statute of 14 Edward III, upon a division of the judges of the court below, the practice, as we have stated, is different. But on writs of error it is similar to that followed by this court. Such, also, is the practice of the House of Lords when sitting as a court of appeals. It is said that this practice depends upon the manner in which the Lords put the question, which is always in this form: Shall this judgment, or decree, be reversed? But that is the question in all appellate courts, and the particular manner in which the question is stated, cannot change the rule of law on the subject.*

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

JUDGMENT AFFIRMED.

KENDALL *v.* UNITED STATES.

A claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, cannot be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them.

APPEAL from the Court of Claims.

A. and J. Kendall made an agreement, in the year 1843, with persons representing a branch of the Cherokee tribe of Indians, called the Western Cherokees, to prosecute a claim

* See Bridge *v.* Johnson, 5 Wendell, 372.

which these Indians set up against the United States. It was a part of the agreement that the Kendalls were to receive, directly from the United States, 5 per cent. upon all sums that might be collected on the claim.

The justice of this claim, which it was thus agreed that the Kendalls should prosecute, had never been acknowledged by the United States, and the amount of it was uncertain. A treaty was finally made, in 1846, not with the Western Cherokees, who were but a part of the Cherokee tribe, but with the whole tribe; and it embraced not only the claim set up by the Western Cherokees, but many other matters, settling matters between the United States and the tribe, as also between the Western Cherokees and the main body. The treaty, as finally ratified by the Senate and by the tribe, provided that the sum of money found due (and which included moneys to the main tribe), should be held in trust by the United States, and paid out to each individual Indian, or head of a family, and that this *per capita* allowance should not be assignable, but should be paid directly to the person so entitled. On the 30th September, 1850, Congress made an appropriation of the amount necessary to fulfil this treaty, and the act contained a provision that *no part of the money should be paid to any agents of said Indians, or to any other person than the Indian to whom it was due.*

The Kendalls having thus failed to get anything from the appropriations, presented a petition to the Court of Claims. They set forth in it the fact and history of the treaty, the great labor which they had had, and the value of which their services had been in procuring the treaty and appropriation (with interest, about $887,000); all, as they alleged, due to those services. That they had repeatedly given specific notice to Congress and to its committees, and to all proper officers of the government, of the contract made by them with the Indians, and of their claim under it, and of the justice of the same.

There was no answer or evidence produced on the other side.

The Court of Claims dismissed the petition.

Arguments for the appellants and appellee.

Messrs. Carlisle and McPherson, for the appellants:

1. The contract and order given by the Indians operated as a valid assignment of one-twentieth part of the amount due the Indians;* it being settled that, in equity, an order given by a debtor to his creditor, upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund;† and these rights of assignees being recognized and protected in courts of law.‡

2. Neither the treaty of 1846, nor the act of 1850, prohibited the payment of this claim. It is true that there are in the treaty provisions intended to secure to the Indian himself the amount due to him; but, while the treaty prohibits payment to any agent of an Indian, and prohibits, prospectively, any assignment of the share of any Indian, it is silent as to any existing assignment, and uses no words applicable to an assignment made by the body of the tribe out of the gross sum. The act of 1850 is more comprehensive in its language, but it was made simply to carry into effect the treaty, and its terms are to be construed in connection with the treaty itself.

Mr. Dickey, Assistant Attorney-General, contra:

1. The pretended assignment, by the Indians, of a portion of their claim, could not, if valid, be enforced in a court of law.§

The Court of Claims has no equity jurisdiction.‖

2. The assignment was not valid unless recognized to be so by the United States.¶

* Smith & Everett, 4 Brown's Ch. 64; Lett & Morris, 4 Simons, 607; Morton *v.* Naylor, 1 Hill (N. Y.), 583; Watson *v.* Duke of Wellington, 1 Russell & Mylne, 605.

† Burn *v.* Carvalho, 4 Mylne & Craig, 699.

‡ Littlefield *v.* Storey, 3 Johnson, 426; Prescott *v.* Hull, 17 Id. 284; Wheeler *v.* Wheeler, 9 Cowen, 34.

§ Mandeville *v.* Welch, 5 Wheaton, 286; Tiernan et al. *v.* Jackson, 5 Peters, 597.

‖ United States *v.* Alire, 6 Wallace, 575.

¶ The Cherokee Nation *v.* The State of Georgia, 5 Peters, 16.

3. The treaty of 1846, and the act of 1850, prohibited the payment of this claim.

The justice or injustice of this action of the government, is not a matter for the consideration of the Court of Claims. The case of the appellants stands upon the legal effect of their agreement with the Indians, and there is nothing in it which can override the action of the treaty-making and the law-making powers of the government.

Mr. Justice MILLER delivered the opinion of the court.

As the case was decided on demurrer, or what is equivalent to a demurrer, the statements of the petition must be taken to be true. They show a faithful and laborious performance of their contract by the plaintiffs, for which no compensation was ever received.

It is insisted by plaintiffs, that because the government of the United States was aware of the contract between them and the Indians, and failed to reserve and pay over to them the five per cent. which by that contract they had a right to claim of the Indians, the United States is liable to them for the amount. It is supposed that the doctrine of an equitable assignment of a debt or fund due from one person to another, by the order of the creditor to pay it to a third party, when brought to the notice of the debtor, is a sufficient foundation for the claim. But, if we concede that the government is to be treated in the present case precisely as a private individual, it is not easy to see how that doctrine can be made to apply. The debt or fund as to which such an equitable assignment can be made, must be some recognized or definite fund or debt, in the hands of a person who admits the obligation to pay the assignor; or, at least, it must be some liquidated demand, capable of being enforced in a court of justice. We apprehend that the doctrine has never been held, that a claim of no fixed amount, nor time, or mode of payment; a claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignor an equitable right to prevent the original parties

from compromising or adjusting the claim on any terms that may suit them. That is just what is claimed in this case. For it is very clear that if this equitable claim in the hands of plaintiffs was not effectual before the treaty, it can have no effect afterwards.

The treaty, by its terms, is incompatible with the claim of plaintiffs. None of the money could be paid to the plaintiffs if all of it was to be paid to the Indians individually, in proportions to be determined by their numbers.

This principle of paying to the Indians *per capita* was not adopted with any reference to the plaintiffs' claim as a means of exclusion. The treaty was made with the entire tribe of Cherokees, of which these Western Cherokees were but a small part; and the claims which they were urging on our government constitute a still smaller part of the matters settled by the treaty.

Land claims were adjusted, the difficulties between this branch and the main body of the tribe were arranged. Other payments were made to the main tribe, in which the rule of paying *per capita* was adopted. Now, the argument assumes that unless in adjusting all these important interests the United States kept in view the sum to be paid to plaintiffs, by their contract with the Indians, and provided for it, they must either make no treaty at all, or must pay their claim. It cannot be permitted that by contracting with other parties, without requiring or asking the consent of the government, any one can establish such a right to control the action of that government in making treaties or contracts.

The claim of the Western Indians was nothing more than a claim prior to the treaty. Its justice had never been admitted. Its amount was uncertain. These, together with the mode of payment, were all unsettled, and open to negotiation. Is it possible, that by making a contract with claimants to prosecute this demand against the government, the plaintiffs thereby acquired such a hold on that government, as not only made the claim good to that extent, but prevented it from compromising or settling with the claimants on the best terms to be obtained?

Statement of the case.

We have no hesitation in saying that the United States, under the circumstances, had the right to make the treaty that was made, without consulting plaintiffs, or incurring any liability to them. The act of Congress which appropriated the money, only followed the treaty in securing its payment to the individual Indians, without deduction for agents. And both the act and the treaty are inconsistent with the payment of any part of the sum thus appropriated to plaintiffs.

The judgment of the Court of Claims, rejecting the demand, is therefore AFFIRMED.

COWLES *v.* MERCER COUNTY.

1. A municipal corporation created by one State within its own limits may be sued in the courts of the United States by the citizens of another State.
2. The statutes of a State limiting the jurisdiction of suits against counties to Circuit Courts held within such counties can have no application to courts of the National government.

ERROR to the Circuit Court for the Northern District of Illinois, the case being thus:

A statute of Illinois enacts by one section that, "Each county established in the State shall be a body politic and corporate, by the name and style of 'The County of ——;' and by that name may sue and be sued, plead and be impleaded, defend and be defended against, in any court of record, either in law or equity, or other place where justice shall be administered;" and by another, that "All actions, local or transitory, against any county, may be commenced and prosecuted to final judgment and execution *in the Circuit Court of the county against which the action is brought.*"*

And the Supreme Court of Illinois has decided that a county can neither sue or be sued at common law, independent of legislative provisions, and have construed the

* Revised Laws, 1845, §§ 1, 18.