35TH CONGRESS, 2d Session. } SENATE. { MIS. DOC. No. 35.

# IN THE SENATE OF THE UNITED STATES.

FEBRUARY 3, 1859.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

## REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

MARTIN B. LEWIS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Depositions numbered 1, 2, 3, and 4, filed in the case and transmitted to the House of Representatives.
3. Solicitor's brief on the first and second argument.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said Court at Washington, this 3d day of February, A. D. 1859.

SAM'L H. HUNTINGTON,
*Chief Clerk Court of Claims.*

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IN THE UNITED STATES COURT OF CLAIMS.

*To the Judges of the Court of Claims of the United States of America, established by act of Congress, approved February* 24, 1855:

The petition of Martin B. Lewis, a citizen of the United States, residing at the Fresno Indian reservation, Mariposa county, respectfully represents to this honorable Court that he is the *bona fide* holder and owner for valuable consideration of a draft on the Commissioner of Indian Affairs for the sum of four thousand two hundred and seventy-eight dollars and fifty cents, a copy of which is as follows:

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

"SAN FRANCISCO, *March* 29, 1852.

"Upon the next appropriation by Congress for the Indian Department pay to the order of James D. Savage, for supplies furnished the Indians in fulfilment of treaty stipulations, four thousand two hundred and seventy-eight dollars and fifty cents, ($4,278 50.)

"O. M. WOZENCRAFT,
"*United States Indian Agent.*

"Hon. LUKE LEE,
"*Commissioner of Indian Affairs.*"

Endorsed: "JAMES D. SAVAGE."

Your petitioner further represents that the draft, of which the foregoing is a copy, was given by O. M. Wozencraft, the then United States Indian agent, at the time it bears date, and was for supplies furnished the United States by said James D. Savage, (the party to whom the said draft was made payable,) at the instance and by the order of O. M. Wozencraft, the Indian agent, the full particulars of which is set forth in the exhibit marked A. Your petitioner states that the prices charged in said account were the lowest market prices for such merchandise at that time and place. Your petitioner further states that he is the sole owner of said claim, and became so by a transfer of the same to him for its face by the public administrator of Mariposa county and surviving partner of Savage, for a debt of equal amount justly due to your petitioner by said Savage, and allowed in the settlement of Savage's estate. The draft was duly sent forward and presented for payment, and payment refused.

Your petitioner, therefore, prays that the Solicitor of the United States appointed to represent the government before this honorable Court, may be required to answer this petition, and that such proceedings may be had thereon as justice and equity require, and that on the final hearing that this Court will grant to your petitioner such relief as his case merits.

JONATHAN D. STEVENSON,
*Attorney for said petitioner.*

*City and County of San Francisco.*

This day, before me, William Hart, a notary public in and for the county of San Francisco, and duly authorized to administer oaths, therein appeared Lewis Leach, and made oath that the statements relative to the matters of fact in the foregoing petition of Martin B. Lewis are true, the affiant living in California, and having personal knowledge thereof.

LEWIS LEACH.

Subscribed and sworn to before me this 25th day of January, 1856.
W. HART, *Notary Public.*

*Exhibit A, being a copy of an original in the charge of O. M. Wozencraft.*

THE UNITED STATES INDIAN DEPARTMENT,

TO MAJOR JAMES D. SAVAGE & CO.

To furnishing the Indians on the San Joaquin reservation the following articles, viz:

| | | | |
|---|---|---|---|
| 1851. | | | |
| December | 1. | To...500 lbs. of flour, at 37½ per lb | 187 50 |
| | 5. | To...600.....do.....do | 225 00 |
| | 10. | To...600.....do.....do | 225 00 |
| | 10. | To...100.....do.....do | 37 50 |
| | 15. | To...600 .....do.....do | 225 00 |
| | 20. | To...600.....do.....do | 225 00 |
| | 26. | To...800.....do.....do | 300 00 |
| 1852. | | | |
| January | 1. | To...700.....do.....do | 262 50 |
| | 10. | To...600.....do.....do | 225 00 |
| | 25. | To...800.....do.....do | 300 00 |
| | 25. | To...300.....do.....do | 112 00 |
| February | 1. | To...400.....do.....do | 230 00 |
| | 5. | To...100.....do.....do | 37 50 |
| | 6. | To...100.....do.....do | 37 50 |
| | 10. | To...600.....do.....do | 225 00 |
| | 15. | To...300.....do.....do | 112 00 |
| | 27. | To 1,500.....do.....do | 562 00 |
| March | 3. | To 1,000.....do.....do | 375 00 |
| | 9. | To 1,000.....do.....do | 375 00 |
| | | | $4,278 50 |

UNITED STATES OF AMERICA,
*State of California, city and county of San Francisco,* } *ss.*

James D. Savage, within named, being duly sworn, doth depose and say: that he is one of the firm of Savage & Co., within named, and that the said firm of Savage & Co. furnished and provided to and for the Indians in the San Joaquin reservation all and singular the goods and supplies within mentioned, and that the within account is a just and true account of the goods and supplies so as aforesaid furnished the said Indians, and that the same is justly due to this deponent's said firm, and that no part thereof has been paid to said firm, or to any other person by their order, or for their use, and that the amount justly and truly due deponent's said firm amounts to $4,278 50.

JAMES D. SAVAGE.

Subscribed and sworn to before me, this 27th day of March, A. D. 1855, as witness my hand and official seal.

[L. S.]

MATHEW F. FURMAN,
*Notary Public in and for said county.*

I certify, on honor, that the above account is true and just, and that the supplies were for the benefit of the United States.

O. M. WOZENCRAFT,
*U. S. Indian agent, Middle district, California.*

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IN THE COURT OF CLAIMS.—No. 506.

MARTIN B. LEWIS *vs.* THE UNITED STATES.

*Brief of the United States solicitor.*

Besides the testimony taken in this case, and yet unprinted, the following public documents of Congress will be referred to, viz:

Doc. 1, Senate, 2d session 31st Congress, Annual Rep. Sec. Int.

Doc. 61, Senate, 1st session 32d Congress, Debts contracted by Indian Agents, &c.

Doc. 4, Senate, special session, 1853, Correspondence with Indian Agents.

Which will be hereafter briefly designated as documents 1, 61, 4.

On or before the 14th of October, 1849, Adam Johnston was appointed sub-Indian agent on the Sacramento and San Joaquin rivers, in California, to include the Indians at or in the vicinity of those places, and any others to be subsequently designated by the Indian Department.—(Com Ind. Aff. to Johnston, Oct. 14, 1849, Doc. 4, p. 2.) This sub-agency was subsequently restricted to the Indians "in the valley of San Joaquin."—(Com. Ind. Aff. to Johnston, Nov. 24, 1849, Doc. 4, p. 5; also pp. 4, 6.)

It seems this appointment was made under the 5th section of the act organizing the Department of Indian Affairs, approved June 30, 1834.—(4 Stat. 735.)

By the act of September 28, 1850, (9 Stat 519,) the President was authorized to appoint three Indian agents for California, and by an act approved September 30, 1850, (9 Stat. 558,) an appropriation of $25,000 was made "to enable the President to hold treaties with the various Indian tribes in the State of California."

George W. Barbour, Redick McKee, and O. M. Wozencraft, were appointed agents under the act of September 28, 1850, but it being soon discovered that no appropriation had been made for their salaries, their functions and salaries as Indian agents for California were suspended; and they were appointed, under act of September 30, commissioners to treat with the Indians.—(Doc. 1, p. 29.) The instructions to them, dated October 15, 1850, as commissioners, are printed in Doc. 4, p. 8. The appropriation of $25,000 was then remitted them.

By an act approved February 27, 1851, sec. 3, (9 Stat. 586,) it was enacted, that "hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian Department as the President of the United States may designate for that purpose." The

provisions of this act were communicated to the commissioners by the Commissioner of Indian Affairs, in a letter dated April 12, 1851, (Doc. 4, p. 14,) whereby they were informed that their offices and functions as commissioners were abrogated and annulled ; they were, however, directed not to suspend negotiations, but to enter upon their appointments as agents, and were, *as such*, designated [under the act of 1851] to negotiate with the Indians of California, under the instructions already given.

This letter was received by the commissioners in San Francisco, early in June, 1851.—(Doc. 4, p. 130.)

By act of March 3, 1851, (9 Stat. 572,) a further appropriation of $25,000 was made for expenses of treating with Indians in California, which was remitted to them by the Commissioner of Indian Affairs, June 25, 1851.—(Doc. 4, p. 17.)

On the 27th of June, 1851, (Doc. 4, p. 17,) the Commissioner of Indian Affairs wrote to the commissioners that the two appropriations of $25,000 each constituted all the money applicable to the negotiation of treaties in California ; and, he said, "when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress." This letter reached McKee September 14, near Humboldt river, (p. 186,) Barbour at San Francisco, in September, (p. 260,) and Wozencraft on the Sacramento river, September 2.—(p. 180.)

The commissioners arrived at San Francisco between the 27th of December, 1850, and January 8, 1851, (Doc. 4, p. 53,) and soon after started southward up the valley of the San Joaquin, meeting and treating with the Indian tribes of the valley.—(Doc. 4, pp. 54 to 76.) Arrived near the head of the valley, at camp Barbour, May 1, (Doc. 4, p. 76,) they concluded to separate and act individually in their several districts, which had been determined by lot. Barbour took the southern district, Wozencraft the middle district, and McKee the northern district.

This division was communicated to the Commissioner of Indian Affairs by letters of May 1 and 13, 1851, (Doc. 4, p. 77,) and approved by him June 27, 1851.—(Doc. 4, p. 17.)

From Camp Barbour Wozencraft returned to San Francisco May 13, and on the 24th left again to visit and treat with the Indians in the northern part of his district. From this he returned to San Francisco on or before the 30th of September, (Doc. 4, p. 187.) Besides what cash he had expended, he had incurred debts for provisions furnished to Indians up to September 16, to the amount of $60,060, (Doc. 4, p. 189.)

This sum alone exceeded the whole appropriation, and he had previously, as above shown, received the letter of the Commissioner of Indian Affairs of June 27, 1851, directing him in that event to cease negotiation. From this date forward, therefore, September 16, 1851, he had no authority except as "agent simply."

The claim of Lewis arose long after this date.

The claim is for flour furnished the Indians by James D. Savage

& Co., from December 1, 1851, to March 9, 1852, to the amount of $4,278 50, by order of Wozencraft. For this amount Wozencraft drew upon the Indian department a draft dated San Francisco, March 29, 1852. This draft was endorsed in full by J. D. Savage to Wells, Fargo & Co., and by them to Riggs & Co. It was not accepted by the drawee, and indeed does not appear ever to have been presented for payment. It came into the hands of Savage's administrator, and was by him passed to Lewis. All endorsements subsequent to that of J. D. Savage are stricken out; and the body of his endorsement is also stricken out, leaving his name alone. This is not an endorsement in blank, which will enable the holder to maintain an action on the draft; nor can there be any privity of contract between the United States and the holder, since the draft has not been accepted. The testimony shows that this claim is a portion of a claim of more than $25,000, all constituting the same cause of action; and it is not competent for Savage or his representatives to parcel out this claim and subject the United States to several suits. The whole should be presented and investigated together.

Savage was a trader, licensed to trade with the Indians south of the San Joaquin. The Indians on the reservation for which he was licensed were working and mining for him and other whites, (Doc. 4, p. 128;) and the traders paid large sums for licenses, and realized great profits from their trade with the Indians, (Doc. 4, pp. 107,128.) It is contrary to public policy, if not in violation of statute, (act of June 30, 1834, sec. 14, 4 Stat., 738,) for any such trader to act as an agent of the United States, in exercising a discretionary authority to distribute provisions among the Indians, as Savage appears to have done.

It is not proven that the Indians were entitled to receive this supply of beef, under any agreement made with them by the commissioners, or either of them; but even if they were, it is contended that no authority was given to the commissioners to do more than was necessary to conclude treaties; that this authority did not extend beyond the conclusion of the treaties—*i. e.*, the commissioners could not, under the authority to conclude the treaties, agree with the Indians, as an inducement to accept terms, that the treaties themselves should be fulfilled before being ratified by the Senate, or even being forwarded to the President. See letters of Commissioner of Indian Affairs to them, June 25, 1851, and July 16, 1851, (Doc. 4, pp. 17, 18.) The act of June 30, 1834, sec. 13, (4 Stat., 737,) designates the officer under whose direction all goods required to fulfil treaties with Indians shall be purchased.

The solicitor maintains that the commissioners had no authority to make contracts beyond what was expressly or impliedly given in their written instructions:

That, if they had any such authority as commissioners, it was taken away by the act of February 27, 1851;

Or, if not by that act, then by the instructions of April 12, 1851, even if given under an erroneous construction of the act, (U. S. vs. Eliason, 16 Pet., 291:)

And that all authority, except as agents simply, ceased under instructions of June 27, 1851, on or before the 30th of September, 1851.

It is further contended, that the contract with Savage is void, being made contrary to the act of May 1, 1820, (sec. 6, 3 Stat., 568,) which prohibits any contracts, except such as are made under a law authorizing the same, or where there are appropriations adequate to their fulfilment;

And again, being made contrary to the provisions of the act of June 30, 1834, (sec. 13, 4 Stat., 757,) which prescribes the mode of purchasing goods for Indians;

And again, if these acts should not be held to apply, objection is further made for non-conformity to the act of March 3, 1809, (2 Stat., 536,) as construed by Attorney General Berrien, August 29, 1829.

It is claimed by the petitioners, that the relation of the government to the Indians is similar to that of guardian to his ward; and it is, therefore, bound for necessaries furnished. If so, those who claim to have furnished necessaries must prove the necessity, (Chitty on Cont. 117, and cases there cited,) and that the government has funds of these wards in possession to pay the debt. But we deny the existence of that relation, and contend that the duty of the government to the Indians is one of imperfect obligation, and one which Congress only can acknowledge and discharge.

The solicitor denies that Wozencraft had authority to purchase the flour from Savage.

He denies that the Indians for whom it was purchased needed it for their subsistence.

And he denies that any of it ever came into the possession of any officer or agent of the United States.

JOHN D. McPHERSON,
*Deputy Solicitor.*

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IN THE COURT OF CLAIMS.

MARTIN B. LEWIS *vs.* THE UNITED STATES.

*Brief on reargument.*

Claim for the amount of a draft made on the 29th of March, 1852, by O. M. Wozencraft, a United States Indian agent for California, upon the Commissioner of Indian Affairs, for the sum of $4,278 50.

The claimant insists that this draft was for supplies furnished by James D. Savage, at the instance of said Wozencraft, for the Indians on San Joaquin reservation between the 1st of December, 1851, and the 9th of March, 1852,

FACTS AS UNDERSTOOD BY THE SOLICITOR.

*First.* That the said Wozencraft had no power or authority from the government to contract the debt in question.

1. The statute does not confer the power upon agents or commissioners to contract debts.

The 7th section of the act for organizing the Department of Indian Affairs (4 U. S. L. 736) specifies the duties of Indian agents in these words:

"It shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies *agreeably to law;* to obey all *legal* instructions given to him by the Secretary of War, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs, and to carry into effect such regulations as may be prescribed by the President."

There is no regulation made by the President authorizing the contracting of a debt by an agent.

2. The instructions to Wozencraft neither authorized or contemplated that he should contract a debt.

The instructions to him and his colleagues are dated October 15, 1850, (Senate Doc. 4, p. 8,) and contain the following:

"You are appointed, with the sanction of the President, commissioners 'to hold treaties with various Indian tribes in the State of California,' as provided in the act of Congress approved September 30, 1850." This was the act appropriating the $25,000.

The instructions further provide:

"As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper. On the arrival of Mr. McKee and Mr. Barbour in California, they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and, after obtaining whatever light may be within its reach, will determine upon some rule of action which will be most officient in attaining the desired object, which is, by all possible means, to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties, binding on them towards the government and each other. You will be able to judge whether it will be best for you to act in a body, or separately, in different parts of the Indian country."

There is nothing in the instructions at all intimating that the commissioners might contract debts.

3. On the 9th of May, 1851, the functions of the commissioners were terminated, and they were directed to enter upon their duties as agents.

No new functions were specified in the letter of the Commissioner.

In reply to a letter of Curtiss & Peabody, Governor Marcy, as Secretary of War, wrote, December 7, 1848, in relation to the Frémont claim, as follows: (Ex. Doc. 109, p. 67.)

"As no officer of this department is authorized to borrow money on the faith of the United States, the department cannot recognise any such contract."

The Indian Office, in a letter to the Interior Department, dated April 13, 1852, (Doc. 61, p. 2,) states:

"The whole amount of appropriations for Indian purposes in Cali-

fornia was placed in the hands of the agents, and they had no authority whatever for exceeding that amount in their negotiations."

"The question of the liability of the government to pay these debts must necessarily be decided by Congress."

*Second.* The commissioners, and Wozencraft in particular, and those with whom they dealt, including Savage, knew and perfectly understood that they had no power to contract debts.

This fact is fully established by the terms of the draft itself.

In the letter of Wozencraft, of May 29, 1852, to the Indian Office, (Doc. 4, p. 332–'3,) speaking of Hensley's drafts, he says;

"I deem it due to myself to inform you of the foregoing facts, and to assure you that I am aware that I have no authority to draw on the department other than *presumptive* drafts on the current action of Congress!"

Barbour (Doc. 61, p. 3) says:

"After separating with my colleagues, many proposals were made by different persons to supply the amount of beef, &c., necessary to carry out the treaties that had been or might be made. I invariably answered such propositions by an assurance that I had no direct authority to make such contracts."

Wozencraft, (Doc. 4, p. 121,) in a letter dated July 18, 1851, says: "In the subsequent contracts, the parties agree to furnish the beef at the current cash price for net beef at the place of delivery, delivering them on foot, and wait for the money until an appropriation is made."

*Third.* Wozencraft and the other agents were forbidden by the Indian Office to contract debts, and long prior to the contracting this particular debt.

On the 16th of July, 1851, the acting commissioner, Mix, wrote to Barbour as follows:

"SIR: Your letter of May 14, 1851, transmitting copy of a treaty concluded by you at Camp Belt with several tribes of Indians in California, has been received.

"Your attention is directed to the following extract of a letter to Agent McKee, June 25, 1851, to which you will conform your action in future negotiations of treaties: 'In the copies of the treaties made with several Indian tribes heretofore transmitted to this office, there are provisions for delivering to them sundry articles in 1851, which cannot be complied with, as Congress will not be in session in time to make the necessary appropriations. Should you conclude other treaties, you will fix the time and payment, under any stipulation, at a period sufficiently in the future to allow of congressional action to meet the requisition.' "—(Doc. 4, p. 18.)

On the 27th of June, 1851, Mr. Mix wrote to McKee as follows:

"You will have perceived that though $75,000 were estimated and asked for the service in which you are engaged, Congress appropriated only $25,000, the amount remitted you on the 25th instant, which, with the $25,000 heretofore placed in your hands, is all that is applicable to the negotiation of treaties in California; and when the funds referred to have been exhausted, you will close negotiations and proceed with the discharge of your duties as agents simply, as the

department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress."—(Doc. 4, p. 17.)

This letter was received by McKee the 14th September, (Doc. 4, p. 186,) and Barbour in September, (p. 260,) and Wozencraft on the 2d of September, 1850, (p. 180.)

Mr. Mix, on the 9th of July, 1851, wrote Wozencraft, (Doc. 4, p. 21.) as follows:

"You will forward to this office diagrams of the country ceded by the Indians to the United States, and of the lands reserved for them, in all treaties you have concluded or may hereafter negotiate with them; and also transmit in every case the estimates of the money that will be required to fulfil the stipulations that may have been agreed upon."

Barbour, (Doc. 61, p. 4,) in writing the Indian Office, says: "Your department had instructed the commissioners to make no further stipulations for feeding Indians during 1851, in any treaties we might make after the receipt of that letter."

*Fourth.* The Indian Office did not approve, but disapproved of the contracting debts by these agents.

On the 17th of May, 1852, Mr. Lea wrote McKee and Wozencraft as follows, (Doc. 4, p. 26:)

"GENTLEMEN: It is feared a considerable length of time may yet elapse before the necessary appropriations are made to enable the superintendent of Indian affairs for California to repair thither and enter upon the duties of his office; I have, therefore, to request that at the earliest practicable period you make a full and detailed report directly to this office of all contracts, debts, and liabilities made and incurred by the agents of the department in California. These are matters that have given rise to much discussion here as well as in California, and the agents owe it to themselves and to the government to place the department in possession of all facts and circumstances tending to elucidate transactions of so much importance, and yet of such a character that they cannot be approved."

*Fifth* It is not shown that the supplies charged for in this case were furnished under any treaty, ratified or unratified.

The abstract made by Wozencraft, found at page 398 of document 4, states that Savage's claim was for flour furnished in San Joaquin valley. I have found no evidence showing that there was a treaty containing provisions requiring the payment by the government to these Indians of any amount in money or provisions, nor any showing that the flour was delivered in pursuance of such provisions. It may have been so, but, if it was, it has not been proved.

*Sixth.* The only proved pretext for contracting these debts consisted in fears occasioned by the illegal and unauthorized acts of these agents themselves.

1. Wozencraft, Barbour, and McKee were authorized to make treaties, and to expend, in so doing, the two appropriations of $25,000 each.

They could incur all the usual and necessary expenses in holding

councils, (such as feeding the Indians and making presents,) at that or at a future time, out of the money thus appropriated.

2. They were authorized to insert such provisions in the treaties as they might deem expedient; but these could not become operative until ratified by the Senate, nor could payments be made under them until Congress should make the necessary appropriations.

3. They had no authority to contract, in the treaties to pay money or furnish supplies, until the treaties became a law by ratification. They were restricted in their powers to make expenditures to the appropriations furnished to them. They could not by treaty make a contract for supplies, or anything else, that would be binding or operative upon either party until approved by the President and Senate. This they and all dealing with them were bound to know, and did actually know, as is shown by the letters of the agents.

4. It is conceded in the letters of the agents, and nowhere denied, that the Indians, if they had been permitted to remain where the agents found them, would have been able to subsist as they formerly had done.

In a letter of the 15th of October, 1851, (Doc. 4, pp. 204, 206,) Wozencraft thus describes their original condition:

"In the valleys we find a mild, equal, and temperate climate throughout the country; the indigenous products, suitable for food, not so abundant, however, as in the tropical latitudes, constantly requiring of the natives, in order to supply their wants, a great portion of their time in procuring their food. There is an abundance of game in these locations, such as the elk and antelope, both of which are with difficulty captured, being found on the open plains. The rivers abound in fish, obtained at certain seasons. In procuring their food, a degree of industry is requisite; and thus we have a full type, in the higher organization of the climate, of the animal and vegetable products of the country. These Indians, like the climate, are mild, passive, and tranquil, industrious through necessity, and only so far as necessity requires in providing for their daily wants.

"The large game above referred to being so difficult to procure, they content themselves with the vegetable products and the lesser animals more easily obtained, from the *hare* down to *small vermin;* thus procuring their food through patient perseverance, and showing the valley Indians to be mild, patient, submissive, and tractable.

"The mountain Indians differ from those in the valleys as materially as do the climate and its products. There they have a cold bracing atmosphere, abounding in game, with but a sparse vegetable product. The climate requiring a full animal diet, compels them to pursue the chase and encounter its perils. The deer abound in the mountains, and it becomes necessary for the Indians to toil in their pursuit if they expect to procure their meat for food; in doing which they undergo great physical exertion, which the climate and its products are well calculated to sustain. And thus we have a race of beings immediately adjacent to the former, yet differing widely from them in every respect. Here are athletic, wild, brave, independent, and measurably intractable beings; their physical and mental organization far superior to those in the valleys. And there is a third and

intermediate race, whose abodes are between the plains, and immediately within the foot-hills; thus forming three separate and distinct races, all within a few degrees of longitude of each other. These tribes possess intermediate characteristics of the other two, showing as perfect gradation in their leading traits as there is in the climate and products of the country in which they live.

"Those tribes living high up in the mountains are generally larger and finer looking, with fairer skins and higher cast of features, and, as previously stated, more independent. The country affords them a great variety of products, from which they collect their food. The acorn being their great staple of consumption, one of the first causes of their complaints is, that the white man is destroying their oaks. The mansanette, a small apple, is also an article of food with them. Indeed, there is a great variety of seeds, berries, and vegetable products that have hitherto supplied their wants. But their broad fields are fast disappearing, and will continue to do so, as the white population increases, until their resources and bounteous nature are gone from them. In the mean while we would wish to teach them husbandry, that they may learn to produce from small fields a sufficiency to supply their wants.

"The salmon abound in these streams. The Indians construct dams entirely across the river, driving down poles in a peculiar manner, holding the maul or driver up in the air, while they repeat an invocation. They then fill it up by wicker-work of the willows. In adopting which method for trapping the fish, they cut off, in a measure, the supplies of those living above on the same streams. At all events they are there abundantly supplied, and this may be the favoring cause of their superior development."

At page 44, Johnson says:

"They all subsist on roots and grass-seeds from the earth, acorns and pine-seeds from the trees, and fish from the streams. Acorns, nuts, and small fish, are gathered in great quantities and stored in magazines, prepared for the purpose. They universally lay up enough of these things for two years' subsistence, and thereby guard against a failure in the future crop of the coming season.

"The acorns and nuts are ground into a kind of flour, which is done by means of mortars or deep basins drilled into rocks. Into these the acorns and nuts are placed and pounded as fine as flour. Before baking, the Indians not unfrequently mix with the flour berries of various kinds. All this is the work of the squaws, or, as they call them, '*mohales.*' Indeed, the same characteristics mark the whole of the tribes in the great valley of the Sacramento and its adjacent territory. They have an indefinite idea of their right to the soil, and they complain that the *pale-faces* are overrunning their country and destroying their means of subsistence. The emigration are trampling down and feeding their grass, and the miners are destroying their fish dams. For this they claim some remuneration, not in money—for they know nothing of its value—but in the shape of clothing and food."

At page 105, he says:

"I would call your attention first to the situation of the Indians of this region before and at the time the respective treaties were entered

into by them. They are an ignorant, indolent, and rather migratory people, who heretofore lived upon roots, grass-seeds, acorns, pine nuts and fish. Their main subsistence, however, was acorns, which they usually gathered in large quantities and stored away in magazines. On the breaking out of the war in December last, the Indians returned to the mountains, leaving behind them their principal stores of subsistence, intending to return for them as necessity required. The whites, in pursuing them, burnt and destroyed all that fell in their way; consequently, at the time the different treaties were entered into, the Indians of this region were destitute of anything to subsist upon, even if left to range at liberty over their native hills. Under each treaty they were required to come from the mountains to their reservations on the plains at the base of the foot-hills"

5. The Indians were taken to new homes without authority, and these homes were known to be poor.

There is no pretence that the agents had authority to take from the Indians their old homes, and remove them to others, to which they had acquired no special right or title.

They had not, in fact, sold their old homes, nor had they obtained new ones by a binding contract, and it is a matter of history that the government has repudiated those which the agents entered into.

The agents knew that they were acting without lawful authority.

They, in fact, were wronging the Indians, in order to give the whites the lands they wanted, by reserving to the Indians poor lands which were useless to them, and would always be comparatively so.

Wozencraft (Doc. 4, p. 133) says: "The land given them is measurably unoccupied; it is very poor, with the exception of two or three small valleys."

At page 206, of Doc. 4, Wozencraft says: "It is to be regretted that most of the reservations given to them (the Indians) there is but little good tillable soil."

Again, he says, at page 83: "The country set apart for them so far is very poor soil; only a small portion is adapted to agricultural purposes."

These extracts show that, by unauthorized acts of these agents, the Indians were deprived of those possessions which were most valuable to them, and attempted to be hemmed in upon small tracts of poor territory. They also prove that to these acts, and those of violence on the part of the whites, are attributable all the difficulties and dangers, if any existed. The pretence that the Indians were starving, and that therefore there was a necessity for furnishing provisions, is all an idle pretence, and got up, mainly, to secure a sanction of illegal acts which had no good foundation to rest upon.

The real cause of all these transactions will be shown under another head.

*Seventh.* It is not shown that the supplies charged for in this case were furnished to prevent the Indians from starving.

The evidence shows that other causes than the fear that the Indians would starve were at the bottom of the arrangements in contracting debts. Wozencraft does not put his justification upon that ground, nor does Barbour.

The real reason for furnishing provision to the Indian is to be found in—

1. The anxiety of the whites to possess the Indian homes and hunting grounds, and the gratification of the gold diggers.

2. To pacify the Indians, and to prevent their resenting the wrongs inflicted upon them by the whites.

It is also probable that the anxiety of persons to supply provisions at the prices charged had some influence in making the contracts for their delivery.

It is clear that the anxiety of the whites to oust the Indians and to possess their country was a leading motive for making the arrangement which produced the alleged necessity for supplying the Indians with provisions.

This motive, so far from being concealed, is avowed.

But the evidence on this point is so interwoven and connected with that of pacifying the Indians and whites that I shall give both together.

Barbour says, (Doc. 61, pp. 23–'4:) "We found the Indians at open war with the whites in many parts of the State, and with but few exceptions, I believe, in the southern portion of the State, (that portion subsequently assigned to me;) they were hostile, and the war between them and the whites charcterized by those acts of rapine and murder usual in Indian warfare. The country called for some relief from such a state of affairs; the miners had been driven from the gold mines, and every day almost, some outrage or injury was done to the persons or property of the citizens, and in return many of the Indians were killed, and their stores and provisions destroyed."

Wozencraft (in Doc. 4, p. 337,) says: "The Indians were then in open hostility. The citizens were clamorous for protection, and were unsparing in abusing the administration for seeming neglect. The soldiers were in the field at a heavy expense, without commensurate success. Under the foregoing existing state of affairs I pushed forward, exerting every means within my power."

He also writes, (Doc. 4, p. 211:) "It will be indispensably necessary that the Indians should be protected from those claiming to be civilized beings."

At page 207 he says: "Indeed, the Indians complained very much, and only consented to go that they might have a home in which they would be protected from the white man."

"The Indians would not consent to move further from their mountain homes than the foot-hills"

Johnston (at p. 200) says: "I am convinced that a bad feeling exists among the Indians, generally, in consequence of the whites remaining in the territory."

At page 196 he says: "The greatest trouble I have had was with miners and persons who were located on the reservations for the purpose of trading with the Indians, and smuggling intoxicating drinks to them"

Wozencraft (at p. 133) says: "It is the opinion of all persons living in this section of the country that pacific measures cannot be effected with those Indians until they are chastised and subdued; they are

and always have been very inveterate in their hatred towards the whites, and very formidable from the time of the first aggression of the whites."

At page 112 he says: "I have been informed that on former occasions those Indians who have been at peace with the whites have been cruelly persecuted by those who either killed or abused their men without assigning a cause therefor; all of which has been very unfortunate, making it difficult for me to have an interview with or conciliate them."

3. The remedy proposed and urged to avoid the consequences of these various illegal acts of the agents and the whites was to feed the Indians at the expense of the government so that they should not feel and appreciate their wrongs.

It is easy to understand that while the immediate wants of an Indian are supplied he will be comparatively quiet and will not feel any loss he may have sustained. Even his resentments will be hushed, and those who have wronged him will be safe from his retaliation.

The whites understood this remedy and the agents practiced and applied it at the expense of the government without the shadow of authority.

In Document 61, pp. 3, 4, Barbour says: "Under such circumstances the commissioners undertook to effect a reconciliation and to carry out the plan agreed upon for treating with the Indians. * * A very important feature in those treaties (and one, too, without which no treaty could have been made with those Indians) was the supply of an agreed amount of beef and flour to aid in the subsistence of the Indians treated with. Without some such provision, the commissioners, as well as every intelligent man in California, knows that no treaty made with those Indians would be observed by them."

"By feeding the Indians with beef, as stipulated in the treaties, I was satisfied, as was every man in California who knew anything of the character of the Indians in that country, that it was the best possible means of conciliating the good feelings of the Indians, and thus carry out the spirit, if not the letter, of our instructions."

*Eighth.* That the whites had nothing to fear from the Indians, except the consequences of their own wrongful deeds.

Wozencraft, Barbour, and McKee wrote the Indian Office on the 17th of February, 1851, as follows:

"We learned, among other things, that hostilities of a deadly character existed between the Indians and whites in different portions of the State, threatening, indeed, a general border war.

"Rumors are reaching us every day of fresh outbreaks and new outrages, some of them of the most cruel and revolting character. In many instances the whites have by their own bad conduct superinduced the difficulties."

On the 1st of May, 1851, the three agents wrote the Indian Office. They say, (Doc. 4, p. 76:)

"If the secret history of the late disturbances is ever written, but nineteen out of every twenty will be found to have had their origin in direct aggression on the part of unprincipled white men, or

the failure on their part to supply the Indians with beef and flour as the promised reward of their labor."

On the 14th of May, 1851, Wozencraft wrote the Indian Office (Doc. 4, p. 82) as follows:

"The common and favorite place of abode of the Indians in this country was in the valleys and within the range of mountains; the greater portion were located, and had resided as long as their recollections and tradition went, on the grounds *now being turned up for gold*, and now occupied by the gold hunters, by whom they have been displaced and driven higher up in the range of mountains, leaving their fisheries and acorn grounds behind."

Wozencraft issued a proclamation, without date, to the people living among the Indians, (Doc. 4, p. 165,) in which he says:

"It would appear that most of the difficulties that unfortunately have occurred between the whites and red men have been owing to an improper and short-sighted policy, or rather a want of true policy, with these children of the forest. Since the discovery of gold in this region, the section of country that was and is peculiarly the home of the Indians has been found rich in the precious metal, and consequently filled with a population *foreign* to them; and this has been done in most instances without attempting to conciliate or appease them in their *grief* and *anger* at the loss of their homes. I am sorry to say, that in many instances they have been treated in a manner that, were it recorded, would blot the darkest page of history that has yet been penned. Had they even been *foreign* convicts, possessing, as they do, a full knowledge of the evils of crime and the penalties therefor, and received the punishment that has been dealt to these poor ignorant creatures, this enlightened community would have raised a remonstrative voice that would have rebuked the aggressor, and caused him to go beyond the pale of civilized man.

"Indians have been shot down without evidence of their having committed an offence, and without even any explanation to them of the nature of our laws; they have been killed for practicing that which they, like the Spartans, deemed a virtue; they have been rudely driven from their homes, and expatriated from their *sacred grounds*, the grounds where the ashes of their parents, ancestors, and beloved chiefs repose. The reverential and superstitious feeling of the Indians for the dead, and for the ground where they were deposited, is more powerful than that of any other people.

"This is not only inhuman and unlawful, but it is bad policy. The Indians of the Pacific are not unlike this great ocean in that respect; they are pacific, and very *tractable*."

On the 7th of August, 1851, Wozencraft wrote the Indian Office, (Doc. 4, p. 133:)

"Ten of said tribes are valley Indians, and are very friendly disposed towards the whites, but have much just cause of complaint, as the whites have taken possession of their homes, and they, through necessity, are reduced to servitude. Their labor is required only in the harvesting season, and the balance of the year they may shift for themselves the best way they can."

On the 14th of October, 1851, Wozencraft wrote the Indian Office, (Doc. 4, pp. 205–210:)

"The valley Indians are mild and tractable, making good and faithful laborers, submitting to correction; and if in fault, to correction without a murmur."

"I am sorry to say they (the Indians) have but little confidence in the white man. Their intercourse has been well calculated to make them skeptical as to his goodness and fidelity."

At page 120, he says:

"In fact, the whites have enclosed all the favorite grounds of the Indians, leaving them no alternative but to go higher up in the mountains, or starve, in most instances denying them the privilege of working in the placers."

Barbour, in a letter dated January 5, 1852, to the Indian Office, (Doc. 61, p. 2,) says:

"Necessity as well as inclination would compel them (the Indians) to steal from the whites animals on which to subsist, as in a large majority of cases the stores of acorns, &c., laid up by them had been destroyed by the whites."

NINTH. *The present claimant is not the lawful owner of the account which Savage had against the United States.*

There is no assignment of the account which formed the consideration of the draft.

The testimony of Leach, as well as the certificate of B. B. Harris, administrator, shows that nothing but the draft was attempted to be transferred by the administrator on Savage's estate or the probate court. If the draft is not valid, or has not become the property of Lewis, then he cannot fall back upon the account and recover for that. Leach swears that the draft was assigned to him by the administrator, and by him transferred to the claimant. There can be no ground for saying that the account was thus assigned from one to another.

There is nothing in the evidence proving that any of the numerous parties to this draft ever became the owner of any portion of Savage's account against the government. There is nothing to show that payment of it to Lewis would be a bar to a claim by the legal representative of Savage. Lewis must recover on the draft, or wholly fail in his attempt to establish a claim.

TENTH. The present claimant shows no title to the draft in question.

The draft itself shows that it was payable to the order of James D. Savage, and specially endorsed by him and made payable to the order of Wells, Fargo & Co., and by the latter specially endorsed to the order of Riggs & Co., and by them in blank.

If these names subsequent to Savage had not been stricken out, on proving them, the claimant would have shown title. But by striking them out he defeats his own evidence of title. He was not authorized to strike out the special endorsement over Savage's name, in order to make title. That, with Savage's name, showed title out of him. Lewis has not shown the title out of Savage's endorsee. There is an entire omission of all evidence to show that the endorsements to Wells, Fargo & Co., and by them to Riggs & Co., was for the mere purpose

of collection, and that the real title remained in Savage, and that the draft was returned to him by those employed to collect it.

It is not shown that Savage had any title to it when he died. This not being shown, the evidence fails to show title in his administrator which he could convey to Leach. This being so, Leach acquired none to convey to Lewis.

The draft may, perhaps, belong to Lewis, but he has not shown it.

It may be claimed and shown to belong to another, and, if valid, might be awarded, hereafter, to such other person, because, if Lewis has no title, the true owner may hereafter successfully assert his claim, notwithstanding a payment to Lewis.

It is the fault of the plaintiff if he has failed to make the proof necessary to establish his title to the draft in question.

ELEVENTH. The claimant has not shown, as required by law, upon what consideration he became interested, or owner of the claim in question.

The first section of the act under which this Court is organized provides—

"It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and the action thereon in Congress, or by any of the departments, if such action has been had; specifying, also, what person or persons are owners thereof, or interested therein, and when and *upon what consideration such person or persons became so interested.*"

It is true that the petition states that the claimant purchased the draft of the public administrator of Savage's estate for the consideration of a like debt due him, as a partner of Savage, from the latter. This statement is not borne out by the proof. Leach swears that he became the owner of the draft in that manner, and that he transferred it to Lewis "for a valuable consideration."

Here the proof does not sustain the allegation of the petition, and that which is actually made does not conform to the requirements of the statute, which requires the claimant to state fully the contract, including its consideration, by which he acquired his claim. If untruly stated, his case may fail upon the coming in of the proof.

If this point comes within the rules applicable to amendments, the motion to make the alteration should be made before the taking of the testimony, so that the ground taken can be the subject of proof, before final hearing.

TWELFTH. Congress alone can convert this unauthorized and unlawful transaction into a legal and valid one, and make it binding upon the government.

1. If the contract in question had been one authorized by law, the claimant would have found ample remedy by presenting his account and proofs at the proper accounting offices. He does not seem to have applied there with the necessary proofs; and it is presumed for the reason that he knew that the claim rested upon no existing law, and therefore could not be paid.

2. He knew, or was bound to know, that no officer of the government can bind the United States by any engagement he may make without the authority of some law.

Such law need not always be by special statute enactment, or by

treaty; still no contract can be binding upon the government unless it is made in pursuance of some express authority, indicated by the words of a law or treaty, or by making appropriations, or in some other clear and certain manner.

It clearly appears here that there was no such law existing at the time of the contracting the debt in question authorizing Wozencraft to enter into the engagement in question.

3. There is no law authorizing any officer of the national government to confirm and make legal what was unauthorized when it transpired.

4. To admit that such legalization could be made, would be conceding unlimited power. If an officer who is not authorized can create a legal obligation, not only without but against law, or otherwise to convert it into a binding obligation, then such unauthorized officer, in effect, is not only equal to, but is really superior to the legislative power of the country.

5. If any act of the Indian Office, or any department, has given legal validity to this unauthorized transaction, the accounting officers can now allow what is due without the intervention of this Court or of Congress.

6. It would prove fatal to the financial welfare of the country if necessity can create a legal liability. If necessity can dictate in one case, it can in every case. In that event the legislative power would not control the extent of our national expenditures. They would be regulated by the necessities of others, even when they were occasioned by wrongful or illegal acts. Such a principle would subvert the laws, and make ours a government of exigencies instead of laws.

THIRTEENTH. This court cannot allow a claim which does not arise under a subsisting legal authority. It can only declare existing legal rights, and has no authority to recommend the creation of them.

The functions of this Court are distinctly defined in the law under which it is established. The law provides that "The said Court shall hear and determine all claims founded upon—

"1. Any law of Congress; or,

"2. Upon any regulation of an executive department; or,

"3. Upon any contract—express or implied—with the government of the United States, which may be suggested to it, by a petition filed therein; and,

"4. Also all claims which may be referred to the said Court by either house of Congress."

The objects of this language cannot be easily mistaken. The party who appeals directly to the Court, or who does so through Congress, must establish, if he succeeds at all, a valid legal claim. To show reasons sufficient to control the discretion of Congress on the subject is not sufficient.

A CLAIM is defined to be a demand of right of something in the possession of another, as a title to a debt.

It implies a legal right on the one side, and a legal duty upon the other.

Burrell, in his law dictionary, defines it to be "A challenge or demand, by any man, of property or ownership of a thing, or some in-

terest in it, which he has not in possession, but which is withheld from him unlawfully."

He quotes Cawell; Blount; Litt., § 420; Stowell *vs.* Zouch, Plowd., 359. The latter case contains the same definition.

In *Prigg vs. The Commonwealth of Pennsylvania,* 16 Pet. 539, p. 615, JUSTICE STORY, in delivering the opinion of the Supreme Court, defined a claim to be: "It is, in a just, juridical sense, a demand of some matter of a right made by one person upon another, to do, or to forbear to do, some act or thing as a matter of duty."

He quotes and approves of the definition of Lord Dyer, above referred to in Plowdon, 359.

Bouvier, in his law dictionary, thus defines a claim: "A claim is a challenge of the ownership of a thing which a man has not in possession, and is wrongfully withheld by another."

Apply this definition to the act establishing this Court, and we shall readily see that its duty is to act upon cases presented, and determine whether the government has in its hands, or possession, money belonging to the claimant as a matter of right, which is wrongfully and unlawfully withheld from him.

This is the understanding of the word "claim" when applied to land cases when a party is seeking a patent, and to pensions when a person asks to be placed on the pension list. In all such cases the question is, has the party shown a legal right to what he claims?

This Court, under the law of its creation, is called upon to determine whether the party has a legal right, and not to determine whether Congress shall create one.

The question to be determined is the same, whether the case comes before the Court directly by an original petition, or indirectly by reference from Congress.

The jurisdiction of the Court upon petitions presented directly to it is limited to three cases.

The provision in the act, that the Court may also act upon cases referred by Congress, does not enlarge the boundaries of investigation. They still have to determine whether the government has in its hands what of right belongs to the claimant, and which it unlawfully withholds from him.

If a court has jurisdiction in cases of assumpsit only, but shall be subsequently authorized to hear cases in debt, or account, this enlargement of jurisdiction would not change the object of investigation. That would continue the same, and would be, in both cases, an investigation of the legal rights of the parties.

When the legislative power added to the three enumerated classes of cases those that either house might refer to the Court, it was not its intention to change the investigations and conclusions in the latter cases from a declaration of an existing right of the claimant and of duty on the part of the government to a recommendation to the legislative power to create a right and impose a duty that did not previously exist.

This view is distinctly recognized by the provisions of the 4th section of the act, "that in all cases where it shall appear to the Court that the facts set forth in the petition of the claimant do not furnish

any ground for relief, it shall not be the duty of the Court to authorize the taking any testimony until the same shall have been reported to Congress as is hereafter provided."

This clearly contemplates that no testimony shall be taken where the claimant does not establish a right upon his part and a corresponding duty upon the side of the government.

The 7th section confirms this view when it provides that the Court shall "report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded."

This language is exclusively applicable to cases where the claimant has legal rights, and not to the creation of those rights by legislation. Congress, when called upon to enact a law from motives of humanity or policy, does not need a court to assign reasons for its doing so. Such laws are passed by the exercise of legislative discretion. But when called upon to make an appropriation to discharge a previous liability of the government, it was natural that it shall wish to have the facts found and clearly stated, and the rule of law under which the Court acted, and the reasons for such rule, in unmistakable form.

The 9th section furnishes conclusive evidence upon this point. It provides, when the Court determines against a claimant and Congress confirms the decision, it "shall be conclusive; and the Court shall not at any subsequent period consider said claims unless such reasons shall be presented to said Court as, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial."

This language cannot apply to anything except a claim as I have defined it, and not to matters where the legal right is yet to be created.

At common law and in chancery new trials and rehearings are only granted in cases where there has been a surprise or an accident which prevented the obtaining the evidence, or the party has discovered new and material evidence, not cumulative, to establish his legal rights against the other party, or when the court, upon further consideration, arrives at the conclusion that it had mistaken the law controlling the question of legal rights involved between the parties.

Neither a court of common law or of equity ever grants a new trial where the party moving for it confessedly has no legal rights which he can assert on the new trial or hearing. New trials and rehearings are always refused where it is apparent to the court that the party cannot establish an existing legal right in his favor.

To grant one when the party concedes he has no such right, would be permitting parties to consume the time of courts where it could not possibly declare and enforce rights between them.

This would be an idle mockery, and is beneath the dignity of judicial proceedings.

In this case no previous liability is established, and therefore the Court cannot report or adjudge that there is anything due to th claimant.

R. H. GILLET, *Solicitor.*

JUNE 7, 1858.

IN THE COURT OF CLAIMS.

MARTIN B. LEWIS *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the Court:

The claim of the petitioner is upon the draft set forth in his petition, as follows:

SAN FRANCISCO, *March* 29, 1852.

Upon the next appropriation by Congress for the Indian department, pay to the order of James D. Savage, for supplies furnished the Indians in fulfilment of treaty stipulations, four thousand two hundred and seventy-eight dollars and fifty cents, ($4,278 50.)

O. M. WOZENCRAFT,
*United States Indian Agent.*

Hon. LUKE LEA,
*Commissioner of Indian Affairs.*

The draft is produced and annexed as exhibit B to the deposition of Lewis Leach, and it is verified by O. M. Wozencraft in his deposition, (answer to second direct interrogatory;) and by the testimony of these witnesses it was given for the flour, set forth in exhibit A, furnished to the Indians on the San Joaquin reservation by J. D. Savage & Company, upon a contract made with them by O. W. Wozencraft, Indian agent and commissioner for the United States.—(Wozencraft's deposition, answers to second interrogatory and to first cross-interrogatory; Leach's deposition, answers to fifth, sixth, seventh, and eighth interrogatories.) Leach was the book-keeper of James D. Savage & Company.

The delivery of the flour is testified to by Lewis Leach, who, in the ninth interrogatory of his deposition, is asked:

Question. Do you know of the delivery of the articles or provisions mentioned in exhibit A?

Answer. I do; a portion of the articles were delivered by me, and the balance by Major Savage, in my presence. I cannot say that every sack was delivered in my presence, but most of it was; but I know the flour was delivered.

And upon his cross-examination he testifies as follows:

Question (13.) What proportion of the articles charged did you deliver?

Answer. It is impossible for me to say; but, to the best of my recollection, I delivered about three-fourths of it.

Leach also testifies as follows:

Question, (9th cross.) Did you make the entries in the books of Savage & Company of the items charged in exhibit A at the several dates when charged?

Answer. I did.

The treaty in fulfilment of which the supplies were furnished was made by the commissioners on the 29th April, 1851.—(Doc. 4, p. 74.) In their report, May 1, 1851, p. 75, the commissioners say:

"We have found by experience that the best way to keep these Indians of California quiet and peaceable is to give them plenty of food. With beef occasionally, and a little flour to mix with the pulverized acorn, making their favorite *panoli*, nothing can induce them to quarrel with the whites. * * * * *

"We have, therefore, been under the necessity of making pretty liberal provision under the head of *subsistence*, and now advertise you that this course will have to be pursued throughout the State."

The receipt of this report is acknowledged by the department June 27, 1851, (Doc. 4, p. 17.)

It is objected that the petitioner is not the lawful owner of the account, because the evidence shows no assignment of the account which formed the consideration of the draft.

But on the evidence the draft was given for the account, and was *prima facie* payment of it, (Bayley on Bills, 248, and notes,) and that is enough for this case, for neither James D. Savage & Company nor an assignee of theirs, without notice to the United States, could recover on the account without producing or accounting for the draft.

It is also objected that the petitioner "shows no title to the draft in question." But the evidence shows the draft in the possession of the administrator of Savage's estate, and that is proof of title in Savage at his death, and his administrator, therefore, could either negotiate the draft by his own endorsement, according to the nature of the instrument and the custom of merchants, or he could assign it as a chose in action.

There is no evidence that the administrator endorsed the draft; the draft itself exhibits no endorsement by the administrator, and the deposition of Leach only says the draft was "*transferred*" and the certificates of the administrator and the judge of probate only say it was "*delivered.*"

The draft itself shows that Savage endorsed it specially to the order of Wells, Fargo & Company, New York; that they endorsed it specially to the order of Riggs & Company, who endorsed it in blanks, and of these endorsements everything is stricken out except the signature of Savage. When or by whom, or why these erasures were made, is not shown by the evidence, nor is it material; the signature of Savage, after his death was not an endorsement, for a delivery is necessary to an endorsement as well as a signature, and both must be by the party having title. After Savage's death the title was in the administrator, and his signature and delivery were necessary to the endorsement. He could not couple his delivery with Savage's signature, for the force of that was extinct, and it could not begin to act as an endorsement after Savage's death. It was as utterly inefficient as if it had been stricken out with the rest of the special endorsement to which it was originally made; and the transfer to Leach, if made as he testifies, was merely the assignment to him for a *bona fide* consideration of a draft, negotiable by endorsement only, and not endorsed. This could not vest in him the legal title; it could only vest in him the equitable title to the draft, and such equitable title, therefore, is all he could assign to the petitioner, and it is all the latter can now claim.

The petitioner, therefore, is before the Court, not as the endorser of a draft, the possession of which is evidence of title, authorizing a suit at law in his own name, but as an assignee of a chose in action, applying to the equity jurisdiction of the Court. And his claim being upon a draft negotiable by endorsement, and not endorsed, the instrument he presents raises a presumption against his claim, and not in favor of it. As the claim is in equity, its substantial merits must be clearly proved according to the rules of procedure in equity.

The title depends on the testimony of Leach. He testifies in his second deposition that the draft was transferred to him by B. B. Harris, administrator of Savage's estate, in payment of a debt due to Leach from that estate, and that he transferred the debt to Lewis for a valuable consideration. This testimony to the title is direct and full; but in his affidavit to the petition Leach swore that the draft was transferred to Lewis for a debt due to him from Savage's estate. If the statement in Leach's second deposition is true, the facts of the title were in his personal knowledge, and his misstatement of them in his affidavit cannot be referred to ignorance or mistake, and inadvertance is not a satisfactory explanation of it, and at the best shows a carelessness in swearing that prevents reliance on his testimony. Besides, it is observable that neither the certificate of the administrator nor of the judge of probate refer to a sale of the draft, or to any consideration for *the delivery* they state. The administrator says: "The said draft was delivered by me to said Leach, and I hold his receipt therefor." Now, of itself, this language does not indicate a sale of the draft, or the transfer of the property in it for a price, but rather *a delivery* of the draft to Leach for some special purpose, he being held responsible for it on the receipt he had given for it. If Leach received the draft, as he alleges, in payment of a debt, he would, in the ordinary course of business, have given a receipt for the debt discharged, and not for the draft by which it was discharged. And in the certificate of the judge of probate there is no evidence of a sale approved or understood by him. He says: "The *delivery* of the said draft was made with my approval." On the whole evidence we are of opinion that the title is not proved with the clearness required for an equitable title in a court of equity.

But the facts referred to become material under a rule of practice in equity. As the petitioner claims only as an assignee of a chose in action, he must show the assignor, and that is the administrator holding the legal title, a party to the bill or the proceedings here, or produce evidence equivalent to the appearance of the assignor in proving his assent to or knowledge of the title set up in that suit and claimed against his legal title. There is no such proof. Leach's testimony is not sufficient nor proper for the purpose; for in such testimony he is supporting his own title, on which he and the petitioner stand together, and that is the equitable adverse to the legal title. Then the certificate of the administrator is obtained, and that does not indicate a sale of the draft, an assent to the title of the petitioner, or a knowledge of the suit here; nor is it shown for what purpose that certificate was given, nor whether in this or any other, or any suit, and therefore upon the petitioner's evidence of his claim the par-

ties are not before the Court whose presence is necessary to authorize the Court to proceed to judgment.

It is also objected that the claimant has not set forth upon what consideration he became interested in the claim according to the requirement of the statute constituting this Court, (section 1,) which enacts that—

"It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof, or interested therein, and upon what consideration such person or persons became so interested."

The citation shows the purpose of the statute to be to bring before this Court and before Congress a full statement of all the particulars which may elucidate the merit and position of claims made. And apparently upon the maxin "*dolus latet in generalibus*," it requires particulars to be shown not necessary to be given in evidence to establish a legal demand in a court of common law. Thus, in all cases, claimants must show when and upon what consideration they became interested. But in a court of common law a plaintiff need not show upon what consideration he became entitled to a draft he sues upon, for the draft itself imports *a* consideration, and that is enough at law, and he may recover without showing whether he paid for the draft or whether it was given to him. But here, by the express requirement of the statute, "*upon what consideration*" the claim arose must be set forth, and specifically, so as to distinguish the consideration given not only in kind but by its circumstances, that they may be put to proof and tested. And generally the best test of the genuineness of title to a claim is the substantial consideration given for it.

In this case the consideration set forth originally in the petition was retracted and another introduced by the evidence, which is Leach's testimony, that he transferred the draft to the petitioner for a valuable consideration; and even this does not specify the consideration in this case, nor distinguish it from any other valuable consideration, nor furnish any circumstances by which it may be tested, and the facts in the case make this proper and show the policy of the statute requirement. Mr. Leach is the only witness to the delivery of any flour, to the amount delivered, and the consequent amount of the claim. He carried the draft and account to the attorney who drew and who signed the petition for the claimant, and Mr. Leach made the verification of the petition. He is the only witness of the title of the petitioner, whose personal action in any part of the case is not shown. Under these circumstances the specification of the consideration, and its circumstances, and the opportunity of their verification by evidence, is required to ascertain the fact of an absolute transfer of the draft from Leach to Lewis, and that the former is not interested in the claim his testimony supports. Such testimony is in the claimant's power, and the language and the purpose of the statute call for its production, and are not complied with without it.

This case is the same in principle as the case of Samuel J. Hensley, heretofore decided by the Court, and for the reasons and considerations therein stated, we are of opinion the petitioner is not entitled to the relief he prays for.