

**A DISCUSSION OF THE
CONSTITUTIONALITY OF THE ACT OF
CONGRESS OF MARCH 2, 1867,
AUTHORIZING THE SEIZURE OF BOOKS
AND PAPERS FOR ALLEGED FRAUDS
UPON THE REVENUE, PP. 1 - 53**

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A Discussion of the Constitutionality of the Act of Congress of March 2, 1867, Authorizing the seizure of books and papers for alleged frauds upon the revenue, pp. 1 - 53 by S. B. Eaton

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OF MARCH 2, 1867,

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FOR

ALLEGED FRAUDS UPON THE REVENUE,

TOGETHER WITH

A BRIEF STATEMENT OF CERTAIN OBJECTIONS TO
THE PRACTICAL WORKING OF THE LAW.

BY

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OF THE NEW YORK BAR.



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This pamphlet is published at the request of the Special Committee upon Revenue Reform of the New York Chamber of Commerce.

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S. B. E.

February 2, 1874.

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An informer intimates to a Revenue official that an importer has defrauded the Government in the matter of duties on imports; the official, upon complaint and affidavit, obtains from the Judge of the District Court of the United States a secret warrant to seize the books and papers of the importer; the books and papers are seized, and are carried away to be examined, for the ostensible purpose of investigating the alleged fraud. Such, briefly stated, is the process usually denominated *Seizing books and papers by the Custom House*, the full purport of which will be laid open in these pages, together with certain first principles of law which, it is believed, that process violates.

The first statute ever passed by Congress authorizing these seizures was that of March 3, 1863.* Subsequently that law was amended by the Act of March 2d, 1867, which is still in force,† the section authorizing seizures being appended:

“Whenever it shall be made to appear to the satisfaction of the Judge of the District Court for any district of the United States, by complaint or affidavit, that any fraud on the revenue has been committed by any person or persons interested or in any way engaged in the importation or entry of merchandise at any port within such district, said Judge shall forthwith issue his warrant, directed to the Marshal of the district, requiring said Marshal, by himself or Deputy, to enter any place or premises where any in

* 12 Stat. at Large, 737.

† 14 Stat. at Large, 546.

voices, books, or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and to take possession of such books or papers, and produce them before the said Judge; and any invoices, books, or papers so seized shall be subject to the order of said Judge, who shall allow the examination of the same by the Collector of Customs of the port into which the alleged fraudulent importation shall be made, or by any officer duly authorized by said Collector. And such invoices, books, or papers may be retained by said Judge as long as in his opinion the retention thereof may be necessary; but no warrant for such seizure shall be issued unless the complainant shall set forth the character of the fraud alleged, the nature of the same, and the importations in respect to which it was committed, and the papers to be seized. And the warrant issued on such complaint, with report of service and proceedings thereon, shall be returned, as other warrants, to the Court of the District within which such Judge presides."

Precisely what this law is designed to accomplish can be best seen by contrasting it with the law authorizing the seizure of *goods and merchandise*. Under section 68 of the Act of Congress passed March 2d, 1799*, every Collector, Naval Officer, and Surveyor, having cause to suspect a concealment in a particular building of any goods subject to duty, is, upon proper application on oath to any Justice of the Peace, entitled to a warrant to enter such building, and there to search for such goods, and "to seize and secure the same for trial." These provisions, found in our earliest statutes, and incident to all laws imposing and collecting duties, are as old as Revenue law itself. They are meant to check fraud by authorizing the seizure and condemnation of the *inculpatated goods*, and are enforced upon the

* 1 Stat. at Large, 678.

theory that the *specific goods and merchandise*, upon which the proper duties are not paid, are subject to seizure and confiscation.

The seizure of *books and papers* is a proceeding of an entirely different nature. The only value of the books seized consists in the information they contain, and the only object of the Government in seizing them is to use them as evidence against their owner. After their contents have been exhausted, and after whatever secrets they may contain have been turned against the party from whom they are taken, they are restored. In the one class of seizures, specific goods and merchandise, inculpated by the fact that the proper duties were evaded, are taken and sold for the benefit of the government. In the other class of seizures, books and papers containing the records of business transactions, are taken and examined to discover what evidence of fraud upon the Revenue law they will reveal. In one case, the official is authorized to search, seize, and carry away *merchandise which is liable to be confiscated*, to be held *for trial*; in the other case he is authorized to seize *private papers, not liable to confiscation*, and hold them *as evidence*.

The terrible consequences entailed by the seizures authorized by this law can hardly be overstated. When the counting room is invaded, and its entire contents removed, the heart of a business is struck. Entanglement easily follows in every branch, and traffic is practically suspended. In suits between private parties, the public takes little interest, but when the government begins proceedings against a man, it raises in the popular mind a strong presumption of his guilt. "There is," as a recent writer has very pointedly put it, "a traditional prejudice that such proceedings, being undertaken on public grounds, and in the public interest, can not be dictated by private malignity or passion, and must have an array of facts behind them;" so that when the

"Custom House," or the "Special Agent" seizes on the books and papers of an importer, on account of alleged fraud, and the telegraph spreads the news over the country, the fair fame of a lifetime often vanishes in a moment.

'Character is damaged to an extent which no subsequent refutation or vindication can wholly cure, because such are the intricacy and obscurity of our Revenue laws that, even if the facts are clear of all suspicion, the defence must, from the nature of the case, be dry and tedious reading, while the charge can be contained in two lines of a spicy dispatch.'"* Laws authorizing such oppressive proceedings, and entailing such consequences, should have the undoubted sanctions of necessity, experience, and obvious constitutionality.

The language of the statute is, that when it shall appear that "*any fraud* on the Revenue has been committed," the books and papers of the party committing the same shall be seized. Fraud, then, is the essence of these proceedings. Ordinarily, there can be no honest doubt in any man's mind as to whether or not he is guilty of fraud. Deception by which an unfair advantage is deliberately gained, or artifice by which another is intentionally injured, are universally known to constitute fraudulent practices; and, where the law punishes fraud, any one, ordinarily, can so govern his conduct as to either incur the penalty, or escape it. This is not true, however, with reference to "fraud" as the word is used in the statute now under consideration. Certainty as to whether "any fraud upon the Revenue is being committed," so far at least as to place it beyond doubt whether books and papers are liable to be seized, depends upon a complete and correct knowledge of Revenue law. Not only is this so, but it is indispensable that, in addition to a correct reading of the

* The Nation, vol. 16, p. 312.

law, the interpretation placed upon it should coincide with that held by the official in whose hands rests the seizing power. The reason for this is found in the very nature of the case. At the inception of seizure proceedings, the *motives* of the importer who is charged with fraud, are seldom in question. Nothing is positively known about them, and it is against the pecuniary interest of the seizing officer to give the importer the benefit of a doubt. The question is one simply of *fact*. The point is this: does the seizing officer, upon such information as comes to him, and as he construes the Revenue Laws, believe that the importer has violated them? If he so believes, he will, ordinarily, take the proper steps to have the seizure made. It becomes, therefore, necessary to know whether the Revenue laws are free from ambiguities, and are readily understood by those who must use them, since such authorities as both Marshall and Story hold that "a doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact."*

The opinion of the Secretary of the Treasury is pertinent upon this point. In his report at the opening of the present Congress, he said, referring to the complexity of the Revenue laws:

"There is often a direct conflict between different statutes, and, occasionally, between two or more provisions of the same statute, *while single provisions are frequently held to embrace different meanings*. These differences can be settled only by arbitrary interpretations, or by adjudications in courts." The number of appeals to the Secretary for "*arbitrary interpretations*," the last year, on account of these "*different meanings*," was nearly five thousand.

Said Secretary McCullough, in his report to Congress, in 1867:

* U. S. v. Riddle, 5 Cranch, 311. The schooner *Friendship*, 1 Gallison, 112.