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356\_03\_001-

Hamlin, Charles S., Miscellany, Printed Matter, Memorandum of Authorities  
As To The Power Of The Decretary Of The Treasury..., N.D.

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MEMORANDUM OF AUTHORITIES AS TO  
THE POWER OF THE SECRETARY OF THE  
TREASURY..., N.D.

MEMORANDUM OF AUTHORITIES  
AS TO THE POWER OF THE ·  
SECRETARY OF THE TREASURY  
TO AUTHORIZE COLLECTORS  
OF CUSTOMS TO ACCEPT · ·  
RELEASE BONDS · · · · ·





BRIEF ON THE LEGALITY OF RELEASE BONDS  
FORMERLY TAKEN BY THE COLLECTOR OF  
THE PORT OF BOSTON.

I.

The Customs Regulations, Article 1265, prescribe that the Collector, after an examination of the invoice by the appraising officer and report thereon, may deliver to the importer the examined packages before final liquidation. Said article further prescribes, however, that if the estimated duties are not sufficient, the Collector before delivery shall require a special deposit from the importer to cover the deficiency.

II.

At the Port of Boston, under a practice which originated many years ago, the Collector has accepted from importers, in lieu of the special deposit called for by article 1265, a bond called a Release bond, under which the importer agrees to pay to the Collector, in consideration of the delivery to him by the Collector of the examination packages prior to final liquidation of the entry, any additional duties found due on final liquidation, and further to save the Collector, officially and individually, harmless from any claims against him because of said delivery.

Such bond, however, has never been accepted where the appraising officers have found any error in the invoice valuation, but has been confined solely to cases where the invoice has been found correct in value, or where, being correct in value, a classification differing from that fixed by the Collector on determination of the estimated duties, has been suggested by the appraising department for the consideration of the Collector.

III.

Early in 1895 the Collector of Boston was ordered by the Treasury to discontinue the practice. A later order, however, sent February 26, 1895, suspended the previous order until



further action by the Department. This later order was intended to be and was a direct authority to the Collector to continue taking Release bonds until, at least, contrary instructions should be received by him. The regulations, therefore, which were inconsistent with this practice were in effect modified so far as related to the Port of Boston, so as to permit the use of Release bonds in lieu of the special deposit prescribed in said article 1265.

In December, 1903, the Treasury Department again instructed the Collector to discontinue taking these Release bonds; at the request of the merchants of Boston, however, a hearing has been assigned by the Secretary of the Treasury for consideration of the legality and the necessity of said Release bonds.

## IV.

It is conceded that under the existing regulations and the recent order of the Secretary, the taking of a Release bond is not authorized. These regulations, however, are framed by the Treasury and can be modified or changed in any manner in accordance with the laws of the United States.

## V.

The question to which this memorandum will be chiefly confined is purely one of law. In its simplest form it may be stated as follows:—

Under the laws of the United States has the Secretary of the Treasury power, by appropriate regulation, to authorize a Collector to accept a bond in lieu of the special deposit prescribed by article 1265 of the Regulations?

It is respectfully represented that the Secretary of the Treasury has this power if, in his discretion, he sees fit to execute it, and to demonstrate the existence of such power is the object of this memorandum.

## VI.

The liability of an importer to pay duties on imported goods is a personal debt. It is settled law that retention of the merchandise by the government is not essential to its claim for duties against the importer.

U. S. v Lyman, 1 Mason 487,  
Meredith v U. S., 13 Peters 486,  
U. S. v George, 6 Blatchford 406.

## VII.

The conditions upon which the importer may obtain possession of imported merchandise are prescribed in two statutes of the United States.

1. R. S. Sec. 2869 (as amended by section 2, Act of June 5, 1894).
2. R. S. Sec. 2899.

1. The Act of June 5, 1894, section 2, prescribes that on payment of the estimated duties, a delivery permit *shall* be given. R. S. Sec. 2869, of which this is an amendment, provided that a *landing* permit should be given on payment of estimated duties. The Act of 1894, however, struck out the provision as to a landing permit and substituted a *delivery* permit.

2. Section 2899 of the Revised Statutes provides:—  
"No merchandise liable to be inspected or appraised shall be delivered from custody of the officers of the customs, until the same has been inspected or appraised or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the Collector."

This same statute provides further for a penal bond which does away with the necessity for appraisal prior to delivery of the merchandise not sent to the public stores for appraisal.



## VIII.

The above statutes impose two sets of alternative conditions precedent to the delivery of imported merchandise:—

1. Payment of estimated duties and the giving of a penal bond to return the unexamined merchandise if called for.
2. Payment of estimated duties and a report to the Collector from the appraising officers that the examination packages are correctly and fairly invoiced and put up.

On complying with either of these alternative conditions, the laws of the United States prescribe the delivery of the merchandise to the importer.

1. The estimated duties, which the importer has to pay prior to delivery of any part of the importation, include duties on the examination packages as well as upon the remainder of the importation, and while in a popular sense looked upon as a preliminary deposit, yet legally are in no sense a deposit. On the contrary the payment of the sum estimated is a payment of duties pure and simple. Prior to the Customs Administrative Act protests could be filed at once after said payment without awaiting final liquidation.

*Davies v Miller*, 130 U. S. 284.

Section 14 of the Customs Administrative Act changed the time of filing protests until after final liquidation. This was done purely for administrative reasons and in no way changed the legal effect of payment of estimated duties.

See *In re Bailey*, 112 Federal Reporter 413.

2. If the appraising officer, on examination of the invoice, finds that it is not correctly and fairly invoiced, he will, of course, make no report to the Collector under section 2899, and therefore the Collector will not and cannot deliver the examination packages to the importer. It is understood that at the Boston Custom House the examination packages have never

been delivered, with or without a Release bond, where any question of valuation or proper invoicing has been raised by the appraising officers.

## IX.

The laws of the United States prescribe two payments of customs duties only:—

1. The estimated duties.
2. Additional duties found due on final liquidation.

From the moment of time when the duties are estimated and paid, until the time when the duties are finally liquidated, no further payments or deposits of duties are prescribed by the statutes of the United States.

Between these times, the invoice being reported "correctly and fairly invoiced and put up" under R. S. 2899, it is respectfully submitted that the Collector has power under the laws (apart of course from contrary Treasury regulations) to deliver the examination packages in accordance with the provisions of said Sec. 2899 of the Revised Statutes and the Act of June 5, 1894, Sec. 2, cited above under VII.

Said latter act declares the purpose of the laws, once the estimated duties are paid, to give possession of the merchandise to the importer, relying upon the right of the United States to bring suit against the importer for any balance of duties later found due on final liquidation.

That such is the purpose of the laws is shown by the fact that Sec. 2899 prescribes that the importer may obtain possession of the merchandise, other than examination packages, at once on entry and before appraisal, on giving a bond conditioned merely to return the merchandise if called for within ten days after the appraisal of examination packages and report thereof to the Collector.

Not a mention is made in this statute as to paying further duties on the merchandise thus delivered. The importer is obliged merely to promise to return it so that if any discrepancy



is found in his invoice and entry, the entire importation can be sent to the appraiser for examination as to value.

This is even more clearly emphasized by the fact that only rarely at Ports where a large business is done, would the final liquidation be made within ten days after the appraiser's report. Yet after ten days all liability of the importer under the penal bond is at an end.

It would seem, therefore, to be established that the intent of the laws is that once the examination packages are found correctly invoiced as to value, they are to be delivered to the importer, as was the balance of the importation at the time of original entry, and are not to be retained as security for additional duties possibly later found due on final liquidation.

#### X.

The fact that the appraiser, on reporting as to values stated in the invoice and determined by him, is authorized by the regulations and often does suggest a different classification from that originally made by the Collector, places no burden in law on the Collector to withhold delivery of examination packages pending final liquidation.

The duty of the appraiser is to fix values; of the Collector to classify and liquidate the entry; the Collector is not bound by any suggestion of the appraiser as to classification. No further duties, after payment of the estimated duties, are due from the importer until the Collector and the Naval officer finally liquidate the entry.

#### XI.

It is respectfully submitted, therefore, that the Secretary of the Treasury has the legal right under the statutes of the United States to direct the Collector to deliver examination packages to the importer on report from the appraising officer that the invoice is correct, even though the appraiser may recommend a different classification on liquidation.

If this right is established, there is clearly no necessity in

law for the taking either of a special deposit or a Release bond. That such bond is not required by law, however, does not make it invalid if given by the importer and accepted by the Collector.

#### XII.

We will now consider the several objections which have been offered to the validity of such a Release bond.

*First Objection.* That the Collector by giving up the examination packages and taking a bond for additional duties which may be found due on liquidation, is in fact accepting a bond for duties in place of the cash required by law.

This objection has been disposed of by showing that under the law, the estimated duties being paid, examination packages can be given up, on the conditions above stated, without any deposit or further payment of duties. If this power exists, the Release bond conditioned to indemnify the Collector and to pay additional duties, if any, which might be found due later, is unnecessary, but not for that reason illegal.

*Second Objection.* That the United States has no power to take a voluntary bond.

It is respectfully represented that a long line of cases establish the validity of a voluntary bond.

(a) As to voluntary bonds generally.

In *U. S. v Bradley*, 10 Peters at page 360, Mr. Justice Story said that the United States had, in his opinion:—

“A capacity to take a voluntary bond in cases within the scope of the powers delegated to the general government by the Constitution.”

In *U. S. v Hodson*, 10 Wallace 395, the Court citing *U. S. v Tingey*, 5 Peters 127, said as to the general power in the United States to take voluntary bonds:—

“The decision was put upon the ground that the government had the capacity to make the contract \* \* \* it was competent to enter into any con-



tract not prohibited by law and found to be expedient in the just exercise of the powers confided to it by the Constitution."

See also *Tyler v Hand*, 7 Howard 573.

(b) From public officers where a bond is required by statute, but conditions are imposed in the bond not so required.

*U. S. v Tingey*, 5 Peters 127,

*U. S. v Bradley*, 10 Peters 343 and cases cited.

(c) From public officers where no bond is required by statute.

20 Opinions Attorneys General, page 508.

Attorney General Miller in the above citation advised the President that he could require a bond from the Register of Wills, although such bond was not prescribed by the laws of the United States.

In *Postmaster General v Early*, 12 Wheaton 135, Chief Justice Marshall said:—

"The Act of 1810 gives the Postmaster-General a right to sue for such balances, and the Act of 1851 enables him to sue in the circuit or district courts of the United States. But it is contended, that he has no right to secure such balance by bond; and, consequently, that bond being unauthorized, the act of Congress cannot be construed to authorize a suit upon it. Were it even true, that an official bond cannot be taken in a case where it is not expressly directed by law, we do not think, that a bond taken to secure the payment of a sum of money is void, because it is also an official bond. Even supposing this bond to be void, so far as it is intended to stipulate for the performance of official duties, it is not necessarily void, so far as it stipulates for the payment of money of the United States, which might come to the hands of the deputy Postmaster.

(d) From individuals, where no bond is required by statute but one is given voluntarily.

In *U. S. v Mora*, 97 U. S. 413, a statute gave the Secretary of the Treasury power to require security

that merchandise should not be transported to insurgents against the government. The regulations issued thereunder authorized the Collector to refuse clearance to all suspected vessels and to require substantial security that the law would be complied with. In an action on a bond given for this purpose, the court ruled that, entirely apart from any statute, under the general power to refuse a clearance, the Collector could accept a voluntary bond from the shipper. The court said:—

"Under this last power of refusing a clearance what was there to prevent him or to make it unlawful for him to take such a bond as was given in this case, if the owner of the goods chose to enter into it for the purpose of inducing the Collector to grant the clearance?"

The court in this case also ruled that the execution of the bond is prima facie evidence that it was voluntarily entered into, citing *U. S. v Bradley*, 10 Peters 343.

In 154 U. S. 51, *Constable v National Steamship Company*, the Collector of Customs gave a permit to unload a steamer and to allow the unpermitted cargo to remain on the wharf for forty-eight hours under a stipulation in which the steamship company agreed:—

1. That this should be at the sole risk of the owners of the steamer.
2. That said owners would pay to the owner of the cargo its value if stolen, burned, or otherwise lost.
3. That said owners would also pay all duties which might be in any way lost because of the merchandise being permitted to remain on the wharf for said forty-eight hours.

There was no statute authorizing such a stipulation but the Court incidentally ruled that the Secretary of the Treasury could by regulation permit said goods to remain on the wharf forty-eight hours before being sent to warehouse, taking the stipulation as to duties above mentioned.

This case, therefore, is a direct authority that a voluntary bond may be taken by the Collector of Customs from an individual.



The Court held in this case that the owner of the goods could not take advantage of that clause in the stipulation requiring the steamship owner to pay the value of the cargo if destroyed, but this decision did not affect the other ruling as to the voluntary bond for duties.

Voluntary bonds are in point of fact taken at the present time from private individuals by the Treasury Department.

(a) The Treasury requires a bond where cargo is unladen by day under section 2 of the Act of June 5, 1894, although the statute calls for no bond.

(b) The Treasury requires a bond where machinery is examined after being set up at the mill. Regulations Art. 1245.

(c) The bond referred to cited above in 154 U. S. 51.

(d) Under the provisions of the Customs Administrative Act a bond may be taken under certain circumstances to produce a certified invoice. The Treasury requires the importer in said bond to promise in addition to producing the invoice to pay all additional duties which may be found due when the invoice is produced and on the strength of this bond the Collector delivers up the merchandise. So far as the promise to pay duties is concerned, this is a voluntary bond because not in terms required by the statute.

Suits on such bonds containing a promise to pay duties have been sustained by the courts.

U. S. v Cutajar, 59 F. R. 1000.

*Third objection.* That such a bond, if taken at all, should run to the United States and not to the Collector, either individually or as a United States officer.

Usually such bonds run to the United States, as in the case of the penal bond under R. S. 2899, and the bond in connection with the examination of machinery under Customs Regulations, article 1245.

The laws of the United States, however, recognize bonds running directly to the Collector. For example see R. S. 2872.

*Fourth objection.* That the Release bond runs not only to the Collector as Collector, but also to him as an individual.

It is respectfully submitted, however, that such a designation would not render a bond otherwise valid illegal.

Under the laws prior to the Customs Administrative Act of 1890, the Collector was treated practically as an individual. Suits for recovery of duties were brought against him individually. R. S. Sec. 989 provided that on a judgment against a Collector no execution should issue against him, provided the court gave a certificate of probable cause. If no such certificate, however, could be obtained from the Court, execution would issue against the Collector personally.

109 U. S. 238, Arnson v. Murphy.

The Courts have decided, however, that because section 25 of the Administrative Act releases the Collector from personal liability, all suits under said Act are really suits against the United States.

152 U. S. 691, Schoenfeld v Hendricks.

These decisions have placed the United States in the place of the Collector in customs cases arising under the Administrative Act, and therefore it would seem not unwise to have the Release bond run to the United States. If, however, the Collector should incur any liability because of giving up examination packages, it would be enforceable against him personally on his bond. There can be no objection, therefore, to have the Release bond run to the Collector individually as well as to him as Collector or to the United States.

### XIII.

It is not intended here to discuss the methods pursued at the port of Boston, or any other question than the legality of the Release bond. If objection, however, is raised on the ground that the assistant appraiser should check the invoices as well as the examiner, that can easily be accomplished by Treas-



ury order, so that the provisions of R. S. 2899 will be literally complied with. So also the store keeper, to whom, under the existing practice, the invoice is reported from the appraiser's office, is an appointee and a representative of the Collector; if there is any doubt of his authority to act in the name of the Collector and deliver the merchandise, his designation could be changed by Treasury Regulations to that of Deputy Collector and Store keeper and he could be given direct authority to act for the Collector.

## XIV.

The objection, not a legal one, that in practice delivery of examination packages might deprive the Collector of an opportunity to inspect these packages in order to exercise his legal right to call for a reappraisal, is answered by the mere statement that the representative of the Collector, whether called store keeper or Deputy Collector, can exercise the Collector's right just as well as the Collector could. It might be well, however, to change the form of the special bond so that the appraiser's department should be required to take samples whenever practicable and an accurate description of the examination packages, by which samples and description the importer should stipulate to abide.

Such a stipulation was authorized in Treas. Syn. 10355 as a condition precedent to delivering examination packages.

## XV.

It is not disputed that the Collector has the right after final appraisal to call for a reappraisal. Prior to the Customs Administrative Act the Collector under R. S. 2930 actually appraised merchandise when the merchant appraisers disagreed. Since that Act, however, the Collector, at Ports at least where there are appraising officers, has had no appraising power. His right to call for a reappraisal is purely a personal right.

Under the existing practice at the Port of New York, the Collector determines, through his Deputy, either to exercise or

to waive this right when the report of the appraiser as to the invoice is given to his Deputy. Under the suggestion made above, that samples be taken and the form of the special bond slightly changed, the rights of the Collector would be more fully preserved until final appraisal, and with more safety to the interests of the Treasury than under the New York practice.

## XVI.

If there were any doubt as to the validity of this Release bond, the fact that the Collector has the right, above mentioned, to call for a reappraisal which would incidentally detain the examination packages, and his immediate decision as to the exercise of that right, or his agreement with the importer as to a sample and description, would certainly be a good consideration for taking such a bond, if any consideration were needed in law.

As was stated by the Court in *U. S. v Mora*, 97 U. S. 413 (cited above under XII):—

“Under this last power of refusing a clearance, what was there to prevent him or to make it unlawful for him to take such a bond as was given in this case, if the owner of the goods chose to enter into it for the purpose of inducing the Collector to grant the clearance?”

## XVII.

It is respectfully represented that if the above reasoning is sound, there has been established:—

1. That, at least since the Act of June 5, 1894, the government has no lien on imported merchandise after estimated duties have been paid and before final liquidation.
2. That after the payment of said estimated duties, possession of the examination packages by the government is retained only for the purpose of inspection and appraisal.
3. That after report from the appraising officer on the invoice under R. S. 2899, the Collector has



the right, under the laws of the United States, apart from contrary Customs Regulations, to deliver up the examination packages to the importer, provided the estimated duties have been paid, without requiring either a special deposit or a Release bond.

4. That although neither said special deposit nor Release bond are required by law, the Collector, if authorized by the Department, can take either, if given by the importer.
5. That if any consideration were needed to support such a voluntary bond, the immediate decision by the Collector through his representative not to call for a reappraisal would furnish such consideration.
6. That a Treasury Regulation, authorizing the Collector to take a Release bond, although said bond is not prescribed by law, would be valid under the laws of the United States.