9258	Emanuel Wertman	365.00	4314	Clem Wilson	455.00
9444	Frank Tuch	100.00	4885	Hiram A. Libby, administrator	707.50
9629	William T. Holt	1,275.00	4899	Amos Lamson	25.00
9870	David T. Mitchell	50.00	4506	Frederick H. Burr	1,950.00
9943	Abram Winne	195.00	6131	Atanasio Romero, administrator	325.00
10119	George A. Morrison, administrator	240.00	6386	Jackson Leatherman	551.60
5756	Margaret A. Genthner	3,212.90	6573	William Sherburn	450.00
1676	Florence F. Fargo	110.00	7298	Severro M. Vigil	90.00
1276	John Woody	725.00	8926	R. C. Patterson	281.10
4848	Mountillan G. Driskell	100.00	9669	Epifanio Prada	50.00
4850	Elijah Woolbert	24.00	9809	Daniel C. Kyle	155.00
10008	Henry Carpenter	1,350.00	9831	George W. Wright	205.00
9810	Wm. L. Arnett	300.00	985	Francis Mayock	1,500.00
9891	Thomas Burns	150.00	1842	E. F. Williams	150.00
4117	Rufus Cook, administrator	1,800.00	2655	John A. Banning	9,600.00
2951	Jerome T. Parrot	1,614.00	620	John J. Fisher, executor	441.00
2558	Lovina Stites, administratrix	320.00	3274	John S. O'Neal, surviving partner	7,800.00
826	John Hunton	100.00	4620	Nehemiah P. Ellsbre	265.00
8658	John F. Waggoner	625.00	4709	Eugene W. Dow	250.00
4501	William Rea	300.00	5797	John Lawrence et al	600.00
5090	John Lowry	1,760.00	9461	Nicholas Dowling	1,000.00
2962	C. C. Shore	64.45	9959	J. A. de Serna, administratrix	66.00
2557	Gabriel H. Horton	3,404.00	3297	Birney Dunn	300.00
5387	Chas. W. and Wm. J. Baum	900.00	6377	Don A. Sanford	150.00
4405	Wm. N. Byers	400.00	537	Eliza Walker, administratrix	450.00
1553	William Midkiff	4,600.00	3381	Maria A. Sandoval	680.00
360	Bernard, Irwin & Co	375.00	4688	Zook & Alderson	3,950.28
6257	Warren W. Bassett	125.00	1110	James H. Farmer	2,825.00
5747	Curtis C. Cady	165.00			

The number of cases in which motions for new trial have been made being so great in proportion to the number transmitted to Congress pursuant to the eighth section of the act of March 3, 1891, and under special resolutions of the Senate, but afterwards returned to the Department for investigation, it is proper that I should place before you in detail the reasons which have governed my official action in making the motions and arresting the payment of the judgments until the Court of Claims shall have finally passed upon the matters set forth in the motions for new trial.

The Court of Claims has held that it is without jurisdiction to render a judgment upon an Indian depredation claim under the act of March 3, 1891, in favor of one who was not a citizen of the United States at the time of the depredation. The decision was first made in the case of James S. Valk, decided March 13, 1893, and again decided February 12, 1894 The question was also passed upon in the case of Benjamin H. Johnson, decided December 4, 1893. (James S. Valk *v.* The United States et al., 28 C. Cls. R., 241. Benjamin H. Johnson *v.* United States et al., 29 C. Cls. R., 1.)

The act of 1885, under which, with acts subsequent thereto, the Secretary of the Interior made allowances, and referred to in the act of 1891 (1 Supp. to Rev. Stat., 2d ed., p. 913, note), provided for the continuation of the examination, allowance, and approval of Indian depredation claims on behalf of "citizens of the United States," omitting the words "or inhabitants," used in former acts. In passing upon the question the court has said, and has several times affirmed the declaration, that the action of the Secretary indicated his belief that this omission was significant of the intention of Congress to limit allowances in such cases to citizens of the United States at the time the depredations were committed, and that it has ever since been the practice of the Department to find in allowed cases that the claimants were citizens of the United States at the time of the commission of the depredations.

While it is true that, as the court has stated, it was the practice of the Interior Department to find, in allowing cases, that the claimants were citizens of the United States at the time of the commission of the depredations, and that this practice of the Department is significant of its construction of the intention of Congress to limit allowances in such cases to citizens, my investigations show that the proof in the Interior Department was not adequate to sustain the finding of citizenship in many of the allowances. On the contrary, it is reasonably certain that allowances were made in many cases by the Secretary in favor of aliens and persons who had no right to have their claims allowed, and it is absolutely certain that such is true regarding the cases set out in this report, in which the proof taken by me shows that the claimants were not citizens when their losses occurred.

In line with the decisions of the court in the cases mentioned, it has been held in the case of William Cox (decided May 21, 1894) that proof of citizenship is a fact as necessary to be proved in a case that had the allowance of the Secretary of the Interior as well as in a case that did not have the allowance of the Interior Department. Such proof was necessary to be made to confer jurisdiction upon the court to render a judgment. (William Cox *v.* United States et al., 29 C. Cls. R, 349.)

Upon the authority of these decisions a motion for a new trial upon the ground that the claimant was not a citizen of the United States at the time of his loss has been made in each of the following cases, the investigation showing the positive fact that the claimant, or one of claimants, as the case may be, was not a citizen:

No.	Claimant.	Amount.	No.	Claimant.	Amount.
2054	Henry H. Woodward	$252.75	6331	William J. Hazen	$150.00
1014	Stephen S. Sharp et al	5,305.00	823	Joseph Leonia	1,000.00
2636	A. E. Ludolph, administratrix	3,900.00	4024	Otto Uhlig	4,961.00
841	August Ernst	125.00	922	Thos. Chevalier	587.87
3177	Deluvina Vigil de Desmaris	8,625.00			

Similar motions have also been made in the following cases, the investigation showing that the claimant was born an alien and was unable or has failed, upon opportunity given, to show naturalization or to furnish the Department with information from which the fact of naturalization may be ascertained by officers of the Government:

No.	Name.	Amount.
3387	Esteban H. Biernbaum, administrator	$2,160.00
3171	Lucinda Wiggins, executrix	350.00
6384	Anna Nelson, executrix	800.00
2027	John L. Whitford, administrator	737.25

A similar motion has been made, the claimant having been naturalized subsequent to his loss, but claiming citizenship under the decision of the Supreme Court in the case of Boyd *v.* Thayer (143 U. S. R.), in the case of Jean Louis Rilliet, No. 1867, for $2,723.

Similar motions have been made upon the simple question that the record fails to show the citizenship of the claimants in the following cases:

No.	Claimant.	Amount.	No.	Claimant.	Amount.
613	Alex. G. McGregor, administrator	$375	4831	Miller & Hardin	$2,550
1294	.....do	720	5793	Oscar F. Bike et al	488
2194	Natividad Montano	420	6387	Russell S. Newell	2,000
1078	Robert M. Nelson	340	6574	Joseph Murphy	100
			3532	Riley Y. Cross, administrator	10,465

In each of these cases, however, the judgments being in all other respects regular, the claimant has been notified that upon the filing of satisfactory evidence of citizenship the motion will be withdrawn.

In the case of Woodward, hereinbefore referred to, where the allowance was made under the act of 1872, the motion for new trial is resisted upon the ground that citizenship was not jurisdictional to the Department, and under the act of 1872 was therefore not jurisdictional to the court. Cases allowed, however, before the act of 1885 were not cases to which Congress intended to give priority of consideration and a right to judgment when neither party elected to open the same, and the judgment in this case therefore was unauthorized, because the Department of Justice had no right under the act of March 3, 1891, to treat the case as an allowed case. It had, therefore, no priority of consideration, and the stipulation on that theory was unauthorized. In the contention that it was not a preferred case I am sustained by a decision of the Court of Claims. (Buchanan *v.* United States et al., 28 C. Cls. R., 127.)

The Court of Claims has held that it is without jurisdiction to render judgment against the Indian tribes and the United States where the tribe or band responsible for the loss was not in amity with the United States at the time of the depredation. (Marks et al *v.* United States, 28 C. Cls. R., 147; Love *v.* United States, 29 C. Cls. R., 332.)

This is true also of cases in which there was an allowance by the Secretary of the Interior. (William Cox *v.* United States, 29 C. Cls. R., 349; Alvin C. Leighton *v.* United States, 29 C. Cls. R., 288.)

Under the last two decisions it is unequivocally held that the amity of the tribes was as jurisdictional to the Interior Department as to the Court of Claims, and the jurisdictional act of March 3, 1891, is in accord with the general policy of the Government, and of all governments, not to pay for property destroyed in time of war. In an early decision before the court (Loranger's case, 1857), where property was destroyed by Indians attached to the British army in 1812, it was declared that for property destroyed by the public enemy it has never been supposed that the injured individual can call upon his Government for redress. The principles of this decision have been again and again announced by the court and received emphatic declaration in Cassius M. Clay's case, and in construing the act which gave the court jurisdiction of claims of citizens of the United States for the depredations of Indians, the court has been governed by express statutes. These statutes have denied to loyal citizens payment for the loss or destruction of property occurring in the civil war; and in the absence of some express provision of law to pay losses occurring in Indian wars the court has declared that it was without power to apply a different rule to a domestic dependent nation with whom the United States were in treaty relations, without the consent of such tribe or nation.

The decisions of the court in the matter of allowing any claim for a loss sustained during an Indian war have been fortified by the highest authorities upon international law, and by the previous legislation of Congress in dealing with claims of citizens for losses sustained at the hands of Indians on our borders. From the first statute in 1796 to the last act of Congress in 1891, the acts of Congress have been practically uniform upon this question, and the argument that it was the intention of Congress, by the act under which these claims are now being adjudicated, to confer on the court separate and distinct jurisdictions to inquire into and finally adjudicate the claims conceded to have the same common origin, though separated in the last act into classes, has been rejected after the fullest argument and consideration.

Acting upon the belief that it was never the intention of Congress, by the act under which these judgments were rendered, that any claim should be paid where the Indians were at war, I have presented motions for new trial according to the

following statement in which references are made to the decisions of the court upon the subject of a want of amity.

The court has adjudged that Joseph's band of Nez Perces was not in amity with the United States on September 13, 1877, having reference to the date of the depredation in the particular case of W. W. Woolverton *v.* United States et al. (29 C. Cls. R., 107).

Motions for new trial embracing that with other averments have accordingly been made in—

No.	Name.	Amount.	Date of depredation.
451	Michael S. Herr	$273.50	Aug. 12, 1877
6714	S. P. Johnson	950.00	Sept. 24, 1877

The court has found that the Rogue River and other tribes of Indians in Oregon were at war in 1855-56. The time at which the war began and ended has not been judicially determined, but court held that the Indians were at war as early as October 9, 1855, and as late as February, 1856. (George M. Love, 29 C. Cls. R., 332; James S. Valk, 29 C. Cls. R., 62.)

Upon the ground, therefore, that the defendant Indians were not in amity with the United States motions for new trial have been made in the following cases against the Rouge River Indians, the date of the depredation being also given:

No.	Name.	Amount.	Date of depredation.
3615	Martin Combs	$5,620.00	Oct. 22, 1855
3749	Robert C. Percival	751.00	Do.
1953	Wm. Barton, administrator	500.00	Do.
8078	Holland McCollum, administrator	1,447.50	Oct. 23, 1855
3941	Wm. H. Morgan	1,150.00	Do.
3621	James S. Wells	1,331.25	Nov. 20, 1855
1400	Granville Naylor	398.62	Sept. 25, 1855
5475	Hester J. Croxton	983.25	Dec. 25, 1855
2742	Dennis Tryon	6,154.00	Feb. 24, 1856
5754	Phœbe E. Day	913.00	Mar. 24, 1856
2431	Allen Embree	500.00	June 19, 1856
284	John W. Redfield	3,149.91	Oct. 24, 1855

It may be added that the records of the Government and the testimony of the claimants and their witnesses in the particular cases, taken either before or since the judgments were rendered, are ample to show that the war began at an earlier date and continued to a later period than the respective dates named in the decisions mentioned.

The court has found that the Yakima, Klickitat, and other tribes of Indians were at war in 1855-56 in Washington. (Isaac Bush, 29 C. Cls., 144.)

The finding in the Bush case was that the Klickitat Indians were in open hostility on March 24, 1856, at the Cascades.

Motions for new trial have been made in the following cases, the depredations having been committed by the same Indians at the same time and place:

No.	Name.	Amount.
591	Daniel F. and Putnam F. Bradford	$7,820
1485	E. C. Hardy	589
1160	Gurden H. Palmer, administrator	1,085

That war, however, as shown in the various records of the Government, began simultaneously with the Rogue River war in Oregon, hereinbefore referred to, in the fall of 1855, and the hostile forces in Washington included the Yakima, Klickitat, Nisqually, Puyallups, White River, Cayuse, Walla Walla, and other tribes.

Motions for new trial have therefore been made upon the ground of the hostility of the Indians in the following cases arising out of that war, the date of the various depredations being also given:

No.	Name.	Amount.	Date of depredation.
4719	Allen Louis Porter	$2,513.00	Oct., 1855
5791	Abram H. Woolery	1,000.00	Do.
1674	Wm. B. Bolton	916.80	Aug., 1855
1675	Isaac Lemon et al	3,241.00	Nov., 1855
2949	Toussaint Morrisette	900.00	Nov., 1855-56
6116	H. A. Smith	1,618.00	Jan., 1856
6332	Henry Van Asselt	1,799.50	Do.

The court has held that the Bannock Indians were at war in June, 1878, the date of the depredation in the case of Marks et al (28 C. Cls., 147). The records show that the war had been in progress for several months prior to that date, and a motion for a new trial has accordingly been made on that ground in the case of Davis Levy, No. 2979, for $927; date of depredation, May 29, 1878.

The court has held that the Ogallala Sioux and the Cheyennes allied with them were hostile in 1867, the particular time referred to being the months of May, June, and August. (Alvin C. Leighton, Nos. 817–819.)

Motions for new trial have therefore been made upon that ground in the following cases, the various depredations, with one exception, having occurred in May, June, and August, 1867:

No.	Name.	Amount.	No.	Name.	Amount.
3563	Pablo Sanchez	$2,850	1014	Stephen S. Sharp et al	$5,305
1338	Joseph Knight	2,700	8636	A. E. Ludolph	3,900
1441	Joseph Bissonette	925	1101	Elizur Hills	200

The court has held that certain of the Sioux tribes were at war in 1865. (Penny & Sons, No. 4634.)

With the Sioux were associated, as appears from the Government records, various bands of the Cheyennes. Motions for new trial have been made upon the ground of the hostility of the Indians during that war in the following cases against the Sioux or their allies:

No.	Name.	Amount.	No.	Name.	Amount.
1035	Chas. H. Elston	$909	6134	Henry T. Clarke et al	$8,692
692 / 6156	Gomez & Foster	16,713	8609	Benjamin Claymore	450
1323	Oliver P. Wiggins	4,590	2332 / 3271	Hiram Davis	3,575
2725	Allen G. Reed	5,185	4843	A. T. Litchfield	10,190

The court has declared that the allied Sioux and Cheyenne tribes were at war in 1864, the date of the particular depredation being in August. (Daniel Freeman, No. 4943.)

Motions for new trial have been made on that ground in the following cases, the depredation in each having occurred in August of that year:

No.	Name.	Amount.
814	Edward Morin	$2,450
4024	Otto Uhlig	4,961
4393	Wm. E. Martin	984
1127	W. N. Hinman	1,000
981	William Bischof	1,500

The court has held that the Sioux were hostile in Minnesota in 1862. (Matthew Wright, No. 3856.)

A motion for a new trial has been made on that ground, the depredation having occurred during that war, in the case of George Storrs, No. 1163, for $740.

Other motions have been made upon the ground of the hostility of the Indians. In all such cases it is believed that the records of the Government, by which is

meant the reports of the various civil and military officers having charge of or connection with the Indians, fully sustain the averments of hostility.

The Ute Indians in 1879 were engaged in a short but bloody conflict with the United States troops. In one of these engagements Major Thornburgh was killed, about September 30 of that year. Motions for new trial have been made in the following cases against the Ute Indians, the date of the depredation being also given:

No.	Name.	Amount.	Date of depredation.
7534	George J. Hangs	$3,000.00	Oct. 21, 1879
7535	O. D. Gaff	2,550.00	Do.
7423	W. E. McLachlen, administrator	8,575.00	Oct. 6, 1879
8693	H. F. Errett, administrator	4,424.20	Sept. 29, 1879

Other motions upon the ground of the hostility of the Indians have been made as follows:

KIOWA.

No.	Name.	Amount.	Date of depredation.
291	E. P. Waterman	$380.00	1864
292	R. T. Batty	225.00	1864
4435	Andrew J. Greenway	700.00	1864
3528	Delilah E. Taylor	1,837.50	1867
4577	Elenterio Baca	2,575.00	1867
3980	Tomos Garcia	2,400.00	1867
2651	Jose M. Montaya	880.00	1867
982	Felix Ulibarrl	1,550.00	1867

KIOWA AND COMANCHE.

4585	Hiram Leaf	$100.00	1870
3524	Wm. E. Davis	180.00	1870
4708	Wm. E. Edgin	125.00	1871
4308	John M. Stacks	825.00	1871
4309	Alfred M. Green	165.00	1871
4896	Wm. B. Gilliland	400.00	1871
6304	Susan M. Roach	4,900.00	1871
1556	Henry A. Whaley	6,700.00	1871–72
1859	Don A. Sanford	21,000.00	1872
4905	John W. Brawley	250.00	1872
939	William W. Man	125.00	1872
984	Theodore Coulson	125.00	1872
4311	Adam Sheek	50.00	1872
4908	S. C. Dean	50.00	1872
5404	Thos. A. Wythe	90.00	1872
1551	George W. Wynne	6,120.00	1872
4310	Henry Williamson	125.00	1873
463	Malcolm McNeil	200.00	1873
4891	John W. Godfrey	250.00	1873

The reports of the Secretary of War show that during these years the military were kept constantly employed in the protection of the people of Texas and their property, that many lives were lost, and a vast amount of property taken or destroyed. Suits are yet pending in the court for property taken by these Indians during that period aggregating hundreds of thousands or perhaps several millions of dollars.

COMANCHE.

In two cases against the Comanche Indians a motion has been made on account of their hostility.

No.	Name.	Amount.	Date of depredation.
829	Joel McKee	$9,960.00	1860
1555	James Whitehead	7,100.00	1861

APACHES.

No.	Name.	Amount.	Date of depredation.
2064	Thomas A. Trujillo	$375.00	1854
523	Trinidad S. de Jaramillo	420.00	1857
2550	Jose Saiz	400.00	1863
1514	P. R. Tully	15,215.00	1863

MESCALERO APACHES.

5728	Samuel N. Hedges	$6,421.00	1854
2982	Juan B. Garcia	400.00	1860
4189	Frank Lesnet	2,737.00	1873
4032	M. W. Fanning	200.00	1880
4026	Peter Corn	250.00	1880
4027	.....do	150.00	1880
4028	.....do	75.00	1880
4029	.....do	75.00	1881

CHEYENNES.

[illegible]	J. L. Sanderson	$7,740.00	1867

CHEYENNES AND ARAPAHOES.

3942 4129	Rufino Gonzales	$605.00	1854
3234	William E. Dean	353.00	1868
5844	John P. Polk, administrator	325.00	1868
2753	Thos. Tedstone	200.00	1868
3235	Martha A. Gallup	223.60	1868
7553	Jerome H. Scott	625.00	1874
5786	Thos. O'Laughlin	4,320.77	1874
1901	Andrew J. Howell	550.00	1874
828	John McKee	5,667.00	1876
6385	Isaac L. Peck	725.35	1878
191	Henry Kollar	570.00	1878

SIOUX.

830	S. A. Hamlin	$2,025.00	1869
2003	Frank Schmidt	1,364.00	1869–70
1081	Jose Merrivale	2,820.00	1872
4890	Isaac Fieldhouse	1,005.00	1874

NAVAJOES.

1580	E. Montaya	$3,800.00	1862
2597	Francisco Saiz	2,575.00	1862
8606	Lazora Sanches	5,250.00	1862
6029	Felipe Delgado	7,930.00	1862
3232	Francisco Saiz	1,835.00	1862
2390	Jesus M. Tafoya	720.00	1864
2392	Marcus Gonzale	900.00	1866

The court has held that suit may not be maintained against the Nez Perces tribe on account of a depredation committed by Joseph's band of Nez Percés, for the reason that the latter was regarded by the authorities as a separate and independent treaty making power. (W. W. Woolverton, 29 C. Cls. R., 107.)

Motions for new trial upon that ground have, therefore, been made in the cases of:

No.	Name.	Amount.
457	Michael S. Herr	$273.50
6714	S. R. Johnson	950.00

Such distinctions are equally marked, if not more plainly so, among the Sioux and also the Apache Indians, and the distinctions have been uniformly regarded for many years in the making of treaties and the creation of annuities.

Motions for new trial have been made, therefore, upon that ground, the suits having been instituted against "the Sioux" or the "Apache" tribe, though the proof showed that a particular band, having an independent existence and an organization of its own, had committed the depredation:

APACHES.

No.	Name.	Amount.	No.	Name.	Amount.
524	Samuel C. Patterson	$1,600.00	1402	Lorin S. Jenks	$250.00
1468	Joanna Barry	1,270.00	3362	Lorenzo Valdez	6,450 00
6984	George A. Webber	100.00	1514	P. R. Tully	15.215.00
8235	Hammon & Taylor	238.82			

SIOUX.

725	Carter & Crary	$4,000.00	1081	Jose Merrivale	$2,820.00
726	Coe and Carter	21,310.00	4393	William E. Martin	984.00
812	Edward Morin	425.00	1127	W. N. Hinman	1,000.00
6134	Henry T. Clark et al	8,692.00	6913	Morgan A. Hanco	3,125.00
614	Jeremiah Graham	750.00	6637	David Cottier	840.00
1339	Hiram B. Kelley	400.00	3614	Nelson Story	2,000.00
1432	Augustus Trabing	675.00	1163	George Storrs	740.00
1439	Nicholas Janis	1,615.00	1344	Daniel S. Shaw	2,100.00
1443	Joseph Bissonette	1,057.95	3829	Bernardo Valencia	1,800.00
814	Edward Morin	2,450.00	5906	Jose Merrivale	660.00
1079	Jose Merrivale	1,190.00			

It should be stated, also, that various other grounds are assigned in the motions in these cases, some of which go to the jurisdiction of the court.

The court has held that if there was no clause of the treaty between the United States and the Indians creating liability for depredations, the Secretary of the Interior had not the authority to allow a claim against the Indians. (Vicente Mares, 29 C. Cls. R., 197.)

Such being the case in the following causes, that fact is set up in motions for new trial and the additional averment made that the stipulation for judgment in a case so allowed was unauthorized, and the court was therefore without jurisdiction to render the judgment.

No.	Name.	Amount.
6521	Augustus C. Larkin *v.* Cherokee Indians	$6,072
1993	Jose A. Trujillo *v.* Jicarilla Apaches	300
129	William Zeigler *v.* Osage Indians	100

Other objections to the judgments in these cases are also embodied in the motions.

The investigation developed that the claimants were not the sole owners of the property, on account of which judgment was rendered in the following cases, motions for new trial of which aver the fact:

No.	Name.	Amount.	No.	Name.	Amount.
4210	Matthew Clark	$550.00	2668	Cyrus F. Goddard	$3,120
5655	Manuel Jiminez	5,135.07	3648	Stephen Stanley	12,935
2394	Maria P. Heranda	7,500.00	4024	Otto Uhlig	4,961

In the following cases, as is averred in the motions for new trial therein made, judgments were rendered for sums in excess of the amount actually lost by claimant out of his own property.

No.	Name.	Amount.
6521	Augustus C. Larkin	$6,072
4719	Allen Louis Porter	2,513
882	Allen G. Reed	1,300

The motions in these cases are based also upon other grounds equally important. Upon general grounds of the insufficiency and the contradictory character of the testimony heretofore taken motions for new trials have been made in the following cases:

No.	Name.	Amount.
2713	Patrick Shanley	$785
3648	Stephen Stanley	12,935
3982	Antonio Jose Herrera	1,950

Other objections to the respective judgments are embraced in the motion, but the investigation as to them will be continued by an assistant, who will be in a short time engaged in the section where the claimants reside.

A motion for a new trial has been made in the case of Charles A. Bantley, administrator Preston Beck, No. 1277, for $6,565, upon the ground that Bantley's administration did not extend to the subject-matter of the suit and that payment of the judgment to him would be no defense to another suit pending for the same cause of action by an administrator appointed in New Mexico, where the intestate died. A motion to dismiss the pending suit has also been made, and the court has been asked to require the opposing administrators to appear, in order that their respective rights may be adjudicated and the United States and the Indians protected in the payment of the judgment to the award of which there is no other objection.

A motion for a new trial has been made by the claimant in the case of Edward Meyer, No. 277, for $165.50.

The claimant was awarded a pro rata out of certain funds set apart under a treaty with the defendant Indians, but declined to accept it, and brought suit for the total sum alleged to have been lost. Judgment was rendered in his favor for the pro rata shown to be due him, and the defendants have no objection to the judgment.

In the case of Lorenzo Valdez, surviving partner, No. 3362, for $6,450, there is a dispute between the survivor and the administrator of the deceased partner, the survivor claiming that the deceased partner was a partner in the profits only, and that the stipulation of his own attorney agreeing to a division of the judgment between them was made without authority. He repudiates the stipulation and declines to accept that part of the judgment rendered in his favor. These and other facts affecting the right of either or both to recover are set up in the motion.

In the case of Henry Williamson, No. 4310, for $125, in which a motion for a new trial has been made as hereinbefore shown, a motion to vacate the judgment for the reason that the claimant was dead when it was rendered has been also made, the information as to the death of the claimant having been acquired since the filing of the motion for new trial.

Of the cases in which motions have been made as reported, the judgments in all but seven cases were rendered during the administration of my predecessor. Of those seven cases the judgments were rendered on stipulations or submissions filed by my predecessor in the following cases:

No.	Name.	Amount.	No.	Name.	Amount.
1277	Chas. A. Bantley, administrator	$6,565.00	523	Trinidad R. de Jaramillo	$420.00
692	Philip P. Gomer and Foster	16,713.00	524	Samuel C. Patterson	1,600.00
6156			1551	George O. Wynn	6,120.00
			3528	Delilah E. Taylor	1,837.50

The one case that has been tried and gone to judgment in my administration, and in which a motion for new trial has been made, is No. 3532, Riley Y. Cross, administrator, for $10,465.

In Senate Mis. Doc. No. 249, second session Fifty-third Congress, the Department reported that a motion for a new trial was pending in the case of John A. Banning, No. 2653, for $9,600. The motion has been since decided adversely to the Government and the judgment has been certified for payment.

In Senate Ex. Doc. No. 7, part 2, second session Fifty-third Congress, the Department reported a motion for a new trial in the case of George W. Harmon, No. 6859, for $4,580. The motion has since been submitted to the court, and remains, as yet, undecided.

An appeal was reported in Senate Ex. Doc. No. 128, second session Fifty-third Congress, in the case of James H. Farmer, No. 1110, for $2,825. The appeal has been since withdrawn and the judgment certified for payment.

Judgments have been rendered since my last report in the following cases:

No.	Name.	Amount.	Date of judgment.
3379	John S. Friend	$897	Oct. 29, 1894
4895	James Wilcox	3,825	Dec. 24, 1894
7299	Wylis K. Morris	125	Do.
8528	James M. Whitmore, administrator	22,260	Do.

In the case of Friend recovery was sought to be had for personal injuries, but was denied by the court, and judgment was rendered for the value of the property lost. In the Wilcox and Morris cases judgment was rendered upon the defendant's election not to reopen the Secretary's allowance. In the Whitmore case the values were fixed as contended for by defendants and the judgment of the court is believed to be substantially correct, depending as it does upon the amity of the Navajo Indians in the year 1866.

It is proper to say that where reasonable grounds for an averment of an objection to a judgment have existed motions for new trial have been made. For instance, in the numerous cases against the Kiowas and Comanches for the years 1870, 1871, 1872, and 1873 there has never been an adjudication by the court in a contested case. In the event of a holding on the subject of amity adverse to the Government it would be necessarily followed by the dismissal of each of the twenty-eight cases in which the motions depend upon that ground.

If the court should hold adversely to the defendants upon the question of the right to render judgment against the Sioux and Apache tribes without designating the particular bands, and should hold that its finding in the Nez Percés case was not applicable to the twenty-eight cases in which that is stated as a ground of the motion, such of those cases as depended upon that objection solely would have to be withdrawn. But in view of the decisions referred to, the statements of the records as to the hostility of the Indians who are defendants in the various cases and the act of Congress directing the investigation, I have felt it my duty to set out such objections in such cases.

It is my purpose to prepare briefs for the defendants upon the motions for new trials promptly and bring them to a hearing if possible in the order in which the judgments were rendered.

CLAIMANTS' OBJECTIONS STATED.

That you may more fully judge of the propriety of my official action in filing the motions for new trial in the causes hereinbefore set forth, and of the difficulties which beset the United States in the presentation and argument of the motions, it will be well at this point to place before you the objections offered by the judgment claimants in opposition to the motions and to the line of argument adopted by them against the right of the court to sustain the United States in the effort to have new hearings. As nearly all the motions for new trial are made in that class of cases in which it is claimed that the Secretary of the Interior had made allowances at a time when the Interior Department had the sole jurisdiction, I quote the provisions of the act which apply to such of the cases as were given priority of consideration by the act conferring the jurisdiction on the Court of Claims. Among other things provided by section 4 of the act of March 3, 1891, is the following:

"*Provided*, That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration of such court.

"And judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proof.

"*Provided*, That the party electing to reopen the case shall assume the burden of proof."

It is urged by way of objection to the motions for new trial that the original judgments having been rendered upon elections and stipulations of the Assistant Attorney-General, the only pertinent evidence upon a motion for new trial is that showing that the elections and stipulations were void as for fraud; that the act of the Assistant Attorney-General was within his own discretion and is not now reviewable by the

court; that the court had at the time of the entry of the judgments no discretion but to enter the same according to the elections filed; and that in any event the new evidence must be of sufficient weight to overcome, with the evidence already presented, the adverse conclusions at the first hearing. The opinion of the court in the Indian depredation case of Wynne, administrator (decided January 15, 1894), is relied upon to sustain these contentions, where it is stated:

"A case that has then had the approval of the Secretary of the Interior and the Assistant Attorney-General can not be reopened for the mere purpose of an argument upon the same evidence that was before them without showing fraud, collusion, or manifest mistake apparent on the record." (29 C. Cls. R., 15.)

And again, in the case of Gorham (decided February 9, 1894), the opinion of the court is relied upon by claimants under the authority of the following language:

"But it is at the same time manifest that where a case has been carefully prepared by a law officer of the Government, and elaborately argued and carefully considered, the judgment which results should not be lightly set aside, and only where the fraud, wrong, or injustice complained of is established beyond a reasonable doubt." (29 C. Cls. R., 97.)

In connection with this case references have been made to some of the earlier decisions of the Court of Claims substantially announcing the doctrine of the Gorham case. (Childs, Pratt, and Fox's Case, 6 C. Cls. R., 44; Silvey's Case, 7 C. Cls. R., 305; Ford's Case, 18 id., 62.) Counsel for some of the claimants contend that the evidence must be newly discovered; and that in all cases allowed by the Secretary of the Interior under the act of 1872 and before the act of March 3, 1885, allowances were lawfully made to persons not citizens, and such allowances in favor of aliens were not affected by the jurisdictional requirements of subsequent acts of Congress.

These contentions and the decisions which it is alleged sustain them, adopted by claimants, were submitted by me to the Appropriations Committee of the House of Representatives in June last as the probable line of argument and authority upon which the claimants would rely if an investigation into the judgments should be directed by Congress. My opinion having been asked in the premises, I stated that I dissented from any construction of the statute which would have the effect of preventing a motion for new trial, notwithstanding the anticipated arguments and the claim that the decisions would sustain them, where the record in any case showed that any defense of a jurisdictional character had not been originally made; that the citizenship of the claimant and the amity of the tribe of Indians at the time of the alleged depredation were matters going to the right of the court to render judgment at all in any case, and must affirmatively appear. My opinion was submitted with the knowledge that there were many able lawyers in Congress fully competent to determine for that body the propriety of its course, independent of my view of the matter, with the desire on my part to avoid the responsibility of disturbing the judgments of the Court of Claims unless properly in the line of my duty, but with no desire to escape the additional labor imposed if the interests of the United States demanded my official action.

OBJECTIONS ANSWERED.

The statute itself is a sufficient answer to the objection that newly discovered evidence only can be used to sustain the motions for new trial. The act of June 25, 1868 (Rev. Stat., sec. 1088), expressly authorizes cumulative evidence. In the case of Ayers (5 C. Cls. R., 712) it is settled that ex parte testimony of the kind and character usually admitted by courts on a hearing of motions for new trial, making out a prima facie case, is sufficient to sustain the motions, although the evidence contained in these affidavits may be cumulative or otherwise. This is the settled practice of the Court of Claims under section 1088 in cases where the original evidence has been taken upon notice to all the parties. There is greater reason for the practice to be sanctioned in the cases now under consideration, because in a very large number of those which have gone to judgment upon the award of the Secretary of the Interior the Department allowances were founded upon the ex parte statements of the claimants themselves and their friends. There are numerous cases allowed by the Secretary of the Interior where there was no field investigation at all; but no doubt the able heads of that Department investigated the facts as fully as the means at their command and the opportunities allowed by law justified; and there are even complaints by some of the claimants that the Secretary arbitrarily cut down the allowances to inadequate amounts.

If it be held that the administrative decision of the Department of Justice in electing, under the fourth section of the act of March 3, 1891, not to reopen the awards of the Secretary of the Interior can supply the place of the proof necessary to confer jurisdiction on the court, that the ipse dixit of the law officers of the Government can create the jurisdiction, that the stipulations accompanying these elections not to reopen are conclusive and can not now be inquired into, then the Government and the Indian defendants whose annuities are chargeable must take the consequences of the mistaken action of the Department and make payment

in those cases where, but for the elections not to reopen, defenses might have been made on the ground of a want of amity and the equally substantive ground of the alienage of the claimant. But consent can not confer jurisdiction. The stipulation that a claimant was a citizen when, in fact he was not, and that amity existed when, in fact, it did not, was in itself a method of attempting to give the court the jurisdiction which the Interior Department did not possess in numerous cases and which the court did not otherwise have. Judgments obtained in this manner would seem to come strictly within the provisions of the statute, which makes no distinction in the judgments to be investigated.

The power which any court has over its judgments during the term at which they were rendered is a power which the Court of Claims may exercise over its judgments subsequent to the close of the term at which they were rendered, provided the bar of the two years has not fallen when the motion is made calling attention to the probable error and when, either by an inspection of the record or by affidavits, it shall appear that the judgment against the United States has worked a wrong or an injustice. As jurisdiction can not be conferred by the waiver of either party to the record, neither is jurisdiction finally dependent upon the act of the court itself in declaring that the conditions to jurisdiction existed where it can subsequently be shown that there was an absence of the jurisdictional requirements at the time of the rendition of the judgments. If the court has ever held adversely to this proposition I am not aware of it. The decisions referred to by counsel do not sustain the proposition that the judgments under consideration may not be set aside.

In the Gorham case to which allusion is made the court declares that where a case has been carefully prepared by a law officer of the Government and elaborately argued and carefully considered the results should not be lightly set aside, and only where the fraud, wrong, or injustice complained of is established beyond reasonable doubt. The opinion in the same case declares that cases may undoubtedly arise where the mistake, error, or negligence of an officer charged with the defense of the Government is so serious or so palpable that it would be a wrong and injustice to allow a judgment to stand. In proceeding under the statute the whole subject has been well stated by Mr. Justice Brewer where he said:

* * * "It would evidently be a wrong, an injustice to the Government, not to relieve it from the consequences of such a mistake of fact, and to continue in force a judgment which ought not to have been rendered." (Belknap *v.* United States, 150 U. S., 588.)

Under this decision of the Supreme Court and the later decisions of the Court of Claims (overruling Silvey's Case, 7 C. Cls. R.), it will only be necessary to reasonably satisfy the court that the stipulations which resulted in the judgments have had the effect of doing an injustice to the United States. The inroads upon the common-law rules in regard to new trials under section 1088 have been judicially declared to be such that the Government can make such a motion after a case has been appealed to a higher jurisdiction; and in granting a new trial the jurisdiction of the appellate court is ousted while the case is pending in the appellate court (United States *v.* Ayers, 9 Wall. U. S., 608), and a new trial may be granted even after the Supreme Court has affirmed the judgment of the Court of Claims; and a motion under this statute may be made at any time within two years after the final disposition of the case, whether that be by the judgment of the Court of Claims unappealed from, or by the judgments of affirmance in the Supreme Court; and while at common law the granting of a new trial rests ordinarily in the sound discretion of the court, the terms of section 1088 leave the Court of Claims no such discretion, if upon evidence, the court is "reasonably satisfied," as therein specified; the language that the court may grant a new trial means shall grant the new trial if they are reasonably satisfied of any fraud, wrong, or injustice. Without such a construction the object of the statute would be defeated. (18 C. Cls. R., 70.)

Summarizing the errors that appear to me to have obtained in the stipulations which resulted in the judgments under consideration, it will be seen—

(1) That there were cases where the Secretary of the Interior allowed claims where there were no treaties operative, and other cases where, under the general provisions of the treaties which were operative, the Secretary deduced a liability without authority under the acts authorizing the Interior Department to investigate. In such cases, where stipulations appeared for judgment, the agreement was unauthorized for the want of power in the Secretary to make the allowance, and such cases had no priority of consideration under the act of 1891.

(2) That there were cases where allowances were made by the Interior Department for aliens contrary to the acts of Congress and where the judgments were rendered upon the agreement of the claimant and the Government, with proof of citizenship not sustained by the record, but dispensed with in fact.

(3) That there were cases where allowances were made by the Interior Department independent of the amity of the tribe of Indians committing the depredations, and where the judgments were rendered upon the agreement of the claimant and

the Government regardless of the amity of the tribe and in instances where from the record itself war was flagrant.

In urging motions for new trial in cases arising under the first proposition above stated, I will rely upon the acts of Congress which only authorized the Secretary of the Interior to examine claims on account of depredations committed chargeable against any tribe of Indians by reason of any treaty and pursuant to some clause in the treaty creating the obligation for payment, and to the absence of any treaty at all, as defined by the Court of Claims in the case of Isaac H. Bush (decided 1894), and to the case of Vicente Mares, administrator (decided April 2, 1894), in which it is declared that the Secretary of the Interior had no jurisdiction of a claim unless there was an express provision of the treaty providing for payment, and annuities applicable to such payment.

In cases arising under the second and third propositions I will rely upon the specific language of the act of March 3, 1891, which conferred upon the Court of Claims the jurisdiction and authority to render judgment in proper cases for property of citizens of the United States only, taken or destroyed by Indians belonging to some band, tribe, or nation in amity with the United States; and to the interpretation given the act of March 3, 1891, by the court in the case of William Cox against the Bannocks (decided May 21, 1894), in which it was declared that the proof of citizenship, the depredation, the value of the property destroyed, the amity of the tribe, band, or nation, and the other facts necessary to be proved were alike as necessary in cases arising under the second clause of the act as in the first clause; and to the further construction given by the court in Leighton's Case (decided May 21, 1894), where the court declares that Congress did not confer separate and distinct jurisdictions to adjudicate claims arising from the same source, although separated into classes by the act; and to the plain letter of the law that the citizenship of the claimant and the amity of the Indians committing the depredation were as essential to the jurisdiction of the court in one class of cases as in the other.

I am strengthened in the general views expressed in this report upon the effectiveness of the motions for new trial to relieve the defendants against wrong and injustice occasioned by the award of the judgments upon the various stipulations, by the opinion of the court in a case which, I presume, was the first of this character presented to it on a stipulation. The court rendered a judgment in claimant's favor, Judge Weldon saying that it determined no question of law; that all questions in fact and in law had become merged in the allowance of the claim by the Secretary of the Interior, and that under the statute the judgment followed upon the stipulation as a matter of course. (Mortimer Hyne, 27 C. Cls. R., 113.)

In passing upon a similar motion for a new trial long before the enactment of the Indian depredation act of March 3, 1891, the court said:

* * * "As to the subject-matter, the intent to throw the door wide open for the investigation, detection, and defeat of every kind, shade, and degree of fraud, wrong, or injustice to the United States is manifest." (Ford *v.* United States, 18 C. Cls. R., 70.)

These adjudications, taken in connection with the decisions heretofore referred to, that the allowed or preferred cases were open to any and all defenses on the proper showing, warrants my confidence in the position that in cases where the stipulations admit the existence of conditions which did not exist, especially where such facts affect the court's jurisdiction, relief against the wrong and injustice will be readily granted and the judgments so obtained vacated.

Believing that Congress intended by section 1088 to devolve upon the Court of Claims in an express and special manner the protection of the United States against fraud or wrong of any kind, and the consequent injustice of judgments obtained by mistake or any species of wrong, I will, in cases where the ex parte showing is sufficient to obtain a new trial, proceed to take such further proof as may be had upon an investigation upon the second presentation of any such case which shall include the inquiry wherever necessary as to whether exorbitant sums have been allowed.

For the reasons which appear in another part of this report no evidence has been presented as yet in the judgments where motions for new trial are pending going to show that exorbitant sums have been allowed. In the cases certified for payment the evidence showed that the judgments were not rendered for exorbitant sums.

It is believed that as the objections contained in the motions for new trial in most of the cases go directly to question the jurisdiction of the court, notwithstanding the stipulations of the former Assistant Attorney-General on which the judgments were rendered, the allowance of the motions on those grounds will in effect finally dispose of the cases without further action upon the part of the Department except of a formal character.

Respectfully,

CHARLES B. HOWRY,
Assistant Attorney-General.

The ATTORNEY-GENERAL.