[HIGH COURT OF AUSTRALIA.]

ZACHARIASSEN AND ANOTHER . . PLAINTIFFS;

AGAINST

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

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SYDNEY, Dec. 5, 6, 7, 20.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Ship—Foreign ship—Clearance—Right of master to receive—Refusal by Comptroller-General to issue—Liability of Commonwealth and Comptroller-General—Liability of Collector—Performance of conditions—Conditions precedent—Arbitrary refusal to entertain application for clearance—Justification—Time of war—Exercise of prerogative—Rights of neutrals and allies—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 64, 69—*Customs Act* 1901-1910 (*No.* 6 *of* 1901—*No.* 36 *of* 1910), *secs.* 4, 7, 9, 117-122, 221, 225—*Magna Charta* (9 *Hen. III.*), *c.* 30.

Held, by the whole Court, that the Comptroller-General of Customs is an "officer" within the meaning of secs. 221 and 225 of the *Customs Act* 1901-1910, and therefore notice must be given of an action to be brought against him, and the action must be begun within six months from the cause of action.

Held, also, by *Barton*, *Isaacs* and *Rich* JJ., that under the *Customs Act* 1901-1910 a master of a ship, on performance of the conditions prescribed by the Act, is as against the Commonwealth entitled to a certificate of clearance, and that where such a certificate is either arbitrarily or on unjustifiable grounds refused by "the Collector," the shipowner may maintain an action for damages against the Commonwealth, but not against "the Collector."

Per Gavan Duffy J.: If the Commonwealth directs that a particular ship shall not be permitted to leave port unless loaded with a certain cargo and in pursuance of that direction the Comptroller-General directs that a certificate of clearance shall not be issued so that the ship may not lawfully leave the port, the shipowner may, in the absence of any justification outside the *Customs Act*, maintain an action for damages against both the Commonwealth and the Comptroller-General, although no formal application for a certificate of clearance has been made.

Held, further, by the whole Court, that to an action by the foreign owner of a foreign ship against the Commonwealth to recover damages from the Commonwealth for the wrongful refusal of a certificate of clearance to the master, it is a good answer that the act complained of was done on behalf and by authority of the King and in the exercise of his sovereign power as a belligerent in time of war.

HEARING of demurrers and questions of law.

In an action brought in the High Court by Alexander Gabriel Zachariassen and Jens Julius Zachariassen against the Commonwealth and Stephen Mills, Comptroller-General of Customs, the statement of claim as amended was substantially as follows :—

1. The plaintiffs, citizens of Abo, Finland, are Russian subjects, and are the owners of a certain ship called the *Samoena* whose port of registry is Nystad, Finland.

2. The ship arrived at Melbourne early in the month of July 1916 with a cargo of oils from New York, which cargo was duly discharged.

3. The ship was not at the time of her arrival in Melbourne or at any time under time charter to any person, firm or company resident or carrying on business in the Commonwealth.

4. Prior to the arrival of the ship at Melbourne the Commonwealth had assumed control of the export of wheat from Australia to the United Kingdom and France and of all arrangements, including the chartering of ships, in connection therewith.

5. On 29th July 1916 the ship was chartered through the agents of the plaintiffs in London by Andrew Weir and Co., a firm not resident or carrying on business in the Commonwealth, to carry nitrates from Chili to Bilbao.

6. On or about 29th July 1916 Elder, Smith & Co. Ltd. and Antony Gibbs & Co., the joint chartering agents in London for the Commonwealth, informed the agents of the plaintiffs in London that the plaintiffs had been notified by the Russian Government that the ship ought to accept a cargo of wheat, and the agents of the plaintiffs immediately replied that the ship was already fixed to carry nitrates and that no other voyage could be taken unless the ship were freed from the charter already concluded by a legal requisition by the Russian authorities.

7. On 1st August 1916 the chartering agents in Australia of the

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Commonwealth by their Melbourne representatives sent to the master of the ship a letter as follows :—"Dear Sir,—We have received a cable advice this morning from our London Office that the British Ambassador in Petrograd has advised the Australian High Commissioner in London, through the Colonial Office in London, that the Russian Admiralty has notified your owners that they consider a cargo of wheat from Melbourne to the United Kingdom should be accepted for your ship. We understand the Consul-General in Melbourne will formally notify you to this effect. Meantime we would inform you that as soon as you are ready to receive your cargo of wheat, please apply to the Secretary of the Victorian Wheat Commission, 39 Queen Street, Melbourne, who will inform you the name of the loading agents, and they will direct you to your loading berth. We shall probably receive a further cable from London in the course of a day or so which will enable us to give you more particulars of the terms of fixture. The charter-party will be signed in London, but we enclose you a blank form of the standard charter-party, which will serve as a guide to you."

On the same day the master replied as follows :—"Dear Sirs, —I am in receipt of your favour of even date, contents of which I have carefully noted. In reply to same I beg to state I have been instructed by cable by my owners' agents to take in ballast, which I am now doing pending further instructions from my owners."

8. The Commonwealth in the month of July 1916, through the High Commissioner and British Foreign Office, made application to the Russian Government for the requisition of the said ship for the purpose of carrying a cargo of wheat from Australia. Although the ship was never in fact requisitioned by the Russian Government the notification mentioned in par. 6 hereof was given to the plaintiffs, but so soon as the fact that the ship had been chartered to carry nitrates was communicated to the Russian Government, that is to say, prior to 16th August, the notification was withdrawn by the said Government. The Commonwealth, nevertheless, during the months of August, September and October continued to make application to the Russian Government in the

manner mentioned for the requisition of the ship for the said purpose, but as hereinbefore stated the ship was never requisitioned.

9. Prior to 8th August 1916 the Melbourne representative of the chartering agents for the Commonwealth informed the said master that the Commonwealth had issued instructions to the Department of Customs that no clearance for the ship should be granted unless she were loaded with wheat and that the ship would not be allowed to leave port unless so loaded.

10. On 8th August 1916 the ship was ready to proceed to sea to carry out the contract for carriage of nitrates, but by reason and in view of the communications and other circumstances hereinbefore alleged the master did not then make application for a clearance.

11. On 24th August 1916 the master by his agents notified the Department of Customs of his intention to take the necessary steps to obtain a clearance, and was then informed by an officer of the said Department that the taking of such steps would be useless as an embargo had been placed on the ship.

12. Thereupon the agents of the master wrote to the Collector of Customs at Melbourne a letter as follows :—" Dear Sir,—The Russian ship *Samoena* now lying in Hobson's Bay in ballast is ready to make her departure for Caleta Buena, Chili. On behalf of the master we notified the clearing clerk that it was our intention to take out the clearance papers this afternoon, but we are informed that an embargo has been placed on the vessel's departure. We will be glad if you will kindly advise the reason of the embargo so that we will be in a position to advise the master, who is ready to sail."

13. On or about 26th August the said agents of the master received from the Comptroller-General of Customs a letter as follows :—" Dear Sir,—In reply to your letter of the 24th instant, addressed to the Collector of Customs at Melbourne relative to the departure from Melbourne of the Russian ship *Samoena* I have to inform you that the master of the vessel is aware of the position."

14. Nothing has been done or omitted up to 26th August by the master in connection with the ship or the discharge or loading of the same or in any matter in connection therewith in contravention of the *Customs Act* 1901-1910 or the regulations thereunder, or in contravention of the provisions of any other Statute or regulations,

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so as to disentitle the ship to a clearance, and no questions had been put or requisitions made by the Collector of Customs in connection therewith, and the only position of which the master was aware was that created by the instructions alleged by the representative of the said chartering agents to have been given as set out in par. 9 hereof.

15. The plaintiffs and the master were, at all times between 8th August and 27th October then following, ready and willing to make formal application for a clearance in the manner prescribed by the *Customs Act* 1901-1910 and the regulations thereunder and to comply with all the requirements of the Act and regulations relating to the obtaining of the same, and the plaintiffs submit that by reason of the facts hereinbefore alleged they were as between the said dates, or alternatively between 24th August and 27th October, excused by the defendants from the making of such formal application for a clearance and of compliance with any or either of the requirements of the Act and regulations relating to the obtaining of the same.

16. From 24th August until 27th October following the master continued to urge the Comptroller-General of Customs to deal with an application for a clearance in the ordinary way and to remove the restrictive conditions that had been imposed in regard to the granting of such clearance.

17. During the last mentioned period the Minister of the Commonwealth of Australia administering the Department in control of the arrangements for the export of wheat from Australia and of shipping arrangements in connection therewith stated an embargo had been placed by the Commonwealth on two Russian ships then in Australian ports and that such ships were being detained by the Commonwealth and not allowed to leave such ports because a cargo of wheat had been refused by each of the said ships.

18. The plaintiffs allege and the fact is that the only Russian ships at that time detained in Australian ports were the ship *Samoena* and a certain ship called the *Lindisfarne*.

19. On 16th October 1916 the master made personal application to the Comptroller-General of Customs for permission to clear and at the same time handed to him a written protest against the

continued detention of the ship, and thereupon the Comptroller-General of Customs directed the master to lodge the written protest at the Department of the Attorney-General of the Commonwealth.

20. The master thereupon attended at the Department of the Attorney-General of the Commonwealth and was there directed to lodge the protest at the Department of the Prime Minister of the Commonwealth, which the master duly did, and the protest was duly received at the Department of the Prime Minister.

21. On 27th October 1916 the master was informed by an officer of the Department of the Prime Minister that a clearance would be granted, and on the same day the master received from the Comptroller-General of Customs a letter as follows :—" Dear Sir,—I beg to inform you, by direction, that on the usual application being made at the Customs House clearance for your ship will be granted."

22. The plaintiffs allege and the fact is that the chartering agents of the Commonwealth and the Comptroller-General of Customs in the matters herein set out were acting under the directions of the Commonwealth.

(Pars. 23, 24, 25 and 26 contained allegations of damage.)

27. The plaintiffs submit that the action of the Comptroller-General of Customs in refusing to grant a clearance as aforesaid or to deal with an application for the same was wrongful, and the plaintiffs claim to recover from the said defendant and from the Commonwealth the damages suffered by them as herein set out in respect of and consequent on the said refusal.

28. The plaintiffs further submit that the action of the Commonwealth in directing the Comptroller-General of Customs to refuse to grant a clearance for the said ship unless a cargo of wheat was shipped was wrongful, and the plaintiffs claim to recover from the Commonwealth the damages suffered by them as herein set out consequent on the compliance of the Comptroller-General of Customs with such directions as aforesaid.

And the plaintiffs claim £20,000.

The defence was substantially as follows :—

1. As to par. 1 of the amended statement of claim the defendants

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admit that the plaintiffs are citizens of Abo, Finland, and are Russian subjects.

2. As to par. 6 of the amended statement of claim the defendants deny that the said Elder, Smith & Co. Ltd. and Anthony Gibbs & Co. were at any time the joint chartering agents or that either of them had at any time authority on behalf of the Commonwealth to inform the agents of the plaintiffs as therein alleged or at all.

3. As to pars. 7, 9 and 22 of the amended statement of claim the defendants deny that the persons therein alleged to be the chartering agents for the Commonwealth and the Melbourne representative of such chartering agents respectively were such agents or representatives as alleged, or that all or any of the said persons had authority to write the said letter or make such representations as therein alleged on behalf of the defendants or either of them, or that the Comptroller-General of Customs had any power or authority other than that conferred on him by the *Customs Act*.

4. Save as hereinbefore expressed the defendants do not admit the allegations contained in pars. 1, 2, 3, 5, 6, 12, 13, 19, 20 and 21 of the amended statement of claim or any of them.

5. As to par. 10 of the amended statement of claim the defendants admit that the master did not make application for a clearance, but deny that such omission was due to the causes alleged in the said paragraph.

6. As to the remaining allegations in the amended statement of claim the defendants deny the same and each of them.

7. As to par. 11 of the amended statement of claim the defendants deny that any officer of the said Department had any authority from the defendants or either of them to inform the said master as therein alleged.

8. As to par. 14 of the amended statement of claim the defendants say that the plaintiffs failed to comply with certain requirements of law, a compliance with which was a condition precedent to the granting by the Comptroller-General or Collector of Customs of a certificate of clearance for the said vessel. These requirements were *inter alia* as follows: (*a*) the making of an application in the prescribed form for a grant of the said certificate of clearance; (*b*) the delivery to the Collector of an outward manifest in duplicate;

(*c*) the production of documents relating to the ship and her cargo; (*d*) a statement duly accounting for all her inward cargo and stores to the satisfaction of the Collector; (*e*) the furnishing of particulars as to the name of the ship, the name of the master, the cargo, the destination and the date and time of the intended sailing of the said ship; (*f*) proof to the satisfaction of the Collector of the payment of light dues and tonnage and pilotage dues.

9. As to par. 15 of the amended statement of claim the defendants say that neither the Comptroller-General of Customs nor the Collector nor any officer of Customs nor any person had any power or authority to excuse the master from making formal application for a clearance or from complying with the conditions set forth in par. 8 hereof.

10. As to par. 16 of the amended statement of claim the defendants deny that any restrictive conditions had been imposed in regard to the granting of such clearance.

11. As to pars. 17 and 18 of the amended statement of claim the defendants deny that an embargo had been placed on the said ship *Samoena* or the said ship *Lindisfarne* or that the said ships or either of them were being detained by the Commonwealth or were not allowed to leave the said ports either for the reason alleged in par. 17 or at all.

12. The defendants further say that the alleged refusal to grant a certificate of clearance to the said vessel and the imposition of the alleged restrictive conditions in regard to the granting of such certificate in so far as the same were acts of the defendants or either of them were acts of a belligerent power in right of war and are not justiciable in this Court.

13. As to pars. 23 and 27 of the amended statement of claim the defendants deny that the Comptroller-General of Customs refused to deal with an application for or to grant a clearance as therein alleged or at all.

14. As to par. 28 of the amended statement of claim the defendants deny that the Commonwealth directed the Comptroller-General of Customs to refuse to grant a clearance as therein alleged or at all, or that the Comptroller-General complied with any such alleged direction.

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15. As to the claim of the plaintiffs against the Comptroller-General of Customs the said defendant says that the alleged acts complained of were done by the said defendant, if at all, after the passing of the *Customs Act* 1901 as an officer within the meaning of the said Act in execution of and by reason of his office and that by virtue of sec. 221 of the said Act it was a condition precedent to the commencement of any proceeding by the plaintiffs against the said defendant in respect of such acts that one month should have elapsed next after notice in writing should have been given by or on behalf of the plaintiffs to the said defendant stating the cause and nature of the proceeding and the Court in which the same was intended to be instituted and the name and place of abode of the plaintiffs or of their attorney or agent, and the said defendant says that no such notice has been given to the said defendant by or on behalf of the plaintiffs in accordance with the requirements of the said section or at all.

16. As to the claim against the Comptroller-General of Customs the said defendant says that the same is a proceeding against an officer within the meaning of sec. 225 of the said Act and the said proceeding was not commenced within six months after its alleged cause had arisen, and the said proceeding is barred by the provisions of the said section.

17. The Commonwealth of Australia says that the acts or omissions of the Comptroller-General or of any officer of the Department of Customs in connection with the alleged application for a clearance were done or omitted by such Comptroller-General or officer in the exercise of his discretion as such Comptroller-General or officer under the provisions of the said Act and not otherwise, and are, as such, acts or omissions in respect of which the Commonwealth is not responsible.

The plaintiffs' replication (as amended at the hearing of the demurrers) was substantially as follows :—

1. The plaintiffs join issue on the statement of defence.

2. The plaintiffs demur to so much of the statement of defence as is contained in par. 8 thereof and say that the same is bad in law on the following grounds : (*a*) that the requirements of law in

the said paragraph referred to are not conditions precedent to the right of the plaintiffs to have an application for a certificate of clearance dealt with by the Comptroller-General or Collector of Customs; (*b*) that the alleged failure of the plaintiffs to comply with the said requirements of law affords no defence in this action to the defendants or either of them; and on other grounds sufficient in law.

3. The plaintiffs demur to so much of the statement of defence as is contained in par. 12 thereof and say that the same is bad in law on the following grounds: (*a*) that no act of the defendants or either of them alleged in the statement of claim was an act of a belligerent power in right of war; (*b*) that the statement of defence discloses no facts which show that any act of the defendants or either of them complained of in the statement of claim was an act of a belligerent power in right of war; (*c*) that neither of the defendants is entitled to rely on the defence set out in par. 12 of the statement of defence in regard to any act of the defendants or of either of them which affects the property or interests of the plaintiffs who are subjects of an allied country; (*d*) that all of the acts alleged in the statement of claim were acts done within the territorial jurisdiction of the Commonwealth; and on other grounds sufficient in law.

4. The plaintiffs submit the following questions of law for the determination of this Honourable Court:—

(*a*) Whether under the circumstances alleged in the statement of claim the defendant Commonwealth of Australia is responsible for the acts and omissions of the defendant Comptroller-General of Customs alleged in the statement of claim.

(*b*) Whether under the circumstances alleged in the statement of claim the plaintiffs are entitled to maintain this action against the defendants or either of them although no formal application was made for a certificate of clearance.

(*c*) Whether the defendant Comptroller-General of Customs is an "officer" within the meaning of secs. 221 and 225 of the *Customs Act* 1901 or of either of the said sections.

The demurrers and questions of law now came on for argument.

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Maughan (with him *Halse Rogers*), for the plaintiffs. As to the first question raised in par. 4 of the replication, the Commonwealth is liable for the action of the Comptroller-General of Customs in relation to a clearance. It is liable because it directed the Comptroller-General not to issue a clearance and because he was performing ministerial duties for the Commonwealth. The duty of entertaining an application for a clearance and that of granting or refusing the application are both ministerial. If the conditions prescribed by the *Customs Act* have been complied with, a clearance follows as of course. On the facts stated in the statement of claim it is no answer to say that the Comptroller-General acted in the exercise of his discretion or that he acted under the directions of the Crown. [Counsel referred to *Randall* v. *Northcote Corporation* (1).] The next question arises out of par. 2 of the replication and the second question submitted by par. 4 thereof. The plaintiffs are entitled to maintain the action although the conditions mentioned in par. 8 of the defence were not complied with and no formal application was made for a clearance. There is a statutory right to a clearance on performing those conditions (see *Clarke* v. *Union Steamship Co. of New Zealand Ltd* (2)). Those conditions are not conditions precedent, and performance of them may be waived either by the Commonwealth or by its officer (*Fulton* v. *Norton* (3)). The Commonwealth could have directed that a clearance should be issued except so far as the Comptroller-General had to be satisfied as to certain matters. Under sec. 6 of the *Customs Act* the administration of the Act is given to the Minister. The defendants, having said that a clearance would be refused even if the conditions should be performed, cannot now take advantage of their non-performance. Under the *Customs Act* the plaintiffs were entitled to an order that a clearance should be issued and that the Comptroller-General should do his duty. As to the third question submitted by par. 4 of the replication, the Comptroller-General is not an "officer" within the meaning of secs. 221 or 225 of the *Customs Act*. "Officer" means a person employed in the service of the Customs (sec. 4). The Comptroller-General is not an employee but an employer. He

(1) 11 C.L.R., 100, at p. 115.
(2) 18 C.L.R., 142, at p. 145.
(3) (1908) A.C., 451.

is the permanent head of the Customs (sec. 7). "Officers" are persons employed by him. Sec. 196 shows a distinction between the Comptroller-General and an "officer." As to the questions raised by par. 3 of the replication, it is not sufficient for the defendants to allege that the acts complained of were done in right of war. The facts should be set out. It should be alleged that the acts were done by reason of a Commonwealth emergency and for the safety of the public or the defence of the realm (see *West Rand Central Gold Mining Co.* v. *The King* (1)). Under no circumstances whatever has the Crown a right in time of war to seize property other than that of a British subject except by the method of requisition.

[ISAACS J. referred to *In re a Petition of Right* (2).]

In that case it was held that the property of a British subject might be requisitioned without compensation. As the ship was not requisitioned, the emergency could not have been such as to justify the refusal of a clearance. [Counsel also referred to *The Zamora* (3); *Pitt Cobbett's Leading Cases on International Law*, 3rd ed., vol. II., p. 260.]

Knox K.C. (with him *H. E. Manning*), for the respondents. As to pars. 2 and 4 (*b*) of the replication, the plaintiffs have no cause of action against either of the defendants because no application was made for a clearance. If it was the duty of the Comptroller-General to entertain an application for, or to issue, a clearance he cannot render the Commonwealth liable by refusing to do his duty (*Baume* v. *The Commonwealth* (4)). There is no distinct statement in the *Customs Act* that there is a right to a clearance, but by implication there may be such a right. [Counsel referred to the *Customs Act*, secs. 118-122, 127-129, 270; *Customs Regulations* 1913 (Statutory Rules 1913, No. 346), regs. 32, 33, 99, 102, 103, 106-108, Forms 9A, 9B, 37, 39, 40, 41.] The necessity of compliance with the Regulations cannot be waived or got rid of by anyone. Although in the case of a purely ministerial duty a cause of action may arise from a refusal to do the duty, it is not so where the duty depends

(1) (1905) 2 K.B., 391.
(2) (1915) 3 K.B., 649.
(3) (1916) 2 A.C., 77, at p. 99.
(4) 4 C.L.R., 97, at p. 113.

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to some extent on discretion, unless *mala fides* is proved. [Counsel referred to *Young & Co.* v. *Leamington Corporation* (1); *Ayr Harbour Trustees* v. *Oswald* (2); *Yabbicom* v. *King* (3).] The Comptroller-General is an "officer" within the meaning of secs. 221 and 225 of the *Customs Act*. [Counsel was stopped on this question.] As to the question raised by pars. 3 and 4 (*c*) of the replication, the effect of par. 12 of the defence is that in time of war the Executive has power to do whatever is necessary for the defence of the realm, and when an act so done is challenged it is an answer that in the opinion of the Executive the act was a proper one for the defence of the realm. When evidence is given that that is the opinion of the Executive, the Court will accept that evidence and will go no further with the matter. [Counsel referred to *In re a Petition of Right* (4); *The Zamora* (5); *British Cast Plate Manufacturers* v. *Meredith* (6); *Phillips* v. *Eyre* (7); *Ex parte Marais* (8).] A subject of an allied nation or a neutral nation is not on a different footing in this respect from that of a British subject. If a ship comes into a British port for the purpose of trading, the owner submits to the British law. He cannot have the benefit of that law without submitting also to its burdens. (See *Pitt Cobbett's Leading Cases on International Law*, 3rd ed., vol. II., p. 261; *The Zamora* (9).)

Maughan, in reply. The allegations in the statement of claim show a sufficient application for a clearance. Nothing formal is required to be done. There was an application to the Comptroller-General, and there was a refusal by him to entertain the application. The right of the Crown in time of war to take property does not apply to a neutral or ally subject temporarily within the Dominions. The necessity which must be shown is a military necessity, and not merely a civil necessity.

Cur. adv. vult.

Dec. 20.

The following judgments were read :—

BARTON, ISAACS AND RICH JJ. There are really three questions

(1) 8 App. Cas., 517.
(2) 8 App. Cas., 623.
(3) (1899) 1 Q.B., 444.
(4) (1915) 3 K.B., 649.
(5) 1916) 2 A.C., at pp. 99, 106.
(6) 4 T.R., 794, at p. 797.
(7) L.R. 6 Q.B., 1, at p. 31.
(8) (1902) A.C., 109.
(9) (1916) 2 A.C., at p. 100.

to be decided in this case, viz., (1) whether the Comptroller-General is *primâ facie* liable; (2) whether the Commonwealth is *primâ facie* liable; (3) whether the plea as to the war power is a justification.

The ground may be cleared by a general view as to the *Customs Act* 1901, on which the two first questions turn. It should be observed in passing that the first question, as it falls to be decided now, was expressly left undetermined in *Baume* v. *The Commonwealth* (1) (see particularly at pp. 113, 122). Full consideration of that Statute has led us to the conclusion that, in the main, the plaintiffs' view of it is right.

The first and fundamental circumstance to be remembered is that by the Constitution itself (sec. 69) it is enacted that "the Departments of Customs and of Excise in each State shall become transferred to the Commonwealth on its establishment." Sec. 64 refers to the Departments of State of the Commonwealth. The Department of Trade and Customs was accordingly established. The *Customs Act* 1901 was for the purpose of regulating that Department so far as Parliament thought necessary. Having in view the Constitutional provisions as to Customs, and the reference to Departments, it is difficult to see how the Commonwealth can so far dissociate itself from the administration of the Department as to say any of its functions are not functions of the Commonwealth, but of some person in his own individual capacity, entirely independent of the Commonwealth. No doubt superior officers may be, and in most cases are, independent of the acts of their subordinates, unless those acts are expressly or impliedly authorized or directed or participated in by them. Further, Parliament could lay a personal duty on an officer towards the public. But it is quite another matter to say that the Commonwealth is or can be, in its corporate capacity, a stranger to any part of the administration of the Department of Trade and Customs.

Reading the Statute by the light of the Constitution, we think that "the Customs"—a short term for the Department—is organized as a Government Department, with a Minister to supervise its administration, but bound by the provisions of the Act in relation to that administration. One provision is that there shall be a

(1) 4 C.L.R., 97.

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permanent Head, the Comptroller-General, who—under the Minister—is to have control of the Department throughout the Commonwealth. Another is that in each State there is to be a Collector called "the Collector of Customs for the State." But that expression is not synonymous with the term "Collector," as used in the Act. The State Collector is a specific individual. The "Collector" is not. The "Collector" is a convenient term for indicating that certain very important duties, some of which involve obligations of individuals, shall not be performed by all and sundry officials, but only by selected officials, of a higher standard and responsibility. The Comptroller, and all State Collectors, are included as of course, but there may be others, as the principal officers of Customs, doing duty at the time and place. Then, in order to indicate that no specific individual is intended by Parliament to be the "Collector," the definition provides that whichever officer is doing duty "in the matter" is as to that to be the "Collector." Detailed reference to the various sections is unnecessary, but would bear out this general view.

The functions so limited by the Act to the "Collector" are limited with respect to the duty and authority of officers as between the Crown and the officers, and as between the Crown and the individual. They are not intended to create rights and duties on the part of the "Collector" personally and the individual. The necessary result of that is that the Comptroller-General is not liable to the shipowner for non-feasance of the duty to issue a clearance (*R.* v. *Lords Commissioners of the Treasury* (1) and *R.* v. *Commissioners of Inland Revenue*; *In re Nathan* (2)). We may add that as he is undoubtedly an officer within the meaning of sec. 221, he is not liable in this action, unless he has been given the necessary notice (secs. 221 and 225—see *Arnold* v. *Hamel* (3)).

Now, to test the matter as between the Commonwealth and the plaintiff: Is there a statutory right to receive a clearance supposing all the statutory conditions are fulfilled? The Act nowhere says in affirmative words that if all the requirements of the law are satisfied, the Collector "shall" grant a clearance. It does not even

(1) L.R. 7 Q.B., 387. (2) 12 Q.B.D., 461.
(3) 9 Ex., 404.

say he " may " grant it. If it did, the principle of *Julius* v. *Bishop of Oxford* (1) would in the circumstances apply, and give such a provision compulsory force. The affirmative duty is found, we think, in other considerations. Magna Charta (9 Hen. III.), c. 30, relating to foreign merchants said : " All merchants unless they were openly prohibited before, shall have safe and sure conduct to depart out of England, and to come into England, and to tarry in and go through England, as well by land as by water to buy or sell . . . except in time of war." This provision, as is observed in *Chitty on the Prerogative* (p. 163), " strongly proves that the English had this liberty before." International commercial intercourse by sea (subject to any specially indicated municipal requirement) is always understood to imply a right to depart with the vessel. Foreign commerce and intercourse would otherwise be impossible, and one main object of the Customs Acts, including Tariff Acts, would be frustrated. The *Customs Act* must be read with reference to maritime practice, applicable to all oversea commerce, inwards and outwards. It is trite law that Statutes should be construed, so far as their language permits, so as not to clash with international comity (*Ex parte Blain* ; *In re Sawers* (2) ; *Winans* v. *Attorney-General* (3) ; *Colquhoun* v. *Brooks* (4) ; *Macleod* v. *Attorney-General for New South Wales* (5)). So reading it, there is a duty on the Commonwealth (by the hand of the Collector) to grant the clearance if satisfied that the law has been complied with. An arbitrary refusal or one based on unjustifiable grounds is the denial of a right implicitly recognized, incorporated into and limited by the Act. By unjustifiable grounds, we must not be understood as excluding in all cases an honest and not unreasonable belief on the part of the Collector acting for the Commonwealth, that the law has not been complied with. In times of peace, the refusal alleged in this case, if its possibility then be assumed, would be a clear *primâ facie* breach of the Statutes.

The justification of the Commonwealth, if any, must rest on par. 8 and par. 12 of the defence. Par. 8 raises considerations applicable

(1) 5 App. Cas., 214.
(2) 12 Ch. D., 522.
(3) (1910) A.C., 22, at p. 31.
(4) 21 Q.B.D., 52, at p. 57.
(5) (1891) A.C., 455.

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both in peace and in war. At this point, we need only say they afford no justification since, apart from the facts raised by par. 12, the refusal was arbitrary and was not based on failure to comply with those conditions. Par. 12 is different. It is not a mere contention in law. It contains allegations of fact, and is so treated in par. 3 of the replication, by which it is demurred to. It is certainly couched in very broad and somewhat vague terms, and possibly the plaintiffs, if they so desire it, are entitled to obtain some greater particularity either in the pleading itself or by way of particulars. But from the standpoint of general demurrer we have to consider whether its allegations however broad and vague are, if true, necessarily insufficient in law to justify the matters complained of.

It alleges that the acts complained of "were acts of a belligerent power in right of war and are not justiciable in this Court." What does that mean when alleged of acts with respect to an alien? It means that inasmuch as the basis of the plaintiffs' claim is as foreigners, and not British subjects, the Crown acting not simply upon its powers considered municipally, towards a subject permanent or temporary, but on the wider ground of international power, acting as representing the whole nation, towards the plaintiffs as externals, that is, as subjects of a foreign power, exercised what are called in the plea belligerent rights—war rights recognized by international law, in effect acts of State in the sense of being "an exercise of sovereign power" (see per Lord *Moulton* (then Lord Justice) in *Salaman* v. *Secretary of State in Council for India* (1)). It is also alleged that this "act of State" was such as not to be the subject of measurement by the recognized standards of this civil Court, a result which, according to the judgment of Lord *Moulton*, may or may not ensue according to the facts proved. That is the substance of par. 12. The principle stated by Lord *Parker* in *The Zamora* (2) is invoked in argument in support of this allegation.

If, however, the plaintiffs abandon the basis of "alien" and take up the position of "British subject" on account of being—though temporarily—within the Dominions (which is not the position they assumed on the argument), then other considerations may apply and are dealt with later. It is said that there is no allegation in par. 12

(1) (1906) 1 K.B., 613, at p. 639. (2) (1916) 2 A.C., at pp. 106-107.

of the Crown's belief that the acts were necessary for the public safety. That, at most, is matter of evidence to support the allegation which is sufficiently comprehensive, however vague, that the acts were belligerent rights. Par. 12, if conceded to be true, as the demurrer must concede it, though raising questions of novelty as to which there is no direct authority, is in our opinion on principle a good answer to the matter complained of, and the demurrer to that paragraph cannot be sustained.

We pass from the demurrer, to the questions of law, separately submitted in par. 4 of the replication. (*a*) The first is whether under the circumstances alleged in the statement of claim the Commonwealth is responsible for the conduct of the Comptroller complained of. This has been already answered by saying the Commonwealth is responsible. (*b*) The second is whether, notwithstanding no formal application was made for a certificate of clearance, a cause of action is disclosed by the statement of claim. Assuming the allegations in the statement of claim to be true, the absence of a formal application is immaterial. The question, however, involves further considerations of law. This question excludes par. 12 of the defence, so that we have now to consider the position apart from the special character of the plaintiffs as friendly foreigners in entirely external relations to the Empire regarded as a belligerent power. In this regard, they are of foreign nationality, but owing temporary allegiance to the British Crown, enjoying its protection, and to be regarded in large measure as British subjects. In this aspect, the problem raised by the question is whether the Commonwealth has the right in time of war, and as an expedient to send food to the United Kingdom and France—which, as a matter of common knowledge, are not only at war, but are in need of supplies by reason of German submarines,—to refuse a clearance under the municipal statutory law of the *Customs Act* to a foreign ship voluntarily arriving in time of war, unless the master agrees to carry a cargo of wheat for the Government from Australia to the United Kingdom. This is not the question of an embargo for considerations of security of which the Executive must be the sole judge (see *Chitty on the Prerogative*, pp. 48 and 172). It is a definite question whether in law the one specific ground of the refusal is justifiable.

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A good deal of argument has taken place based on the cases of *In re a Petition of Right* (1) and *The Zamora* (2). The contention on the one side was that though "requisition" of the vessel with compensation would have been *intra vires*, nothing short of that would be—for instance, an embargo considered by the Crown to be necessary for the public safety. On the other side it was urged that property of a foreigner may be taken equally with that of a subject without any right on the part of the owner to compensation, but subject to a diplomatic liability to his Sovereign to compensate the owner. From this it was deduced that anything short of total acquisition—such as temporary user—of a foreign ship is equally permissible and equally free of compensation.

In our opinion, the question as it arises in this case is not confined to property. The requirement of the Commonwealth was that the aliens should themselves engage in the service of the Commonwealth as well as permit their property to be used. To some extent this appears to be recognized as permissible. In *Hall's Foreign Jurisdiction*, at p. 171, it is said that an alien "in return for the protection which he receives, and the opportunities of profit and pleasure which he enjoys, is liable to a certain extent at any rate, in moments of emergency, to contribute by his personal service to the maintenance of order in the State from which he is deriving advantage, and under some circumstances it may even be permissible to require him to help in protecting it against external dangers." At p. 172 it appears that during the American Civil War Lord Lyons was instructed accordingly. But, in the authorities which we have been referred to or have seen, there is not any statement showing that the mere fact of war supports an attempt to compel aliens to personally enter into the King's service outside the territory, and on the open sea, and while there to risk capture or death at the hands of the enemy. Any such act, if justifiable at law, must be justified by emergency under the war power specially pleaded.

It would be most unwise, even if possible, to endeavour by anticipation to state the circumstances which alone would justify the acts complained of. In view of the fact that par. 12 is pleaded and remains to be proved, if it can be proved, we abstain

(1) (1915) 3 K.B., 649. (2) (1916) 2 A.C., 77.

from entering further into the position of the parties, apart from that paragraph. We must not be understood as saying that the war power does not on *The Zamora* principle enable the Crown—quite independently of the direct international aspect—to refuse a clearance if it considers the public safety demands such a refusal. But, in view of the actual state of the pleadings, that is largely a hypothetical question and further answer might embarrass or prejudice the just result of the case.

We therefore answer the various questions as follows :—

(1) As to the demurrer in par. 2 (*a*) of the replication :—The law necessarily requires the making of an actual application as a condition precedent to the Collector determining whether a clearance should be granted or not. Once an application is made, the other requirements of law mentioned are not conditions precedent to the application being "dealt with," but are conditions precedent to its being granted.

(2) As to par. 2 (*b*) of the replication :—The failure to comply with those requirements affords no defence to this action in view of the refusal to consider any application whatever.

(3) As to par. 3 of the replication :—(*a*) The answer depends on what is proved under par. 12 of the defence ; (*b*) the ultimate fact as alleged includes all necessary constituent facts: demurrer therefore does not lie, though further particularity may be required. (*c*) We have had no argument addressed as to the special position of a foreigner who is also the subject of an allied power. (*d*) This, apparently directed to show the impossibility of "act of State," has been already sufficiently dealt with.

(4) As to the questions of law raised by par. 4 of the replication we answer as follows :—(*a*) Yes. (*b*) Yes, against the Commonwealth, unless the facts admissible and proved under par. 12 of the defence establish a justification under the war power. (*c*) Yes.

GAVAN DUFFY J. The plaintiffs in twenty-six paragraphs of their statement of claim set out a vast quantity of evidence, and continue thus :—(27) "The plaintiffs submit that the action of the defendant

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Comptroller-General of Customs in refusing to grant a clearance as aforesaid or to deal with an application for the same was wrongful and the plaintiffs claim to recover from the said defendant and from the defendant Commonwealth of Australia the damages suffered by them as herein set out in respect of and consequent on the said refusal." (28) "The plaintiffs further submit that the action of the defendant Commonwealth of Australia in directing the said Comptroller-General of Customs to refuse to grant a clearance for the said ship unless a cargo of wheat was shipped was wrongful and the plaintiffs claim to recover from the defendant Commonwealth of Australia the damages suffered by them as herein set out consequent on the compliance of the said Comptroller-General of Customs with such directions as aforesaid."

In order to support their claim with respect to the alleged refusal to grant a clearance, they state in par. 14 that "Nothing has been done or omitted up to the said twenty-sixth day of August by the said master in connection with the said ship or the discharge or loading of the same or in any matter in connection therewith in contravention of the *Customs Act* 1901-1910 or the regulations thereunder or in contravention of the provisions of any other Statute or regulations so as to disentitle the said ship to a clearance."

To this the defendants plead in par. 8 of the defence:—"As to par. 14 of the amended statement of claim the defendants say that the plaintiffs failed to comply with certain requirements of law a compliance with which was a condition precedent to the granting by the Comptroller-General or Collector of Customs of a certificate of clearance for the said vessel. These requirements were *inter alia* as follows." (The requirements are then set out.)

The plaintiffs in their replication say:—(2) "The plaintiffs demur to so much of the defendants' statement of defence as is contained in the 8th paragraph thereof and say that the same is bad in law on the following grounds:—(*a*) That the requirements of law in the said paragraph referred to are not conditions precedent to the right of the plaintiffs to have an application for a certificate of clearance dealt with by the Comptroller-General or Collector of Customs. (*b*) That the alleged failure of the plaintiffs to comply

with the said requirements of law affords no defence in this action to the defendants or either of them. And on other grounds sufficient in law."

Par. 8 of the defence relies on the non-performance of the alleged requirements only as an answer to the allegation in par. 14 of the statement of claim that there have been no acts or omissions by the ship master, &c., which would disentitle the ship to a clearance, and has no reference to the alleged refusal to deal with the application. Par. 2 of the replication treats it as if it purported to be an answer to the plaintiffs' cause of action founded on the refusal to deal with the application. The demurrer is bad. Par. 8 of the defence, if proved, would sufficiently answer the allegations contained in par. 14 of the statement of claim and the claim based upon such allegations. Par. 15 of the statement of claim alleges that the plaintiffs were excused by the defendants from a compliance with the requirements of the Act and regulations, but that question is not touched by par. 8 of the defence or by the demurrer.

Par. 12 of the defence runs thus: "The defendants further say that the alleged refusal to grant a certificate of clearance to the said vessel and the imposition of the alleged restrictive conditions in regard to the granting of such certificate in so far as the same were acts of the defendants or either of them were acts of a belligerent power in right of war and are not justiciable in this Court."

Par. 3 of the replication is as follows: "The plaintiffs demur to so much of the defendants' statement of defence as is contained in the 12th paragraph thereof and say that the same is bad in law on the following grounds." (The grounds follow.)

In my opinion par. 12 of the statement of claim alleges that the acts there referred to were done by the Commonwealth of Australia as a belligerent power or by the Comptroller-General of Customs as its officer. If this be its meaning, it is enough to say that the Commonwealth is not a belligerent power. But my learned brothers agree in thinking that it may be read as setting up and relying on the power and prerogative of the King and on the fact that whatever was done by the defendants was done on his behalf and by his

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authority. If this wide interpretation be given to the language of par. 12, it is impossible to say that the defendants might not under it prove some facts which would afford justification for their conduct. In that view the demurrer must fail.

In addition to demurring to the defendants' pleadings, the plaintiffs in effect proceed to demur to their own. They submit certain questions of law for our consideration, which as amended at the instance of my brother *Isaacs* run thus:—(*a*) "Whether under the circumstances alleged in the statement of claim the defendant Commonwealth of Australia is responsible for the acts and omissions of the defendant Comptroller-General of Customs alleged in the statement of claim." In par. 22 of the statement of claim the plaintiffs state that, in the matters therein set out, the Comptroller-General of Customs was acting under the directions of the Commonwealth of Australia. If so, the Commonwealth of Australia is clearly responsible for his acts and omissions alleged in the statement of claim. (*b*) "Whether under the circumstances alleged in the statement of claim the plaintiffs are entitled to maintain this action against the defendants or either of them although no formal application was made for a certificate of clearance." The statement of claim alleges facts from which it might properly be inferred that the Commonwealth of Australia directed that the ship should not be permitted to leave port unless loaded with wheat and that the master should be so informed, and that in pursuance of the purpose and by the direction of the Commonwealth of Australia the Comptroller-General of Customs directed that a clearance should not be granted so that the ship might not be able lawfully to leave port. If these facts are proved at the trial and such an inference is drawn, the plaintiffs will be entitled to maintain their action against both defendants although no formal application was made for a certificate of clearance. The ship master was in my opinion at liberty to accept the intimation that his ship would not be permitted to leave port and consider it detained by *force majeure* unless and until he consented to carry a cargo of wheat. (*c*) "Whether the defendant Comptroller-General of Customs is an 'officer' within the meaning of secs. 221 and 225 of the *Customs Act* 1901-1910 or of either of the said sections." I agree with the other members of the

Court in thinking that the Comptroller-General of Customs is an officer within the meaning of these sections.

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Plaintiffs' first demurrer allowed, and their second demurrer overruled. Questions raised as points of law in par. 4 of the plaintiffs' replication answered as follows :— (a) Yes. (b) Yes, against the Commonwealth, unless the facts proved under par. 12 of the defence establish a justification under the war power. (c) Yes. Costs to be costs in the action.

Solicitors for the plaintiffs, *Dalrymple & Blain.*

Solicitor for the defendants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

Aff Commonwealth v Zachariassen & Blom (1920) 27 CLR 552

[HIGH COURT OF AUSTRALIA.]

BLOM . . . . . APPELLANT ;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 7, 10, 20.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Ship—Foreign ship—Clearance—Refusal by Comptroller-General and Collector to issue—Liability of Commonwealth—Placing of armed guard on ship to prevent sailing without clearance—Customs Act 1901-1910 (*No.* 6 *of* 1901—*No.* 36 *of* 1910), *secs.* 117-122.

The master of a ship, of which the port of registry was in Russia, applied to the Collector of Customs at Sydney for a certificate of clearance and tendered to him all the documents required by law to be tendered for the purpose of