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Elias C. Boudinot

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ELIAS C. BOUDINOT.

MARCH 30, 1870.—Ordered to be printed and recommitted to the Committee on the
Judiciary.

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

REPORT.

[To accompany joint resolution H. R. No. 219.]

The Committee on the Judiciary have had the following preamble and resolution under consideration :

Whereas the tenth article of the treaty of July 19, 1866, between the United States and the Cherokee nation of Indians stipulates in these words: "Every Cherokee and free 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 restraint, paying a tax thereon, which is now or may be levied by the United States, on the quantity sold outside of the Indian Territory;" and whereas Elias C. Boudinot, a "Cherokee, resident in the Cherokee nation," confiding in the faith of the government, did, subsequent to the date of said treaty, manufacture and sell tobacco in the Cherokee nation "without restraint;" and whereas it is not charged by any party that the said Boudinot ever sold any "manufactured products" "outside of the Indian Territory" without paying the tax thereon levied by the United States; and whereas on the 20th of July, 1868, an act imposing taxes on distilled spirits and tobacco, and for other purposes, was passed, the one hundred and seventh section of which reads as follows:

"*And be it further enacted,* 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."

And whereas the said Boudinot, after the passage of said act of July 20, 1868, referred the question of his right to manufacture and sell his manufactured products within the Indian Territory without paying tax thereon to the United States to Mr. Rollins, at that time Commissioner of Internal Revenue; and whereas on the 23d day of February, 1869, in response to such reference, Mr. Rollins decided 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;" and whereas, after Hon. Columbus Delano succeeded Mr. Rollins as Commissioner of Internal Revenue, the said Boudinot submitted the same questions to Mr. Delano, citing the one hundred and seventh section of the act of July 20, 1868, and the tenth article of the Cherokee treaty of 1866; and whereas Commissioner Delano referred the questions submitted to his legal adviser, to which the following opinion was given:

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

"**STR:** 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.

"Very respectfully,

"CHARLES P. JAMES,
"Counselor at Law.

"Hon. COLUMBUS DELANO,
"Commissioner of Internal Revenue."

And whereas Commissioner Delano wrote the following letter:

"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 107 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."

All of which opinion of Judge James and letter of Commissioner Delano were authorized to be sent, and were sent, to the said Boudinot as the final settlement of the question; and whereas but a few days after the date of the Commissioner's decision he authorized and instructed the supervisor of internal revenue for the district of Arkansas to seize the tobacco factory of the said Boudinot in the Cherokee nation; and whereas, in pursuance to such instructions, the property of the said Boudinot in the Indian country was seized, and he arrested as a felon without notice of any change in the opinion of the Commissioner, and for no other offense than pursuing a legitimate business specially authorized by treaty and the repeated decisions of the revenue department; and whereas the said Boudinot has applied to have the merits of his case referred to the Attorney General for his decision, and the Secretary of the Treasury has refused to submit the questions involved to the Attorney General; and whereas the said Boudinot has not given bail, but is still at large, courting arrest in vain, that he may obtain a decision from the courts: Therefore,

Be it resolved by the House of Representatives of the United States of America, That the Committee on the Judiciary be, and is hereby, instructed to inquire into the foregoing statements of fact, and provide for the proper enforcement of the stipulations of the treaty with the Cherokee nation and for the protection of the individual rights herein involved, and that they be authorized to report at any time by bill or otherwise.

Mr. Speaker: Your committee find the facts to be as follows:

On the 19th day of July, 1866, a treaty with the Cherokee nation of Indians was made and ratified by the United States, in the 10th article of which it was stipulated 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 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 being a "resident in the Cherokee nation," established a factory for the manufacture of tobacco in the Cherokee nation, and claimed and exercised the right to ship his manufactured products to market "without restraint;" and it is not charged or pretended that he ever sold, or attempted to sell, any part of such manufactured products "outside of the Indian Territory, without paying the tax thereon levied by the United States. Your committee find that previous to July 14, 1868, Mr. Boudinot addressed a letter to Commissioner Rollins, respecting his rights as a manufacturer of tobacco in the Cherokee nation, to which letter he received the following reply:

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, July 14, 1868.

SIR: In your letter of May 8, you state that you have a factory for the manufacture of tobacco in the Cherokee nation in the Indian Territory, and you ask my opinion as to whether you have a legal right to sell tobacco manufactured at such factory without the payment of the revenue tax thereon, at any place you may choose to sell it, whether in the Cherokee nation or elsewhere in any of the United States.

I reply, that in my opinion, under *existing* laws, no tax can be legally assessed and collected upon tobacco manufactured at such factory, whether it be sold in the Cherokee country or elsewhere in any of the United States. I do not, however, feel called upon to express any opinion as to the effect which the bill now before Congress may have upon this question should it become a law.

Very respectfully,

JOHN E. RISLEY,
Deputy Commissioner.

E. C. BOUDINOT, Esq.,
Washington, D. C.

The bill "before Congress," referred to by Deputy Commissioner Risley, became a law on the 20th of July, 1868, six days after the date of the foregoing letter; the 107th section of which reads as follows:

And be it further enacted, 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.

After the act of July 20, 1868, became a law, the said Boudinot again referred the question of his liabilities and rights in the premises to Commissioner Rollins; and on the 23d of February, 1869, was officially informed 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."

After the succession of Mr. Delano to the office of Commissioner of Internal Revenue, Mr. Boudinot presented to him a frank statement of his business as a manufacturer of tobacco in the Cherokee nation, and requested an official opinion, as he had previously done of Mr. Rollins, respecting his rights and liabilities. In reply to such statement and request, Commissioner Delano, on the 21st day of October, 1869, wrote the following letter:

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 107 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.

The opinion of Judge James, referred to in the letter of Commissioner Delano, is in these words:

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 twelfth 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.

Very respectfully,

CHARLES P. JAMES,
Counselor at Law.

Hon. COLUMBUS DELANO,
Commissioner of Internal Revenue.

It appears, then, from the record, that Mr. Boudinot not only was anxious to obtain, but actually *did* obtain the official sanction of Commissioner Rollins and Delano, with respect to his said manufacturing business. And there is no allegation whatever that Mr. Boudinot has not scrupulously complied with the instructions and interpretations of the Commissioners of Internal Revenue in the actual management of his business in the Territory. The seizure of Mr. Boudinot's factory occurred on the 20th of December, 1869. It was more than a month afterward before Commissioner Delano officially or otherwise incorporated the Indian country into any collection district.

It is now stated by the Commissioner that he has reversed his former decision, before quoted, and the decisions of his predecessor, and holds, at present, that the 107th section of the act of July 20, 1868, intended the extension of the revenue laws over the *Cherokee territory*, and not alone over the "*articles produced*" there; but it is admitted that no notice was given to Mr. Boudinot of any change in the opinion of the Commissioner, and that his property was seized, and his person arrested, as though he had willfully violated the law; and it is also admitted by Judge James, who represented Mr. Delano before your committee, that the reversal of the repeated decisions of the Commissioners of Internal Revenue was never officially promulgated until after the seizure of Colonel Boudinot's property, and after his personal arrest. The order was issued under date of January 25, 1870. It reads as follows:

TREASURY DEPARTMENT,
OFFICE INTERNAL REVENUE,
Washington, January 25, 1870.

Whereas it is provided by section 107 of "an act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 20, 1868, "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;" and whereas it is further provided by section 103 of the same act, "that when any tax is imposed, and the mode or time of assessment or collection is not provided for, the same shall be established by regulation of the Commissioner of Internal Revenue; and the Commissioner is authorized to make all such regulations, not otherwise provided for, as may become necessary by reason of any change of law in relation to internal revenue made by this act;" and whereas neither the mode nor time of assessment or collection of the taxes imposed and extended by the provisions of said section 107 to distilled spirits, fermented liquors, tobacco, snuff, and cigars, produced within the country lying west of the States of Arkansas and Missouri, and known as the Indian Territory or country, has been provided for, except as in said section 103:

Now, therefore, by virtue of the power and authority given to me, as Commissioner of Internal Revenue, by said section 103, Thomas J. Hunt is hereby appointed, with

full authority to exercise all the powers vested by the internal revenue laws in assessors, and Robert W. Wishard is hereby appointed, with full authority to exercise all the powers vested by said laws in collectors, respectively, within so much of the said country known as the Indian Territory or country as constitutes a part of the western judicial district of Arkansas, for the purpose of the assessment and collection, respectively, of the taxes imposed and extended by said section 107, as above recited. And they are hereby directed and instructed to pursue, respectively, in the assessment and collection of said taxes the same mode and practice which are prescribed by law and regulations in like cases arising in collection districts, and to make the same reports and return the same accounts which are required in such like cases by law and regulations.

C. DELANO,
Commissioner of Internal Revenue.

It follows, therefore, that the opinions of Mr. Rollins and Mr. Delano, heretofore set forth, were the only recorded evidence of the views of those officials with reference to the right of Mr. Boudinot to manufacture tobacco and sell the same in the Indian country without paying tax to the United States. It further appears that Mr. Boudinot appealed from the last verbal decision of Commissioner Delano, and petitioned the Secretary of the Treasury to submit the legal questions involved to the Attorney General. The letter of Mr. Boudinot to the Secretary of the Treasury is herewith submitted:

WASHINGTON, D. C., *January 26, 1870.*

SIR: As a citizen of the Cherokee nation, born a Cherokee, and resident in the Cherokee country, and as personally and gravely interested in the question, I appeal to you from the decision and action of the Commissioner of Internal Revenue, in respect to the collection within the Cherokee country of the tax upon tobacco manufactured there by me, and respectfully request your consideration of and judgment upon these questions:

1. Whether, under the tenth article of the treaty of 19th July, 1866, a Cherokee Indian manufacturing tobacco within the Cherokee country can, under the pretense that section 107 of the act of 1868, imposing taxes on distilled spirits, tobacco, &c., applies to the Indian country, be compelled to pay any tax to the United States on other or more of the tobacco manufactured by him than he may sell beyond the limits of the Indian Territory.

2. Whether, as to such tobacco, so manufactured in the Cherokee country by him, a Cherokee Indian is punishable for not observing the provisions of the revenue laws, when he takes none at all outside of the Indian Territory, or when he pays the taxes required on all that he does carry beyond those limits.

3. Whether a Cherokee Indian, residing in the Cherokee country, is liable to pay the tax on tobacco manufactured by him, which was grown in a State and purchased by him, when manufactured and sold by him in the Cherokee nation and not elsewhere, and for use and consumption in the Indian country.

A more full statement of the case and its circumstances in which these questions arise, and referring to some charges which may seem to you to deserve to be inquired into, accompanies this letter. I most respectfully invite your attention to it, and have the honor to request that the foregoing questions, being of the utmost gravity and importance, may be submitted to the Attorney General for his decision, with the arguments herewith presented.

With the utmost respect, your obedient servant,

ELIAS C. BOUDINOT.

Hon. GEORGE S. BOUTWELL.

The answer of the Secretary was as follows: •

TREASURY DEPARTMENT, *January 28, 1870.*

SIR: I have the honor to acknowledge the receipt of your letter of the 28th instant, covering an appeal by Elias C. Boudinot, from the decision and action of the Commissioner of Internal Revenue, in respect to the collection within the Cherokee country of taxes upon tobacco manufactured by him. In reply I have to say, that the action taken by Mr. Delano in the matter was after consultation with me, and that I fully concur in the opinion which he has given.

Very respectfully,

GEO. S. BOUTWELL,
Secretary.

Hon. ALEX'R McDONALD,
U. S. Senate.

Thus failing in his attempt to get his case referred to the Attorney General, Mr. Boudinot announced that he was an escaped prisoner, and with the certified copy of the proceedings before the United States commissioner of the western district of Arkansas in his hands, showing that he had not given the required bail, but was committed to the custody of the marshal, he sought to be arrested in this city, that he might test the legal merits of his case by *habeas corpus*. Yet, though the officer of internal revenue who had first procured his arrest, and knew the facts, was in Washington, he refused to have the arrest made.

Disappointed in getting his case before the Attorney General or before the courts, Mr. Boudinot represented to Mr. Delano that he had a large amount of unmanufactured material on hand, which was in imminent danger of being wasted and ruined, and made the following proposition in writing:

WASHINGTON, D. C., January 26, 1870.

SIR: The undersigned, a Cherokee Indian, is the proprietor of a tobacco factory in the Cherokee nation, recently seized by order of the supervisor for the district of Arkansas.

Being desirous of resuming his business, the undersigned proposes the following compromise:

1. He will conform strictly hereafter, until relieved therefrom by competent authority, with all the regulations respecting collection of tax on tobacco in the United States.

2. He will pay the government the revenue tax on all tobacco he has hitherto sold unstamped, whenever the courts shall determine that such tax is due.

ELIAS C. BOUDINOT.

HON. COMMISSIONER OF INTERNAL REVENUE.

This proposition to waive for the present what Mr. Boudinot conceived to be his rights under the treaty, the law, and the repeated decisions of the Revenue Bureau, was refused, as will appear from the following:

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, February 9, 1870.

SIR: I have considered the proposition of E. C. Boudinot, presented through you, to compromise his liabilities to the United States for having manufactured and sold tobacco in violation of all the requirements of the act of July 20, 1868, relating thereto, and declined to accept it.

I shall be obliged to you if you will inform Mr. Boudinot of this result of his proposition, or give me his address that I may so advise him.

Very respectfully,

C. DELANO,
Commissioner.

Hon. A. McDONALD,
United States Senator

As a last resort Mr. Boudinot appeals to Congress for redress; the record shows that he has been frank and open-handed in all his deportment in relation to this matter; but, while his conduct in the premises has been such as to command respect and sympathy, the whole question is one of law, and must be judged as such, without reference to extraneous matters. What is the law?

The tenth article of the Cherokee treaty of 1866 certainly gives Mr. Boudinot a right, as a Cherokee "resident in the Cherokee nation," to ship his manufactured products anywhere in the Indian Territory "without restraint," and requires him to pay tax thereon only on such portions thereof as he may carry beyond the limits of the Indian Territory.

We do not feel called upon to give an opinion as to whether an act of Congress passed subsequent to a treaty, and in conflict with it, will ab-

rogate the treaty; for we do not consider that such question enters into the present case at all.

It is now contended by Commissioner Delano that the one hundred and seventh section of the act of July 20, 1868, gives the United States revenue jurisdiction over the *territory* of the Cherokees and Indian country; but there seems to be nothing in the act that warrants this construction. The decisions of Mr. Rollins and Mr. Delano set out in this report appear to rest upon clear legal ground, and to give the true construction; and it is evident from the terms of the one hundred and seventh section that Congress did not intend to assert revenue jurisdiction over the *territory*, but only over the articles that might be produced and manufactured there, and that tax upon the same could only be imposed and collected *when* such articles were taken *beyond* the limits of the Indian Territory for sale.

In all cases of ambiguity of language in Indian treaties it has been the custom of the government and the decisions of the courts to give such construction thereto as would be most favorable to the Indians. The same rule should, for much stronger reason, apply to the interpretation of acts of Congress, where such acts tend in any respect to work a hardship upon the Indians, or to change the established policy of the government toward them.

Chief Justice Marshall, in 6 Peters, 582, uses this language: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty." (See also the case of the Kansas Indians, 5 Wallace, R. 737.)

In addition to these judicial decisions it seems eminently just, upon principle, and to be required by the uniform policy of the government, that the treaty stipulations with Indian tribes should be so construed as to give liberal effect to their intent and objects in favor of the Indians, and that no law of Congress should be permitted to reverse this policy, even where it is competent by law to do so, unless its terms be so clear and explicit as to admit of no other or more favorable construction.

The terms of the tenth article of the treaty in this case are very clear and free from ambiguity. They do not appear to forbid an Indian to purchase out of the Territory, in good faith, materials to be changed or manufactured by him in the Territory and there sold. Of course, it would not protect persons who, in any business they might conduct in the Territory, should attempt to do so in bad faith, or to evade revenue or other laws; but no such questions arise in this matter. Colonel Boudinot, although he admits he purchased some of his leaf tobacco out of the Territory, is not charged with having done so for any improper purpose. To construe the treaty to forbid any such purchase would unjustly limit the range of industry and production by the Indians in the Territory.

It is not necessary in this case to consider the power of Congress by law to repeal or annul a treaty with an Indian tribe. It will be conceded that such a power ought only to be exercised, if it exist, in the clearest cases of right and necessity. It is only demanded here that the law of Congress of July 20, 1868, be construed. There is nothing in its terms to disclose any clear intent on the part of Congress to annul the treaty. They can well stand together. They are not inconsistent. The original constructions put upon the law by the Commissioners, as stated, fully and fairly reconcile them. Those constructions do not in-

vite or lead to frauds upon the revenue. If any frauds should be attempted they can be readily detected and defeated. Besides, the laws extended over the whole Territory by the Commissioner are highly penal in their character, and cannot fail to lead to much embarrassment to legitimate business and enterprise, and much discontent.