1951 *Present :* **Gratiaen J.**

WIJEYESEKERA & CO., LTD., Petitioner, *and* THE PRINCIPAL COLLECTOR OF CUSTOMS, Respondent.

S. C. 145—Application for a Writ of Mandamus.

Mandamus—*Refusal to perform public duty—May be implied as well as express—Customs Ordinance (Cap. 185), s. 59.*

Mandamus would lie where a public officer, by his failure to reply to letters, gives the impression, by his continued silence, of refusal to discharge a statutory duty. " There may be a refusal by continued silence as well as by words."

APPLICATION for a writ of *mandamus* on the Principal Collector of Customs, Colombo.

The petitioner was a Company carrying on business in Colombo as an exporter of coconut oil and other commodities. In regard to a consignment of oil in October, 1950, they were compelled by the Customs authorities to submite a bill of entry containing particulars which were known to be false, in contravention of the provisions of section 59 of the Customs Ordinance. On November 20, 1950, and on three other subsequent dates, they wrote to the respondent placing on record their protest against the procedure adopted and asking whether such irregular procedure would be insisted on in respect of future shipments. To none of these letters was a reply received. Thereupon, the Company made the present application for the issue of a writ of *mandamus* directing the respondent, *inter alia*, to permit the Company to export 200 tons of coconut oil by a certain ship and to pass the same for shipment without imposing the illegal requirements which had been demanded on the earlier occasion.

H. V. Perera, K.C., with *G. E. Chitty* and *G. T. Samarawickreme*, for the petitioner.

Walter Jayawardene, Crown Counsel, for the respondent.

Cur. adv. vult.

June 22nd, 1951. GRATIAEN J.—

The petitioner (to whom I shall hereafter refer as " the Company ") is a corporation with limited liability carrying on business in Colombo as an exporter of coconut oil and other commodities. The respondent is the Principal Collector of Customs vested with statutory powers and charged with statutory duties under the Customs Ordinance.

The Company has secured freight for the export of 250 tons of coconut oil by the s.s. " President Jefferson " which was scheduled to sail from the Port of Colombo on 20th October, 1950, and the Company complains that, despite their protests, they were compelled by the Customs authorities who passed the consignment for shipment to acquiesce in a procedure which contravened the law.

It will be convenient if at this stage I describe the correct procedure which should have been followed in regard to this consignment of coconut oil. Section 59 of the Ordinance is normally applicable, and requires an exporter to deliver to the Customs authorities a bill of entry setting out various particulars including " an accurate specification of the *quantity, quality and value* of the goods ". He must also " pay the duties and dues which may be payable *on the goods mentioned in such entry* ". Upon such payment the bill of entry is countersigned by the Collector and the goods are passed for shipment. An alternative procedure is apparently available to an exporter if the goods which require to be shipped are of such description that it is difficult, for technical reasons, to ensure that the quantity actually shipped will correspond precisely with the quantity intended to be shipped. The respondent states that coconut oil is such a commodity, because it is pumped into a vessel from storage tanks controlled by the Port authorities, and the equipment available does not guarantee perfect accuracy. In such cases the exporter may, if he so desires, resort to an alternative procedure in terms of certain statutory rules passed under seection 103 of the Ordinance. In that event, pending ascertainment of the exact quantity pumped into the vessel, he may deposit a sum of money which the Customs Authorities assess as more than sufficient to cover the duty payable on the consignment. Thereafter, the true quantity shipped is measured, and a correct bill of entry prepared and signed. The exporter is entitled under this procedure to recover the excess duty deposited in terms of the rule together with interest thereon.

It is apparent that these alternative procedures—i.e., under section 59 or under the rules passed under section 103—are both specially designed to ensure that the bill of entry signed by the exporter and countersigned by the Customs official will always contain accurate particulars of the quantity and value of the consignment. Indeed, it is on the basis of these particulars that export duty and other charges must be levied. The procedure actually insisted upon by the Customs authorities in regard to the consignment of 20th October, 1950, purported, however, to combine the mutually exclusive procedures laid down by section 59 and the relevant rule. The Company was required to deposit, in terms of the rule, a sum which was 25 per cent. in excess of the estimated duty. At the same time the Company was called upon before the actual quantity shipped was estimated to prepare and sign in advance a bill of entry on the assumption that the quantity passed for shipment would exceed by 25 per cent. the quantity of the intended cargo. This document was signed under protest, and the Company complains that they were faced with the alternative of either signing a false document or of cancelling the shipment and exposing themselves to a substantial claim for damages from their purchasers. They selected what they regarded as the less invidious choice.

I understood learned Crown Counsel to state that the Customs authorities now admit that the procedure resorted to by them in regard to the consignment of coconut oil in the s.s. " President Jefferson " cannot be supported. Quite independently of this admission, I am satisfied that it is indefensible. There is no provision in the Ordinance which sanctions a demand that an exporter of goods should submit a bill of entry containing

particulars which are known to be false. The actual quantity of oil pumped into the vessel was ascertained to be 247,252 tons. The bill of entry obtained under the circumstances which I have described purported to state that the quantity shipped was 312.5 tons. The excess duty deposited has yet not been refunded for reasons which I am not called upon to examine in connection with the present application.

The Company states that it now became concerned to obtain an undertaking from the respondent that such irregularities would not be repeated in regard to their future shipments. On 20th November, 1950, they wrote to him placing on record their protest against the procedure adopted on the earlier occasion. *No reply was received to this letter.* On 26th January, 1951, the Company wrote again and asked that the respondent's position should be clarified. This letter refers specifically to the respondent's previous " order " that an incorrect bill of entry should be signed, and invites him " to be good enough *even at this stage* to inform us under what provisions of the Ordinance or otherwise you made such an order in that instance *and also whether such an order would apply in respect of future shipments* ". This was clearly a legitimate request for information which any exporter was entitled to demand. *Nevertheless the letter was ignored.* On 7th February, 1951, the Company wrote once more, and the letter concludes as follows:—

> " Unless we have a satisfactory reply from you on or before the 10th instant we shall be compelled to refer this matter to our lawyers and make application to the Supreme Court in order to compel you to carry out your statutory duties laid down in the Customs Ordinance, so that we might not again be caught up in the invidious position of having to pay you extra money on account of Duty and Dues on future shipments without sufficient explanation on your part for making such levies which to our mind are unlawful.
>
> Kindly consider this as the final opportunity given to you in the matter."

It is surprising, but it is nevertheless true, that *this letter was also ignored by the public officer to whom it was addressed.* I do not see how his attitude can have given the Company any other impression than that he was not disposed, in regard to its future shipments, to reconsider his previous decision to insist upon a procedure which is now admitted to be contrary to law. Notwithstanding these rebuffs, the Company has not yet reached the final stages of exasperation. It had now secured freight for a shipment of 200 tons of coconut oil to a foreign buyers per s.s. "President Buchanan " which was expected to sail from the Port of Colombo in May, 1951, and it was therefore of practical importance to know how the Customs authorities would deal with this intended shipment. A registered letter couched in polite but uncompromising language was accordingly forwarded by express post to the respondent asking him once again to clarify his position and, *inter alia*, to state " (i) whether the practice you put into operation in the case of our shipment per s.s. ' President Jefferson ' on 20th October, 1950, will apply and . . . . . (2) whether you will also compel us to submit to you a bill of entry of copies thereof setting out therein a quantity 25% in excess of the actual

quantity . . . . as a condition precedent to passing our goods for shipment ". A reply on or before 28th February was requested, *but no such reply was sent. Indeed, the letter was not even acknowledged.*

In this state of things the Company applied to this Court on 19th March, 1951 (by which time the respondent had not yet informed them of his intentions in regard to the proposed shipment), for the issue of a Mandate in the nature of a writ of *mandamus* directing the respondent, *inter alia,* " to permit the Company to export the said consignment of 200 tons of coconut oil by the s.s. " President Buchanan " and to pass the same for shipment on the Company making payment of the correct Duty and other Dues in respect of the same and on its complying with the formalities imposed on it by law ". The basis of the application was that, having received no reply of any kind to its requests for information as to the respondents intentions the Company apprehended that the respondent would not pass the consignment for shipment except upon compliance with the illegal requirements which had been demanded on the earlier occasion. A rule *nisi* was issued by the Court on 20th February, 1951.

In the meantime, and before the application could be finally disposed of, the respondent condescended at long last to write to the Company on 31st March, 1951, stating in reply to its letter of 23rd February, that it would " be permitted to make the shipment referred to provided an entry is passed *in terms of section 59 of the Customs Ordinance* ". This very belated assurance can only be construed, in the context in which the letter was written, as an undertaking that the Company would not be called upon to enter up in a bill of lading any quantity of oil in excess of the true quantity. The Company was satisfied with this undertaking, and, when the application came up for disposal before my brother de Silva on 18th April, 1951, learned Counsel appearing for the Company stated that it was no longer necessary to ask that the rule should be made absolute. Each party, however, insisted upon an order for costs, in his favour, and it is for an adjudication on this outstanding issue that the matter came up for my adjudication on 14th June, 1951.

The Company's right to an order for costs against the respondent depends on whether, at the time when these proceedings were instituted, good grounds existed to justify the application for a writ. Admittedly, the respondent is charged with a public duty under section 59 of the Customs Ordinance to accept in proper form a bill of entry tendered by an exporter and containing true particulars as to the quantity, value, &c., of the intended consignment. It necessarily follows that to insist upon the bill of entry being incorrectly filled up in such a manner that, upon the face of the document, the exporter would be liable to pay a heavier export duty than was justly due, would amount to a refusal to perform a public duty. In that event, a *mandamus* would clearly lie.

Learned Crown Counsel has submitted that, upon the facts, the respondent could not be held to have categorically refused to comply with the provisions of section 59 of the Ordinance at the point of time when the petitioner initiated these proceedings, and that the application for a *mandamus* was therefore premature. I understood the argument to go to the extent of submitting that the petitioner should have actually tendered a correct bill of entry, together with the export duty justly due

by him, in respect of the particular consignment intended for shipment and that no *mandamus* would lie unless and until the respondent had refused to countersign the particular document tendered to him. I am not prepared to accept this proposition without some qualification. If a public officer, having previously purported to discharge his public duty in a manner which contravened the law, makes it clear that he will act in the same unlawful manner on a future occasion which is imminent, I do not see what purpose would be served by going through the idle formality of tendering to him, in proper form, a document which is certain to be rejected. " It is not indeed necessary that the word ' refuse ' or any equivalent to it, should be used ; but there should be enough to show that the party withholds compliance and distinctly determines not to do what is required ". *The King v. Brennock and Abergavenny Canal Navigation* [1]. Lord Denham there pointed out that if, in effect, a party said to a public officer, " I desire a direct answer, and your not giving it will be considered a refusal ", the public officer may legitimately be regarded as having refused to do his duty if he withholds a direct answer to the question. In the present case the respondent's failure even to acknowledge at the proper time a series of letters which asked for information as to his future attitude speaks for itself. It is legitimate, I think, to apply, by analogy, the language which is appropriate to ordinary contracts in which the necessity of a formal tender may be regarded as waived. *In re the Norway* [2]. " An announcement, expressly or by implication, that a tender in proper form would be refused constitutes a constructive waiver of any tender ". Nor is a tender necessary where the " creditor " refuses (or may reasonably be understood to have refused) to perform his part of the obligation " even where the repudiation takes place before the time for performance has arrived ". *Heckstar v. De La Tour* [3].

The respondent now explains that his failure to reply in time to the Company's final letter of 23rd February, 1951, was because he decided on the following day to consult the Law Officers of the Crown as to the scope of his duties under the Ordinance. No excuse of any kind has been offered for ignoring the earlier letters. I appreciate the respondent's action in obtaining proper legal advice *even at this late stage*, but I entirely fail to understand why, in reply to a letter which demanded a disclosure of his intentions before a specified date, he did not regard it as necessary to inform the Company that the Attorney-General's advice was now being obtained, and that his intentions would be communicated *in good time before the vessel was due to sail*. Having failed to take this obvious step, which would have been both courteous and business-like, he cannot complain if his persistent silence was construed as a virtual refusal to perform his statutory duties in the proper manner. I trust that it will never be suggested that public officers need not observe the same high standard which is expected from ordinary citizens with regard to the duty to attend promptly to official or business correspondence—*Vide* the remarks of Macdonell C.J. *The Times of Ceylon v. Attorney General* [4].

[1] *3 Ad. and El. 217 (= 111 E. R. 295).*
[2] *2 El. and B 678 (= 118 E. R. 922).*
[3] *3 Moo. P. C. 245 (= 16 E. R. 92).*
[4] *38 N. L. R. at page 446.*

The present case bears a strong resemblance to *The Queen v. Commissioners of the Navigation of the Thames and Isis* [1]. The petitioner had called upon the respondents to hold a certain inquiry in accordance with their statutory duties. The respondents did not comply immediately with this request because they had first decided to obtain legal opinion on certain matters, but this decision was not communicated to the petitioner who was led by their conduct to believe that they had refused to perform their duty. It was held that an application for a *mandamus* against the respondents was justified in the circumstances of the case. Lord Littledale said " there may be a refusal by continued silence as well as by words ". Patterson J. similarly observed " the petitioner was entitled to some answer . . . . and no sensible man could treat this as otherwise than as a refusal ". Upon an examination of the one-sided correspondence filed of record in these proceedings, I am satisfied that the Company's application for a writ of *mandamus* was, at the time when it was made, entirely justified. The rule need not be made absolute because of the respondent's subsequent undertaking with which the Company is satisfied. The respondent must however pay the costs incurred by the Company in these proceedings.

I have now disposed of the only question which calls for my adjudication. There have been much recrimination and counter-recrimination in regard to matters which do not affect the present issue. If all or any of these allegations be true, they will no doubt be investigated in other proceedings and upon proper material.

Petitioner declared entitled to costs of proceedings.