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HOW TO SUE THE GOVERNMENT

BY HON. J. E. DODGE

When, in 1893, I became assistant attorney-general of the United States charged with defense of suits within the Claims Jurisdiction, and more especially in the Court of Claims, I found myself confronted with a docket of some 25,000 cases, some of them involving claims of several hundred distinct and individual litigants, joined in interest only by the mutuality of their desire to extract money out of the national treasury, and having their local habitation in every state, and more especially in every territory, of the country. I found these thousands of claimants represented almost exclusively by the bar of the Court of Claims; a body of some hundred or two gentlemen admitted to practice by that court; some of them really lawyers, and more of them lawyers only by virtue of such admission to practice; a bar very largely recruited from the wreckage of public office whence they have been stranded on the beach of lobbyism by one political convulsion after another; men whose official positions had varied from cabinet officers down through the ranks of senators, foreign ministers, congressmen, bureau chiefs, to the lowest grade of clerk; but who, upon being released from their respective duties to their mother country, had conceived that in the course of performance of those duties they had acquired special facility to aid those desiring to assault her treasury, or at least special facility to make the would-be claimants believe so. As a result of the activities of that court, sundry millions of dollars are annually paid from the treasury to the litigants, from which this bar of the Court of Claims subtracts various proportions, ordinarily ranging from fifteen to fifty per cent of the recovery; seldom falling below the first named figure and perhaps averaging about twenty-five per cent. It was early impressed upon my mind that so far as residents of Wisconsin found it necessary to enter the ranks of this litigant claimant horde, there was no reason why the profession of the law at home could not as well, or better, protect

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**Justice of the Supreme Court of Wisconsin for twelve years. Born 1854, died 1921.
their interests and, incidentally, promote the general welfare, prosperity and happiness of Wisconsin lawyers, and it has seemed to me that I might be of use to that profession, by calling the attention of the members thereof to this fairly profitable field of professional activity, to the benefit, also, both of the claimants and of the court. Such is my excuse for presenting before you to whom the portals are about to open, the dryest lucubration in your scholastic experience. I pray it may have some utility to atone for its prosiness.

The practice in suits on claims is so simple that the field is specially adapted to the young lawyer. The individual claims are often small in amount, but each may be typical of a very large number resting upon substantially similar considerations, and claimants are ordinarily very willing to assure an attorney a considerable contingent share of their claims if he will establish them; and while the first may involve him in much work and long delay, if he is successful the fruition may be very gratifying. An illustration occurs to me of a member of the Court of Claims Bar, originally from Wisconsin, by the way, who, meditating upon the statutes regulating compensation of army officers, found those statutes to provide for the pay of the several grades somewhat thus: I will not be exact, but assume that first lieutenants were allowed as basic pay, $1,600; second lieutenants, $1,800; captains, $2,000 and so on. He then found another statute which provided that every army officer in the second five years of his continuous service should receive an additional sum equal to ten per cent of the annual pay of his grade, and that in the third five years of service he should receive another ten per cent increase, and in the fourth another, and in the fifth still another. Such increase is officially dignified as “longevity allowance” but among irreverent lieutenants it is derived as “fogy” pay. This law had always been construed by the paymaster’s department as giving the man with the $2,000 basic pay, $2,200 in his second five years; $2,400 in his third; $2,600 in his fourth and $2,800 in his fifth. My friend, in a spasm of mathematical genius, became illumined by the proposition that $2,400 was not a ten per cent increase on $2,200, nor was $2,600 a ten per cent increase over $2,400. After brooding long in the effulgence of this brilliant discovery, he decided that he might convince the Court of Claims of that proposition, and that an army officer should have received anywhere from $20.00 up to perhaps $100.00 per year which had been
denied him. This multiplied by six, the statutory years of limitation, would give a respectable recovery in individual cases, and again multiplied by the thousands of officers affected, promised the discoverer wealth beyond the dreams of avarice. He therefore industriously circularized pretty much the entire army list, and was rewarded by agreements from a large number that if he would extract out of the public treasury these various sums, which none of them had ever claimed or supposed himself entitled to, he might retain the half thereof. He filed large numbers of claims in order to save the statute of limitations, brought one to trial, persuaded the Court of Claims of the soundness of his logic and mathematics, and recovered a judgment, from which this good and great government promptly appealed to the Supreme Court, and there, after a delay of three of fours years, my friend's ingenuity was again vindicated, the judgment affirmed, and the claims were paid in great numbers; some of them, by reason of the long pendency of the litigation, reaching as much, if I remember right, as $1,200. This is but one, though perhaps an unusually striking one, of many instances where the study of statutes has been rewarded by the discovery of the meaning or theory entitling the beneficiaries to larger sums than have been accorded them by the government officers having charge of the disbursements. This is but natural; for while the government disbursing and accounting officers in the main seek to be fair and to ascertain the true meaning of laws, they, probably properly, resolve any doubtful question in favor of the retention in the treasury of public money rather than in favor of paying it out.

I venture to take your time to suggest certain fields where industrious search by a young and not too busy lawyer might find adequate reward. In Wisconsin to-day are some thousands of men who went into the nation's service at the time of the war with Spain, and later in connection with the Philippine insurrections, who are now returned to private life. All of the laws and regulations as to the compensation to which they were entitled were administered in much haste, and those men, generally, were ready to assume that what government officers paid them was all to which they were entitled. As I look over the recent decisions of the Court of Claims I find many in which the court takes a different view of those laws and allows to such volunteer soldiers, both officers and men, considerable sums which the paymasters either never thought of or considered not properly payable.
Another instance, reference to which in a newspaper has just met my eye, is a decision by the Court of Claims for recovery back of certain excesses exacted under the law imposing inheritance taxes during the Spanish war; probably each small in amount, but amounting upon the claims filed to some five million dollars; an amount which probably might be multiplied by a search of the probate records of the entire country.

The federal Government is constantly enlarging, and adding to its activities, and more and more coming in contact with individual and property rights throughout the country. More and more government buildings are being built; in the case of each is usually more than one intricate contract subject to modification and change in the course of the work at the command of some public officer, out of which difference of opinion as to the rights of the contractors is fully as likely to arise as in the case of similar contracts between individuals, for the government officers are arbitrary and dogmatic in requiring compliance with their own views, and the courts readily recognize that the contractor is at the mercy of such commands, and are slow to hold him estopped by submission thereto from demanding compensation. Light-houses and harbors are being constructed by contract, and, perhaps more frequently than in the case of private structures, are subject to those modifications and changes which result in differences of opinion as to compensation. Contracts, again, are being made with many of the manufacturers and merchants in this part of the country for stores, supplies, and machinery, in all of which the question of performance or breach is one possible of dispute which may be fruitful of litigation. As the maritime activities of the Government in harbor construction and lake and river protection and improvement increase, vessel charters become numerous with resulting controversy as to compensation.

Again, at our elbow, are large numbers of government employees whose duties and compensation depend upon construction of statutes. Their official superiors on the one hand are prone to construe those statutes broadly for the imposition of duties, while the accounting officers of the Government are somewhat prone to more restricted views, or at least to the withholding of compensation for the performance of duties for which they do not find clear sanction in the statutes, although the official superior may have done so. Amongst these may be mentioned the circle of postal employees in every city, indeed in every
village; the railway postal clerks; the new class of employees who make the rural deliveries, the contractors for the transportation of mails within the cities and over routes not served by rail, often the local electric car-lines which are contracting to large extent to carry mails; the federal courts, with their various clerks, marshals and subordinates, all subject to suffer deprivation of some money right by reason of differences of opinion as to the meaning of the statutes which fix their compensation and duties.

Then there is the field of government liability upon what I may term quasi-contracts, where private rights or property are in effect taken for public use. Whenever harbor works are constructed, private property is certain to be affected and liable to be taken. The same is true with reference to the property in the vicinity of rivers, where work in aid of navigation is done; in the vicinity of military posts, rifle ranges, and even of government buildings. Again, there is the field of injuries to, or interference with, vessel property and private rights of navigation, and in the use by the Government of all sorts of devices which may be subject to patent. In every one of these fields, people in our immediate locality may be sufferers, may well have rights which ought to be enforced and vindicated, and which are often in effect surrendered because of unfamiliarity with the methods for obtaining redress.

Again, in the multiplicity of legislation are many acts of Congress affecting private individuals and private enterprises throughout the country from which may directly result a private right to some compensation. There are, for instance, the recent free alcohol statutes by which alcohol, treated and used in a certain manner, is entitled to be free from the ordinary duty of about $2.00 a gallon. At the time of the alcohol rebate provision under the law of 1894, the Wilson Bill, everybody was astonished at the number and general distribution of the industries in which alcohol might be used entitling the user to such rebate. More than 30,000 people were found to make claims, and how many more had not yet been aroused to their opportunity, I of course cannot say. Again, in this great manufacturing state must be numbers of people who make use of imported materials upon which tariffs have been paid and who are entitled upon exportation of the manufactured article to repayment of the duty. Under this provision of law has already arisen considerable litigation;
the brewers, for instance, contending that imported bottles and even imported corks had been manufactured by them into bottles of beer, have claimed they were therefore entitled to rebate of the duty which had been paid on those bottles and corks, a claim which was not allowed. Corporation taxes are now being collected under a statute the validity of which is already assailed, and the exact construction of which will present many questions. Under threat of penalties the amounts demanded must be paid, and their recovery back will offer rewards for legal acuteness and enterprise.

These are only a few of the phases of contract of your neighbors and legitimate clients with the United States Government out of which claims may grow inviting professional services.

II

Having discovered the extended field of its application, let us next turn to the reasons for the existence of judicial jurisdiction over transactions and relations arising in that field, and then the existence and limits of that jurisdiction under existing laws.

There is in the case of a state or a nation a legal entity, intangible, and apprehensible only as a mental concept, which is distinct from any or all of the people comprising the nation or any or all of the individuals comprising its Government. The concept of such an entity bears some analogy to the corporation, which is a legal thing or person different from any of the individuals composing it, whether mere stockholders and members or officers. Such entity we call the state or the Government, somewhat interchangeably, though, strictly speaking, the Government is but the authorized agent of the state to perform certain of the latter's functions. That imaginary person or being presents a two-fold aspect: first, the governmental one, in which it exerts certain powers over the individuals composing it, but also one in close analogy to a natural person or corporation. In the latter aspect it may own property, like a state capitol, a custom house, a post office, an army post or a battleship, as also chattels, merchandise and choses in action. It may come in contacts of various kinds with individuals and their property. It may contract with you or me for the purchase of property or for our labor, in which case, obviously, we do not work for any individual, our property when purchased does not pass to any individual, but to that somewhat imaginary being, the state or the nation. Since it can
contract to pay money or deliver property, it can fail to perform its contracts, and may thus become indebted, or, in other words, owe a duty to pay money in performance of such contract or as damages for breach, just as can an individual. We are all of us familiar with this aspect of a municipality and its government, and this largely for the reason that we and our neighbors more frequently come in contact with such entities and their activities in the more personal aspect of the ownership of property, and in the transaction of business, all of which is more directly under our notice. These municipalities have always been subject to the power of courts to compel the performance of such obligations. In the case of sovereign states and nations, however, there has persisted from the earliest times a doctrine that their obligations could not be coerced in court. When our neighbor refuses to pay us money that he owes, or refuses to deliver to us our property which he holds, we can apply to a court to establish the fact that he does so refuse wrongfully and to compel him by its judgment to perform or pay. All that because the court is a branch of the government under which each individual lives. But the state lives not under, but above, its government and every branch thereof. That government and all of its parts and officers are mere agents deemed subordinates of the state, and it was for a long time deemed anomalous and improper that the subordinate should be entrusted with authority to command its master. Hence the maxim, old as the conception of sovereignty, that no sovereign can be sued without its own consent, and the United States lived up to this maxim very religiously for the first seventy years of its national existence. In support of that maxim is the argument that nations are always willing to do right voluntarily; that if the United States is under obligation to pay money to any one, theoretically the Government is ready and willing to do so and needs no coercion by courts, which indeed are only a part of the Government. This involves a conception of a Government which might exist in the millenium, when the necessity for all government has gone by, but up to the present time a practical working, the results of that theory or maxim have been disappointing. However ready and anxious the nation or the Government may be, theoretically to do justice, and especially that branch of the government which we call the legislature, yet, since the legislatures or congress must be made up of fallible and erring individuals, they have generally failed to come up to
that degree of perfection of wisdom and morals necessary to an infallible ascertainment of duty, or even to prompt and accurate performance of it, and many individuals to whom an obligation of payment was pretty obviously owed have worn out their lives in attempts to obtain recognition and performance of such duty.

In the case of the United States, the practical difficulties in the way of legislative working out of the exact pecuniary obligation of the Government or the nation to individuals have been found well-nigh insurmountable, and fraught with so large a proportion of injustice to one or the other party as to be unbearable.

The condition of things thus brought about is aptly, though very moderately, described by Hon. William A. Richardson, many years Chief Justice of the Court of Claims, in a history of that court published in the seventeenth volume of the Court of Claims reports. It at last led to efforts to mitigate the evil, which are described with exactness in Chief Justice Richardson's history above mentioned. The first legislation on the subject in 1855, went little further than to create a commission, although made up of so-called judges holding for life, whose function was merely to investigate and express an opinion on claims, which then were considered by Congress, where, the court’s opinion having no controlling effect, the same confusion, opportunity for fraud, and either neglect or absorption of congressional time arose, as if they had not received consideration by the court. This was followed in 1863 by legislation empowering the rendition of judgments to be paid "out of any general appropriations made by law for the payment and satisfaction of private claims." The presentation of these judgments to congress for appropriations was, however, subjected to discretionary approval by the Secretary of the Treasury, who might report them for appropriation or refuse to do so. The Supreme Court, on this ground, declined to recognize the function of the Court of Claims as completely a judicial one, and refused to entertain appeals from its judgments. This provision, however, was eliminated in 1866, since which time the judgments of the Court of Claims have been paid almost without exception by virtue of appropriations made each year, wherein Congress describes the several judgments which are to be paid. While thus the judgments are in practice generally recognized by Congress as concluding the rights of the parties, in practical results they have not quite that effect,
for Congress may omit or refuse to appropriate money to pay any one or more of such judgments, in which case they would become practically useless and ineffective except as a ground of criticism of the legislative branch.

The law prescribing the general jurisdiction of the Court of Claims was originally embodied in the Revised Statutes of 1873, in Ch. 21, Secs. 1049 to 1093. That jurisdiction has from time to time been enlarged by certain amendments, notably by what is known as the Bowman Act of March 3, 1883, and by the more comprehensive act ascribed to Randolph Tucker, of March 3, 1887. The latter Act, with subsequent detail amendments, may be considered as the general charter to the courts to entertain suits against the United States. That general jurisdiction, as described in the Tucker Act, extends, first, to "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department or upon any contract express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort; second, all set-off, counterclaims and claims for damages on the part of the Government against any claimant in said court." Section 2 of the Act of 1887 for the first time provided that the District Courts of the United States should have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed $1,000 and the Circuit Courts of the United States shall have such concurrent jurisdiction of all such claims between $1,000 and $10,000. This section has since been amended to exclude from the local courts suits for fees or official compensation of officers of the United States. Certain exceptions and various phases of special jurisdiction may be omitted from even mention at present as they would confuse the consideration of this general scheme.

Primarily, it should be borne in mind that this act is not regulative of any existing right, for no right inheres in the individual to sue the nation. On the contrary, it merely confers a privilege ex gratia. This distinction is important, in both construction and application; in construction, because any right claimed under it must find clear words or implication to support it; in application, because all qualifying or restrictive provisions express absolute conditions precedent with no government officer can waive. For this reason the language of the ordinary six year
statutes of limitations which appears in this act, does not, as ordinarily construed, merely confer the right to a defense which may be waived by failure to plead it, but absolutely denies any jurisdiction when the six years have elapsed.

Another limitation on the right to sue which may as well be mentioned here, though not in the Court of Claims Act, is found in Sec. 3477 R. S. U. S., declaring all assignments of claims null and void, so that suit by an assignee cannot be entertained. This, however, is held not to apply to assignments by operation of law as in bankruptcy, insolvency, probate or on execution or other court process.

III

Turning now to the construction of the several details of this statute, it will be observed from the quotation made that the jurisdiction is only over "claims." The word claim in these statutes has been construed as limited to money demands so as to exclude attempts to enforce the delivery of property, the conveyance of land, or the compulsion of any act by governmental officers except as the same may be ancillary to the jurisdiction to render a money judgment. So one cannot sue for such ultimate relief as specific performance, mandamus, injunction, or quieting title, but merely to recover money.

Next, a sueable claim may be one "founded on the constitution." I know of no case in which any money claim has been sustained under this clause except by virtue of that provision of the Fifteenth Amendment which provides that no private property shall be taken for public use without just compensation. To so sustain these the Court of Claims and the Supreme Court have transposed this phrase into "just compensation shall be made for all private property which may be taken"; a somewhat doubtful equivalent, but now fully sanctioned. Some rather nice lines of distinction have been drawn in this class of cases which are quite numerous. The first of these is between a taking of private property by the United States so that compensation must be made and a mere deprivation of the owner's control and possession thereof by some federal officer without authority of law, in which case it is held that his property is not taken by the Government and therefore right to compensation does not arise, although by reason of the physical power at the command of the public officer the private individual may be just as completely deprived and the United States may completely enjoy. The leading case sustaining
a right of recovery is Great Falls Mfg. Co., 112 U. S. 645, where
engineer officers of the United States, under authority of an Act
of Congress, tapped the Potomac River and drew therefrom water
supply for the city of Washington to impairment or destruction
of the water powers owned by the claimant. It was held that the
acts of the officers, being authorized by law, amounted to a taking
from the claimant by the Government of property for public use,
and that Congress, being presumed to act in obedience to the
Constitution, must have intended to imply in their legislation a
promise to pay the owners. Perhaps the leading case upon the
principle involved on the other side, although not a claims case,
was Kaufman v. Lee, 106 U. S. 196, where representatives of
Robert E. Lee, the Confederate General, brought suit in eject-
ment against an army officer in command of a post established
on the estate of Arlington near Washington. The action was
sustained on the ground that the army officer had no authority in
law to occupy private property. His possession of it, therefore,
was held not the possession of the United States, and judgment
in ejectment against him was sustained notwithstanding the con-
sideration that such judgment could by the Government be
rendered entirely futile by removing that particular officer from
the command of the post and substituting another. But the
principle has been applied to numerous claims cases. Thus in
Langford, 101 U. S. 341, an Indian agent possessed himself of
private buildings under a contention of right so to do, and it was
held that it was not a conscious taking by the Government, but a
tortious violation of a private right by the officer and therefore
not within the claims jurisdiction. These cases, with subsequent
ones referring to them, will serve to illustrate and mark more
clearly this line of distinction. The clause of the claims juris-
diction act has been invoked to justify recoveries for the use of
patents in Government work in very many instances, and the line
of distinction between those resulting in a sueable claim and those
not so resulting seems to turn upon whether the government
officer, within his legal authority, uses the patent knowingly and
in recognition of the patentee's rights, either with or without any
express contract to pay a royalty; or whether the patent is used
either in ignorance or denial of the patentee's rights. In the first,
liability results; in the latter, not. Interesting and typical cases
upon patents are Schillinger, 155 U. S. 163; Berdam F. Co. 156
U. S. 552; Russell, 182 id. 516; Bethlehem S. Co. 42 C. C. 365;
Brooks, 39 C. C. 494. Use of inventions patented by government employees has been prolific of many claims for compensation which have been generally controlled by the above principles. Gill, 25 C. C. 415; Harley, 39 id. 105; McAleer, 150 U. S. 424.

Another distinction in this field is that between a taking and the commission of acts entirely within their lawfully authority by government officers, resulting in consequential damages or interference with the enjoyment of private property by the owner. Thus, if in the performance of its power and duty to improve the navigation of streams, the Government actually occupies the land of a private owner, as by the abutment of a bridge, or by storing water upon it, it will be deemed a taking for which compensation must be made. *Pumpelly v. Green Bay Co.* 13 Wall. 166; Lynah, 188 U. S. 445. On the other hand if a dam or other structure in improvement of navigation merely has the effect to interfere with private owner's access or use, without actually invading his property, it is uniformly held that there is no taking, but merely a consequential damage for which no liability results. *Gibson*, 166 U. S. 269; *Scranton v. Wheeler*, 179 id. 141; *Bedford*, 192 id. 217.

I must not spend time on further illustrations, but hasten to certain other phases of jurisdiction.

IV

The next class of sueable claims are those "arising upon any law of Congress, or upon any regulation of an executive department." Under this head naturally the claims are multitudinous: Most obviously, those of officers or employees of the government to whom some statute or regulation provides compensation. Such claim may arise on behalf of any officer from the President of the United States to the most temporary employee, and involve often very nice analysis of confusing statutes. A question of this sort frequently arising is whether an appropriation act actually setting a specific sum aside to pay for services of an officer or an employee, different in amount from the salary of the office as fixed by some previous general statute is to be deemed a modification or repeal of the former legislation. Obviously Congress may, and not infrequently does, intend to presently appropriate a less sum than is, or at the end of the fiscal year will be, due the officer. Thus the salary of an Indian agent may be a general statute be fixed at $1,800, and Congress by the annual appropriation act may
set aside but $1,500 to be paid him, leaving the remaining $300 due
but not payable out of any money yet appropriated by Congress.
The holding of the court have been various upon different situa-
tions; in some cases holding that there was a discoverable purpose
in the appropriation act to legislate with reference to the amoun-
t of compensation earned, and thus to amend or pro tanto repeal
the previous statute on that subject; in other holding that no
such purpose could be discovered and the appropriated amount
must be deemed merely a partial payment on account so that the
balance might be sued for. Illustrations of the discussion of
these questions will be found in Langston, 118 U. S. 389; Belknap.
150 id. 588.

Another question constantly arising is whether new or unusual
duties imposed upon one holding a governmental office or employ-
ment entitle him to additional compensation or are merely
additional burdens imposed upon him ex officio and therefore to
be performed for the salary of the office under the doctrine of
cum onere. An illustration is the case of Mullett, 150 U. S. 566,
one of the first claims cases which I had occasion to argue to the
Supreme Court of the United States. There, Mullett, who was
supervising architect of the treasury, upon a salary of $5,000 a
year, with duties not specifically defined, but ordinarily employed
in architectural supervision of court houses and post offices
throughout the country, prepared tentative plans for the great
building of the State War and Navy Departments at Washington
in response to a request from a commission which had been
appointed to take charge of the construction of such a building
with authority to employ architects. Such plans were accepted,
and the building, at the expense of more than ten million dollars,
erected thereon; Mullett superintending the construction while
three million dollars were being expended—all with the consent
of the Secretary of the Treasury, and while retaining his position
and salary as supervising architect. He claimed architect's and
superintendents' commissions to the extent of five per cent or some
half million dollars. He was denied recovery. Another case in
which the preceding authorities are quite fully reviewed, is that
of King, 147 U. S. 676.

Another curious case in the same line was that of Gibson v.
Peters, 150 U. S. 242, where a district attorney attended to litiga-
tion for the receiver of a national bank, and it was held that he
could not recover from the receiver compensation other than his official fees as district attorney.

There have been cases of recovery on certain grounds of distinction, one of which is that of Saunders, 120 U. S. 126, justifying the holding of two distinct offices and the receipt of the salary of both if their duties are not incompatible.

Another class of claims somewhat similar have been those for overtime, especially since the law prescribing eight hour days for various subordinate employes and clerks. Generally such claims have been disallowed, but in many instances special statutes have been enacted for the payment of overtime, in which case of course arose legitimate claims under statute, usually in large classes and very profitable to the attorneys representing them.

Another set of claims founded upon statute have been brought by discharged or reduced employees and officers, claiming that their discharge or reduction was unlawful and therefore ineffective. In the civil offices and employments, of course these have been almost exclusively since the adoption of civil service statutes and regulations. In general such claims have been defeated, usually because the civil service statutes did not attempt to interfere with the executive power of removal. But there has also been made the contention that statutes could not so interfere, the power of removal inhering in the executive and being beyond any restriction by Congress. This subject was fully argued by me in the case of Parsons, 167 U. S. 324, but the court did not deal with the constitutional question, for they construed the law is not intending to deprive the President of the power of removal. A different rule exists, however, by virtue of differences in the statute and constitution in regard to the army, discharges from which are, in time of peace at least, regulated by statute, and there are many cases where officers or men have been discharged and gone out of actual service, and years later the discharge has been found to be prohibited by statute. The holding has pretty uniformly been that it was a question of status; that a man becoming a soldier remained such until legally discharged from the service, and that the pay prescribed by law was an incident of the status, and many recoveries have been had under quite surprising circumstances of entire absence of services through many years.

A curious case, either based upon a statute or founded upon the constitutional right, has arisen out of the acquisition of Porto
Rico, that of Sanches, 42 Courts of Claims Re. 458, since affirmed. The claimant, while a subject of Spain, purchased the office of procurador of the courts, in perpetuity, and received a patent from the King of Spain. After our acquisition, the military governor abolished the office. It was claimed that this was a taking of property so as to make the United States liable. The court held the abolition of the office was within the lawful power of the military governor, and therefore not a tort; but that, notwithstanding the ownership of the office was a valuable property right according to Spanish law, such office under the principles of the United States Government could not be a property right, and hence the abolition of the office did not constitute a taking of property.

Another variety of claims which falls under this head arises under certain rebate provisions in the Statutes of the United States, as, for example, under provisions for rebating to manufacturers using imported goods upon which customs duties have been charged, the amount or some portion of the amount of such duties. Campbell's case, 107 U. S. 407. Also there was in my time a very extended class of claims for rebate of the internal revenue duty upon alcohol used in manufactures, amounting it was estimated to some twenty million dollars annually. These were defeated upon a construction that the statute granting them was conditioned upon the use being in accordance with regulations to be first promulgated by the treasury department, a step that was never reached during the lifetime of the law (Dunlap case, 173 U. S. 65), making a very narrow distinction from the Campbell case, supra.

Another illustration of claims arising upon a statute which led to a very famous litigation, was that for sugar bounties provided for by the Wilson Bill, which abolished the preceding law granting bounties generally, which had been attacked in Congress as unconstitutional, but granted as a sort of consolation, a sum equal to about one half of the previous bounties earned during the crop year in which the repeal bill was enacted. The allowance of these claims by the Court of Claims was opposed upon the ground of want of power in Congress to grant bounties: a litigation in which the most eminent counsel in the country were employed for the claimants, including Mr. Choate of New York and Mr. Semmes of Louisiana, who had been a senator in the confederate government and a brother of the famous Admiral Raphael
Semmes. The Supreme Court evaded the constitutionality of bounties by holding that those who acted in establishing a manufactory of sugar on the faith of such an apparent law, though unconstitutional, might arouse such a moral obligation from the government to them, that a subsequent appropriation in recognition of that moral obligation might arise sufficient to support a subsequent gift. Some of us who had been upon the defensive thought a new principle, both in law and physics, was established by this decision, namely, that a chasm too wide for a single leap might nevertheless, by Congress at least, if not by an individual, be cleared in two jumps.

Other classes of cases are continually arising under new statutes, and this field offers abundant reward for ingenuity and exploration, but I must pass to the next class of claims under this Court of Claims charter, which are:

V

Those founded upon "any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law or equity or admiralty if the United States were sueable." This is a very complex clause, and its construction has presented many questions of doubt. It is, first, obvious that claims are authorized upon express contracts to pay money, and these are of course very numerous in the varied activities of our National Government and involve enormous amounts of money. River and harbor work, improvement of navigation, construction of public buildings, transportation of mail, government employees, troops, stores and supplies, construction of naval vessels and revenue cutters and dry docks and furnishing of supplies of all sorts, are but a partial illustration of the contracts which the Government is continually making wherein it promises to pay money. In the nature of things such contracts involve differences of opinion as to their construction which are ordinarily resolved by the executive officers most favorably to the Government, and thus many doubtful questions here arise for adjustment in court. But government contracts are fruitful of litigation for other reasons. They are necessarily performed under the direction and command of some public officer whose primary and most important point of view, if he is faithful
to his duties, is the obtaining of that which is necessary for the purpose of the Government, even though in excess of the contract. If the contract has been ambiguously drawn, the contractor of course contends for that construction which will render performance easiest. The public officer, on the other hand, contends for that which will give the government what he thinks it ought to have. But the latter is equipped with drastic powers. He can refuse to receive that which is not in accordance with his construction of a contract and he can command that which he thinks ought to be done, and the contractor has, practically, no alternative but to obey. The contracts are often so large that the periodical payments of actual money are necessary to the continuance of the contractor's business life. Further than this, even, if the government officer in charge becomes convinced that the work or commodity unambiguously specified is not such as will serve the Government's purpose, he ordinarily does not hesitate to insist on that which will, leaving the contractor to discuss the question of compensation with some other representative of the Government later, and again the contractor has little choice but to comply. Exigencies of government work are such that frequently, if not ordinarily, there is not time for the making of new contracts when defects in existing ones are discovered, and thus, even more than in contract relations between individuals, arise questions to be settled afterwards. The Court of Claims, and the Supreme Court in review of its decisions, have recognized this arbitrary power in government officials to coerce by withholding of money and in other ways the doing of acts against the will and right of the contractor, and permit recovery upon less showing of duress than is usual as between private individuals. Intent on the part of the contractors to concede the contention of the government officer as to the true measure of the contractual duty from the mere act of obedience is not so readily inferred. A very moderate showing of damage to contractor, likely or threatened, as a result of refusing to obey, if accompanied by reasonable protest, will ordinarily be sufficient to entitle him to a consideration by the court of the question of his real duty under the contract as an original one.

It is also a pretty obvious construction of the last quoted clause of the jurisdictional statute that sueable claims may arise for damages growing out of breach of an express contract, and these are, generally speaking, controlled by the general law of contracts. Indeed I should be inclined to say that here too breach of contract
in the sense of preventing the contractor from performance was somewhat more readily presumed or found than between private individuals because of the absolute physical power of the government officer to prevent acts of the contractor which he forbids.

Again, it will be noted that implied contracts are recognized as foundation of legitimate claims. There never has been any doubt in regard to true implied contracts, those where the intention of the parties to promise to pay money is inferred from words or acts. Thus an army officer authorized to purchase certain goods who orders such goods will commit the Government to an implied contract to pay for them, although no word of promise is uttered. The rules governing claims so founded are those of the law generally as applied between individuals, of which, by the time you graduate, you will of course be fully informed. But the dispute has been serious as to that type of what is sometimes called implied contract, but more properly quasi-contract, which proceed not on the inference that the parties had any intention or understanding that a promise was made by the Government to pay, but so act that the Government ought to pay. The great majority of those situations as between individuals arise out of torts, as where one unlawfully takes another's property; although his intention very obviously is not to pay for it, the law imposes upon him a duty to do so. Now it will be noticed that this jurisdictional clause contains the phrase, "in case not sounding in tort," and that phrase has been given very dominating effect in the construction of the statute, and many cases have declared that, if the act out of which contract to pay was sought to be implied were tortious, no jurisdiction is given to any court to consider it. Much refinement of argument has been indulged by counsel and court in reference to this. It has been insisted that the Government cannot do any unlawful act, cannot unlawfully deprive a man of his property, because the Government's powers are strictly limited by law, and when such act, committed as it must be by some individual, is unlawful, that is, not authorized by law, the Government does not act at all, but only the individual. This, it has been argued, leads back to the old doctrine that the Government, like the king, can do no wrong; and, speaking generally, this doctrine has been pretty logically applied by the court, and where no authority of law could be found for the act done or it was in defiance of law, it has been held that any moral duty of the Government to pay could not be enforced
in court, but must, as before the creation of the Court of Claims, be presented to the conscience of Congress. An interesting discussion appears in Bigby, 188 U. S. 400, a case of injury from a defective elevator. There have on the other hand been many phases of quasi-contract held to result in a money claim which could be enforced. Most prominent amongst these are cases where the payment of money has been coerced, which the individual was not under legal obligation to pay.

VI

The remaining grant of jurisdiction over setoff and counter-claims presents some phases peculiar to the Court of Claims which I ought to mention. While many demands that the Government may have and properly present against an individual do not differ in their characteristics at all from those with which you will become familiar in general practice, there are some which rest on principles peculiarly applicable of the Government. The fundamental principle at the basis of these is that all individuals performing any acts on behalf of the Government are creatures of the law, and their power and authority limited by the law of which all persons have constructive knowledge. When, therefore, a public officer, be he highest in official grade or lowest in clerical service, pays out to an individual money which the law did not authorize, or releases him from payment which, under the law he ought to make, such officer exceeds the authority conferred upon him, and neither the United States nor the Government acts in so doing; and therefore the individual has received or retained the money unlawfully and is chargeable with knowledge that he has done so, and the Government may recover back, unhampered by any of the rules of voluntary payment or mistake of law applicable as between individuals. The principle is supplemented by the rule that no statutes of limitation run against the Government. It becomes obvious that the right to counterclaim is a very broad one. No matter at what stage in history an individual may have received or retained money, under however well established departmental construction of the law, the correctness of the construction may be repudiated and the court invoked to decide upon it and require a repayment with interest. It has become pretty well established in the departments that settlements made in pursuance of a fairly established rule of construction, in the absence of any fraud or collusion, will be permitted to stand, unless the individual
party to such settlement is likely to be against the Government. If he does so, however, any such settlement is likely to be repudiated and the claimant called to a new accounting. Some decisions in line with these principles have been so extreme in their results as to be very surprising to the claimant and his attorney.

Thus in the Verdier case, 164 U. S. 213, decided in 1896: a postmaster in 1870 had retired from office with a balance against him of $929.00, as the accounts were then kept. In 1883 Congress authorized a restatement of all postmaster's accounts upon a different basis of computation, and on such restatement for the years 1866 to 1869 it was found that there was actually due him at the time he retired some $2,900 more than had been allowed. His previous apparent defalcation which had been reduced to a judgment in favor of the United States was set up as a counter-claim and was found to amount with interest to about $2,300, which it was held proper to deduct from the principal of what was due him on restatement of his salary account which drew no interest.

In Wisconsin Central Railroad, 164 U. S. 190.205 the principals above stated were carried to their logical extent and many other decisions cited. The Wisconsin Central claimed pay for carrying the mails. Postmaster General Gresham, with the aid of his law officer, after full argument, construed the statutes as allowing full contract rates not reduced by reason of a land grant having been made to the company, and on these rulings the company was paid such full rates up to 1884 for many years, at which time a different construction of the law was adopted by Postmaster Gresham and the lower rate paid thereafter. Upon an application by the company, Postmaster General Vilas, on his accession, again considered the whole subject judicially, with the aid of his law officer, General E. E. Bryant, and adhered to the rule last adopted in favor of the lower compensation; but not content with so ruling as to future payments, he caused to be restated the closed accounts upon the lower basis, whereby the company was found to have received on the deliberate judicial consideration of the Postmaster General and settlements in accordance therewith, the sum of $12,000 in excess of what it was entitled to, and this it was held was money of the United States unlawfully received, and judgment for its recovery back was affirmed in the Supreme Court.
Many other striking illustrations might be given, especially of officers or employees of the United States, who, having a trifling controversy as to the amount of fee or compensation to which they are entitled for some service, and having sued therefore, were confronted by erroneous rulings in their favor by the highest government officials and have been required to pay back moneys which they had received and spent, relying upon such rulings many years before, and manifold the amount of the claim which they represented; whereas, if they had been content to let sleeping dogs lie, they would never have been disturbed in their retention of it.

There are also many subjects over which special jurisdiction has at times been conferred on the Court of Claims, even an enumeration of which would be an abuse of your patience and of little value, since each of the acts of Congress granting the jurisdiction prescribes peculiar rules of law to be applied.

VII

The procedure, pleading and practice, in the Court of Claims present no serious terrors or difficulties to a Wisconsin lawyer. Once the question of jurisdiction is passed, the hearing and adjudication upon the claim proceed according to a typical code practice, of which the merest general outline is prescribed by statute, and within which, according to the liberal custom of the court, one can hardly make fatal mistakes or errors. You will find it described in the rules of the Court of Claims, obtainable from the clerk, and in Vol. II Foster's Fed. Practice.

The suit is commenced by filing with the clerk a petition corresponding to the complaint in Wisconsin. That petition may be signed and verified by the claimant in his own name, by any attorney in fact, or by any member of the Court of Claims Bar whose duly acknowledged power of attorney accompanies the petition. There are certain detail steps necessary to such commencement, which are prescribed by rules: such as the filing of a certain number of copies in order that the clerk may deliver them to the representative of the Government, namely, the assistant attorney-general in charge; also, that within a brief time after the original filing, there must be filed a certain number of printed copies of the petition, unless that be dispensed with by order of court. Ordinarily they are filed. These steps are regulated by sec. 1072 R. S. U. S. and by the rules of court.
Their omission will merely delay progress. No service is required other than the deposit with the clerk, whose duty it is, as I have said, to deliver copies to the assistant attorney-general. The filing of a petition, the verification, and the authentication of the power of attorney are, in a sense at least, jurisdictional steps; important not so much to the further procedure as to the purpose of stopping the statute of limitations in case of dismissal.

The petition itself may and should be characterized by the utmost simplicity. By statute, it must set forth the claim, the action thereon in Congress, or by any of the departments, if any has been had; what persons are owners thereof or interested therein; when and how each person became interested; that no assignment or transfer of said claim has been made; and that the claimant is justly entitled to the amount therein stated from the United States after allowing all just credits and set-offs; that the claimant, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not voluntarily aided, abetted or encouraged rebellion against the said government. The rules add little to these statutory requirements. They require, first, the title of the action with full Christian and surnames of all claimants; second, a plain concise statement of the facts, giving venue and date, free from argumentative, irrelevant and impertinent matter; and that, if claim be founded upon express contract, the substance thereof shall set forth in the petition and the original or a copy, in writing, must be annexed; also that the bar of the statute of limitations be negatived, in case more than six years appear to have expired since the claim accrued, by setting up the existence and duration of any disability preventing the filing of the petition. In practical application of these statutes and rules, any petition which states facts from which, by any reasonable inference, may result a liability of the Government to the claimant within the claims jurisdiction, will suffice to enable the court to relieve all evidence of transactions having reasonable relation to those mentioned in the petition and to ascertain and adjudge the right of recovery; unless indeed it states facts negativing the existence of a claim within the jurisdiction, as for example by showing that the right of the claimant to a money recovery is based upon tort or that it accrued beyond the period of limitation, or that it has been assigned. Of course this liberality in the treatment of the petition is guarded by rules which enable the government counsel to
demand greater specification, if necessary; but it must be remembered that in the case of probably ninety per cent of the claims, they have already been investigated, passed upon and disallowed by some of the executive departments, so that the attorney-general can be furnished from that department not only with an explanation of the attitude of the Government adverse to the claim, but a reasonably full statement of the facts and circumstances claimed to support it, and in practical working no more specification is ordinarily demanded by government counsel than will serve to identify the claim sued on with some claim theretofore presented and disallowed by some executive officer.

After the petition is filed and the copies thereof delivered to the assistant attorney-general he may make all the usual motions and pleadings. He may move to dismiss for non-compliance with the law in regard to filing or authentication of the petition, but seldom does. He may raise the question of sufficiency of parties claimant or of the immaturity of the claim by motion in the nature of plea in abatement, or he may demur, but substantially on no ground except that the petition does not state facts from which any claimant against the Government arises within the jurisdiction of the court: one of which reasons, in accordance with what has already been said, is, that the claim accrued more than six years before the filing of the petition, since that is a jurisdictional fact and one of which the attorney-general cannot waive the fatal effect. By the rules, the defendant’s pleadings must be filed within sixty days after the position, but in practical working expiration of that period is not customarily held to bar the right of the Government to raise any such objections.

Neither motion nor demurrer being interposed, or if interposed overruled, the attorney-general may then plead any set-off or counterclaim. The nature of such set-offs and counterclaims I have mentioned elsewhere. He may also set up the fact if it is not, as it should be, made apparent by the petition, that the claim has been assigned which on grounds of public policy is a complete defense, as I have previously explained. He may also set up by answer that the claimant or his privies have practiced or attempted to practice some fraud against the United States, which fact is fatal to the claim by virtue of sec. 1086 R. S. U. S., which provides that any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement establishment or allowance of any claim or any
part of any claim against the United States shall *ipso facto* forfeit
the same to the Government, and it shall be the duty of the Court
of Claims in such case to find specifically that such fraud was
practiced or attempted to be practiced, and thereupon give
judgment that such claim is forfeited to the Government, and that
the claimant be forever barred from prosecuting the same. No
omission of the attorney-general to make or sustain plea, demurrer
or special defense, however, gives any right to the claimant to
take judgment *pro confesso* or by default. This is guarded against
by a rule that if the attorney-general refuses to plead over, the
claimant may proceed with his case, but shall not have judgment
for his claim unless he establishes the same by proof satisfactory
to the court; and by another rule which provides that if the
attorney-general refrains from interposing any of the before
mentioned motions, pleas or special defenses for a period of sixty
days, a general traverse of the petition shall be considered as
entered. In the overwhelming majority of cases the attorney-
general in fact interposes no pleading whatever, but rests upon
the general traverse by this rule implied. This custom has grown
out of the condition before mentioned, that the claims and con-
tenitions both of the claimant and of the executive department
which has denied his claim, are there already well known and
matter of record, and such record will, as we shall discover in a
few minutes, be shortly communicated to the court, thus serving
the purpose of the fullest possible exposition of the claims of both
parties; and hence rendering particularization and specification
of the respective contentions, either fact of law, unnecessary in
the pleadings. In case a counterclaim or set-off is pleaded, or the
practice or fraud on the part of the claimant, the latter must reply
under oath within the next three months. In other cases no
further pleading of the claimant is necessary.

At this stage in the procedure of suit on a claim usually
intervene certain steps peculiar to that court. Either first the
claimant moves the court to make a "call," as it is termed, upon
the executive department, where are the records of all proceed-
ings, correspondence and departmental rulings on the transactions
out of which the claim accrued, upon which the court may make
that call, which is in form a request and may, theoretically, be
refused in the discretion of the executive department, but, in
practical working, is almost uniformly complied with. There are
certain restrictions in the rules of the court on abuse of this
privilege in the claimant so that the departments shall not be troubled unnecessarily, but, generally speaking, the court is very free to call for, and very uniformly receives, the whole record of the transaction. This motion by the claimant may be made for use of the documents as evidence, or upon a proper showing it may also be made to enable him to frame his petition. On the other hand, it is the custom of the assistant attorney-general as soon as he receives a petition from the clerk of court, to immediately transmit it to the department whose ruling in denying the claim it has thus become his duty to defend in court, and he requests information which will enable him to make that defense, to which response is almost uniformly made by transmission of all papers and documents on the subject, or certified copies thereof, and these he may file in court. In practice, they are received in evidence with the utmost freedom and are often the sole basis upon which the court decides and, almost uniformly, an important part of the evidence before that court. The assistant attorney-general, not infrequently, with such documents receives information from the law officer of the department where the transactions occurred, stating the reasons and authorities for adverse decision to the claim, which often is filed with the other papers of the Court of Claims and, while not evidentiary of specific facts, is considered by the court much as would be a brief on such subjects.

At any time after the issue is framed so that the disputed facts become defined, the parties are at liberty to take evidence as to those facts and to any new facts which they may deem material. According to the literal reading of the rules, this right is first in the claimant and, after he announced completion of his evidence, is in the defendant. In practice, however, especially in my time, either party took such evidence as he pleased at any time after the issues had been defined by the report of the department where the claim arose and the claimant, usually, was not allowed to take testimony until that time. True, the attorney for the Government had no authority under the rules to impose such a condition precedent, but the court and the department of justice being burdened with approximately twenty-five times as many cases as they could handle, some cases had to wait, and the court quite uniformly listened to the statement of the assistant attorney-general that it was not consistent with the dispatch of other business to turn the attention of his bureau to the taking of
evidence in a particular case at the particular time named by the claimant: claimants knowing this, usually yielded to such requests to postpone. This power was exercised in this way because in a great majority of cases a large part of the facts became either established or conceded by the documentary evidence from the department, and the taking of much evidence was obviated, to the expedition not only of business generally, but of the particular case.

As an almost uniform rule, the evidence is all taken by deposition. Rules so provide, except that the court may upon a showing of reasons order that any witness be produced before the court or before some judge thereof. Such a step, I believe, was only once taken during my term as assistant attorney-general, and that was upon a motion for a new trial after the claim had been adjudged by the Court of Claims and affirmed by the Supreme Court, in order to enable me to raise the defense of practice of fraud perpetrated by forgery; and some witness, who must have been in complicity in the fraud if there such existed, was ordered to appear before the court to testify in its presence. The taking of depositions is very similar to the practice followed in Wisconsin. They may be taken anywhere in the United States on oral interrogatories, and before a variety of officers, including notaries public, and also including commissioners of the court of claims, who can be appointed at any time and thus furnish an officer at any place where none exists. The deposition may also be taken on written interrogatories, in which case the opposing party has the right to file written cross-interrogatories to accompany the commission, or has the right, by giving notice, to be present when the claimant’s written interrogatories are answered and to cross-examine orally. In foreign countries the depositions are required to be taken upon commission and written interrogatories. While the rules literally contemplate the prompt and orderly closing of the taking of evidence first by the claimant and then by the defendant, in practical operation the court is extremely liberal in allowing evidence to be taken any time before the final argument of the case, and indeed afterwards, before its decision, upon any reasonable showing of necessity or promotion of justice.

After the evidence is completed it becomes the duty of the claimant to file with the court a request for findings, something with which Wisconsin lawyers are entirely familiar, stating
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specifically the detail facts which he claims are established by all the evidence in the case, including that which has been received from the executive departments; and also the conclusions of law which he claims the court should draw from those facts, and to accompany this with his written or printed brief, embodying an abstract of the evidence. This being done, the case is transferred from the mass of thousands of cases upon the general docket to what is known as the trial calendar; but this does not greatly help the situation, for the trial calendar contains manyfold more cases than the court can dispose of in its annual term, and cases are customarily not placed upon the day calendar until the Government has filed its brief and is ready to argue them. Hence the custom is that after being placed upon the trial calendar, and as soon as possible consistently with the other business of the bureau, the active preparation of the defense commences. If the evidence introduced by the claimant seems to call for the taking of testimony on behalf of the Government, that is done, and when completed, the attorney in charge files his brief and argument consisting of his contentions adverse to those of the claimant and of a request for modification of the specific findings requested by the latter. He also requests any findings of other facts which are deemed established by the evidence and essential to the defense. When this brief is filed the case usually quite promptly reaches the day calendar for argument, and is either argued (usually by an "assistant attorney," of whom there are several to aid the assistant attorney-general) or is submitted without argument upon the briefs. The latter being a very common practice, since it accomplishes some acceleration of the case, relieving it from the necessity of waiting its turn upon the day calendar. The argument is always to the full bench of five judges, except for casual absences, and the consideration of the case is by all who listen to the argument, and generally in my time was a very careful study of the true merits of the controversy, with an opinion setting forth the reasons for the decision.

There is no statute with reference to the entry of judgment, which is of course a mere money judgment, but the Supreme Court has by rules prescribed certain formalities with a view to the make-up of a convenient record for appeals, of which I shall speak later. Those require, both as to judgments of the court of claims and of circuit and district courts, that the record shall contain a finding of the facts in the case established by the
evidence, in the nature of a special verdict, but not the evidence establishing them, and a separate statement of the conclusions of law upon such facts upon which the court founds such judgment or decrees. This practice is entirely familiar to Wisconsin practitioners, and corresponds almost entirely to the finding of fact required by our statute in cases tried without a jury. I was much surprised to find, however, that in many jurisdictions throughout the United States it was novel, and that neither judges or members of the bar had any clear conception of the meaning of the word "finding" in such connection. The Court of Claims makes up its own findings from the requests filed by the respective parties, or by originating others.

Judgment being entered, either party has a right to move for a new trial and present its motion either by submission on briefs or by argument; but the right of the respective parties to make such motion is very different. By sec. 1087 the court is empowered to grant a new trial on the claimant’s motion "for any of the reasons which by the rules of the common law or chancery in suits between individuals would furnish sufficient ground for granting new trial." The motion therefore, however, is by rule required to be made at the term in which the judgment is rendered, and must specify with minuteness either the error of facts, the error of law, or the newly discovered evidence which is claimed to justify it, with various specifications which I shall not take time to mention now, as any practitioner will need to refer to the rules therefor. The Government, however, has much more ample privilege. Sec. 1088 of the revised statutes empower the court to grant to the Government a new trial at any time while the claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim; and “final disposition” is held to include as well the decision of the Supreme Court on appeal as the original judgment entered in the Court of Claims. Not only is the time thus greatly more extended in behalf of the Government, but the grounds also. The same section authorizes the court to grant the new trial upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done the United States; and the decisions have construed fraud, wrong and injustice so broadly as to be satisfied by any convincing showing that the judgment ought to have been the other way, unless in amount. It seems an anomaly to a lawyer familiar with the
sanctity of final judgments to find that after the Court of Claims has adjudicated in favor of a claimant and, on appeal, the Supreme Court of the United States has affirmed and ratified the judgment, that such judgment may still be assailed on the mere assertion that it is unjust and, ought not to have been rendered. But one familiar with the confused methods of doing business in the departments, the frequent impossibility of finding in the service or elsewhere the men who had actual contact with the transactions out of which the claims accrued, and the consequent difficulty of making the merits appear as against a prima facie showing by the claimant who may be more or less restrained by his conscience from making an untrue statement of facts, soon appreciates the necessity of such a provision as a qualification of the privilege accorded by the Government to allow a court to decide whether it ought to pay money or not. The right to this motion is very freely exercised by the assistant attorney-general in charge of the government defense, and is received with a degree of favor by the court that marks the judges thereof with a high degree of broad-mindedness. Neither neglect nor oversight of the assistant attorney-general’s bureau nor of the executive officers or clerks is any deterrent. Even a new legal argument tending to a change in the judgment, justifies the motion and has many times induced the court to grant it. I myself presented more than one motion for no reason whatever except that in my opinion the attorney who tried the case ought to have called the court’s attention to other considerations, either of fact or law, and that for failure thereof I believed injustice had resulted to the United States.

Assuming that a judgment has been entered, the claimant then procures a copy thereof certified by the clerk of court, and presents the same to the Secretary of the Treasury who, when Congress is next in session, certifies to it all of such judgments which the attorney general certified to him are not intended to be appealed, and, as I have said, they are usually included in the general appropriation. Judgments which have been appealed to the Supreme Court and are afterwards affirmed, draw interest at four per cent from the date of filing the judgment of the Court of Claims in the treasury department up to and including the date of the mandate and of affirmance.

To the general practitioner, whose client and witnesses live in his own vicinity, it often will be more convenient and probably more expeditious to avail himself of the concurrent jurisdiction
of the local federal courts, which is conferred by sec. 2 of the Act of March 3, 1887. Ch. 359, known as the Tucker Act. That jurisdiction is entirely concurrent with the Court of Claims over all claims within the general jurisdiction of the court; to the extent of $1,000 in the district court and $10,000 in the circuit court, except as to claims of government officers for compensation. The rules of law affecting the merits of the claim are of course the same. The practice, however, is slightly more technical in analogy to other suits in those courts. By sec. 4 of the Tucker Act "such procedure shall be in accordance with the rules of the respective courts"; controlled, however, by the rules of the Supreme Court requiring the record to contain a finding and not the evidence. By the Tucker Act right of appeal was granted from the judgments of district and circuit courts to the same extent and in the same manner as then existed from the Court of Claims.

No costs are allowed for or against either party, and there are no fees of court officers to be paid by either.

VIII

Direct appeals to the Supreme Court are allowed from judgments of the Court of Claims by sec. 707-708 R. S. U. S., which provide (Sec. 707):

"An appeal to the Supreme Court shall be allowed on behalf of the United States from all judgments of the Court of Claims adverse to the United States; and on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000, or where his claim is forfeited to the United States by the judgment of said court as provided in sec. 1089."

(Sec. 708): "All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct."

Appeals from judgments of the Circuit and District Courts in the appeals jurisdiction are regulated by the same statutes and rules, by virtue of sec. 9 of the Tucker Act, which is held to makes secs. 707 and 708 applicable, so that they go direct to the Supreme Court instead of to the Circuit Court of Appeals.

The procedure is, again, very simple. The rules require the record to consist of the pleadings, the findings and the judgment, without the evidence, and the review is therefore merely of the
questions of law, as a general rule. The Supreme Court has, however, under its power of regulation, the authority to order up the evidence or any other of the proceedings, and in very rare instances has exercised this power. La Abra Silver Mining Co., 175 U. S. 423.

An appeal is accomplished by filing with the clerk an application for appeal signed by the claimant or his attorney of record, or by the attorney-general or his proper assistant attorney-general, and must be allowed either by the court if in session, or the Chief Justice if in vacation. The record is made up by the clerk and transmitted, whereupon the case takes its place on the calendar of the Supreme Court and proceeds like other causes.