43D CONGRESS, 1st Session. } SENATE. { REPORT No. 168.

IN THE SENATE OF THE UNITED STATES.

MARCH 10, 1874.—Ordered to be printed.

Mr. STEVENSON submitted the following

REPORT:

[To accompany bill H. R. 826.]

The Committee on the Judiciary, to whom was referred House bill for the relief of Elias C. Boudinot, have had the same under consideration, and beg leave to report:

It appears that Elias C. Boudinot established a factory for the manufacture of tobacco in the Cherokee Nation. At that period there was no law imposing taxes whatever upon members of the Indian tribes inhabiting what is known as the Indian Territory; but, on the part of the Cherokee Nation of Indians, it appears that a special provision of their treaty with the United States of July 19, 1866, exempted all Cherokees resident in that nation from taxation of every kind. The tenth article of that treaty is in words and figures following, to wit:

> Every Cherokee and freed person, resident in the Cherokee Nation, shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market, without any restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory.

Mr. Boudinot proceeded in his business of manufacturing tobacco without doubt of his right to do so, in the Indian Territory, he being an Indian by blood and a bona-fide resident of said Territory, without being subject to any tax for tobacco so manufactured and sold in said Territory.

Congress enacted, on July 20, 1868, imposing and regulating taxes on liquors and tobacco. The 107th section of that act provided—

> That the internal-revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be held and construed to extend to such articles produced everywhere within the exterior boundaries of the United States, whether the same shall be within a collection-district or not.

Early in 1869, Boudinot applied to the Commissioner of Internal Revenue, Hon. E. A. Rollins, to know if the 107th section applied to tobacco manufactured in the Indian Territory.

Upon 23d February, 1869, Mr. Rollins officially informed Boudinot:

> Notwithstanding the language of the said section, the tax could not be collected upon tobacco manufactured in the Indian country, so long as it remained in said country, but upon its being brought within any collection-district of the United States, it would be liable to seizure and forfeiture, unless it be stamped thus, and only the tax imposed by law had been paid.

Upon the succession of Hon. Columbus Delano to the office of Commissioner of Internal Revenue, it appears that Boudinot applied to him for his construction of this 107th section; after a thorough examination of the Cherokee treaties, and the act of July 20, 1868, Mr. Delano replied by the following opinion:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, October 25, 1869.

GENTLEMEN: This office does not propose to apply within the territories of the Cherokee Nation the revenue laws relating to tobacco and spirits produced there; but holds that section 107 of said act of 20th of July, 1868, applies to the articles themselves and will be enforced when those articles are carried into the States or Territories of the United States for sale. The grounds of this determination and the instructions given to the revenue officers are more fully explained by the accompanying memorandum of opinion by Judge James, to whom the question was originally referred.

Very respectfully,

C. DELANO,
Commissioner.

Messrs. PIKE & JOHNSON,
Attorneys at Law.

The opinion of Judge James, is as follows:

In the matter of taxes on tobacco produced in the territory of the Cherokee Nation.

SIR: I have examined the argument of Colonel Elias C. Boudinot, a citizen of the Cherokee Nation, against the collection within its territory of taxes upon tobacco manufactured there, and have the honor to make the following reply:

The question whether section 107 of the act of 20th July, 1868, intended that the revenue laws relating to tobacco and spirits produced in "the Indian country" should be extended *into* that country and there enforced, was submitted to me by yourself about the 12th day of August last. I had the honor to advise you that, without any reference to existing treaties, it was apparent, on the face of the statute itself, that Congress did not intend to apply the revenue laws to the Indian country itself, but to the *articles* produced there, and that the application could be made only to such part of these manufactures as might be carried thence into the States or Territories of the United States. The action of your office was afterward taken in accordance with this advice, and instructions to that effect were sent, as I was informed, to the revenue officers of Kansas, Missouri, and Texas.

CHARLES P. JAMES,
Counselor at Law.

Hon. COLUMBUS DELANO,
Commissioner of Internal Revenue.

The opinion of the Commissioner of Internal Revenue, Mr. Delano, was forwarded with Judge James's opinion to Boudinot, by his attorneys, Messrs. Pike and Johnson, about 1st December, 1869.

Very soon thereafter, the tobacco factory of Boudinot, with everything pertaining thereto, was seized by the revenue officers of the United States in the Indian country. Boudinot was also arrested and held to bail in the sum of twenty-five hundred dollars, to answer a criminal charge before the next term of the United States court for the western district of Arkansas.

And civil proceedings were also instituted against Boudinot in the United States court for the western district of Arkansas; a good deal of his tobacco was sold.

At the May term, 1870, of said court, Boudinot, for himself and his copartner, Stand Wattie, interposed, and by his answer submitted, among others, the following allegations:

That the claimants, Boudinot and Wattie are Cherokee Indians by blood, and residents of the Cherokee Nation. That the manufactory of tobacco was carried on in the Cherokee Nation, and that the manufactured tobacco, raw material, and other property were never within any collection district of the United States, nor subject to the taxes mentioned in the libel, nor were the owners bound to comply with the re-

quirements of the laws of the Congress; that the revenue laws were complied with as to all tobacco sold or offered for sale outside of said Indian country, if any such there were, and that said firm was the sole owner of the property described in the libel; and that the property libeled was found and seized in the Cherokee Nation, outside of any revenue collection district of the United States.

At the trial the claimants moved the court to instruct the jury that the act of Congress imposing the taxes already referred to, approved 20 July, 1868, is not in force in any part of the Indian Territory embraced in the western district of Arkansas; that the tenth article of the treaty of 1866, between the Cherokee Nation and the United States, was in full force with reference to the territory of the Cherokee Nation; that section 107 of the act of 1868 requires stamps to be sold only to manufacturers of tobacco in the respective collection districts, and that it gave the claimants no legal right to buy said stamps to place on their tobacco in the Cherokee Nation, and that they are not responsible for not having done so.

The court refused to give these instructions. The jury found for the United States, and judgment was entered accordingly.

The claiments excepted to the refusal of the court to give the instructions asked for, and an appeal was prayed to the Supreme Court of the United States.

At the December term of the last-mentioned tribunal, said judgment was by a divided court affirmed, and is reported in 11 Wallace Reports, 616. Judges Bradley, Nelson, Field, and Chief Justice Chase dissenting.

A majority of the court held that the second section of the fourth article of the Constitution of the United States declares: "That this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land.

"It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution of the United States. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, (Foster & Elam *vs.* Neilson, 2 Peters, 314;) and an act of Congress may supersede a prior treaty, (Taylor *vs.* Morton, 2 Curtis, R., 454; 1 Walworth, 155.)

"In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved, and require their faithful observance, cannot be more obligatory. They have no higher sanctity, and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the Government. They are beyond the sphere of judicial cognizance. In the case under consideration, the act of Congress must prevail, as if the treaty were not an element to be considered; if a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

"We are glad to know that there is no ground for any imputation upon the integrity or good faith of the claimants, who prosecuted the writ of error. In a case not free from doubt and difficulty they acted under a misapprehension of their legal rights."

TENNESSEE STATE LIBRARY

It will be perceived from letters from the Internal Revenue Department, addressed to the Attorney-General, and from letters from the Attorney-General himself, that these officers deemed, after the decision of the Supreme Court, as quoted above, that they could not properly interfere, either by a compromise with the claimants, or by dismissing the proceedings against them. They referred the claimants to relief by Congress, as suggested by the Supreme Court.

The House of Representatives passed a bill during the last Congress, giving to Boudinot the relief sought.

The Attorney-General strongly recommends the passage of an act giving relief to the claimant, Boudinot.

From a mistake in the construction of the 107th section of the internal-revenue act of 20th July, 1868, involved in great doubt, and on which the Supreme Court of the United States were almost equally divided, Boudinot has already been subjected to great loss of his property which was seized and sold by the United States, and to a very expensive litigation. He does not ask a return of this property; he simply asks the discontinuance and dismissal of pending proceedings in the United States court in the western district of Arkansas against him. Rarely has a claimant come before Congress with stronger claims for its equitable jurisdiction; approved by the Supreme Court of the United States, by the law department of the Government, by the Internal Revenue Department, and by your committee.

They recommend unanimously the passage of a bill for the relief of E. C. Boudinot, in lieu of the House bill. They append to their report the letters of Attorney General Williams and the Commissioner of Internal Revenue touching this claim and recommending relief.

○