[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . PLAINTIFF;

AND

TARRANT AND OTHERS . . . . DEFENDANTS.

H. C. OF A. 1912.

MELBOURNE, *Sept.* 16, 17, 18, 20.

Isaacs J.

Customs Prosecution—Penalties—Facts affecting Amount—Customs Agent—Powers of—Customs Act 1901 (*No.* 6 *of* 1901), *ss.* 180, 234 (*d*), 241.

In a Customs prosecution under secs. 234 (*d*) and 241 of the *Customs Act* 1901 where an intent to defraud the revenue was admitted, the offences were not isolated acts and the general conduct of the defendants in relation to the passing of Customs entries and the clearing of goods was reprehensible (although in conformity with common practice), the maximum penalties prescribed by the Act were imposed.

Semble, sec. 180 of the *Customs Act* 1901 does not allow an agent to state matters as facts about which the agent personally knows nothing.

HEARING OF ACTION.

This was an action by the Crown for penalties for offences under the *Customs Act* 1901.

The statement of claim set out (*inter alia*) the following facts:—

The defendants, Harley Tarrant, William Howard Horatio Lewis and William Stuart Ross, were importers of motor-cars and accessories and the owners of the goods in respect of which the offences were committed, and carried on business in Melbourne under the firm name of Tarrant Motor Company.

The defendants by their agent on the 26th August 1908 made a Customs entry with respect to certain motor tyres and a motor-car body, in which the country of origin of the motor tyres was

wrongly stated, and the rate of duty on the motor tyres, the value for duty of and the duty payable on the motor tyres and motor-car body, were understated. The defendants made the false entry with intent to defraud the revenue.

The defendants by their agent on the 18th February 1910 made a Customs entry with respect to certain tyres, in which the value for duty of and the duty payable on the tyres were understated. The defendants made the false entry with intent to defraud the revenue.

The plaintiff claimed a declaration that the defendants had been guilty of the offences set out, and an order that the defendants should pay a penalty as to each offence of six times the value of the goods in respect of which the offence had been committed or two hundred pounds whichever should be the higher or such other penalty as to the Court might seem proper.

The defendants in their defence admitted the facts set out in the statement of claim, and that the plaintiff was entitled to a declaration that the defendants had been guilty of the offences alleged and to an order that the defendants should pay such penalties as to the Court should seem just.

The facts agreed by the plaintiff and the defendants to be placed before the Court and the further facts given in evidence for the defendants at the hearing of the action sufficiently appear in the judgment.

Mann, for the plaintiff.

Irvine K.C. and *Holroyd* for the defendants.

Cur. adv. vult.

Sept. 20.

ISAACS J. read the following judgment:—

This is a Customs prosecution in which the defendants, Harley Tarrant, William Howard Horatio Lewis and William Stuart Ross, are sued for the recovery of pecuniary penalties in respect of two offences of making false Customs entries relating to imported goods, such offences being committed with intent to defraud the revenue. The defendants by their defence admit the

H. C. OF A. 1912.

THE KING v. TARRANT.

offences, and also that they had the intent to defraud the revenue. They admit that the plaintiff is entitled to an order for such penalties as to the Court seems just.

I have therefore to determine what amount of penalties, within the limits provided by law, is just in the circumstances. The maximum, as agreed by both sides, would be as follows: For the first offence apart from fraud, £132 16s. 6d., being three times the value of the goods, which was £44 5s. 6d., and for the second offence, apart from fraud, £100. As fraud is admitted in respect of both, the ultimate maximum is £265 13s. for the first offence and £200 for the second.

The Crown presses for the full maximum on the ground that besides the admitted fraudulent intent in respect of the two offences actually charged the evidence discloses further frauds, partly shown by a former statement of defence now used merely as evidence liable to rebuttal, and partly shown by a written statement of facts signed by authority of the defendants and agreed by them to be admitted in evidence. And the Crown says the general manner of the conduct of business by the defendants in relation to clearing goods at the Customs of which the selected charges are said to be examples was so reprehensible as to merit the highest penalty for each admitted offence.

The defendants urge that a much lighter penalty ought to be imposed, notwithstanding the admitted intent, because, as it is contended, the former further admission was really not correct, being made to avoid heavy expense, and to enable one of the partners, Tarrant, to preserve his journey abroad free from the pressure of an impending contest, and because, as it is further contended, the conduct of the defendants' business was not fraudulent, or even negligent, but quite in accord with the usual and accepted system of clearing importations, and the total amount of duty underpaid in the two instances sued for did not exceed £18 or £19. It is said to be a trifling matter.

The admissions of fraudulent intent made by all three defendants in the former defence of 8th November 1911 have been controverted by the defendants. Two of the defendants, Lewis and Ross, some of their employés, and some employés of Mullaly & Byrne, customs agents, have been called.

I do not think anything would be gained by minutely stating my impressions of each of the instances dealt with or other details of the testimony, because the result mainly depends on the broad impression—either that urged by the Crown or that contended for by the defendants—of the general behaviour, so to speak, of the defendants with respect to passing entries at the Customs.

The result, so far as concerns the admissions of fraudulent intent contained in the earlier defence, is that I accept those statements as true, and as not displaced by any of the other evidence adduced.

The absent defendant, Tarrant, is the senior member of the firm, he specially had a knowledge of values, and apparently an intimate acquaintance with the facts materially relating to the accuracy of the entries. He was for some considerable time, and down to about the time his own actions were challenged, an official valuer for the Customs, and after that he was employed —apparently by other importers, certainly by some one—as an expert for Customs purposes on values of motor goods. It is unfortunate that he is absent, but his absence leaves his earlier admission of intent unqualified by any personal explanation, and the want of his testimony, if there were nothing else against the defendants, would leave the rest of their case with an obvious gap of an important nature.

There are other circumstances, however, which influence me against adopting the defendants' view. I find it very hard to believe that men conducting a business in which £19,000 was paid for Customs duties in a period of four years, which included the events in question, would prefer to place on public record, and on more than one occasion, an admission of fraudulent intent, rather than defend their honor and reputation, knowing, too, as they say, that they were innocent, and therefore would succeed. It is always difficult to sheet home intent of that nature; and, on the whole, after weighing the evidence and what was said by the learned counsel on this point, I conclude that the admissions of November 1911 were well founded. They cover an extended period. The instances so admitted are dated 9th April 1908, 19th April 1909, 29th October 1909, 18th February 1910 (which is the

H. C. OF A. 1912.

THE KING v. TARRANT.

second one charged in the present claim) and 19th October 1910, the day before the Customs took action against the defendants.

Before dealing with other instances of alleged improprieties, it is desirable to state the methods by which the defendants' goods were cleared at the Customs. This turns out to be, from a public standpoint, by far the most important feature of the case, because of the number and magnitude of the operations affected by substantially the same method, and the manner in which the general interests of the community are thereby imperilled. The practice was that when the goods arrived the defendants' accountant took up from the bank the documents consisting of bills of lading, policies of insurance, drafts, and invoices. He took them to Mullaly & Byrne, who are customs and clearing agents. The accountant instructed that firm to clear the goods and deliver them to the defendants' firm. The accountant described himself, so far as this task was concerned, as a mere machine, having no knowledge of where the goods came from, and without any instructions from his principals, or indeed any material knowledge.

To Mullaly & Byrne, then, was entrusted in general the duty of getting the goods out of the control of the Customs, and delivered over to the defendants. For this purpose that firm, who act in a similar manner for hundreds of firms in the year, and in respect of all classes of merchandise, have a special department, the inward shipment department, of which one Perkins is the head. Under him is one Phillips. Byrne, senior, is a licensed customs agent, and both Perkins and Phillips are also licensed customs agents, as between themselves and Byrne, regarding themselves as sub-agents, and so styling themselves in the declarations; but, of course, when acting in passing entries, they are legally the agents of the importer, a position here admitted. Perkins, as a rule, received the documents from the defendants' accountant, and from the invoice obtained—apart from rare and exceptional answers to special enquiries—the only information upon which the Customs entries were framed. Perkins examined the invoices, determined under which heading of the tariff each item came, marked down in pencil the rate of duty, or the word "free"—as the case might be—and then handed the document to an assistant to make out a statement classifying the articles and

prepare an entry. Phillips, then, again taking the invoice, checked the entry and proceeded to get it passed. For this purpose he filled up the necessary declaration which is printed on the back of the entry and made it in the presence of a Customs collector. This declaration is the real and fundamental guarantee upon which the Customs primarily act. A document presented as an invoice may be a sham, it may be teeming with inaccuracies, the genuine invoice may be suppressed. Even if a genuine invoice, the values may be wrongly stated, by design or error. Consequently a declaration of the genuineness of the document presented as an invoice and of the true value of the goods is indispensable to afford some assurance, at all events to the Customs, that the law is being complied with.

But what happened in the case of the defendants' goods? In other words, what has happened and apparently constantly happens in the case of hundreds of firms for whom Mullaly & Byrne act in the course of the year? Phillips, who made the majority of the declarations here and through whose hands, as he says, a very large number of matters pass, had no personal knowledge of the value of the goods, and took no steps to ascertain their value. He simply accepted the invoices as correct and without taking any steps to see whether they were genuine or not. So far as he knows no such steps were taken by his firm, and clearly none were. He says it is part of his regular duty to make the declarations he made in the defendants' case, as in all the hundreds of firms his firm acts for. With him it is simply a matter of routine. He told me quite frankly he did not know whether the invoice was the genuine invoice, nor did he know anything about the market value of the goods except from the invoice. And yet, in this declaration, he declared as the "sub-agent duly authorized by the defendants, that the invoice was the genuine invoice, and the only one received or expected to be received, that the value of the goods was to the best of his belief the fair market value of the goods at the time of shipment in the principal markets of the country whence they were exported"; then (paragraph 4) that the invoice price was the usual and ordinary price paid for goods of the same quality at the time of shipment in the country whence they were exported

H. C. OF A. 1912.

THE KING v. TARRANT.

without any deduction whatever other than such as would be allowed in the ordinary course to any purchaser thereof, and (by another paragraph) that the particulars in the invoice were true in every respect.

He admitted to me that he knew nothing about paragraph 4 of his declaration except what he gathered from the invoice. Perkins his superior officer, who also at times makes declarations, as in the case of the *Whakarua*, likewise disclaimed any personal knowledge of the value of the goods; he stated he trusted his principals, meaning the defendants. He, like Phillips, depended solely on the invoice. He stated that the defendants' accountant stood by his side and saw him mark the rate of duty, and that in one instance—the *Miltiades*—he must have said something to indicate that the tyres were German. But as Paul, the accountant, denies all knowledge of values, &c., and as the two defendants who were called and Byrne Junior denied any specific instructions with respect to the goods, the matter stands thus: The importers sent an employé, who disclaims all knowledge of the matters to be declared, to get the documents and hand them for clearing purposes, including the making of a declaration as to the genuineness of the invoices and the accuracy of values, to a firm of agents having no specific instructions and no knowledge of any of those matters, who in turn deputed an employé entirely ignorant of the facts to make the declaration as if he were well acquainted with the matters declared. Obviously such a declaration is a solemn farce. In the result, in several instances there has been underpayment of duty directly affecting the revenue, the defendants paying about £280 as underpaid duty though they now contest their real liability for that amount. But besides that, there has been a most material defeat of Parliament's expressed intention as to an important feature of its Imperial policy. By the Customs Tariff 1908 various rates of preference are given to the produce of the United Kingdom. This preference in the events that have happened has been conferred also upon goods of German manufacture on the strength of the declaration of the Customs agent, who, in the absence of information to the contrary, assumed that an indorsement on certain invoices that the goods (Continental Tyres) were of

British origin was true. It was in fact false, and the English Company whose employé placed it there says it was a clerical error, and was obviously wrong. That statement as to its being a clerical and obvious error may be true or not. If true it shows the necessity for some one acquainted with the trade to make the declaration, but at all events Phillips says he assumed the declaration of origin was correct while the defendants say they did not know of the erroneous entry. Between the two I am invited to say no blame attaches to anybody. Learned counsel for the defendants argued that as the course of procedure was the one constantly followed no blame could at any rate attach to the defendants even for negligence. I do not agree with him. If a thousand men do wrong that does not justify any one of them. The more common a dangerous practice, the more sharply it should be stopped. The hurry of business and the facilities afforded by the Customs to entrust to agents the necessary work of making entries does not connote the employment of persons to make essential and fundamental statements as to matters of which they have not and cannot possibly have any knowledge whatever. Neither those who employ persons to make declarations in those circumstances, nor the persons who actually make them can claim exemption from severe reprehension. It can never guard against honest error and it opens the door wide to fraud where that is desired. In any case the declaration is worse than useless because while it affects to protect the Customs it throws them off their guard. It was argued that sec. 180 of the *Customs Act* 1901 allows a licensed Customs agent to do any act for an importer. But I do not understand it as including permission to state matters as facts about which the agent knows nothing, because in my view an absolute statement as to the genuineness of an invoice and the non-receipt or expectation of any other invoice imports an acquaintance with the importer's business, and such a statement as to value and market price and trade allowances imports a knowledge of the trade, and as specially affecting those goods. If it does include such permission, then the Customs Department might well consider how far the section should be amended—or how far in the future agents who make improper declarations should according to the circum-

H. C. OF A. 1912.

THE KING v. TARRANT.

stances continue to be licensed at all, or how far the security they give for their "faithful and incorrupt conduct" should be enforced, or whether they should be otherwise personally made responsible, or how far additional proof should in such cases be required of the importer, as for instance, under sec. 216. I was also referred by the learned counsel for defendants to sec. 183. That tells very much against the defendants. It provides that any declaration authorized by the Act, which here includes the regulations, made by the agent of any person, "shall be held to have been made with the knowledge and consent of such person, so that in any prosecution in respect of any declaration made by such agent, such person shall be liable only to the pecuniary punishment provided by any Customs Act, as if such declaration had been made by himself."

As the defendants have largely relied on the circumstances that they were personally ignorant of the contents of Phillips's declaration, this section is most material, and I will read with all the approval at my command a note by Dr. *Wollaston* appended to that section, in his book on *Customs Law*, at p. 124:— "The liability thrown upon the principal by this section is, although much objected to in some quarters, an eminently reasonable one. Were it not for some such provision the Customs would be perfectly helpless in a majority of instances in preventing evasions of the revenue. Men of straw would be put forth as agents, and principals could plead their non-liability, leaving the Department to deal with the agent only, who might be a mere youth acting under compulsion, though willing to take the whole blame." Phillips, I may add, is only 26 now, and has been making declarations since he was 20.

It is proper to say something in particular as to the instances dealt with in the written statement of facts. With regard to the Continental tyres entered as produce of the United Kingdom, I conclude on the whole that they were so entered with intent to defraud the revenue. Those tyres are of German manufacture, and in the case of the *Miltiades* shipment, the entry being dated 30th April 1908, they were so stated and paid for at 5 per cent., the then duty of such tyres on one car. In all succeeding instances, the first being 26th June 1908, the *Marathon*, the same

make of tyres were entered as British ; the defendants' accountant on 12th August 1908, the *Commonwealth* shipment, marking on one of the invoices " 20 per cent.," that being then the proper rate for British made tyres, as against 25 per cent. for tyres of foreign origin. On the whole, I am not satisfied with the explanations and suggestions of the defendants on this point, and having regard to the whole circumstances, including the placing before Mullaly & Byrne the invoices with the incorrect declaration of origin on the back, I am of opinion there was an intention to defraud. Whether the false declaration of origin on the back of the invoice was the result of arrangement or whether, as stated in the letter of the Rover Company of 28th August 1911, the words " Continental Tyres " were so obviously indicative of a foreign make, I do not stop to inquire. But whichever of those alternatives be the correct one, I cannot believe the defendants, with their expert knowledge, their acquaintance with their own transactions, and the necessary knowledge of the elements of cost to them in disposing of their goods, would be or would long remain ignorant of the fact that German tyres had been repeatedly passed through the Customs as British.

As to some of the other instances, such as not entering spare parts at all or not including inland carriage, they are small in themselves, but there has certainly been very gross negligence and disregard of what the law requires. But I am not prepared to find a fraudulent intent in respect of these matters.

As to the other instances, such as Mercedes car and the Argyll cases, there was certainly a fair ground for an honest belief, and saying nothing about the accuracy of values I find no fraud or other fault whatever in these matters.

The law (sec. 229) declares that all goods in respect of which any entry which is false in any particular has been delivered shall be forfeited ; sec. 239 provides that all penalties are in addition to any forfeiture, and sec. 262 gives to the conviction of a person for any offence causing forfeiture the effect of a condemnation of the goods. The goods the subject of the two offences charged have long since passed into consumption ; and so the defendants have escaped this part of the consequence of

H. C. OF A. 1912.

THE KING v. TARRANT.

their offences. The goods were worth about £66, apart from any profit made.

On the whole, viewing the general conduct of the defendants in relation to the Customs as intensifying the necessity for a severe penalty, and having regard also to the fact that the offences are not isolated acts, but are, so to speak, of a typical business nature, I am of opinion justice would not be done if I were not to impose the maximum penalties. I accordingly convict the defendants of the offences charged, and impose penalties —£265 13s. for the first offence and £200 for the second.

The defendants must pay the costs of the action.

Judgment for plaintiff with costs.

Solicitor, for plaintiff, *Powers*, Crown Solicitor.
Solicitors, for defendants, *Hill & Talbot.*

Varied *A-G (Cth)* v *Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644

Cons *Yougarla* v *WA* (1999) 21 WAR 488

Appl *Yougarla* v *WA* (1999) 153 FLR 385

[HIGH COURT OF AUSTRALIA.]

THE COLONIAL SUGAR REFINING CO. LTD. AND OTHERS . . . . . } PLAINTIFFS;

AND

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH AND OTHERS. } DEFENDANTS.

H. C. of A. 1912.

MELBOURNE, *Sept.* 24, 25, 26, 27, 30; *Oct.* 4, 22.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Constitutional law—Powers of Commonwealth—Compulsory inquiry—Incidental power—Inquiry as to matters outside powers of Commonwealth Parliament—Royal Commission, powers of—Judicial power of Commonwealth—Granting of immunity in State Court—Royal Commissions Act 1902-1912 (*No.* 12 *of* 1902—*No.* 4 *of* 1912), *ss.* 6B, 6DD—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxix.)-128.

Practice — Action against Crown — Declaratory judgment — Injunction — Threatened illegal act.