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the awful possibility that an innocent man may suffer through legal process, the British Parliament in 1907 granted to the Courts the power, under carefully guarded provisions, to reopen convictions. This legislation has been copied in Victoria, as well as in other States. It is a power, however, to be exercised with the greatest care; and I certainly do not feel free to say that the discretion to refuse an appeal was in this case wrongly exercised. In my opinion, it was rightly exercised. The prisoner has had fair play and due process of law. The twelve jurors have unanimously found the accused guilty; the responsibility for the verdict rests on the jury; and if the Courts were to interfere they would be unwarrantably usurping the functions of the jury.

*Special leave to appeal refused.*

Solicitor for the applicant, *N. H. Sonenberg.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE KING AND THE MINISTER FOR } PLAINTIFFS;  
 CUSTOMS . . . . . }

AGAINST

AUSTRALASIAN FILMS LIMITED AND } DEFENDANTS.  
 ANOTHER . . . . . }

H. C. OF A. 1922.  
 SYDNEY,  
 Mar. 30;  
 April 6.  
 Knox C.J.

*Practice—High Court—Costs—Taxation—Judgment for plaintiff with costs—Finding against plaintiff as to part of claim—Costs incurred in respect of that part—Unnecessary costs—Supreme Court Rules of 18th November 1915 (N.S.W.), r. 42.*

Rule 42 of the *Rules of the Supreme Court* of 18th November 1915 (N.S.W.) provides that “The Court or Judge may, at the hearing of any cause or matter, . . . disallow the costs of any document, evidence or proceeding which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter . . . or may direct the taxing officer to consider such document, evidence or proceeding and to disallow the costs thereof, or of such



part thereof as he finds to be improper, unnecessary, vexatious, or to contain unnecessary matter, . . . and in such cases the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties; and in any case where such question has not been raised before and dealt with by the Court or Judge it shall be the duty of the taxing officer to consider the same . . . for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so, and the taxing officer shall make such order as may be required to effect the object of this rule."

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In an action instituted in the New South Wales Registry of the High Court to recover penalties for a large number of breaches of the *Customs Act* 1901-1910, the plaintiffs also alleged that the breaches had been committed with intent to defraud the revenue. At the trial all the breaches were found to have been committed, and some of them with the intent charged, but as to the majority of the offences it was specifically found that they had not been committed with that intent. Judgment was given for the plaintiffs with costs.

*Held*, that on taxation of the plaintiffs' costs the taxing officer, under the above rule, properly disallowed the costs incurred in attempting to prove an intent to defraud the revenue in respect of the breaches specifically found not to have been committed with such intent.

#### REVIEW of taxation.

An action was brought in the High Court in the New South Wales Registry by His Majesty the King and the Minister of State administering the Customs against Australasian Films Ltd. and Harry George Musgrove to recover penalties under secs. 234 and 241 of the *Customs Act* 1901-1910. Thirty offences were charged against the Company under sec. 234, and each of them was separately charged under sec. 241 to have been committed with intent to defraud the revenue. Twenty-four of the offences were alleged to have been committed in respect of claims for drawback on certain goods, and the other six in respect of the importation of certain arc lamps. Eight offences were charged against the defendant Musgrove under sec. 234. The action was heard by *Knox C.J.*, and at the trial it was admitted that the Company and Musgrove had committed all the offences charged under sec. 234. The learned Chief Justice stated a case for the Full Court (*The King v. Australasian Films Ltd.* (1) ); and in accordance with the opinion of the Full Court he found specifically that the thirty offences charged against the Company under sec. 234 had been committed, that the six offences

(1) (1921) 29 C.L.R., 195.



H. C. OF A. in respect of the importation of arc lamps had been committed with  
 1922. intent to defraud the revenue, and that the twenty-four offences in  
 THE KING respect of claims for drawback had not been committed with that  
 v. intent. He then gave judgment for the plaintiffs, imposing certain  
 AUSTRAL- penalties and directing the Company to pay the plaintiffs' taxed  
 ASIAN FILMS costs of the action, including the costs of the reference to the Full  
 LTD. Court.

When the bill of costs of the plaintiffs was brought in for taxation before the District Registrar for New South Wales, the plaintiffs claimed that they were entitled to all the costs they had incurred in the action as there had been no order of the Court depriving them of any of such costs. The defendant Company, on the other hand, contended that the plaintiffs were not entitled to the costs incurred in attempting to prove that the twenty-four offences in respect of drawback had been committed with intent to defraud the revenue. The District Registrar upheld the contention of the defendant Company and disallowed the particular claim. The plaintiffs then, in pursuance of the *Rules of the Supreme Court* of 18th November 1915 (N.S.W.), brought in objections to the taxation; the material one being that the said costs so disallowed were costs properly incurred in the action, were proper to be allowed, and were not incurred through over-caution, negligence or mistake. The District Registrar disallowed the objection. In his reasons for so doing he referred, in the first instance, to rule 42 of the *Rules of the Supreme Court* of 18th November 1915 (N.S.W.), under which a taxing officer is required to consider whether costs have been unnecessarily incurred although no order has been made directing him to make such inquiry, and to *Re Wormsley* (1); and stated that it therefore became necessary for him to consider whether the costs in question had been necessarily incurred. He pointed out that the costs which a successful litigant can recover from his opponent are such as will indemnify him for the expense he has properly and necessarily incurred in prosecuting a claim that he is entitled to make. He also referred to rule 50 and the following authorities: *Gray on Costs*, pp. 41-42; *Kearney v. Bryan* (2); *Reid, Hewitt & Co. v.*

(1) (1878) 39 L.T., 85.

(2) (1871) 10 S.C.R. (N.S.W.) (L.), 167.



*Joseph* (1); *Delisser v. Towne* (2); *Cocks v. Peachey* (3); *Anderson v. Chapman* (4); *Daniel v. Barry* (5), and *Reynolds v. Harris* (6); and expressed the opinion that those authorities established the proposition that the costs incurred by a successful litigant in attempting to prove some part of a claim or defence which the finding of the Court shows he has failed to prove, are not costs which have been necessarily incurred by him; and that this proposition was also supported by the fact that the litigant succeeds in the action although he fails to prove that part of his case. He then stated that he had acted upon that principle and had disallowed the costs incurred by the plaintiffs in unsuccessfully attempting to prove that the twenty-four offences had been committed by the Company with intent to defraud the revenue, as being costs unnecessarily incurred.

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—

The plaintiffs now applied, by summons before *Knox C.J.*, to review the taxation.

*Badham*, in support of the summons.

*H. E. Manning*, to oppose.

[During argument reference was made to *Howell v. Dering* (7); *Reid, Hewitt & Co. v. Joseph* (1).]

*Cur. adv. vult.*

*KNOX C.J.* dismissed the application.

April 6.

*Application dismissed with costs.*

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

Solicitors for the defendant Company, *Sly & Russell*.

B. L.

(1) (1918) A.C., 717.

(2) (1841) 1 Q.B., 333.

(3) (1828) 2 Man. & R., 420.

(4) (1839) 7 Dowl., 822.

(5) (1843) 4 Q.B., 59.

(6) (1857) 3 C.B. (N.S.), 297.

(7) (1915) 1 K.B., 54.