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Elias C. Boudinot.

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ELIAS C. BOUDINOT.

FEBRUARY 10, 1871.—Ordered to be printed and recommitted to the Committee on the Judiciary.

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

R E P O R T .

The Committee on the Judiciary, to whom was referred the memorial of Elias C. Boudinot, together with a resolution that the committee be instructed to inquire into the statements of fact contained therein, and provide for the proper enforcement of the stipulations of the treaty with the Cherokee Nation, and for the protection of the individual rights therein involved, and that they be authorized to report at any time by bill or otherwise, respectfully report :

That the tenth article of the treaty made with the Cherokee Nation of Indians, on the 19th day of July, 1866, provides 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, paying any tax thereon which is now, or may be, levied by the United States on the quantity sold outside the Indian Territory.

The one hundred and seventh section of the act of July 20th, 1868, is 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.

Prior to the passage of this act, Mr. Boudinot, who claimed to be a Cherokee Indian and a resident of the Indian Territory, applied to the Commissioner of Internal Revenue, by letter, for information concerning his rights as a manufacturer of tobacco, and 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 the United States. I reply, 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.

JOHN E. RISLEY,
Deputy Commissioner.

After the passage of the act of July 20, 1868, Mr. Boudinot requested

the opinion of the Commissioner as to the effect of the law, and received the following reply :

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, 1863, 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 for 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 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, 1863, 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.

The Commissioner, at the time that this reply was made, entertained doubts whether the courts of the United States had jurisdiction to enforce the revenue laws within the Indian country, and for that reason it was held that the intention of the provision was that the taxes should be applied outside of the Indian country to the articles produced there, and in pursuance of this opinion instructions were given to the officers of the adjoining States to take care that all tobacco brought from the Indian country into their respective districts should be subjected to the tax.

Subsequently, and without previous orders from the Commissioner of Internal Revenue, several tobacco factories, with their stocks of tobacco, in the Indian country, were seized by the revenue officers of the adjoining district of Arkansas. The report of these seizures did set forth that a number of factories had been established near the State lines of Kansas and Arkansas; that the tobacco manufactured by them was almost wholly, if not wholly, purchased in Missouri and other States, and carried into the Indian country for manufacture; that an extensive illicit trade was carried on either by the manufacturers or by persons who purchased from them, by which the tobacco so manufactured was smuggled into Texas, Arkansas, Missouri, and Kansas; that for the purpose of claiming the protection of the treaty of July 19, 1869, white men nominally associated with them, as owners of the factories, members of the Cherokee Nation, but that the actual transactions were carried on by persons who did not claim to come within the terms of the treaty. The

local officers reported the whole system of tobacco manufacture in the Indian country as a fraud, as well upon the treaty as upon the revenue laws.

Under these circumstances the question was reëxamined by the Commissioner of Internal Revenue. The Indian country had originally been attached to the Territory of Arkansas, and afterward to the State of Kansas, for the limited purpose of giving the United States courts jurisdiction to punish certain crimes, and for no other purpose; but when the State of Arkansas was divided into two judicial districts, the Indian country was described as part of the western district, in the same terms as were the counties specified as part of the district. The western district of Arkansas was declared to consist of certain counties and of the Indian country. The revenue laws provided that the several district courts of the United States should have jurisdiction to enforce the revenue laws within their respective districts, and it was determined by the Commissioner, upon this reëxamination of the question, that under the literal terms of the acts referred to and of the revenue acts, the district court of the United States for the western district of Arkansas had special jurisdiction in two classes of cases—first, those arising under the acts regulating intercourse with these Indians; secondly, revenue cases—and that the one hundred and seventh section of the act of 20th of July, 1868, applied to all the tobacco produced in the Indian country, and made no distinction between that part of the product which was sold and kept within that country and that part which was carried outside; that the words of said section, "That the revenue laws imposing taxes on distilled spirits and tobacco shall be held and construed to extend to such articles produced anywhere within the exterior bounds of the United States," necessarily meant all such articles produced anywhere within the exterior boundaries of the United States, and consequently, after such reëxamination of the question, and decision thereon, the Commissioner declined to order the release of the factories and tobacco which had been seized, and the cases were left to the action of the courts. In the case of Mr. Boudinot, the question was raised whether he was entitled to claim any benefit secured by the treaty to the members of the Cherokee Nation, his claim of being a Cherokee being denied. It is conceded that, while Mr. Boudinot is of mixed white and Cherokee blood, he acted as secretary of the senate of the so-called Confederate States government of Arkansas during the war of the rebellion; and it is claimed that he has elected to be considered a citizen of the State of Arkansas, and exercised the rights of citizenship in that State.

The questions of law arising in the case are, first, what are the relative rights of the Cherokee Nation and the United States under the treaty, whether the treaty did protect the manufacturers of the products of the States carried on in the Indian country; secondly, whether the treaty is superior to and irrevocable by any law of Congress, in so far as such law relates to the collection of revenues; and, thirdly, what is the proper construction of the one hundred and seventh section of the act of July 20th, 1868, so far as the same applies to the Indian country.

The district court of the United States has already decided these questions adversely to Mr. Boudinot, and the case has been appealed to the Supreme Court of the United States, where it is now pending, and where the very important questions involved will be finally and authoritatively settled. The committee are of opinion that no action of Congress is advisable at the present time. It is impossible for the committee to say that the reports of the local officers to the Commissioner that

the tobacco factories in the Indian country were all established close to the lines of adjoining States, and that ample proofs existed that they were the means of an illicit trade which had destroyed the trade of tax-paying manufacturers of the neighboring States, are not entitled to credit; and if credit is to be given them by the Commissioner, it was clearly his duty to procure from the courts a decision of the question whether the laws of Congress do not forbid these injurious results.

The questions of law involved here have been submitted to the proper tribunal, and the committee are of opinion that an appeal to Congress, upon the purely judicial questions arising in this case, ought not now to be considered.

The committee ask to be discharged from the further consideration of the subject, and that the memorial do lie upon the table.

VIEWS OF THE MINORITY.

Mr. Kerr, on behalf of the minority of the Committee on the Judiciary, presented its views on the subject of the memorial in the following report:

Mr. SPEAKER: The undersigned, being unable to concur with the majority of the Judiciary Committee in the disposition they propose to make of the memorial of Colonel Elias C. Boudinot, respectfully submit their reasons for such non-concurrence in the following statement of facts and law in the premises:

We first embody the memorial itself, in order that the subject may be more fully comprehended by the House:

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.

"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.

"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 law 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 for 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.

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 tenth 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 of 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. We 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 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.

After the act of July 20, 1868, became a law, Mr. 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 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.

It appears, then, from the record, that Mr. Boudinot not only was anxious to obtain, but actually *did* obtain, the official sanction of Commissioners Rollins and Delano, with respect to his 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 was afterward stated by the Commissioner that he had reversed his former decision, before quoted, and the decisions of his predecessor, and holds, at present, that the one hundred and seventh 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 action 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 decline 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 abrogate 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 1831, in *The Cherokee Nation vs. The State of Georgia*, (5 Peters, 1,) Chief Justice Marshall says:

Is the Cherokee Nation a *foreign state* in the sense in which that term is used in the Constitution? The counsel for the plaintiff have maintained the affirmative of this proposition with great earnestness and ability. *So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful.* They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. *The acts of the Government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts.*

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 when 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 exists, 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 invite 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.

It is true the Commissioner of Internal Revenue has caused legal proceedings to be instituted against Mr. Boudinot, and that the subject-matter of this controversy is in that way in process of adjudication by the courts. But, in our judgment, it is the duty of Congress, under the circumstances, to settle the legal construction of the treaty in question in favor of the memorialist, by enacting a law declaratory of the meaning of section 107 of the act of July 20, 1868. The history of this case, the extraordinary care and solicitude manifested by Mr. Boudinot to act within the law, his repeated efforts to have it construed officially and authoritatively, the several constructions of the law with which he was furnished by the proper officers, his absolute freedom from criminal intent in what he has done, and the true spirit and intent of the treaty, fully justify, if they do not require, as matter of simple justice, the enactment at once of such a law. We, therefore, recommend, as a substitute for the proposition of the majority, that the following joint resolution be passed by the House:

JOINT RESOLUTION declaratory of the true intent and meaning of section one hundred and seven of the act entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July twenty, eighteen hundred and sixty-eight.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That neither section one hundred and seven nor any other part of the act entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July twenty, eighteen hundred and sixty-eight, shall be so construed as to repeal, annul, or abrogate article ten of the treaty of July nineteen, eighteen hundred and sixty-six, between the United States and the Cherokee Indians, or so as to require the members of said Indian tribe to pay any revenue taxes on live stock, merchandise, or other products in good faith raised, produced, or manufactured in said Territory, unless the same shall be removed from, and sold outside of, the said Indian Territory, and in that case taxes shall be required to be paid only on the quantity sold outside of the said Indian Territory.

Independently of the many meritorious considerations arising out of the personal conduct of Colonel Boudinot, and entitling him to just and kind, if not generous, treatment at the hands of Congress, we believe that the enactment of the joint resolution we offer is necessary, in order to maintain the good faith and honor of the Government toward the Cherokee Nation.

Respectfully submitted.

M. C. KERR.
C. A. ELDRIDGE.