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ELIAS C. BOUDINOT.

JANUARY 16, 1880.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. LAPHAM, from the Committee on the Judiciary, submitted the following

REPORT:

[To accompany bill H. R. 966.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 966) to permit Elias C. Boudinot, of the Cherokee Nation, to sue in the Court of Claims, respectfully report:

That it appears by the papers to the satisfaction of your committee that said Boudinot is a Cherokee Indian; he is recognized as such by the United States and the Cherokee Nation, as his name appears to the treaty with such nation of 1868 as one of its delegates.

On the 19th day of July, 1866, the United States made a treaty with the Cherokee Nation, the tenth article of which stipulated that—

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.

Shortly after making this treaty, Boudinot established a tobacco factory in the Cherokee Nation and did a considerable business therewith up to December, 1869.

By the act of Congress approved the 30th day of July, A. D. 1868, section 107 (15 Stat., 167), it was 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 anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not.

On the 20th day of November, 1868, Boudinot addressed the following letter to Maj. James Marr, at that time supervisor of internal revenue for the district of Missouri:

CHEROKEE NATION, November 20, 1868.

SIR: I am a citizen by birth of the Cherokee Nation of Indians, and am the owner of a tobacco factory in said nation; the tobacco I have sold in the Indian country is exempt by treaty from taxation; such quantities as I have sold in the United States I have paid the tax upon, and still intend to do so upon every pound disposed of hereafter. It has been my custom to report all tobacco sent within the States to the nearest assessor, who marks the same and collects the tax when sold. I respectfully ask that the assessors for the southern district of Kansas, and those stationed at Carthage and Kansas City, Mo., be instructed to permit the continuance of the practice until otherwise directed, with such additional regulations to prevent fraud as you may deem expedient.

Very respectfully, your obedient servant,

E. C. BOUDINOT.

Maj. JAMES MARR, *Supervisor Internal Revenue.*

The said Supervisor Marr referred this letter to the Commissioner of Internal Revenue at Washington City for his information and action in

ELIAS C. BOUDINOT.

the premises. Such reference was made by his indorsement in writing thereon, as follows:

OFFICE SUPERVISOR INTERNAL REVENUE,
Saint Louis, December 3, 1868.

Respectfully referred to the Commissioner of Internal Revenue for decision as to how this tax can be collected. I believe Major Boudinot desires to pay the tax on all tobacco sold in the States, and I would recommend that the assessors and collectors and their deputies in the southwestern portion of this State be instructed to assess and collect this tax upon requiring Major Boudinot to report all tobacco to them that he intends offering for sale in this State. I am not exactly aware how this tax is to be collected, but if this is not contrary to the spirit of the law, I think it would be well to afford him this facility.

Major Boudinot desires to pay this tax at Carthage and Kansas City, Mo.
JAMES MARR, *Supervisor.*

To this letter and reference the then Acting Commissioner of Internal Revenue made reply in the words following:

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, December 26, 1868.

SIR: I have received the letter of E. C. Boudinot, esq., dated Cherokee Nation, November 20, 1868, addressed to you, and by you referred to this office with the request that instructions be given to the assessor and collector in the southwestern portion of the State of Kansas to assess and collect the tax on all tobacco manufactured by Mr. Boudinot in the Cherokee Nation and sent into the State for sale.

In reply I have to state that under the law now in force all taxes on tobacco must be paid by affixing stamps of such denominations and value as will cover the amount of tax to which the tobacco in question may be liable when sold or offered for sale in any of the States or Territories of the United States where collection districts are established and officers of internal revenue are appointed to collect the tax and see that the law is strictly administered.

No collection district is established over the Cherokee Nation, and no taxes are authorized to be assessed or collected under the internal revenue law upon goods manufactured and sold in the Cherokee Nation. But tobacco, snuff, and cigars manufactured within the Cherokee Nation and sent into the States for sale will be liable to seizure and forfeiture unless the same shall bear revenue stamps denoting the payment of the tax.

To secure his tobacco against such liability Mr. Boudinot must purchase and affix the stamps, and there can be no objection, under the circumstances, to the collector or deputy collector nearest to Mr. Boudinot's place of manufacture furnishing him with the amount of stamps he may require upon his paying for the same. Mr. Boudinot can affix to his tobacco labels and he can put upon it his brands showing where and by whom it is manufactured.

This being done, and the stamps affixed, which the government regards as the most important point, his tobacco will pass current in any of the States where he may desire to ship it, and will be free from any liability to seizure or detention.

If the collector should have any hesitation in furnishing Mr. Boudinot with stamps, upon application of Mr. Boudinot, stating of whom he wishes to purchase stamps, instructions will be given.

I presume, however, that this letter, or a copy of it, sent to the collector, will be all that is needed to enable Mr. Boudinot to purchase stamps.

Your, respectfully,

THOMAS HARLAND,
Acting Commissioner.

JAMES MARR,
Supervisor, Saint Louis, Mo.

The said Supervisor Marr acknowledged the receipt of the foregoing letter by his to the Commissioner of Internal Revenue in words following:

OFFICE SUPERVISOR INTERNAL REVENUE,
Saint Louis, January 4, 1869.

Hon. E. A. ROLLINS,
Commissioner Internal Revenue, Washington, D. C.:

SIR: Your letter of the 26th of December last in relation to the manner in which tobacco manufactured in the Indian Territory can be sold within the limits of col-

lection districts is received, and copies thereof have been sent to collectors in districts adjacent to the Indian Territory for their information.

Under the instructions of the Commissioner, all trouble in the premises will be surmounted, and Mr. Boudinot can go on with his business without molestation.

Very respectfully, your obedient servant,

JAMES MARR,
Supervisor.

On February 20, 1869, Boudinot addressed the following letter to the Commissioner of Internal Revenue:

WASHINGTON, D. C., *February 20, 1869.*

To the COMMISSIONER OF INTERNAL REVENUE:

By the terms of the tenth article of the Cherokee treaty of 1866, a citizen of the Cherokee Nation has a right to send any article manufactured in said nation to market without restraint.

No tax is required upon any such article unless it is sold outside of territory of said nation.

I am engaged in the manufacture of tobacco in said nation, being a citizen thereof. There is but little market for it in the nation, and I wish to avail myself of the treaty stipulations to send it into the market of the country "without restraint." It is plain that this stipulation is defeated if I am required to pay the tax upon my tobacco before I start with it from the place of manufacture, or as soon as it crosses the line of the territory of the nation into the States.

No one manufacturing tobacco in the nation can pay the taxes on the same until he gets it into a market where he can anticipate the proceeds of the sale of the same. To require me, or any one else, to do so defeats at once the provisions of the treaty. Besides, by the terms of said article of the treaty, a tax can only be levied upon what is actually sold outside of said nation. How can a proper tax be levied unless a sale is allowed outside of the boundaries of the nation? A proper construction of this article of the treaty would doubtless require means to be provided by which the amount of actual sales should be kept, and upon it the assessment be made; that is the wording and only correct meaning of the treaty, if it was literally fulfilled. But I do not ask that this shall be done. I only desire to send my tobacco, manufactured in said nation, "to market without restraint." For that purpose, I respectfully ask that the collectors and revenue officers of the collection district of Kansas, the third collection district of Arkansas, and the sixth district of Missouri, all of which border on the territory of said nation and are contiguous to my place of manufacture, be instructed to receive into their custody such manufactured tobacco as I report to them, and that I have transit, without restraint or molestation for the same, to Baxter's Springs and Fort Scott, in Kansas; to Fort Smith, Fayetteville, and Bentonville, in Arkansas; and to Kansas City, Carthage, and Neosho, in Missouri. And I further respectfully ask that I be allowed to pay the taxes on said tobacco when I withdraw it from the custody of said revenue officers for the purposes of sale. I submit that in this way I can avail myself of my right under the treaty aforesaid to send my product to market without restraint, and at the same time the government collect its taxes on such amounts as are sold outside of said nation, and be made entirely secure in the transaction. I am not only willing but anxious to pay all taxes that may be levied, and will give bond, if required, to that end, with sureties to be approved. I will also mark my tobacco to the care of the collector of revenue when I send it from the nation to market at any one of the foregoing places.

Respectfully, &c.,

E. C. BOUDINOT.

To this letter the following reply was made:

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, February 23, 1869.

SIR: This office is in receipt of your letter of the 20th instant, in which you state as follows:

"By the terms of the tenth article of the Cherokee treaty of 1866, a citizen of the Cherokee Nation has a right to send any article manufactured in said nation to market without restraint. No tax is required upon any such article, unless it is sold outside of the territory of said nation."

"I am engaged in the manufacture of tobacco in said nation, being a citizen thereof. There is but little market for it in the nation, and I wish to avail myself of the treaty

stipulation to send it into the market of the country 'without restraint.' It is plain that this stipulation is defeated if I am required to pay the tax upon my tobacco before I start with it from the place of manufacture or as soon as it crosses the line of the territory of the nation into the States. No one manufacturing tobacco in the nation can pay the taxes on the same until he gets it into a market where he can anticipate the proceeds of the sale of the same. To require me or any (one) else to do so defeats at once the provisions of the treaty. Besides, by the terms of said article of the treaty, a tax can only be levied upon what is actually sold outside of said nation. How can a proper tax be levied unless a sale is allowed outside of the boundaries of the nation? A proper construction of this article of the treaty would doubtless require means to be provided by which the amount of actual sales should be kept, and upon it the assessment be made; that is the plain wording and only correct meaning of the treaty if it was literally fulfilled. But I do not ask that this shall be done. I only desire to send my tobacco manufactured in said nation to market 'without restraint.' For that purpose I respectfully ask that the collectors and revenue officers of the collection districts of Kansas, the third collection district of Arkansas, and the sixth district of Missouri, all of which border on the territory of said nation, and are contiguous to my place of manufacture, be instructed to receive into their custody such manufactured tobacco as I report to them, and that I have transit without restraint or molestation for the same to Baxter's Springs and Fort Scott, in Kansas; to Fort Smith, Fayetteville, and Bentonville, in Arkansas; and to Kansas City, Carthage, and Neosho, in Missouri. And I further respectfully ask that I be allowed to pay the taxes on said tobacco when I withdraw it from the custody of said revenue officers for the purpose of sale. I submit that in this way I can avail myself of my right under the treaty aforesaid to send my product to market without restraint, and at the same time the government collect its taxes on such amounts as are sold outside of said nation, and be made entirely secure in the transaction. I am not only willing but anxious to pay all taxes that may be levied, and will give bond, if required, to that end, with sureties to be approved. I will also mark my tobacco to the collector of revenue when I send it from the nation to market at any one of the foregoing places."

To which I reply, that the precise language of article 10 of the treaty of August 11, 1866, between the United States and the Cherokee Indians, is as follows: "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, by paying any tax thereon which is or may be levied by the United States on the quantity sold outside of the Indian Territory."

In a former correspondence between this office and yourself upon a similar subject, attention was directed only to the provisions of section 107 of the act of July 20, 1868, imposing a tax on manufactured tobacco produced anywhere within the exterior boundaries of the United States, whether the same shall be within any collection district or not. It was then held by this office that notwithstanding the language of said section the tax could not be collected upon tobacco manufactured in the Indian country so long as it remains 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.

At that time attention was not called to the provision of the treaty above referred to. The construction of the statute then adopted seemed to be in conflict with the provisions of the treaty. Inasmuch as the treaty is the paramount law, the statute, when in conflict, must give way to it.

Although the treaty provides that every Cherokee and free person, resident in the Cherokee Nation, shall have the right to sell any product of his farm, including any merchandise or manufactured products, and to ship the same to market without restraint by paying any tax thereon which is or may be levied by the United States, it is nevertheless proper and reasonable that the Government of the United States should adopt necessary precautions to secure the tax imposed upon the quantity sold outside of the territory of the Indian nation.

To this end you will be permitted to ship your manufactured tobacco to the places indicated, to wit: Baxter Springs and Fort Scott, in Kansas; Fort Smith, Fayetteville, and Bentonville, in Arkansas; and to Kansas City, Carthage, and Neosho, in Missouri, provided that the packages indicate by sufficient marks the place of manufacture, the name of the manufacturer, and be shipped to the care of the collector of the district in which the place of destination is situated, the tobacco upon arrival to go into and remain in the custody of the collector of said district until the tax thereon is paid; and, provided, further, that timely notice is given such collector of the shipment of such tobacco, the notice indicating the quantity and description shipped, where shipped, and when its arrival may be expected, and the same must be shipped by the most direct route.

The observance of these provisions will probably save you annoyance and secure to the government its rights.

Copies of this letter will be sent to the respective collectors of the districts of Kansas, the third district of Arkansas, and the sixth district of Missouri for their guidance.

Very respectfully,

JOHN E. RISLEY,
Deputy Commissioner.

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

The foregoing correspondence was had with the Office of Internal Revenue while Mr. Rollins was Commissioner. After Mr. Columbus Delano succeeded him, Boudinot, through his attorneys, addressed a letter to Mr. Delano, setting out at length a statement of his case, and without reserve explained the character of his business, and requested an official statement as to his rights and liabilities, as he had previously done in his letters to his predecessor. In answer to this letter, which is omitted on account of its length, but which may be found on the records of the Office of Internal Revenue, the following reply was made :

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, October 21, 1868.

Messrs. PIKE & JOHNSON,
Counselors-at-Law :

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.

The memorandum of opinion referred to in the foregoing letter of Commissioner Delano was in these words :

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

Hon. COLUMBUS DELANO,
Commissioner of Internal Revenue :

SIR : I have examined the argument of Col. 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, 1869, 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 afterwards 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.

This letter and opinion were sent by the Commissioner of Internal Revenue to the attorneys of Boudinot on the 21st of October, 1869, by them forwarded, and received by Boudinot about the 10th of November following.

On the 20th day of December, about forty days thereafter, the fac-

tory of Boudinot was seized by John McDonald and John A. Joyce, the former supervisor of internal revenue and the latter a confidential and special agent of the Internal Revenue Bureau. Boudinot was also arrested and indicted in the United States court for the western district of Arkansas for manufacturing and selling tobacco in the Indian Territory without paying tax to the United States. The district court decided that the act of Congress of July 20, 1868, was in conflict with the treaty with the Cherokee Nation of 1866, and therefore abrogated it *pro tanto*.

Boudinot appealed to the Supreme Court of the United States, and that court, by a division, sustained the opinion of the lower court. (11 Wallace, page 616.)

The majority of the court in its opinion used this language:

The only question argued in this court, and upon which our decision must depend, is the effect to be given respectively to the 107th section of the act of 1868 and the tenth article of the treaty of 1866 between the United States and the Cherokee Nation of Indians. * * *

On behalf of the claimants it is contended that the 107th section was not intended to apply and does not apply to the country of the Cherokees, and that the immunities secured by the treaty are in full force there. The United States insist that the section applies with the same effect to the territory in question as to any State or other Territory of the United States, and that to the extent of the provisions of the section the treaty is annulled.

From this statement it will readily be seen that the case before the court involved the consideration of but these two questions:

1st. Did Congress intend that the said 107th section of the act of July 20, 1868, should apply to the Indian Territory embraced within the western district of Arkansas and occupied by the Cherokee Nation of Indians, notwithstanding the existence of the tenth article of the treaty of 1866?

2d. Assuming that such was the intention of Congress, had Congress the constitutional power to abrogate a treaty stipulation by merely passing an act in conflict with such stipulation?

The court decided both questions in the affirmative, but felt itself constrained to say in the course of its opinion (see page 621):

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 this writ of error. In a case not free from doubt and difficulty they acted under a misapprehension of their legal rights.

Congress has by an act caused the dismissal of all civil proceedings in the court below against Boudinot, and at the request of the Judiciary Committee of this House the Attorney-General directed the dismissal of the criminal proceedings against him.

Boudinot now asks that Congress should give him the right to sue in the Court of Claims. In other words, he endeavors to adopt the advice of the Supreme Court, when it said in the decision referred to—

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.

The indictment against Boudinot and the seizure and confiscation of his property was for manufacturing and selling tobacco *within* the limits of the Cherokee Nation. There is no charge that he sold *outside* of the territory without paying tax.

Your committee, under the circumstances surrounding this case, and in view of the great wrong done to the petitioner, are of opinion he is entitled to relief, and report favorably the accompanying bill and recommend its passage.