sion of the exception to the ruling of the court in excluding certain evidence offered by the defendant. Suffice it to say that the court here is of the opinion that the ruling is erroneous; that the evidence was properly admissible as explanatory of the surrounding circumstances.

Judgment REVERSED with costs, and the cause remanded with directions to issue

A NEW VENIRE.

UNITED STATES *v.* O'GRADY.

When the government means to set up any counterclaim to the claim of a party suing in the Court of Claims, as *ex. gr.*, when on a suit under the Captured and Abandoned Property Act, to recover the proceeds of cotton sold under that act, it means to set up a tax, such as what is known as the "cotton tax," it must plead that tax by way of set-off or counterclaim to the suit, as is contemplated by the act of March 3d, 1863; or move for a new trial, under the provisions of the act of June 25th, 1868. It cannot, after judgment has been given for the amount claimed by the petitioner, irrespective of such counterclaim, and without any motion for a new trial having been made, set up and deduct at the treasury the counterclaim when the amount awarded by the decree of the court is asked for there.

APPEAL from the Court of Claims; the case being thus:

By the act organizing the Court of Claims, A.D. 1855, power was given to it to hear and determine all claims *against the United States* founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.*

Doubts, however, were suggested immediately upon the act going into practical operation and on suits being brought against the United States, whether the act meant to allow the United States to file set-offs in such suits, and to give jurisdiction to the court to hear and determine them in the

* Act of February 24th, 1855 (10 Stat. at Large, 612).

way usually practiced in suits between private parties. If the act did thus mean, its meaning was not clearly expressed. Congress accordingly, by an act passed March 3d, 1863,* enacted that—

"In addition to the jurisdiction now conferred by law, the court shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government, against any person making claim against the government in said court; and upon the trial it shall hear and determine such claim and demand, both for and against the government and the claimant; and if upon the whole case it finds the claimant is indebted to the government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases," &c.

A still subsequent act—one passed June 25th, 1868†—enacted:

"That the said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any suit or claim, may on motion of the United States grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence as shall reasonably satisfy said court that any fraud, wrong, or injustice has been done to the United States."

These two acts being in force, one O'Grady sued the United States in the said Court of Claims, to recover the proceeds of certain cotton, confessedly his, which had been seized and sold under the Captured and Abandoned Property Act, and which proceeds were now in the treasury of the United States. That act, provides‡ that the owner of such property shall be entitled to receive the residue of the proceeds thereof, "after the deduction of any purchase-money which may have been paid, together with the ex-

* 12 Stat. at Large, 765. † 15 Id. 75.

‡ 12 Stat. at Large, 820, act of March 12th, 1863.

pense of transportation and sale of said property, and any *other lawful expenses* attending the disposition thereof."

The United States appeared, pleaded various pleas, but no plea in the nature of set-off, nor did it make any claim for or allusion to any sum as due for a "tax" on the cotton under any act of the United States, approved June 30th, 1864, or any other act, or as due otherwise for any tax.

The Court of Claims having heard the case and allowed to the United States a deduction from the gross proceeds for its outlay of purchase-money, expense of transportation, sale, and other lawful expenses as claimed, decreed in favor of O'Grady for $72,450.

On O'Grady's presenting his claim as thus fixed for payment at the treasury, the secretary refused to pay it without the deduction of $4181, which sum he alleged that he had a right to retain as a tax under acts of Congress, in force at the time of the capture of this cotton, one of which did confessedly assume to impose a tax of two cents a pound upon all cotton produced or sold and removed for consumption, and upon which no duty had been levied, paid, and collected; the tax being made by the act, until paid, a lien upon the cotton in the possession of any person whomsoever,* and another of which† enacted that "whenever any cotton, &c., shall arrive from any State in insurrection against the government, the assessor shall immediately assess the taxes due thereon."

This deduction was submitted to under protest, and an agreement was entered into "that the rights of the several parties in respect to this tax are reserved, and remain subject to the decision of the Supreme Court."

To bring the question to this court under this agreement, a petition was filed—the petition in the present case—praying judgment for $4181.40, the amount of the tax claimed. The government pleaded that the government "is not indebted to the claimant in the said sum of money or in any part thereof."

* 13 Stat. at Large, 16. † Act of June 30th, 1864, § 177, Ib. 305.

Argument in support of the secretary's act.

Judgment was given for the claimant, and the government now brought the case here.

The sole question thus was whether the secretary was justified in withholding the amount for the reason stated by him, to wit, the debt of the claimant to the government for the tax of two cents per pound on cotton.

Mr. C. H. Hill, Assistant Attorney-General, for the United States, appellant:

The cotton itself, on the sale of which the tax was claimed, was confessedly liable to that tax; the question, much agitated some time since, about the constitutionality of the cotton tax, not being here raised.

Why, then, could not the secretary deduct it?

It has been decided that the government held this sort of property as trustee for the owners.* This being so, it is but a reasonable construction of the language of the statute to hold that the payment of an excise tax due upon the property, and made a lien thereon, was a lawful expense attending the trust, which the secretary was justified in deducting. The deduction of the tax may be assumed to be made at the time of the payment of the proceeds of the sale of the cotton into the treasury, and as the statute makes the amount due certain, no technical assessment of the tax was necessary.†

Besides, it is not to be presumed that the statute intended that the owner should be paid the amount of the proceeds of the cotton and the government lose its lien for the tax. The sale of the cotton by the government would entirely destroy the lien unless one subsisted on the proceeds in the treasury; and construing the act imposing the tax and the Captured and Abandoned Property Act together, full effect can be given to both by holding that the lien for the tax remains upon the proceeds in the treasury, and the tax is to be deducted before payment thereof to the owner.

* United States *v.* Klein, 13 Wallace, 128.

† Dollar Savings Bank *v.* United States, 19 Wallace, 227.

Argument in opposition to the secretary's act.

Messrs. P. Phillips and T. J. Fuller, contra:

We raise no question in this case about the constitutionality of the cotton tax, since the judgment below can be fully sustained, conceding the tax to be constitutional.

The institution of the Court of Claims was to remove the anomaly of permitting a party to contracts, express or implied, from an arbitrary decision in his own cause.

Claims against the government were therefore submitted to the judicial determination of officers, whose tenure of office under the Constitution was regarded as a guarantee of independence. Thenceforward, claimants under contracts, express or implied, had a standing in court to enforce them. But under the organizing act the court only had jurisdiction when an individual was plaintiff and the United States were defendants.

There thus remained in the hands of executive agents the assertion of claims in favor of the government. Ordinarily these could only be enforced by suits in the courts of the United States. But it often occurred that when a party had a liquidated admitted claim against the government, he was met on demand of its payment by the assertion of a claim due by the party to the government, and on a settlement of these conflicting rights the claimant had to submit to such decision as the government agent might make of it.

This presented an evil which the institution of the court was intended to remedy, and in order fully to remedy the evil, the amendatory act of 1863 was passed.

If this view of the legislation is the correct one, and it was the object of Congress, as we suppose, to give to parties dealing with the government the same protection of the judiciary as was offered to dealings between individuals, it follows that any counterclaim which the government had against O'Grady, should have been presented before the court was called to adjudge the original claim, and thus enable the claimant to contest its validity or justice and have judicial action upon the same. It is a violation of the spirit as well as the letter of the law for the secretary to withhold his counterclaim—the character of which was fully known

to him—to permit a judgment to be rendered in favor of the claimant, the finality of which is declared by statute, and then to refuse payment thereof, unless the party should allow a deduction for an asserted claim on the part of the government, the amount and validity of which should be determined by his own judgment.

If, then, the government had any right to the tax, it was bound to assert that right in the course of the litigation, and having failed to do so has thereby forfeited it.

In addition to its ability to have set up its counterclaim in pleading, the government had the right to move for a new trial under the extraordinary provisions of the act of June 25th, 1868.

Having failed to do this, it is precluded in every way from doing what it now attempts to do, by the act of its Secretary of the Treasury.

Mr. Justice CLIFFORD delivered the opinion of the court.

Judgment was recovered by the claimants for the whole amount of the net proceds of the cotton in the original suit, and it is not even suggested that the United States filed any set-off or counterclaim in that case, nor would it now make any difference if the claim of set-off or counterclaim had been filed in that case, for if filed and rejected the appropriate remedy of the United States was by appeal to the Supreme Court. Appeal to this court in such a case undoubtedly would lie; nor was that the only remedy left to the United States, as the Court of Claims, on motion, might grant a new trial in such a case, if it appeared that any fraud, wrong, or injustice had been done to the United States.*

But the United States did not appeal from the judgment of the Court of Claims, nor does it appear that any application in their behalf was made to that court for a new trial, as expressly authorized by an act of Congress. On the contrary, it appears that the United States acquiesced in the

* 15 Stat. at Large, 75.

judgment and claimed to deduct from it the amount now in controversy as due to the government for the internal revenue tax. Such a power is not vested in the Secretary of the Treasury, nor in any other executive officer of the government, even if it could be; and it is clear that the judgments of this court, rendered on appeal from the Court of Claims, if no such power is conferred by an act of Congress, are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that court as provided in the beforementioned act of Congress.*

By the act of the 3d of March, 1863, it was provided that no money shall be paid out of the treasury for any claim passed upon by the Court of Claims till after an appropriation therefor *shall be estimated for* by the Secretary of the Treasury, which provision was of course as applicable to the judgments on appeal, rendered by this court, as to the original judgments rendered by the Court of Claims, as the subject-matter of the suit in either case is one "passed upon by the Court of Claims."†

Either party by virtue of that act was allowed an appeal to the Supreme Court, but the Supreme Court declined to take jurisdiction of such appeals, chiefly for the reason that the act practically subjected the judgments of the Supreme Court rendered in such cases to the re-examination and revision of the Secretary of the Treasury.‡

Subsequently Congress repealed the provision conferring that authority upon the Secretary of the Treasury, and since that time no doubt has been entertained that it is proper that the Supreme Court should exercise jurisdiction of appeals in such cases.§

Judicial jurisdiction implies the power to hear and determine a cause, and inasmuch as the Constitution does not

* Ex parte Russell, 13 Wallace, 664.

† 12 Stat. at Large, 768.

‡ Gordon *v.* United States, 2 Wallace, 561.

§ 14 Stat. at Large, 9.

contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government.

Opposed to that is the suggestion that the internal revenue tax is a lien upon the property taxed, and that the lien, when the property is sold, is transferred to the proceeds of the sale, as in the case of a maritime lien when the *res* is sold and the proceeds of the sale have been paid into the registry of the court. Whether that is so or not is not a question in this case; but suppose the question is presented, it is a sufficient answer to the suggestion, that the United States, if they desire to enforce such a right, must seek some other remedy than the one pursued in the case before the court, as it is clear that when such a claim as that preferred by the claimants in the original petition passes into judgment in a court of competent jurisdiction it ceases to be open, under any existing act of Congress, to revision by any one of the executive departments or of all such departments combined. Remedies, such as have been suggested, if seasonable, may be pursued in a proper case, but it will be time enough to decide the question whether any remedy now remains when the question is properly presented.

Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial.

JUDGMENT AFFIRMED.