CUSTOMS ADMINISTRATION UNDER THE 1913 TARIFF ACT

A review of the development of legislative enactments on the subject of customs administration shows that while Congress has passed a great many tariff bills since 1789,[1] making manifold changes in rates of duty specified in the various schedules of merchandise, very little progress, until recent years, has been made in the conditions and requirements imposed upon those engaged in the business of bringing foreign products into this country. From the early days of the republic, Congress has always been very loath to undertake the work of perfecting customs procedure, partly because its members were unfamiliar with the practical problems facing government officers in charge of the administration of the tariff laws, and partly because its time and energies had invariably been exhausted in framing the schedules, so that the administrative features, vitally important as they are, were suffered to be let alone.

The administrative sections of every tariff deal with the following chief points: (1) the manner in which assessments of duties are to be made; (2) how the market value of merchandise is to be determined; (3) the written information that is to be furnished by the importer making an entry; (4) how and under what circumstances an importer may lodge a protest against the exaction of duties deemed by him to be erroneous; (5) the functions of the various officers concerned in the appraisement of goods and the collection of duties thereon; (6) the labeling or stamping of articles of foreign origin with the name of the country of manufacture; (7) prohibition of the importation of obscene books, pictures, etc.; (8) prohibition of the importation of neat cattle

[1] The first session of the first Congress of the United States convened in the city of New York on March 4, 1789. The very first law imposing duties on goods, wares, and merchandise was enacted on July 4 of that year. About four weeks later, July 31, Congress passed a brief and rather crude statute entitled, "An act to regulate the collection of duties imposed by law on the tonnage of ships or vessels and on goods, wares and merchandise imported," etc.

and of goods manufactured in whole or in part by convict labor; (9) certification of invoices by American consuls abroad; (10) the forms of declarations to be made by the importer; (11) penalties for making false statements; (12) allowance of duties for decay or destruction of perishable articles, particularly fruit; (13) penalties for attempting to bribe customs employees; (14) the filing of manifests by masters of vessels; and (15) the exemption from duty of $100 worth of personal effects and wearing apparel brought in by passengers as baggage.

The fact that at the second session of the first Congress it was found necessary to pass an act[1] providing "more effectually for the collection of duties" indicates that from the very start the troublesome character of customs administrative problems became manifest. Again, we find that on March 2, 1799, about ten years later, Congress passed another law on the subject—one that is frequently referred to as the "organic law." It established customs districts or ports, prescribed the duties of collector, surveyor, and naval officer, and specified in detail the form of manifest that was to be filed by masters of vessels and the form of declaration, bond, and entry that was to be used by the importer. This act also defined the methods for appraising merchandise, authorized the giving of an allowance for leakage, and made provision for inspectors' salaries.

Various amendments[2] to this law were enacted from time to time, but no comprehensive legislation on this subject was had until the McKinley tariff revision of 1890, when Congress undertook a codification of the customs administrative statutes that had accumulated during the preceding one hundred years. In that year, shortly before the enactment of the tariff law, a bill[3] was passed which set forth in detail the procedure to be observed in the importation of merchandise. This law has served as a basis for customs administration ever since. It was only slightly amended by the

[1] Act of August 4, 1790, *Public Statutes at Large of the United States of America from Organization of Government in 1789 to 1845*, edited by Richard Peters, and published in Boston by Charles C. Little and James Brown, 1845.

[2] Among them was the act of June 22, 1874, which repealed moieties, defined smuggling, etc.

[3] Act of June 10, 1890.

Dingley tariff act of 1897[1] and by the law of May 27, 1908, the latter extending the time for the filing of protests against assessments from ten to fifteen days. The Payne-Aldrich law of 1909[2] re-enacted the administrative features of the tariff law then in force, adding thereto provisions creating the Court of Customs Appeals and establishing a special staff of government attorneys in whom was vested the exclusive charge of the trial of cases arising under the tariff laws. No changes of importance were introduced until the passage of the Underwood-Simmons Act in 1913,[3] when a radical revision was made in the tariff schedules in accordance with the revenue policy of the Democratic party. The changes brought about in the administrative sections were no less novel and unique.

The customs administrative provisions of a tariff law are essentially disciplinary in character, and upon their enforcement depends the collection of a maximum revenue from duties imposed upon imports. The more stringent the rules laid down, the more certain is the government to get what is due it. But, like the economic limits which obtain in the case of prices charged by monopolies, ultra-stringent or drastic legal restrictions placed upon the business of importing merchandise are likely to discourage and hamper foreign trade to such an extent that the government, as well as the importing community, will be the loser. It is obvious that while each of the various schedules of the tariff concerns a particular trade or trades, the administrative sections of the law are of paramount importance to all lines of business. Domestic manufacturers take as keen an interest in this part of the law as they do in the duty rates charged on the goods which they produce, for they are constantly exercising a vigilance over their foreign competitors to the end that the importers pay the highest rate assessable. Just as the manufacturer seeks "protection" in prohibitive rates, so is he eagerly desirous of having Congress enact administrative rules calculated to place all possible barriers in the way of foreign importations.

[1] Act of July 24, 1897.

[2] Act of August 5, 1909.

[3] Act of October 3, 1913.

I

In the revision of the tariff as effected by the enactment of the Underwood-Simmons law, the administrative provisions were considerably strengthened, although not to the extent proposed in the bill originally introduced by the Ways and Means Committee of the House, the Senate having eliminated most of the drastic provisions which had evoked the severest criticism. Two facts must be considered in attempting to explain the reasons which prompted Chairman Underwood to incorporate in his bill provisions designed to make more stringent the requirements governing the importation of merchandise. First was the realization that with a general reduction of the rates of duty the revenue obtainable under the new law would be materially less than under the old, and that consequently there was more imperative need for making sure that the government would get all the revenue to which it is entitled. He felt that the government could ill afford to lose any money through lax administration of the tariff law. The second factor was the disclosure of gross frauds that had come to light during the previous few years, in which importers in nearly every line of business were implicated. Millions of dollars in evaded duties were paid back into the public treasury during the four years' life of the Payne-Aldrich tariff act as a result of the vigorous and aggressive campaign against smuggling and undervaluation carried on by Secretary of the Treasury MacVeagh and Collector Loeb of New York. The revelation of the common and widespread practice of undervaluing imported merchandise served to call forcibly to the attention of Congress the great need of preventing, so far as possible, the continuance and repetition of these dishonest methods. This could only be accomplished, it was determined, by placing in the hands of government officials instruments designed to aid them in the prevention, as well as in the detection, of fraud.

The original House bill was replete with severe and revolutionary provisions, subjecting the importing business to exceedingly obnoxious regulatory requirements. No sooner was the draft made public than individual merchants and influential commercial organizations made earnest protest, and sought to have the more objectionable features eliminated or amended. In this they met

with partial success. The Senate made less rigorous certain of the provisions, at the same time inserting several additional paragraphs. The bill underwent further modification by the Conference Committee. As thus revised, the chief administrative reforms brought about in the new tariff act were: (1) provisions compelling importers and foreign shippers to submit their books of account and cost sheets to the inspection of customs officers, under penalty of an additional 15 per cent tax on the goods involved; (2) the imposition of a fee incident to the filing of protests against the exaction of duties—a provision calculated to reduce litigation before the Board of United States General Appraisers; and (3) the prohibition of contracts for contingent legal fees in customs cases.

These and other changes in the law will be discussed in detail. On the whole, the reform measures are praiseworthy, but time alone will demonstrate their efficacy. The wisdom of extending the book-inspection provisions to non-Americans in foreign lands is seriously doubted, because, aside from the legal question of jurisdiction, the activities of American agents in European producing centers tend to cause much criticism and resentment, if not vexatious international complications. The protest-fee provision is unquestionably a good innovation, and it is surprising that the protective interests of the country who had heretofore taken such an active and prominent part in framing tariff legislation had not, before this, persuaded Congress to enact a provision compelling importers to pay for the privilege of contesting duty assessments. As for disallowing contingent fees, judgment must be suspended, for a theoretical discussion is of little consequence, and it is too early to gauge results from a practical standpoint.

Despite the fact that the new tariff act has been in operation for over a year, the full effect of the novel provisions relating to customs administration have not yet been fully felt, although it is generally agreed that the protest-fee exaction has successfully performed the service for which it was intended. Little, if anything, has been done with regard to the inspection of books and papers, and, with the European war demoralizing practically the entire import business of the country, it will be some time before

this feature of the act will be given a test. The chief reason for the Treasury Department not having invoked, thus far, its authority to examine the books and papers of foreign manufacturers and American importers has been the constant change of the personnel of the customs bureau. Since the passage of the new tariff act, twelve months ago, no less than three men have occupied the position of assistant secretary of the Treasury in charge of customs, two of whom had no previous experience in the work of the department. Under the circumstances, they have not deemed it prudent or wise to venture to exercise new authority without first familiarizing themselves with the usual and ordinary customs procedure. Admittedly, the book-inspection feature of the law is likely to make serious trouble in its administration, and, appreciating this fact, the new hands in the Treasury have manifested great reluctance in putting it into operation, particularly at this time when rigorous action is likely to meet very hostile criticism.

II

The most drastic innovation in customs administration proposed in the House was a provision denying admission into the United States of merchandise shipped by a foreign manufacturer who refuses to submit his books and records to the inspection of duly accredited investigating agents of the United States government. A similar provision relating to the importer or consignee in this country was also inserted in the bill. So far as the importer is concerned, there was relatively little criticism; but an attempt to meddle with the affairs of foreigners was looked upon as a revolutionary proposal, likely to cause serious trouble. To be sure, merchants resent having special agents enter their places of business and demand their books, but this procedure was to be followed only in unusual and special instances, for the reason that another paragraph of the tariff law—an old paragraph, re-enacted in a slightly amended form in the present law[1]—gives the collector, appraiser, and general appraisers authority to subpoena importers and require them to produce books and papers, failure to produce the documents being punishable by a fine.

[1] Paragraph P, section III, Tariff Act of October 3, 1913.

Before the tariff bill was put into final form, the refusal of entry provision was replaced by a less drastic clause imposing an additional tax of 15 per cent on merchandise respecting which the shipper or the importer declines to show his books and papers.

During the Taft administration, when Collector Loeb of New York, in co-operation with special agents of the Treasury Department, set out on his aggressive campaign against undervaluation of merchandise, which had been going on for a number of years and involved some of the largest firms in the country, it was found that positive proof of fraud could only be established—and the extent of the fraud appraised—by the examination of the merchants' books. The many difficulties experienced in ascertaining whether or not an importer was placing correct valuations on his goods prompted legislation regarding the inspection of books and papers.

Proceedings instituted against concerns suspected of defrauding the revenue were usually started by some employee of an importing firm—or, more generally, an ex-employee with a grievance—furnishing the collector with information concerning fraudulent acts on the part of his principal. At this period of the history of the customs service an unusually large number of importers' clerks and bookkeepers suddenly turned "informers," doubtless because of the newspaper notoriety given a certain federal employee who was awarded a large sum of money for discovering the enormous sugar frauds. A great deal of publicity was given to the fact—previously unknown to the general public—that the Secretary of the Treasury is empowered under the law to compensate citizens who supply information which leads to the detection of fraud against the revenue and to the subsequent recovery of duties, payment of which had been evaded.

Acting on information thus received, examination was made of the suspected importer's entries and other papers on file at the custom-house. These documents, as a rule, furnished but little data, and served merely to indicate the volume of business transacted. With the view of getting more useful data and for the purpose of ascertaining whether or not correct valuations were placed on the goods, the appraiser of merchandise was usually asked by the collector carefully to inspect current importations.

This notice invariably led to delay on the part of the appraiser in passing the goods and frequently aroused a suspicion in the importer's mind that the government was exercising undue surveillance. Having been placed on his guard, as it were, the importer ceased undervaluing, if he had been in the habit of doing so in the past. The special agents, on the other hand, not having been successful in obtaining any specific data upon which to base a charge of undervaluation—in fact not having any evidence fit for presentation to the federal grand jury—proceeded to subject the merchant to various forms of duress. Usually traveling in pairs, the special agents would visit an importer's office and demand his books and papers. A refusal to deliver the documents was met with the threat that the man would be arrested, and receive a great deal of undesirable publicity, resulting in an impairment of his credit and business standing. It might be said that in practically all of these proceedings the special agents were "morally certain" that the man was guilty of wrongdoing, notwithstanding the fact that they lacked tangible evidence of any crime.

The pressure thus brought to bear upon the suspected importer usually proved effective. In the first place, the importer, being intimidated, became alarmed, and although advised by his attorney that the government agents had no legal right to the books and papers, he felt that a refusal to produce them would be construed as an admission of guilt and might lead to more serious trouble. Furthermore, importers feared publicity more than anything else, and not a few felt disposed to pay a large sum of money demanded by the collector for alleged or actual evaded duties, rather than fight for their rights in the courts. They thought it more prudent to turn over their cash in the privacy of the collector's office, where business transactions are not open to the public and the press, as are the proceedings in a court of law. The books and papers produced by importers were carefully scrutinized by accountants in the custom-house, who obtained from them the prices actually paid for the goods and were thus able to estimate the undervaluations. In many cases it was found that shippers abroad had made out two sets of invoices; one for customs purposes, giving fictitious

prices, and the other a "private invoice" upon which was stated the actual price value of the goods.

These inquiries almost invariably ended in settlements or compromises, by which importers paid large sums of money. Practically no publicity was given to the firms making the settlements, and in many instances one of the conditions stipulated by lawyers representing importing firms was that all the official papers in the case be sealed, and that no statement be given to the newspapers.

The special agents having found that one importer engaged in a certain line of business was defrauding the government, took it for granted that his competitors must be doing the same, for otherwise they could not remain in business. In a great many instances this surmise proved true, and led to a half-dozen or more compromises. Going from one importer to another, and from one line of business to another, the collector succeeded in bringing about nearly two hundred settlements, which, including the famous case of an international art concern, aggregated over $5,000,000.[1]

Needless to say, the collector and the special agents came in for a great deal of criticism for pursuing the extraordinary tactics just described, particularly inasmuch as there was concededly no warrant in law for conducting government business in this fashion—a method which savored of blackmail, and resembled highwaymen's

[1] Official statistics covering the campaign against underweighing, smuggling, and undervaluation, instituted by William Loeb, Jr., shortly after he became collector of the port of New York on March 9, 1909, show that during a period of two years and eight months 158 importing firms, representing 34 lines of trade, made offers of compromise; that 86 merchants and passengers paid fines for violating the customs laws, and that 47 received prison sentences after conviction. The total moneys received in compromises, fines, penalties, and forfeitures from March 9, 1909, to October 31, 1911, amounted to $7,170,237.10, divided as follows:

Court fines	$ 204,911.00
Accepted offers in compromise	5,198,401.29
Sales of seizures under decree of court, sales of small seizures, mail importations, from passengers, etc	505,980.38
Total	$5,909,282.67
Back duties collected	1,260,954.43
Grand total	$7,170,237.10

In the fifteen years from 1894 to 1909 the aggregate receipts from these sources were only $926,162.00.

"hold-up" methods. At the same time, these proceedings strengthened the belief in the need of providing customs officials with power to compel the production of books; and it was the demonstration of the absolute necessity of legal means for securing access to books that was responsible for the making of representations to the framers of the new tariff act, with the eventual result that the Ways and Means Committee inserted the provisions (paragraphs U and V of section III) under discussion.

The Senate Finance Committee rejected these paragraphs in their entirety, declaring the provision for the production of the books to be "drastic and capable of abuse, if not certain to be abused." The committee pointed out that under paragraph U an innocent American importer could be punished, and in some cases even perhaps bankrupted, because of the refusal of a firm, in a foreign country, to submit its books to inspection. It was also asserted by the Senate committee that the paragraph penalized not only those engaged in the importation of merchandise but those "engaged in dealing with such imported merchandise," which might be stretched to cover the case of a retail merchant in the heart of South Dakota to whom goods had been shipped without any knowledge on his part of whence they were imported or how. As for extending customs visitatorial powers to foreign producers, the report stated that the paragraphs in question were not only obnoxious, but clearly violative of international equity and equality.

A compromise was reached in conference, the House paragraphs being restored with the amendment to the effect that failure to produce books should be punishable, not by the exclusion of the merchandise from entry into the United States, but by the assessment of an additional duty of 15 per cent.

The activities of the special Treasury agents referred to above were not limited to the investigation of importers resident in the United States, but in several instances extended to factories abroad. A case in point was the inquiry conducted in 1911 respecting the undervaluation of German cutlery. The agent sent on this mission met with but little success in his research work. The manufacturers he visited were for the most part hostile, and local

chambers of commerce severely criticized him and the United States government for the audacity and impudence of interfering with their private business. The foreign newspapers were emphatic in their denunciation of the agent's activities, and it is even reported that the municipal authorities of a city in Germany served notice upon him to leave town within twenty-four hours under penalty of eviction if he tarried longer.

The Limoges china commissions sent abroad by the Treasury Department for the purpose of determining cost of production and selling prices of French pottery were never pleasing to the foreigners, and in fact are largely responsible for the antagonism and disrespect felt toward our customs laws and practices. The visit of one of the commissions was characterized by the president of the American Chamber of Commerce in Paris as a veritable "scandal."

In France, the chief ground for complaint is that the United States government assumes to exercise a jurisdiction which the French authorities themselves do not possess. The French treasury, even for purposes of taxation, has no right to demand the production of books and papers of a manufacturer or merchant. In case of bankruptcy the judicial authorities may accept the books as evidence, but the French citizen is protected against any inquisition on the part of administrative officers. The distilling of alcohol, fabrication of gunpowder, and the like, in which government control is exercised, are not even apparent exceptions, for the scrutiny concerns only quantities and not commercial figures.

In France, as well as in other foreign countries, manufacturers are inclined to distrust American investigators, and a feeling prevails that whatever data is obtained by Treasury agents will be used by American producers to the detriment and injury of the foreigner. The European merchant jealously guards his trade secrets and he is naturally averse to disclosing them to government officials.

III

Fifty years ago Congress passed the first law[1] providing for the filing of written protests against duty assessments in cases where the importer challenges the correctness of the collector's

[1] Act of June 30, 1864.

exactions. The time within which such protests may be filed has been several times extended, the Underwood-Simmons law allowing the importers thirty days. Originally it was ten days, but the act of 1908 fixed it at fifteen. Protests are of two kinds: against classification and against appraisement. The former kind relates to the selection by the collector of the proper paragraph under which the merchandise is held dutiable; and the latter concerns the accuracy of the valuation set upon the goods by the appraiser whose function it is to examine all imported merchandise for the purpose of ascertaining the foreign market value, which is the basis of appraisement. If there is any merit in a protest, the Board of United States General Appraisers,[1] which passes upon claims made by importers, orders a refund of duties collected in excess of the proper amount. In order to be entitled to a refund, the merchant must protest against the first and every subsequent importation until the tariff question at issue is decided. In this manner protests rapidly accumulate, the trials being limited to "issues" presented by test cases, the ruling upon which covers all protests involving the same point.

The Board of Appraisers, which is a court of first resort in customs cases, was, up to the passage of the Underwood law, the only tribunal in the world where a litigant could enter suit without the payment of a calendar or any other fee. This right or privilege of free litigation was greatly abused, due in a measure to the instigation of customs brokers and attorneys who solicited suits on a speculative basis under an arrangement by which importer and lawyer shared the profits, if any accrued. So common was the practice of protesting against the classification and appraisement of merchandise that some concerns made it a point to lodge a protest in every case, without exception. The result was that the Board's calendar was constantly clogged, that its clerical staff had more work to do than it could manage, and that the disposition of cases was indefinitely postponed. The longer it took to get a final decision the more profitable was the case likely to be, for pending the adjudication of an issue protests were continuously

[1] Rules of Procedure and Practice before the Board are published in *Treasury Decisions*, Vol. XXVI, No. 10 (T.D. 34210).

piled up, and by the time a decision was rendered there was a large accumulation of refunds in the event that the case was decided in favor of the importers.

Various Secretaries of the Treasury, in their annual reports in years past, have commented on this condition, and suggested the passage of a law prescribing a protest fee of from $1 to $5. Occasionally the subject of a protest fee has been discussed, and each time the importers, brokers, and attorneys have entered vigorous objection to such proposals, declaring that taxpayers should, as a matter of right, be allowed to protest against an assessment believed to be erroneous, without the payment of a fee. In support of this contention it has been asserted that the practice of collectors, whenever in doubt, of assessing the higher rate, made it imperative for importers to file frequent protests for their own protection. The charge that merchants were accustomed to lodge a great many "frivolous" protests was met with the statement that in a number of instances protests considered to have but little merit brought the largest refunds, many cases being on record where lawyers won issues generally believed to be undeserving.

The efficacy of imposing a fee of $1 for the filing of a protest against duty assessments has already been demonstrated at New York and other ports. The requirement has served the purpose for which it was intended, namely, to reduce litigation by the elimination of the trial of frivolous and unworthy cases, where the protestant knows quite well that his chance of recovering any part of the duties paid is very doubtful and remote. Exact figures for statistical purposes are not available.[1] The Board

[1] Chairman Underwood of the Ways and Means Committee, in reporting the bill to the House of Representatives said: "The report of the Board of General Appraisers for the year ending June 30, 1912, shows there were received by the Board that year 96,099 protests, and that there were pending 146,153 protests. Fully one-half of the present protests are estimated to be *fictitious*, and to file, index, and keep a proper account of each protest entails a great amount of labor and expense. It is believed that the imposition of this fee will eliminate the *fictitious* protests and work a great saving to the Treasury Department."

Exception is taken to this statement by General Appraiser Cooper in his concurring opinion in the McCoy case (T.D. 33981; G.A. 7515) in which he says: "It is apparent from the fact of the report and the records of this office that the report was loosely drawn and based upon inaccurate information. Evidently the opinion that

of United States General Appraisers before whom these protests are tried has been obliged in the past to spend a large portion of its time in hearing worthless cases, and as a result the Board is about six months behind in its work. With the reduction of the volume of protests it is expected that the Board will soon catch up with its work, and that before long a customs issue will be finally disposed of in a short period of time, as it should be.

Paragraph N of the tariff bill as originally introduced in the House (H.R. 10, dated April 7, 1913) provided that each protest should be limited to a "single issue" with respect to each article or class of articles. Subsequently the provision was modified by limiting each protest to a "single article or class of articles," and to a "single entry or payment," and forbidding the joining of classification issues with other issues in the same protest. In this form the House passed the bill and transmitted it to the Senate. The Senate Finance Committee, evidently swayed by the argument presented to it by the aggressive and alert committee of the New York Merchants' Association,[1] struck out the limiting clause. As finally agreed upon in conference and passed by both houses, paragraph N requires that reasons for objections to assessments be set forth distinctly and specifically "in respect to each entry

one-half of the protests filed are fictitious was derived from the fact that thousands of cases are abandoned, defaulted, or submitted without evidence before the Board each year. There is no reason, however, for stating that such protests are fictitious, for a great number, and possibly the majority, of these protests have been abandoned, defaulted, or submitted without evidence after a test case involving the same issue had been decided adversely to the importer's contention by the United States Court of Customs Appeals, and it cannot be said that a protest is fictitious when there is sufficient merit in the issue to carry it to the court of last resort. When an issue is first presented to the Board, a test case is usually made up for trial, and, after a decision by the Board, either party may appeal to the United States Court of Customs Appeals for a review of the law and facts involved. Several months usually elapse before the issue is finally decided, and, in the meantime, the importers file a similar protest on each incoming importation of the same class of goods, in order to protect their rights and interests. These protests are all held on the suspended files of the Board until the test case is decided. If the decision is adverse to the importer's contention, the suspended protests are abandoned, defaulted, or submitted without evidence. I do not consider such protests fictitious."

[1] Briefs and statements filed with the Senate Committee, 63d Cong., on H.R. 3321, Vol. III, p. 2208.

or payment," and provides that protests shall be deemed to be finally abandoned and waived unless there is deposited within thirty days "a fee of $1 with respect to each protest."

Paragraph M, dealing with protest fees in appraisement cases, as reported by the House, provided for the payment of $1 "with respect to each appraisement objected to," but was changed by the Conference Committee to read: "A fee of $1 for each entry," thus giving the importer wider latitude. The law provides that in both classification and appraisement cases the protest fee shall be returned to the importer in the event that his protest is finally sustained in whole or in part.

Immediately after the passage of the tariff act the question arose whether the importer must deposit a fee of $1 for each entry covered by a protest, or whether a fee of $1 only is chargeable on each protest. The Treasury Department issued a letter on October 27, 1913 (T.D. 33817), interpreting the law as requiring the payment of a dollar fee for each entry. The importers contested this ruling and brought a test case before the Board of the United States General Appraisers, which rendered a decision[1] in their favor. The government appealed to the Customs Court, but that tribunal affirmed[2] the Board's findings.

For years it has been the practice to include more than one entry in a single protest. An entry may, and frequently does, consist of more than one invoice, each invoice containing a number of different articles of merchandise. Since the nine general appraisers are divided into three boards of three members each, and since particular subjects are assigned to the respective boards, it is the practice of lawyers handling customs cases to file separate protests for each class of merchandise. Although the decision of the Customs Court is not specific on this point, it is taken for granted by brokers and attorneys that the ruling permitting the consolidation of two entries into a single protest does not contemplate that a single fee of $1 may cover an indefinite number of entries, each consisting of a great many invoices enumerating a

[1] *In the Matter of Protest of Joseph F. McCoy Co.*, decided December 12, 1913 (T.D. 33981; G.A. 7515), *Treasury Decisions*, Vol. XXV, No. 25.

[2] *U.S.* v. *McCoy Co.* (T.D. 34445) decided May 4, 1914.

dozen or more different articles. Were this to be permitted the protest-fee provision in the 1913 tariff act would prove a boomerang, for an importer could limit his entire protest-fee expenses to $12 or $13 a year by making it a practice to file one omnibus protest every thirty days covering all entries accumulated during the preceding month. By an arrangement of this kind the importer would probably have the major part of his $12 returned to him, because it is reasonable to suppose that in each case at least one item on the protest would be sustained. The prevailing opinion is that a single protest, filed within the statutory time of thirty days, may cover a number of entries, provided, however, that it involves only a single issue.[1]

It was the Senate Finance Committee that inserted in the tariff act a provision declaring unlawful any agreement for a contingent fee in customs cases. Compliance with this provision was made a condition precedent to the validity of the protest and to any refund thereunder, and a violation of the prohibition was made punishable by a fine not exceeding $500, or imprisonment for not more than one year, or both. The purpose of this legislation was to make more effective the accomplishment of results that were to be obtained from the exaction of a protest fee, namely, the discouragement of litigation, speculative in character, and frequently of little or no merit. Heretofore the absence of any restrictions to the filing of protests induced customs brokers and lawyers to file protests *ad nauseam*. The more protests they filed, the greater were the possible refunds. Importers never objected to their attorneys filing a protest for them, for they had nothing to lose, because under the contingent-fee system no attorney's charge was made in the event the case was decided against them.[2]

[1] See Treasury Department letter of June 13, 1914 (T.D. 34541).

[2] The prohibition of contingent fees was strongly advocated by James F. Curtis, Assistant Secretary of the Treasury, in charge of the Customs Bureau, and by Winfred T. Denison, Assistant United States Attorney-General—the latter chairman of President Taft's commission which investigated the structure, methods, and practices of the Board of United States General Appraisers. They filed a memorandum on the subject saying that the prohibition would "destroy illegitimate customs litigation, of which heretofore there has been a great mass." They declared that such litigation is, in the main, without substantial merit because its purpose usually is to get refunds

The importers, in arguing against the prohibition of contingent fees, contended that "there should be no restriction upon the proper interpretation of the law" and expressed the view that the prohibition might sometimes amount to class legislation, because the well-to-do importer can hire an attorney and fight his case, while his less fortunate competitor can do nothing to correct the evil that is done him by the assessment and collection of excessive duties which may be clearly illegal.

Leading customs attorneys declare that the prohibition has not caused and probably will not cause, in the long run, a decrease in their incomes. In short, it is assumed that the attorney's regular clients, large firms doing an import business, will pay about the same as they did under the old system. In making out bills for services, lawyers will figure on the old basis, but instead of demanding, let us say, $579.31 will send a bill for an even $600 or $550. There can be no doubt, however, that the occasional importer, the small man, will be made to suffer, for under the old system any one of a number of lawyers would have been glad to handle his case without retainer, while under the new law he will be obliged to engage an attorney, pay him for his services, and take his chance of winning or losing the case. It is manifest that in instances where the amount involved is small, importers will be reluctant to pay protest fees and lay out money for legal services.

IV

The provision in the tariff act that has given most trouble and was the cause of the greatest anxiety to the administration in Washington is subsection 7, paragraph J, section IV, providing that a discount of 5 per cent on all duties imposed shall be allowed on goods imported in vessels of American registry, provided that nothing in this subsection shall be so construed as to abrogate, or in any manner impair or affect, the provisions of any existing treaty. On the face of it, the provision was inserted in deference to ship-

for importers who have already reimbursed themselves out of the consumer. "The excess of duties," they insisted, "goes into the selling price and is recovered in that form by the importers out of the public. It is paid twice to the importers, once by the public as consumers and then again by the public as government."

subsidy advocates. As originally introduced in the House, there was no qualifying proviso. The Senate, believing that the granting of a rebate on goods shipped in American vessels would conflict with existing treaties and conventions, and result in unpleasant international complications, rejected it in its entirety. The Senate Finance Committee, in striking out the discount provision, declared that it was in contravention of some nineteen or twenty treaties, and called attention to the fact that it had not been preceded by the courtesy of a notice of revocation, and had already called forth protests from a great many foreign nations.

In conference, however, the qualifying proviso was added to the mandatory provision. In the opinion of many, the addition of the proviso made the subsection inoperative by reason of the fact that the rebate could not be granted to American vessels without impairing treaties, and that being the case, the discount could not be given. Immediately upon the passage of the act importers began applying for a rebate, and before customs collectors had time to act the Treasury Department issued a ruling that no rebate was to be allowed.[1] This order was promulgated after the Attorney-General had rendered an opinion on the subject to the head of the Treasury Department. This opinion, strange to say, has never been made public. Importers filed protest after protest, their attorneys arguing in their briefs: (1) that the mandatory provision accorded the rebate to goods shipped in American bottoms, and (2) that by virtue of the qualifying clause a like discount must be given to goods shipped in vessels of a foreign country with which we have "most-favored-nation" treaties, for else we should be impairing such treaties. The case finally got to the Board of United States General Appraisers which rendered a curious decision[2] holding that only American vessels are entitled to the rebate, and no other. This decision came as a surprise to

[1] (T.D. 33847.) The instruction to collectors states that the Attorney-General has advised that "the 5 per cent discount to American vessels only, which was the primary object of the subsection, cannot be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

[2] Vol. XXVI, No. 11 of *Treasury Decisions* (T.D. 34246; G.A. 7540), decided March 6, 1914.

counsel representing the government and the importers, and it evidently pleased no one, excepting perhaps Chairman Underwood of the Ways and Means Committee, with whose views the Board's decision coincided. The case has been taken to the Court of Customs Appeals where it is now pending. The case is of such magnitude that the administration has thought it desirable to have the questions involved passed upon by the Supreme Court of the United States. Consequently, an act was passed on August 22, 1914, permitting appeals in customs cases where the issue pertains to a constitutional or treaty question, or upon petition of the Attorney-General declaring it expedient to have a review by the Supreme Court.[1] Should the importers win out finally it will spell an annual horizontal reduction of the revenue by approximately $20,000,000.

V

To the end that the government's arm may be strengthened in its labor of preventing fraud upon the revenue, there was incorporated in the new tariff act a clause providing that the arrival, within the territorial limits of the United States, of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the consignee or agent of the consignor, or the existence of any other fact constituting an attempted fraud, shall be deemed to be "an attempt to enter" such merchandise, notwithstanding that no actual entry has been made or offered. According to attorneys considered authorities on customs law, the application of this provision may strike an innocent person, who, without his knowledge, may be sent an invoice which is fraudulent. Of course, it is to be presumed that government officials will not invoke this provision in such instances, but will use it only in cases where there is reason to believe that the importer connived at or abetted an attempted fraud. Still the potential liability of innocent persons exists.

The insertion into the act of the phrase, "the arrival within the territorial limits of the United States," is directly traceable

[1] An act to amend section 195, Act of March 3, 1911, relating to the judiciary (Public No. 180, 63d Cong., S. 6116).

to the experience of customs officials in the Panama hat undervaluation cases. It was found that in one case an importer who had undervalued his goods had a large lot of hats in bonded warehouse for which he had not made entry. The government tried to seize the goods on the ground of fraud, but the importer resisted the attempt in the courts by holding that goods in bonded warehouse are not actually in the commerce of the country, and that before he presented the formal entry papers at the custom-house there was no telling whether or not he would place the correct valuation on the goods. In the lower courts the importer's contention was sustained, but the United States Supreme Court, on a final review, upheld the government's position. The decision[1] was rendered subsequent to the passage of the tariff act.

Another point at which the customs administrative act was made more stringent is seen in paragraphs O and P of section III which give collectors, appraisers, and general appraisers authority to examine, under oath, owners, importers, and consignees respecting the classification or dutiable value of merchandise under consideration. The failure to appear or the refusal to answer questions was formerly punishable by a fine of $100. The new tariff makes the penalty from $20 to $500. Furthermore, it gives customs officers power to cite and question importers not only in respect to the value or classification of goods under consideration, but also in regard to goods "previously imported within one year." This amendment to the law is considered of great importance, because it affords the government a wider latitude in the conduct of its inquiries.

The new tariff also provides that, in all proceedings for the recovery of the value of merchandise imported contrary to any act providing for the collection of duties, the burden of proof shall be on the importer. The purpose of this provision is to strengthen the government's position in the prosecution of frauds.

VI

An innovation in respect to the drawback provisions of the tariff was effected by granting permission to cigar manufacturers, operating bonded factories, to sell for home consumption cigars

[1] *U.S.* v. *25 Packages of Panama Hats* (231 U.S. 358), decided December 1, 1913.

made of imported tobacco leaf. This privilege is not accorded to any other class of manufacturers.

Technically speaking, drawback is the refund of duties, less 1 per cent, that have been paid on raw material, upon the exportation of the products in the finished state, proper evidence being presented for the identification of the goods used. The 1 per cent is intended to reimburse the government for clerical work and incidental expenses in connection with the administration of the law. As a matter of fact it costs the government considerably more. The object of drawback laws is to encourage manufacturing for export, American labor being given an opportunity to convert foreign raw materials into finished products.[1]

In addition to the regular drawback provision, the law provides for the licensing of so-called bonded warehouse factories. To these factories imported merchandise is admitted without the payment of duty. The law requires, however, that in each case a customs employee, called a storekeeper, shall be assigned to such factory, that he be on duty at all times when the factory is open, and that at the end of the working day he, the storekeeper, shall lock up the premises and take the keys with him. The owner of the factory must pay the government for the services of the storekeeper, his salary usually being about $1,400 a year. Under the old tariff all goods manufactured in such bonded warehouses had to be exported. The new tariff re-enacts this provision, making an exception in the case of cigars.

For a large manufacturer, it is an advantage to operate a bonded factory instead of running an ordinary shop and collecting drawback on imported materials used in the articles exported. In the first place, experience shows that the $1,400 paid a storekeeper is far less than 1 per cent of the total duties, especially in case where the manufacturer is a large user of imported products. In the second place, the man who does not operate a licensed factory must lay out large sums of money in customs duties, the

[1] According to figures compiled by the Department of Commerce, American manufacturers have received in the last decade nearly $50,000,000 in drawback payments. In 1883, the amount thus paid was $2,250,000; in 1893, $3,330,000; and in 1913, $4,500,000. The largest amount of drawback paid in any single year since 1883 was $8,500,000 in 1885.

return of which is made only several months later when he is ready to export the finished product. In case of the bonded factory the manufacturer does not pay any customs duties whatever.

The Senate Finance Committee, at the suggestion of Treasury Department officials, proposed increasing the 1 per cent retention of duties to 3 per cent, but this amendment was rejected by the Conference Committee. For some years prior to the act of 1890 the drawback paid was 90 per cent, the government retaining 10 per cent of the duties. Many manufacturers, in fighting the proposed increase to 3 per cent, stated that the 2 per cent difference was so large, while their margin of profit was so small, considering the foreign competition, that they would be forced to give up business entirely or move their plants to Canada in the event that the 3 per cent rate was adopted.

The provision relating to cigars states that they may be withdrawn for home consumption upon the payment of duties on the imported tobacco used in their manufacture, and the payment of the internal revenue tax accruing on such cigars in their condition as withdrawn. The law further provides that the boxes containing such cigars shall be stamped to indicate their character, the origin of the tobacco from which they are made, and the place of manufacture. In other words, the cigars manufactured in these bonded factories must be packed in boxes upon which is affixed a government label stating that the cigars contain Cuban tobacco to the exclusion of all other tobaccos. It is obvious that this stamp has a distinct advertising value; and a number of manufacturers have already taken advantage of it, some of them going to the extent of having posters printed representing Uncle Sam as supervising and approving the output of their plants.

In support of the provision, it was stated that the act sought to protect the consumer of cigars from misrepresentation, by affording him means for knowing that the cigars bearing the government stamp are "clear Havana" cigars not only in name, but in fact, and that Connecticut wrappers did not enter into their making. Furthermore, this provision makes it possible for consumers to obtain in this country absolutely clear Havana cigars without being obliged to buy those manufactured in Cuba, the duty

upon which is so high that the price is prohibitive to the average smoker.

The report of the Senate Finance Committee states that the cigar paragraph would "enable independent manufacturers of tobacco to have better chances with the tobacco trust." Just how, is not explained, and it is doubtful if there is an explanation, the trust question having absolutely nothing to do with it; particularly inasmuch as the tobacco trust may avail itself of the provision under the same terms as its smallest competitor, who, because of limited means, is not likely to take advantage of it.

There is no good reason why the right to sell for home consumption the articles manufactured in bonded warehouse factories should not be extended to other, if not to all, products, besides cigars, proper supervisory measures being taken to insure the payment of duties on goods not exported.

Cigar manufacturers have found it very profitable to open these bonded factories. Not only does the advertising value of the government stamp mean larger sales and larger profits, but the new tariff act permits of larger saving in the cost of manufacture by reason of the fact that bonded manufacturers are required to pay customs duties only on the actual quantity of tobacco that enters into the cigars, and they may export the scrap. Manufacturers who do not operate bonded factories cannot avail themselves of this saving, for they must pay duty on the whole tobacco as it reaches port.

VII

Among the proposals made by the House and rejected by the Senate were: (1) vesting the Secretary of the Treasury with power to determine the existence or non-existence of a foreign market; (2) the registry of commissionnaires or purchasing agents in each of the United States consulates abroad; and (3) the "dumping" clause, which provided that "if the export or actual selling price to an importer in the United States, or the price at which such goods are consigned is less than the fair market value of the same article when sold for home consumption in the usual and ordinary course in the country whence exported to the United States, at

the time of its exportation to the United States," there shall be levied an additional duty equal to the difference between the export price and the market value.

The first of these was chiefly objected to on the ground that the work of determining the existence of a foreign market would undoubtedly be delegated to the special agents whose work in the past has not been free from adverse criticism, and in whom importers do not place much confidence. Furthermore, it was felt the provision placed great power in the hands of a secretary—a condition considered undesirable.

The registry of commissionnaires was opposed on the plea that it proposed to give our government what was closely akin to extra-territorial jurisdiction in foreign countries, which would be resented.

The "dumping"-clause idea was borrowed from the Canadian tariff. It was stricken out of the House bill for the reason that it was feared that under an unfriendly administration it was capable of being used as a means for increasing the tax upon dutiable articles by 15 per cent, and of putting on the free list articles dutiable at less than 15 per cent.

It is to be regretted that Congress did not act upon the suggestion of Messrs. Curtis and Denison that provision be made for the issuance of proclamations, establishing in advance fixed values for duty purposes upon all merchandise susceptible of standard definition. At present, some such practice exists informally in schedules known as the Limoges china rate list, the St. Gall stitch rate card, and the Nottingham lace schedule, which, however, are merely advisory and have not the effect of law.

The proposal was to authorize such lists and give them the force and effect of law, making the proclaimed values the dutiable values irrespective of fluctuations in actual markets. The proclaimed values were to approximate the normal foreign market values so far as practicable. The desirability and necessity of such a provision lies in the importance of preventing the extension of the ad valorem system from carrying with it a corresponding extension in the evils (already excessive) of the existing appraisement system, while still accomplishing what is understood to be the essential

purpose of the ad valorem items in the Underwood tariff, namely, that cheap goods should not carry the same tax burden as expensive goods.

VIII

It is unfortunate that Congress did not undertake a revision of the laws governing the appraisement of merchandise and did not reconstruct the provisions affecting the Board of United States General Appraisers. The opportunity for doing so was particularly timely, the facilities offered for carrying on the work properly being exceptionally good by reason of the fact that simultaneously with the introduction of the tariff bill in the House, there appeared two separate reports of two distinct commissions, one dealing with the appraisement of merchandise and the other with the structure, practices, methods, and procedure of the Board. It is not contended that the recommendations of these investigators should have been adopted *in toto*, but undeniably the documents referred to would have served as an excellent basis for legislation. Interest in these reports was so widespread and pronounced at the time, and the government officials who conducted the inquiries and the importers and customs brokers who figured as witnesses were so keenly interested in the subject, that they were in a better position to argue and discuss the matter then than they are likely to be in the future. Furthermore, the vulnerable spots in the law affecting appraisements and the work of the Board are so numerous, and abuses have existed so long, that legislation designed to remedy conditions should not have been indefinitely postponed.

The Finance Committee of the Senate inserted in the tariff bill a provision calling for the appointment of a joint committee of the two Houses for the purpose of investigating the revenue administrative laws with the view of simplifying, harmonizing, revising, and codifying the same, and to make a final report with recommendations not later than February 1, 1914. The Conference Committee rejected this amendment, and wisely so. It is extremely doubtful whether Congress would have passed a bill prepared by the committee, had such a committee been appointed in the manner proposed; and it is equally doubtful whether Congress will legislate on the subject in the near future. In all likelihood the

matter will not be considered until such time as Congress determines to wrestle with another tariff act.

A serious omission in the revision of the customs administrative features of the tariff law is found in the failure to take any action in regard to the tea law of 1897. While the government does not derive any revenue from tea, the cost of administering the law is exceptionally large, considering the employment of expert tea tasters and examiners, the work of the Board of Tea Appeals, and the expenses of the Board of Tea Experts. In recent years the handling of tea imports has been exceedingly troublesome, vexatious, and costly. There is no good reason why the examination of teas should be in the hands of the Treasury and not under the control of the Department of Agriculture, which passes upon the purity and fitness of all other food products, imported or traded in under interstate commerce. It is to be hoped that Congress will soon take action looking toward the transfer of the work to the proper department of the government.

Changes brought about in the tariff schedules by placing on the free list a number of articles heretofore dutiable will result in a reduction of the cost of administering the customs laws. Government employees who were formerly engaged in the examination of merchandise for the pupose of determining values, and those who were assigned to weighing goods, will now be shifted to other work. This economy will result from the fact that under the new law there is to be no weighing of wool or coal, no measurement of lumber, and no appraising of cattle.

In view of the fact that the revenue to be derived from the new tariff will be far below that obtained under the old, the Treasury Department is alive to the necessity of reducing the cost of administration. For that reason efforts are being made to devise better and more efficient methods. Recently a conference[1] of collectors of customs was held at which various problems of administration were discussed. The Secretary of the Treasury also recently

[1] The first conference of collectors was held at New York, November 3–10, 1913. The questions discussed are published in *Treasury Decisions*, Vol. XXVI, No. 15 (T.D. 34338). The second annual conference of collectors of customs was held in New York, September 14–19, 1914.

announced the appointment of an efficiency board whose duty it will be to investigate conditions at the various ports with the view of installing more uniform and economical methods.

The customs administrative features of the tariff have been considerably improved by the law of 1913, notwithstanding the fact that the reforms consummated were not so comprehensive as they might have been. Although, as pointed out above, the conservation of the customs revenue is largely dependent upon strict rules of administration, it must not be forgotten that an essential factor in the enforcement of the laws is the character and ability of officers appointed to important places in the service. The frauds unearthed and prosecuted during the last administration had been committed many years before Secretary MacVeagh and Collector Loeb took office. Their predecessors lacked ability or courage or the support of the administration in Washington, and for that reason did not bring the dishonest importers to terms. This is mentioned only for the purpose of showing that stringent laws are, in themselves, of little value, unless officials whose sworn duty it is to enforce them have the necessary capacity and force. Collectors of customs who owe their appointment to political favoritism or expediency, and who use their office as a stepping-stone in an ambitious public career, cannot be expected to, and never do, give an efficient administration.

I. NEWTON HOFFMANN

NEW YORK CITY