

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COLLECTOR OF CUSTOMS FOR VICTORIA;

EX PARTE BERLINER AND ANOTHER.

H. C. OF A. Customs—Imports—Duties—Cost of goods—Buying commission and inspection fee—
 1935. —Inclusion in price assessed for duty—Payment of duty under protest—Cash
 security for duty required—Onus cast on importer of satisfying Collector that
 charges were correct—Importers prevented from resorting to Courts—Onus of proof
 MELBOURNE, —Mandamus to compel receipt of payment under protest—Customs Act 1901-1930
 April 30; (No. 6 of 1901—No. 6 of 1930), secs. 42, 167, 216.*
 May 1.

—
 SYDNEY,
 June 4.
 —
 Rich, Starke,
 Dixon, Evatt
 and McTiernan
 JJ.

Importers of goods from Japan paid the merchants in Japan, who, they said, were their buying agents, the cost of the goods with all charges, among which were included a buying commission of 10 per cent and an inspection fee of 5 per cent on the price paid to the manufacturers. The Collector of Customs required the importers to deposit as a cash security an amount equal to the duty on the amount of the buying commission and inspection fees. The condition of the security was that the money should be the property of the Crown unless within a limited time the importers proved to and to the satisfaction of the Collector that the goods were in the entry properly described and valued for duty. In one case the importers refused to comply with this demand, and tendered the extra duty under protest in pursuance of sec. 167 of the *Customs Act 1901-1930* and demanded the goods. The tender and demand were refused. In another case they gave the cash security and the goods were passed. The importers obtained an order nisi for a mandamus to compel the Collector to accept an entry at the increased duty under protest under sec. 167, and to enforce repayment of the amount of the cash security given.

Held that the order nisi should be made absolute to determine the duty and pass an entry, as the Collector had resorted to the cash security in order to

*The provisions of these sections are set out at pp. 308, 309, *ante*.

avoid any definitive assessment of duty and thus to prevent the importers from exercising the right given to them by sec. 167 of the statute to attempt to establish in the Courts that the duty charged was excessive; but that no mandamus should issue to compel the repayment of the deposit made or the exercise of any function to which the terms of the conditions of the security might give rise.

R. v. Comptroller-General of Customs; Ex parte Woolworths Ltd., ante, p. 308, applied.

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ORDER NISI for mandamus.

Alfred Lewis Berliner and Colin Leslie McDonald obtained an order nisi calling upon the Collector of Customs for the State of Victoria to show cause why a writ of mandamus should not be issued directing him:—

1. To pass the entry relating to seven cases of goods imported by the prosecutors on 1st March 1935 by the s.s. *Melbourne Maru* without requiring further payment of duty or security in respect thereof.

2. To deliver to the prosecutors the said seven cases of goods.

3. To accept payment under protest under sec. 167 of the *Customs Act* 1901-1930 of the amount of £1 2s. 4d. claimed by the Collector to be payable in respect of the importation of seven cases of goods imported by them by the s.s. *Melbourne Maru* on 1st March 1935 by reason of the inclusion, or possible inclusion, in the value for duty of the goods of "buying commission and inspection fees."

4. To make or cause to be made upon the memorandum signed by or on behalf of the prosecutors, on or about 23rd October 1934, of a cash deposit of £11 10s. 6d. under sec. 42 of the *Customs Act* 1901-1930 in respect of certain goods imported by the prosecutors on the s.s. *Atsuta Maru*, all necessary indorsements or entries authorizing and directing the repayment to the prosecutors of the sum of £11 10s. 6d. and/or to sign or cause to be signed all necessary warrants or orders, and do all other necessary acts and things to cause or enable the repayment of such moneys by the customs to the prosecutors.

5. To make or cause to be made upon all other the memoranda signed by or on behalf of the prosecutors in respect of cash deposits

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and purporting to be pursuant to the requirements of the Collector or his predecessors in office under secs. 42 and/or 216 of the *Customs Act* 1901-1930, indorsements or entries authorizing and directing the repayment to the prosecutors of the amounts set out in exhibit "A.L.B.34" to the affidavit of Alfred Lewis Berliner sworn and filed herein and any other sums so deposited by them and/or to sign or cause to be signed all necessary warrants or orders, and do all other necessary acts and things to cause or enable repayment of such moneys by the customs to the prosecutors.

6. To consider and determine whether the goods referred to in the memoranda of cash deposit made by the prosecutors with the Collector or his predecessors in office as set out in the second part of exhibit "A.L.B.34" (and any other cash deposits made by them) were properly described and valued for duty.

7. To consider and determine whether, in respect of all cash deposits made by the prosecutors pursuant to the requirements of himself or his predecessors in office and in respect of which the periods for the production of evidence prescribed by the respective memoranda thereof, or any extensions thereof, have expired, he should extend or further extend the respective periods for a time sufficient to enable him to consider and determine the matters proper to be considered in relation to all such deposits in the light of the result of these proceedings.

Exhibit "A.L.B.34" showed:—Duty paid on buying commission and inspection fees (sec. 167) under protest, £794 15s. 9d.—Duty paid on buying commission and inspection fees (secs. 42 and 216), £778 18s. 1d.—Duty paid on buying commission and inspection fees but not under either secs. 167 or 42 and 216, £670 5s. 5d., making a total of £2,218 11s. 2d. The remainder of the exhibit showed how the details of these amounts were made up.

The prosecutors were importers of goods from Japan which were subject to customs duty. The goods were obtained through merchants in Japan who, the prosecutors said, were their buying agents. They paid them the cost of the goods with all charges, among which were included a buying commission of ten per cent and an inspection charge of five per cent on the price paid to the manufacturers. Before 1930 the question had been raised by the customs

department whether these commissions should be allowed or should be included in the value for duty as if part of the price of the goods. Duty upon that footing had sometimes been charged, but was afterwards refunded. In June 1929 notice was given to the importers requiring a cash deposit under sec. 42 of the amount of the additional duty arising from the inclusion of the charges for buying and inspecting. Later the importers were permitted to avail themselves of sec. 167, and to pay under protest the increased duty referable to the inclusion of the buying and inspection charges. This course was permitted until May 1930 when, acting under instructions from the Comptroller-General, the Collector refused any longer to accept payment of the increase in duty under protest pursuant to sec. 167, but required a deposit equal to the amount of that duty on the terms of the departmental form of security. A reason which the Collector gave for adopting this course was that by so doing he threw the onus on the importer, whereas, if he accepted payment under sec. 167, he was exposed to an action in which he would not be able to substantiate his denial of the genuineness of the invoices. For a month or two such deposits were obtained from the importers, but, after July 1930 they paid the full duty demanded without any attempt to protest under sec. 167 and without signing the form of security. This course was followed for eighteen months when the importers again resorted to sec. 167. The Collector permitted them to do so, and from March 1932 until December 1933 accepted payments under protest in respect of duty referable to the inclusion of the two charges in the value of the goods for duty. The Collector again refused to accept such payments, and again the importers resumed making unconditional payments of duty. In December 1933 some refunds were made of amounts paid under protest in pursuance of sec. 167, and from that time until October 1934 entries were passed without the inclusion of the buying or inspection commission. In September 1934 instructions were issued from the Comptroller-General's office in respect of buying commissions and inspection fees on Japanese goods. These instructions were that cash security was to be taken in the departmental form, and in no circumstances was there to be an acceptance of payment tendered under protest

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pursuant to sec. 167. This instruction was applied to the prosecutors, and a demand was made upon them for repayment of the duty refunded to them.

On 1st March 1935 a parcel of goods arrived in the s.s. *Melbourne Maru*. The importers refused to comply with the demand for a cash security in the departmental form. They tendered the extra duty amounting to £1 2s. 4d. under protest in pursuance of sec. 167, and demanded the goods. The tender and demand were refused. The rule nisi also included the parcel of goods which arrived by the s.s. *Atsuta Maru* on 23rd October 1934 in respect of which the importers gave the cash security amounting to £11 10s. 6d. which the Collector required of them. Having obtained that security, he did determine the value for duty. He passed the entry at the importers' value. The cash security equalled the excess duty which would arise from including the buying commission and the inspection fee in the value of the goods. The importers then obtained the order nisi above set out, which was made returnable before the Full Court.

Latham K.C. (with him *Sholl*), for the prosecutors. In this case the principal dispute is as to the inclusion in the value for duty of what are called charges for buying commission and inspection fees. These are genuine charges, but the customs department is apparently not satisfied that they are genuine charges and insists that the Collector himself must be satisfied on the matter, and that the critical point is the satisfaction of the Collector and not the facts themselves. That is to say, the matter is to be determined finally by the Collector. He makes up his mind whether he is satisfied that this is the true value for duty, and the intention of the department apparently is that unless he is satisfied, that is the end of the matter, and there is no room for the Court really to determine the value for duty. The importers desire to be allowed to pay disputed sums under protest under sec. 167 of the *Customs Act*, which confers a right on the importer to pay a disputed amount of duty under protest, and then to have the actual facts litigated. The revenue is fully protected by a payment under protest under sec. 167, because unless an action is brought by the importer in pursuance of the section the sum paid shall be deemed to be the proper duty payable in respect

of the goods. The Collector determines the amount which is to be paid under protest. By adopting the course of requiring the deposit of a cash security under sec. 42 he is able to obtain any amount of money that he likes to fix, and be free from the risks of litigation. The importer has had no chance whatever under the procedure adopted by the Collector of litigating this matter in any jurisdiction in the country. Sec. 42 only applies where the security really and bona fide is taken for compliance with the Act and the protection of the revenue. Where the facts plainly show that there is no need for the taking of such a security, there is no power in the Collector, of his own arbitrary motion, to require the giving of a security as a condition of releasing the goods from customs control or passing an entry or doing any other act that is necessary to enable the importer to obtain control of his goods. Sec. 42 is not an unlimited general power which entitles the Collector to ask for any security that he chooses to specify in relation to any goods which may in some of the circumstances of their importation or otherwise arouse his suspicion, but the section can only be put into operation where the security really is for the protection of the revenue or for compliance with the Act, and where the importer is prepared to pay the full amount demanded under protest under sec. 167, there is no room for sec. 42. The disputes here are as to quite definite sums, one being as to the sum of £1 2s. 4d. and the other as to £11 10s. 6d. There is nothing in the facts of this case to suggest that any documents which are within the power of the importers to produce have not been produced to the Collector. If false documents are produced, the Act provides a penalty in such a case. When sec. 216 says that the Collector may require certain proof, what is meant is that he may require certain evidence. The Collector has at some stage to determine whether the goods are dutiable, and if dutiable, he then has to determine at what value the goods are to be assessed. The words "pending such proof" at the end of sec. 216 mean while the evidence is being adduced, not pending the period during which the Commissioner is making up his mind. The Collector is really extracting money from the subject in a manner which is not authorized by law, and this amounts to the imposition of a tax which is not authorized by Parliament. Under the procedure adopted

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by the Collector, unless the importer can satisfy him within six months as to the value of the goods, the money is retained by the Commonwealth. In the present case there never has been any doubt as to the precise amount, and there never has been any doubt as to the amount demanded, or the amount in dispute under sec. 167. The required proof has been provided, and the Collector has no power to detain the goods which he is detaining. This practice, if authorized, means that people have no right and can acquire no right to get their goods unless they submit to any demand for money which the Collector chooses to make. An order is also sought under clause 5 of the order nisi for the repayment of all moneys paid in respect of duty on these charges. What is sought is that a memorandum be made on the necessary official documents which would have the result of letting the importers get their money back.

[DIXON J. referred to *United States v. Tingey* (1).]

Fullagar K.C. (with him *O'Bryan*), for the respondent. The orders claimed in the order nisi fall into two classes. The first three relate to the s.s. *Melbourne Maru* which arrived on 1st March 1935. In that case the Collector refused to accept payment of any additional amount of duty under protest, and would not release the goods unless the importer was prepared to sign a security, which the importer refused to sign. As to the remaining orders, the matter stands on an entirely different footing, because in the cases dealt with by all of the remaining orders, the importer actually has entered into a memorandum of cash deposit. Taking the first three orders first, orders one and two cannot be divorced from order three. If they are regarded as distinct they must be refused. No order can be made with respect to the three first orders until the duty has been assessed. It is an essential preliminary to order three that the Collector be ordered to assess the duty and make the demand for the duty. The charges, which the importer says should be excluded in calculating the value for duty, are not genuine charges, that is, these so called inspection fees and buying commissions are not genuine charges. If it is a genuine buying commission which is set out in the document, it is impossible to see how it is worked out.

The documents do not disclose any agreement to pay a buying commission, which is what one would expect to find in the agreement made by the parties themselves. The position of the Collector is that he is not satisfied with the documents produced, but requires proof under sec. 216. If no proof is offered under sec. 216—and no proof has been offered in the present case—there is no term at the end of which the power of collection no longer exists, and the goods just stay where they are. When an entry is presented to the Collector, he may do one of three things, he may accept it as correct and pass it, he may refuse to accept it as correct and say the value is greater than the amount declared, or he may require more evidence before he determines the duty. Provided he acts in good faith, there is no duty on the Collector to assess the duty. The Act is framed in a totally different way from the *Income Tax Assessment Act* and the *Land Tax Assessment Act*, where the Commissioner is expressly charged with the duty of making assessments. What the Collector has done is to require from the owner of the goods proof that the goods are properly valued for duty, and pending such proof to refuse to deliver the goods; then acting under sec. 216 he relaxes the stringency of that attitude by offering to release the goods if security is given under secs. 42 and 43. The Collector is entitled to act under sec. 216, and has in fact acted under that section. He is entitled so to act, and no attempt to bring any proof before him has been made. Sec. 167 does not apply, because no duty has been demanded. The Collector is not at present in this case under any duty to assess the duty or to make a demand. The making of a demand is a necessary preliminary to the coming into operation of sec. 167. In these circumstances, order three in the order nisi cannot be made. As to orders four and five of the order nisi; these orders are directed at getting the money back which the importer has lodged under secs. 42 and 43. First, the memoranda actually executed constitute binding contracts at common law. There is nothing inherently unlawful in them, and there is no reason why they should not bind the importer as contracts (*The Commonwealth v. Melbourne Harbour Trust Commissioners* (1)). If it is

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(1) (1922) 31 C.L.R. 1, at pp. 10, 16, 18, 19.

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suggested that these contracts are void under *Attorney-General v. Wilts United Dairies Ltd.* (1) and *Brocklebank Ltd. v. The King* (2), the answer is that this is a taxing Act, and the Collector is charged with its administration and with the duty of seeing that the tax is duly paid; there is an inherent right in him to release goods on security, and the security is authorized and lawful under secs. 42 and 43. Thirdly, the money here is held by the Crown, and if it is wrongly held by the Crown, the remedy is by an action against the Crown (*R. v. Lords Commissioners of the Treasury* (3); *R. v. Secretary of State for War* (4)). There must be some provision for forfeiture if the security is to be of any value or effect at all. Sec. 109 gives a power of sale. Sec. 47 also confers a wide discretion on the Collector. As to orders six and seven, these refer to cases in which security has actually been taken, and are in a similar position to orders four and five. The whole matter in these cases is governed by the terms of the security, which is binding either at common law or by virtue of sec. 42. The importer has his goods, and it is merely a matter of whether or not he produces proof. If the contracts are valid, it is merely a matter of whether proof be produced or not, and no proof has yet been submitted.

Latham K.C., in reply. Having regard to secs. 42, 216 and 167, the proper procedure for the Collector to follow in such cases as the present is, if at the moment he is not satisfied as to the value of the goods, to require security to ensure payment of the proper amount of duty. The Collector then has the security in the form of a bond or cash deposit, as the case may be. He should then proceed to determine the value of the goods for duty, to assess the duty and to demand the duty. When the duty was demanded, it would be open to the importer to tender the amount under protest under sec. 167, if he were not prepared to recognize the amount demanded as the proper amount. When the duty was paid under sec. 167 the importer would then have an opportunity of having the matter determined by a Court, if he thought proper. On the assumption that the memoranda of security are authorized by the Act, the duty

(1) (1922) 91 L.J. K.B. 897.

(2) (1925) 1 K.B. 52.

(3) (1872) L.R. 7 Q.B. 387, at pp.

394, 398, 399.

(4) (1891) 2 Q.B. 326.

to be performed thereunder becomes a statutory duty, and mandamus is appropriate for compelling the performance of this public duty in the interests of a private citizen.

Cur. adv. vult.

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The following written judgments were delivered :—

RICH, DIXON, EVATT AND McTIERNAN JJ. There is little to distinguish this case from *R. v. Comptroller-General of Customs; Ex parte Woolworths Ltd.* (1), decided to-day.

The importers, who in this case seek a writ of mandamus, have for some years obtained goods through merchants in Japan who, they say, are their buying agents. They pay them the cost of the goods with all charges, among which are included a buying commission of ten per cent and an inspection charge of five per cent on the price paid to the manufacturers. Before 1930, the question had been raised by the customs department whether these commissions should be allowed or should be included in the value for duty as if part of the price of the goods. Duty upon that footing had sometimes been charged, but only to be refunded afterwards. In June 1929 notice was given to the importers requiring a cash deposit under sec. 42 of the amount of the additional duty arising from the inclusion of the charges for buying and inspecting. The form of notice and of security were the same in all respects as those employed in the case of *Woolworths Ltd.* (1). Later in the year the importers' documents were seized, and heavy security was taken from them in respect of their current imports. They were told they were absolved from fraud, however, and subsequently the security was refunded. They were permitted to avail themselves of sec. 167, and to pay under protest the increased duty referable to the inclusion of the buying and inspecting charges. This continued until May 1930 when, acting under instructions from the Comptroller-General, the Collector refused any longer to accept payment of the increase in duty under protest pursuant to sec. 167, but required a deposit equal to the amount of that duty on the terms of the departmental form of security already referred to. A reason which the Collector gave for

(1) *Ante* p. 308.

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adopting this course was that by so doing he threw the onus on the importer, whereas, if he accepted payment under sec. 167, he was exposed to an action in which he would not be able to substantiate his denial of the genuineness of the invoices. For a month or two such deposits were obtained from the importers, but, after July 1930, they appear to have capitulated, and paid the full duty demanded without further attempt to protest under sec. 167 and without signing the form of security. After following this course for over eighteen months the importers once again resorted to sec. 167. The Collector now permitted them to do so, and from March 1932 until December 1933 accepted payments under protest in respect of duty referable to the inclusion of the two charges in the value of the goods for duty. Then the Collector again refused to accept such a payment, and again the importers resumed making unconditional payments of the duty. During this time the importers were pressing for repayment of the duty in dispute, and threats of legal proceedings were made. In December 1933 some refunds were made of amounts paid under protest in pursuance of sec. 167, and from that time until October 1934 entries were passed without the inclusion of the buying or inspection commission. But, in September 1934, instructions were issued from the Comptroller-General's office in respect of buying commissions and inspection fees on Japanese goods. Cash security was to be taken in the departmental form, and in no circumstances was there to be an acceptance of payment tendered under protest pursuant to sec. 167. This instruction was applied to the prosecutors, and moreover a demand was made upon them for repayment of the duty refunded to them. In common with other importers they had in June 1934 issued a writ to recover payments made for duty on buying commission. They now determined to bring the matter to a head, and took steps to lay the foundation for an application for a writ of mandamus. In respect of a parcel of goods arriving from Japan on 16th October 1934 by the *Atsuta Maru* they lodged an entry accompanied by invoices which showed the buying commission and inspection fees, but, in calculating the value for duty, they excluded those charges. The Collector refused to deliver the goods, and demanded a cash security equal to the additional duty calculated upon the buying

commission and inspection fees. The notification was in the stereotyped form headed with a reference to sec. 42 and sec. 216. At the foot it bore a reference to the buying commission and the inspection fee, and showed that the amount of the deposit was arrived at by calculating these charges. The importers then tendered the sum to the Collector under protest as in pursuance of sec. 167; the tender was refused. Next the importers, under cover of a letter saying that they did so solely to obtain their goods, made the cash deposit demanded. Thereupon the entry was passed, but apparently with some reference indorsed upon it to the cash security. It was passed with a value for duty from which the commission and fees were excluded. From this time forward the customs department consistently required the importers to make a cash deposit upon the terms of the departmental form in order to obtain their goods arriving from Japan. They say they were in such need of the goods for the purposes of their business that they were unable to resist. But at length on 1st March 1935 a parcel of goods arrived in the *Melbourne Maru* which they were prepared to leave in the hands of the customs. They refused to comply with the usual demand for a cash security in the departmental form. They tendered the extra duty under protest in pursuance of sec. 167, and demanded the goods. The tender and demand were refused. The importers then obtained the present order nisi for a writ of mandamus. The reasons given in the case of *Woolworths Ltd.* (1) show that the order nisi must be made absolute. It is quite clear that the Collector has attempted to avoid any definitive assessment of the duty at the amount he wishes to obtain for the revenue. He has resorted to the cash security in this case, as in that of *Woolworths Ltd.* (1), to enable him to obtain a sum representing or equivalent to the extra duty, and to impound it unless he is personally satisfied thereafter that the importers have on their entry properly described the goods and valued them for duty. Thus he intends to prevent the importers from exercising the right given to them by sec. 167 of the statute to attempt to establish in the Courts of Justice that the duty charged is excessive. It is said that, in refusing to enter the goods unless a cash deposit is made upon the terms that it should become the

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property of the Crown unless he be satisfied, the Collector is presenting an alternative to the exercise of the power given by sec. 216 of retaining the goods pending proof. Thus when the alternative is refused, as it was in the case of the parcel of goods imported by the *Melbourne Maru*, he does no more, it is said, than exercise the very power conferred by that provision. The answer is that he is not doing what that section intends. It does not mean anything so absurd as to enable him, because he remains unconvinced of the facts stated by an importer, to withhold for ever the importer's goods, and never to determine what duty is payable upon them. It enables the Collector to ask for evidence that the goods are owned as claimed and are properly described, valued, or rated for duty. It authorizes him to retain the goods and refuse to pass the entry during the time occupied in furnishing what evidence the importer adduces. But when, as in this case, all the evidence the importer says he can produce has been supplied and is in the Collector's possession, the importer says he can do no more and neither side contemplates the furnishing of any further evidence, the section has no application. The process of proof is over, and the Collector is called upon to give his determination thereon. Because he remains dissatisfied of the truth or correctness of the importers' valuation and proof, the Collector cannot deny him his goods and defer indefinitely the levying of the duty. It follows that in the case of the parcel of goods imported by the *Melbourne Maru* a mandamus should issue commanding the Collector to determine the duty and pass an entry.

The contention of the prosecutors that he should be required to accept the value for duty at which they entered them cannot be sustained. This proceeding is in no way concerned with the question whether in fact the buying commission and the inspection fee are genuine charges for services. It is concerned only with the question whether the Collector is at liberty, by the means he has adopted, to deprive the importers of an opportunity of submitting that question to the Courts for decision. The Collector has done nothing to bind himself to accept the value for duty stated by the importers.

The rule nisi includes the parcel of goods imported by the *Atsuta Maru* in respect of which the importers gave the cash security

which the Collector required of them. Having obtained that security, he did determine the value for duty. He passed the entry at the importers' value. It is true that he would not have done so had he not thus obtained a sum equal to the excess duty which would arise from including the buying commission and the inspection fee in the value of the goods. Nevertheless he did pass an entry; and no mandamus can go on the ground that he has not performed his function of determining the value for duty and passing the entry. It is said that he did demand duty at the higher sum within the meaning of sec. 167, and thus incur an obligation to accept payment under protest under that section. But, however close the two things may be, he appears finally to have succeeded in distinguishing his demand for a cash deposit from a demand for duty, and to have maintained only the latter.

Mandamus is not an appropriate form of relief in relation to cases where a cash security has been given. Nor can the suggestion be supported that he might be compelled to perform duties falling under the terms of the memorandum or in consequence of taking the deposit on those terms.

The *Customs Act* does not authorize the exaction of a cash deposit upon the terms stated in the departmental form, and by taking it upon those terms the Collector incurred no statutory or other public duty enforceable by mandamus to make determinations under those terms or to make entries upon the document in which they are expressed.

The order nisi should be made absolute with costs for a writ of mandamus commanding the Collector to determine the value for duty of the seven cases of goods imported by the prosecutors on 1st March 1935 in the ship *Melbourne Maru*, and to demand the duty therefor and to accept payment of such duty under protest pursuant to sec. 167 of the *Customs Act* 1901-1930, if payment of any part thereof is so tendered, and to pass an entry in respect of the goods accordingly.

STARKE J. Rule nisi for writ of mandamus. Berliner and McDonald are importers into Australia of glassware and other goods. Goods imported are subject to the control of the customs from the

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time of importation until delivery for home consumption or until exportation to parts beyond the seas (*Customs Act* 1901-1930, sec. 30). All imported goods must be entered (*Customs Act*, sec. 68), and an entry is made by delivery of the entry to the Collector of Customs. In the entry the goods are described, and valued for duty. The *Customs Tariff Acts* impose the duties of customs. When a duty is imposed according to value, the value for duty is the sum of the following : (a) the actual money price paid or to be paid for the goods by the Australian importer, plus any special deduction (such, for instance, as discounts), or the current domestic value, whichever is the higher ; (b) all charges payable or ordinarily payable for placing the goods free on board at the port of export ; (c) ten per cent of the amounts specified under pars. (a) and (b) (*Customs Act*, sec. 154). The function of the Collector of Customs is to examine the entry and, if satisfied, pass it. " Entries shall be passed by the Collector placing on the entry the word ' Passed ' and adding his signature thereto, and on the passing of the entry the goods shall be deemed to be entered, and any entry so passed shall be warrant for dealing with the goods in accordance with the entry " (Act, sec. 39). Duty is paid accordingly, and the goods are delivered if entered for home consumption. But if the Collector be not satisfied with the information supplied, he may require further proof that the goods are owned as claimed, and are properly described, valued or rated for duty, and may refuse to deliver the goods or to pass any entry relating thereto, pending such proof (Act, sec. 216). Further, the customs shall have the right to require and take securities for compliance with the Act, and generally for the protection of the revenue of the customs, and pending the giving of the required security in relation to any goods subject to the control of the customs may refuse to deliver the goods or to pass any entry relating thereto (sec. 42). The importer may be dissatisfied with the duty claimed, and the Act, sec. 167, provides for this case : " If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff . . . the owner . . . may pay under protest the sum demanded by the Collector . . . and thereupon the sum so paid shall, as against the owner

of the goods, be deemed to be the proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section" (sub-sec. 1). The action may be brought "in any Commonwealth or State Court of competent jurisdiction" (sub-sec. 2). The importer must enter his goods and pay duty on any that are dutiable before he can release them from control of the customs or obtain delivery. It is the Collector's main function and duty to examine the entry, and, among other things, ascertain the duty and claim what is payable, in his opinion, according to law; and his powers under secs. 216 and 42 of the Act do not warrant his refusing to perform that duty. They are auxiliary powers, but they are not powers which can be used arbitrarily and capriciously, or in a manner defeating the manifest intention of the Act. Sec. 167 is a provision for the benefit of the importer, of which the Collector cannot deprive him by refusing to perform his duties or by any abuse or arbitrary exercise of power.

It remains to apply this general view of the *Customs Act* to the facts of the particular case now before the Court. Berliner and McDonald import goods from Japan into Australia. They entered goods at the customs, but claimed that certain buying commissions and inspection fees should not be included in the value of such goods for the purpose of ascertaining the duty of customs payable in respect thereof. It is a common business practice to purchase goods through buying houses abroad, and to pay such houses a buying commission, and also in cases in which inspection is had—inspection fees for inspecting the goods before shipment. Genuine charges such as these cannot be included in "the value for duty" of the goods imported, nor does the Collector claim that they should be so included. But he is not satisfied that the commission and inspection fees which Berliner and McDonald excluded from "the value for duty" of the goods imported by them from Japan are not part of the purchase price; he is not satisfied that they were paid as buying commission and inspection fees. It is unnecessary to go in detail through the many different claims and demands that the Collector has made since 1926 as to these buying commissions and inspection fees, for he now seems to have adopted a definite and settled course of action.

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It is perhaps best stated in an instruction issued by the Comptroller-General to Collectors of Customs in September 1934 :—" In future the charge for buying commission shown on invoices from Japan may be recognized provided evidence is produced to confirm its genuineness. The evidence required must be in the form of a declaration made before the British Consul by the Buying Commission Agent as per Form A herewith, also a statutory declaration by the importer as per Form B herewith. The 'manufacturer's invoice' must also be produced. (Forms of declarations are available in the Correspondence Branch.) If the Collector has no reason to doubt the correctness of the particulars shown in Forms A and B the buying commission may be recognized. Where in any case the Collector for reasons which he regards as sufficient refuses to accept the Forms A and B, a deposit under sections 216 and 42 is to be required pending production of conclusive evidence as to the genuineness of the charges, and payment of the cash security must not under any circumstances be accepted under protest in terms of section 167 of the *Customs Act*. Full report to be furnished to this office indicating whether the evidence has been accepted or rejected. In connection with paragraph 4 a copy of the Crown Solicitor's opinion, dated 23rd February 1934, dealing with the question generally is forwarded herewith for the Collector's information (Held by Senior Inspector). In those cases where the Collector is already in possession of evidence satisfactorily proving the genuineness of the buying commission, such evidence may be accepted subject to the importer producing within a reasonable time (in the case of Japan say 4 months) declarations in accordance with Forms A and B. As regards past importations no refunds are to be given but any claims for refunds are to be referred to this office, together with full particulars as to whether the extra duty demanded was paid under protest in accordance with section 167 of the *Customs Act* and whether the importer has complied with the requirements of that section." But Berliner and McDonald have been unable to satisfy the Collector of the genuineness of the buying commission and inspection fees which they claim to have paid. The Collector will not add them to the value of the goods for duty, nor allow them to be deducted. The procedure adopted is illustrated in the case of goods arriving from

Japan by the s.s. *Atsuta Maru*. The goods were entered by means of an import entry, and the value of duty was calculated, without including buying commission. The word "Passed" was not placed upon the entry, but the duty calculated by the importers was paid. The Collector notified the importer that he required proof, by the production of documents, that such goods were properly described and valued for duty. And, pursuant to sec. 42 of the Act, the Collector required the importers to furnish security, to the amount of £11 10s. 6d., by cash deposit, for the protection of the revenue of the customs in connection with the importation of the goods. Pending such proof, or the giving of such security, the Collector refused to deliver the goods or to pass any entry relating thereto. The importers then tendered what is described as a Post Entry. It was substantially as follows:—"Extra duty demanded on Buying Commission and Inspection Fee . . . £11 10s. 6d. Duty paid under protest sec. 167. Claimed that same is non-dutiable." The Collector marked this document thus:—"Cannot be accepted under sec. 167. A cash security is required under secs. 42 and 216 of the *Customs Act*." As, however, the goods were urgently required, the importers subsequently paid the sum of £11 10s. 6d. by way of deposit, and entered into the security required. In skeleton form this security is as follows: "Pursuant to the requirement of the Collector of Customs for the State of . . . etc. the sum of . . . is hereby deposited with the said Collector as security for the protection of the revenue of the Customs in respect of the above-mentioned goods, and the condition of the said security is that if proof shall within six months from the date hereof or such further period as the said Collector may in writing allow be produced to and to the satisfaction of the said Collector that the above-mentioned goods are in the said Entry properly described and valued for duty, then the amount of the deposit shall be returned to the depositor, otherwise it shall be the property of the Commonwealth." The goods were then released from the control of the customs. The same procedure was followed in a number of other shipments. At last Berliner and McDonald determined that the legality of the Collector's acts should be tested in law. A quantity of goods arrived from Japan by the s.s. *Melbourne Maru*. An import entry

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was made of certain of these goods, excluding buying commission and inspection fees from the value for duty. The Collector required a cash deposit of £1 2s. 4d., the duty which would have been payable if buying commission and inspection fees were included in the value for duty, and also a memorandum of cash deposit in the form already mentioned. The importers refused to sign the memorandum, but they tendered an entry: "Additional duty demanded on buying commission and inspection fee £1 2s. 4d.," and marked the entry:—"Paid under protest, sec. 167 of 1901-1934 *Customs Act*. Claimed that the above charges are non-dutiable." The following conversation took place:—"Importers' Agent: I tender you this entry. Officer of Customs: I will not accept it. Agent: I hand you herewith the amount of £1 2s. 4d. in cash. Officer: I cannot take it." The Acting Collector of Customs was then interviewed, and the foregoing conversation was related to him. The importers asked that the goods be delivered to them, but delivery was refused. The importers said they would only pay the amount demanded under sec. 167 of the *Customs Act* under protest, and tendered the amount, but the Acting Collector declined to receive it. He was asked so to mark the entry form, and he marked it as follows:—"Acceptance of payment of duty under protest refused. What is required is a cash security in terms of secs. 216 and 42 of the *Customs Act* 1901-34." Delivery of the goods was consequently refused, and they still remain, I understand, under the control of the customs.

It is palpable, from this relation of the facts, that the Collector is acting, and advisedly acting, in the manner described in order that the legality of his action shall not be submitted to the judgment of a Court of law, pursuant to the provisions of sec. 167 of the Act. He apparently accepts the value of the goods for duty shown in the entries, for he never challenges it, and accepts duty upon the value so declared. He has all the material which the importers can give him, but he will not ascertain the duty. He is in no doubt as to the amount of buying commission and inspection fees which the importers declare they have paid, but his doubt is whether those amounts are not part of the price of the goods, and not buying commission and inspection fees at all. But if he regards them as part of the price, why not add them to the value, and claim duty in

respect thereof, when it would be for the importer, by action brought pursuant to sec. 167, to prove that they are legitimate? Simply, to my mind, because the Collector fears that he might be defeated in such an action, and desires to substitute his satisfaction for the legal decision contemplated by the *Customs Act*. But the Collector, by using the powers contained in secs. 42 and 216 for the purpose of defeating the operation of sec. 167, is in truth refusing or neglecting to perform his main function under the Act, namely, examining the entry and ascertaining and claiming the duty payable. It is an abuse of those valuable and even drastic powers, and cannot be supported. Further, the security required by the Collector finds no sanction in sec. 42, or any other section of the *Customs Act*. The form of security adopted forfeits the importer's money or cash deposit unless the Collector is satisfied within a limited time that goods have been correctly described and valued in the entry, and still leaves the duty of customs payable. Security certainly may be required for the protection of the revenue, but that does not warrant any forfeiture of the importer's money, or any penalty upon him. It is a new form of exaction, and would require explicit statutory authority. No such authority is found in the *Customs Act*, or elsewhere.

The rule nisi must be absolute for a mandamus to the Collector. But its form requires attention. The directions sought by the rule are inadmissible. All the Court can do is to direct the Collector to perform his duty according to law; the Court cannot perform his duty. Consequently the mandamus should go to consider and examine the entry of the goods *ex the Melbourne Maru* which is in contest, and to ascertain and claim the duty payable in respect of such goods.

The importation by the *Atsuta Maru* above referred to stands in a different position. These goods have passed from the control of the customs and the security already mentioned has been taken. It is a security not warranted by the Act. No public duty is cast upon the Collector in respect of this security either by reason of the *Customs Act* or by the fact that the security has been given. The Court cannot give the directions sought by the rule nisi as to this

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importation, or similar importations. Mandamus is not an appropriate remedy, whatever other remedy may be open to the importers.

Order nisi absolute with costs for a writ of mandamus commanding the Collector to determine the value for duty of the seven cases of goods imported by the prosecutors on 1st March 1935 in the ship Melbourne Maru and to demand the duty therefor and to accept payment of such duty under protest pursuant to sec. 167 of the Customs Act 1901-1930, if payment of any part thereof is so tendered, and to pass an entry in respect of the goods accordingly. Respondent to be given thirty days within which to comply with the order with liberty to make application to a single Justice in Chambers for directions in case of difficulty in applying the judgment to any particular case.

Solicitors for the prosecutors, *Upton & Ettelson*.

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.