

E. C. BOUDINOT.

[To accompany bill H. R. 163.]

MEMORIAL

OF

E. C. BOUDINOT.

DECEMBER 4, 1873.—Referred to the Committee on the Judiciary and ordered to be printed.

To the Congress of the United States:

Your memorialist, Elias C. Boudinot, a Cherokee Indian, respectfully represents that a suit against his property is now pending in the United States court for the western district of Arkansas, and has been for several years.

That it originated from the fact that he manufactured tobacco in the Cherokee Nation, and sold the same in the Indian Territory without conforming to the internal-revenue laws of the United States, providing for the collection of taxes on manufactured tobacco in the United States, believing himself at the time exempt from the operation of such laws while he manufactured and sold his products within the limits of the Indian Territory, and did not attempt to sell the same outside of the Indian Territory, without paying the tax required by law.

That upon a complete presentation of all the facts of his case, both Houses of the Forty-second Congress passed, without objection, a bill for his relief. The bill passed by both Houses, together with the report of the Judiciary Committee, are herewith annexed, and prayed to be made a part of this memorial.

Your memorialist candidly believes he is justly entitled to the relief unanimously adjudged by the Forty-second Congress to be due him; but desiring to save his securities from loss, he simply petitions your honorable bodies to relieve him and his securities by directing the dismissal of all proceedings against him or his property, or his securities, which may be pending in the United States district court for the western district of Arkansas, on account of said alleged violations of the internal-revenue laws.

Respectfully, &c.,

E. C. BOUDINOT.

FORTY-SECOND CONGRESS, SECOND SESSION.

HOUSE OF REPRESENTATIVES.—REPORT NO. 6.

JANUARY 16, 1872.—Ordered to be printed and recommitted to the Committee on the Judiciary.

JANUARY 30, 1872.—Ordered to be printed and recommitted to the Committee on the Judiciary.

Mr. VOORHEES, from the Committee on the Judiciary, made the following

REPORT:

The committee have carefully examined the facts and record in the case of Elias C. Boudinot, a Cherokee Indian, and find them to be as follows:

In the year 1867 said Boudinot established a factory for the manufacture of tobacco in the Cherokee Nation; at that time there was no law imposing any taxes whatever upon members of 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 10th article of such treaty is in these words:

"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 the Indian Territory."

Mr. Boudinot proceeded in his business of manufacturing tobacco, without apprehension or doubt as to his right to manufacture and sell tobacco in the Indian Territory without paying tax until Congress enacted the revenue law of July 20, 1868, regulating the collection of taxes on liquors and tobacco. The 107th section of this act of Congress is as follows:

"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 anywhere within the exterior boundaries of the United States, whether the same shall be within a collection-district or not."

The record shows that, shortly after the enactment of this law, Mr. Boudinot applied to the Commissioner of Internal Revenue—at that time the Hon. E. A. Rollins—to know if the said 107th section, above quoted, was intended to extend the revenue laws in respect to liquors and tobacco over the Indian Territory.

In response to this application of Mr. Boudinot, Mr. Rollins officially informed him that—

"*Notwithstanding* the language of 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 should be properly stamped, thus indicating that the tax imposed by law had been paid."

This letter of Mr. Commissioner Rollins is dated the 23d day of February, 1869.

Upon the succession of Hon. Columbus Delano to the office of Commissioner of Internal Revenue, it appears that Mr. Boudinot was anxious to obtain from the new incumbent an indorsement of his business, as he had previously done while Mr. Rollins was in office.

The record shows that Mr. Delano was more deliberate and careful in the expression of his opinion than was Mr. Rollins, for Mr. Delano referred the subject to Judge Charles P. James for legal advice. After thorough examination of the Cherokee treaty, and the said act of Congress of July 20, 1868, Mr. Delano authorized the following letter and opinion to be forwarded to Mr. Boudinot:

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"Washington, October 21, 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 one hundred and seven of the act of 20th 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, *Counselors-at-Law*.

"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*."

It will be observed that this letter of Mr. Delano is dated October 21, 1869; it was forwarded to Mr. Boudinot, who was, at that time, in the Cherokee Nation, and received by him about the 1st of December, 1869; in less than thirty days after the reception by Boudinot of Mr. Delano's letter, the tobacco-factory of Boudinot, with everything pertaining thereto, was seized by the revenue officers of the United States. Mr. 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 district court for the western district of Arkansas.

At the regular term of said court, which convened on the 2d Monday in May, 1870, the court decided that, although the treaty of 1866 clearly gave Mr. Boudinot the right to manufacture tobacco in the Cherokee Nation, and sell the same in the Indian Territory without paying tax, still, the 107th section of the act of Congress of July 20, 1868, being repugnant to said treaty, abrogated the same, *pro tanto*, and extended the provisions of the revenue laws relating to liquors and tobacco over the Indian country, and that the decisions of Mr. Rollins and Mr. Delano were no protection to Mr. Boudinot. The judge of such district court, however, explicitly exonerated Mr. Boudinot from any intent to defraud the Government, as the following language from his decision in the case will show:

"In what I have said in reference to the frauds committed by those who might engage in the manufacture of tobacco in that country, I do not wish to be understood as reflecting on the claimant in this case. There is nothing in this case, as submitted to the court and jury, to show that he was engaged in any such practices. He seems to have acted in good faith, supposing the law to be as he claims it. In this he was mistaken, and his manufactory and tobacco are as much subject to forfeiture as if he had in fact acted with the most fraudulent motives."

Mr. Boudinot was also indicted at said term of the district court for manufacturing tobacco in the Indian country without conforming to the internal-revenue laws.

Mr. Boudinot appealed his case to the Supreme Court of the United States, which court, on the 1st day of May last, affirmed the judgment of the said district court; two of the judges, however, Justices Bradley and Davis, dissenting, while Chief Justice Chase and Justice Fields did not sit in the case.

The committee invite attention to the concluding portion of the opinion of the majority of the court, delivered by Justice Swayne:

"But conceding these views to be correct, it is insisted that the section cannot apply to the Cherokee Nation, because it is in conflict with the treaty. Undoubtedly one or the other must yield. The repugnancy is clear, and they cannot stand together.

"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. 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 Pet., 314,) and an act of Congress may supersede a prior treaty, (*Taylor vs. Norton*, 2 Curtis, 454; the *Clinton Bridge*, 1 Walworth's Reports, 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.

"Does the section thus construed deserve the severe strictures which have been applied to it?

"As before remarked, it extends the revenue laws over the Indian territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt. As regards those articles, only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians? The frauds that might otherwise be perpetrated there by others, under the guise of Indian names and simulated Indian ownership, is also a consideration not to be overlooked.

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

"The judgment of the district court is affirmed."

The indictment against Mr. Boudinot will be dismissed in accordance with instructions of the Attorney-General; but the question for the committee to determine is, what further redress should be given to Mr. Boudinot. It will be noticed that, in the opinion of the court above quoted, Boudinot is advised to appeal to Congress in the following words:

"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 presumed, will promptly give the proper relief."

There is one point in Boudinot's case that should not be overlooked; that is, that he had the official written authority of the Commissioners of Internal Revenue for doing what he was doing, up to within thirty days of the seizure of his factory, and that Mr. Boudinot received no notice that a different policy would be pursued.

The Supreme Court has settled the law to be against the right of Boudinot to manufacture tobacco in the Cherokee Nation without conforming to the revenue laws, but that does not affect the equities in his case; he was acting under the direction of the very officer authorized by law to advise and direct in such business. It was due Boudinot, as well as the good faith of such officer, that notice should be given to Boudinot that the 107th section of the act of July 20, 1868, had abrogated his rights under the 10th article of the Cherokee treaty of 1866, and that thenceforward he would be required to conform to the revenue law the same as any citizen of the United States.

There is no complaint that Boudinot ever sold, or authorized to be sold, a pound of tobacco outside of the Indian Territory without the payment of tax required by law. The judge of the district court which decided his case testifies to his good faith in every respect; the Supreme Court, affirming the judgment of the lower court, takes pleasure in testifying to his good faith.

There is not the slightest doubt but Mr. Boudinot is a Cherokee Indian, and a citizen of the Cherokee Nation; he was one of the recognized representatives or delegates from the Cherokee Nation to the United States Government, in 1868, and his name appears as such to the treaty of that year made by this Government with the Cherokee Nation. Though an Indian, he claims no leniency on the ground of ignorance; he has shown throughout a disposition to deal honorably and justly with the Government of the United States in this matter, and pursued just such a course as any gentleman of intelligence and education would have pursued under similar circumstances.

The committee recommend the following bill:

"A BILL for the relief of Eljas C. Boudinot, a Cherokee Indian.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the civil proceedings now pending in the name of the United

States against the property claimed by the said Elias C. Boudinot, for alleged violations of the internal-revenue laws, be discontinued and dismissed, and that the property seized and taken from him, and the gross proceeds of the sale of any such property, on account of alleged violations of said laws, be returned and restored to him by the proper officers of the Government."

AN ACT for the relief of Elias C. Boudinot.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the civil proceedings now pending in the name of the United States against the property claimed by the said Elias C. Boudinot, for alleged violations of the internal-revenue laws, be discontinued and dismissed, and that the property seized and taken from him, and the gross proceeds of the sale of any such property, on account of alleged violations of said laws, be returned and restored to him by the proper officers of the Government: *Provided,* That taxes legally due from and unpaid by said Boudinot, in respect to the business, shall have first been paid, or deducted from the proceeds aforesaid.

Passed both Houses, as printed within, and presented to the President for approval, March 1, 1873.

EDW. MCPHERSON,
Clerk House Representatives.

NOVEMBER 22, 1873.

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