[HIGH COURT OF AUSTRALIA.]

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

AGAINST

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

H. C. OF A. 1921.

SYDNEY, *April* 11, 14.

KNOX C.J., GAVAN DUFFY AND RICH JJ.

*Customs Duties—Offence—Intent to defraud revenue—Corporation—Liability of corporation for acts of servant—Acts done by servants of corporation with intent—Customs Act* 1901-1910 (*No.* 6 *of* 1901—*No.* 36 *of* 1910), *secs.* 234, 241—*Acts Interpretation Act* 1901 (*No.* 2 *of* 1901), *secs.* 22, 24.

Sec. 234 of the *Customs Act* 1901-1910 provides that no person shall do certain acts, and imposes a penalty not exceeding £100 upon a person convicted of doing any one of them. Sec. 241 provides that "Any person may at the same time be charged with an offence against this Act and with an intent to defraud the revenue and if in addition to such offence he is convicted of such intent the maximum penalty shall be double that otherwise provided."

*Held*, that under sec. 241 a corporation may be convicted of doing an act prohibited by sec. 234 with intent to defraud the revenue where its servant or agent in the course of his employment has done the particular act charged and that servant or agent, or some superior servant or agent by whose direction the act is done, had an intent to defraud the revenue, but not where a servant or agent not concerned in the doing of the act alone had that intent.

*Mousell Brothers Ltd.* v. *London and North-Western Railway Co.*, (1917) 2 K.B., 836, applied.

*Stephens* v. *Abrahams*, 27 V.L.R., 753; 23 A.L.T., 233, approved.

QUESTIONS of law reserved.

An action in the High Court was brought by His Majesty the King and the Minister of State administering the Customs against Australasian Films Ltd. and Harry George Musgrove to recover penalties

H. C. OF A. 1921.

THE KING v. AUSTRAL-ASIAN FILMS LTD.

under secs. 234 and 241 of the *Customs Act* 1901-1910. The action was heard by *Knox* C.J., who, at the conclusion of the evidence, made certain findings of fact, which he stated in the following case, whereby he reserved the questions of law therein set out for the consideration of the Full Court :—

This is an action to recover penalties for certain alleged offences against the *Customs Act*. By the statement of claim the defendant Company was charged with sixty offences, which may be classified as follows :—In respect of drawback claimed on the export of four films, viz., Diamond from the Sky, Little Brother, A Square Deal and A Journey to Nowhere—six offences in respect of each film against the provisions of sec. 234 of the Act were charged, viz., (1) misleading an officer in a particular likely to affect the discharge of his duty (sub-sec. (*f*) ), (2) making in a document produced to an officer (a drawback debenture) an untrue statement (sub-sec. (*e*) ), (3) producing to an officer a document (a drawback debenture) containing an untrue statement (sub-sec. (*e*) ), (4) producing to an officer a statutory declaration by defendant Musgrove containing an untrue statement (sub-sec. (*e*) ), (5) misleading an officer by producing the drawback debenture and a statutory declaration mentioned above (sub-sec. (*f*) ), (6) obtaining a drawback which was not payable (sub-sec. (*b*) ). In respect of the importation of certain arc lamps by the s.s. *Aeon* and s.s. *Roscommon*—three offences in respect of each shipment against the provisions of sec. 234 of the Act were charged, viz., (1) making an entry which was false in certain particulars (sub-sec. (*d*) ), (2) making in a declaration produced to an officer a statement which was untrue in a certain particular (sub-sec. (*e*) ), (3) evading payment of duty which was payable (sub-sec. (*a*) ). The defendant Company was also charged separately with having committed each of the thirty offences specified above with intent to defraud the revenue (sec. 241).

The defendant Musgrove was charged with sixteen offences in all, as follows : In respect of drawback claimed on the export of the films mentioned above, with two offences in respect of each film against the provisions of sec. 234, viz., (1) making in a declaration a statement which was untrue (sub-sec. (*e*) ) and (2) misleading an officer in a particular likely to affect the discharge of his duty

(sub-sec. (*f*) ). This defendant was also charged separately with having committed each of the eight offences specified above with intent to defraud the revenue (sec. 241).

During the trial before me Dr. *Brissenden*, for the Crown, withdrew the charges made against Mr. Musgrove under sec. 241 (intent to defraud the revenue), and Mr. *Shand* admitted that both defendants had committed all the offences charged against them respectively under sec. 234. These admissions reduce the issues which I have to decide to the following :—(1) Does the evidence establish an intent on the part of the Company to defraud the revenue (*a*) in respect of the offences committed in connection with claims for drawback on export of films or any of such offences, (*b*) in respect of the offences committed in connection with the import of arc lamps by the *Aeon* and *Roscommon* or any of such offences ? (2) What penalties should be imposed on the defendants for the offences admitted or proved to have been committed by them respectively ?

Before dealing in detail with the evidence given in support of this charge on intent to defraud the revenue, it will be convenient to state the contention of counsel on either side with respect to the liability of a company charged with committing an offence against the Act with intent to defraud the revenue. Dr. *Brissenden* contended, while Mr. *Shand* denied, that a company could be convicted of an offence involving intent to defraud the revenue as an essential ingredient of the offence. On the assumption that a company could be so convicted Mr. *Shand* contended that intent to defraud the revenue could only be imputed to a company in respect of an act done by a duly authorized agent of the company if such an intent were proved to exist in that agent in the doing of that act and the directors of the company knew of its existence. Dr. *Brissenden* admitted that, if this proposition were correct, there was no evidence in this case on which intent to defraud could be imputed to the Company in connection with the claims for drawback, inasmuch as it was not suggested that the agents of the Company who did the acts in respect of which offences were charged did any of such acts with intent to defraud the revenue ; but he contended that as a company can have neither knowledge nor belief nor intention except such as may be imputed to it through the knowledge, belief or intention of

H. C. OF A. 1921. THE KING v. AUSTRAL-ASIAN FILMS LTD.

an agent, a company doing an act by the hand of an agent must have imputed to it the knowledge, belief and intention not merely of that agent but of all its agents. To put the matter in a concrete form, he contended that if the authorized customs clerk of a company in the course of his duty makes a statement which he honestly believes to be true, the company can be convicted of knowingly making a false statement if some other duly authorized officer of the company would, if he knew of the statement being made, know it to be false.

Drawback on Films Exported.—On this part of the case I find the relevant facts to be as follows:—The business carried on by the defendant Company included (*inter alia*) the importation, use and exportation of kinematograph films. The defendant Musgrove was, at all relevant times, the general manager of the defendant Company. In the course of carrying on its business the Company imported copies of the following films, viz., Diamond from the Sky, Little Brother, A Square Deal and A Journey to Nowhere. Some time after the importation of these films the Company at different times proposed to export one copy of each, and in connection with each copy so proposed to be exported the Company made a claim for drawback under Part IX. of the *Customs Act* 1901. The course of procedure in each case was as follows:—Notice of intention to pack the film for export having been given to the Customs Department on a particular form, an officer of the Department attended at the premises of the Company and inspected the film specified in the notice. Inspection of a film would not necessarily disclose whether it had been used or exhibited, and accordingly the Customs officer inquired from one T. E. Ferguson, a clerk employed by the Company, whether the film had been used or exhibited. In the case of the films other than Diamond from the Sky, it was Ferguson's duty to attend to all matters connected with claims for drawback on export of films, and in the case of all the films in question it was his duty to prepare all the necessary particulars and documents in support of the claims, and to afford to the Customs officers such information as they might require, the difference in the procedure in the case of Diamond from the Sky being that one C. R. Barton, the duly authorized customs agent of the Company, acted

as hereinafter set forth. On each occasion Ferguson told the Customs officer that the film or films under consideration had not been used or exhibited; and I find as a fact that on each occasion on which Ferguson made that statement he honestly believed it to be true, and had no intention of defrauding the revenue. In fact the statement was in each case untrue. On each occasion the Customs officer was shown the appropriate folio of a book of the Company known as the Film Release Book, from the entry in which it appeared that the film in respect of which the claim was made had never been "released." Both the Customs officer and Ferguson believed that the word "released" in such entries meant "exhibited" or "used." The Film Release Book was kept by one W. Johnston, a clerk in the employ of the Company, in the course of his duty. It was Johnston's duty to enter in this book (*inter alia*) the date of release of each film. In fact the copy of each of the films above mentioned upon which drawback was claimed had been exhibited in Australia. The errors and omissions in this book were probably caused by the slipshod and unbusinesslike method or want of method displayed in keeping the books and records of the Company; but, however this may be, there is no evidence that any entry or any error or omission in any entry relating to these films was made by any employee of the Company with intent to defraud the revenue. The Customs officer, being satisfied by inspection of the Film Release Book and by the information he received from Ferguson that the film had not been used or exhibited, signed the certificate at the foot of the form of notice of intention to pack, the films specified in the notice being packed and sealed in his presence. Documents in particular forms, one of which was called a "drawback debenture," were then lodged with the Customs Department, and these documents were, in each case, supported by a statutory declaration of the defendant Musgrove that the films mentioned in the drawback debenture had never been used or screened in Australia. In the case of Diamond from the Sky, one of the films now in question, the later steps in the matter were taken by C. R. Barton, as customs agent for the Company, and the declaration on the drawback debenture was made by one G. McKnight, his clerk, but in this case McKnight relied on information given to him by Ferguson. There

H. C. OF A. 1921.

THE KING v. AUSTRAL-ASIAN FILMS LTD.

is no evidence of any intention on the part of Barton or McKnight to defraud the revenue; and I am satisfied that McKnight honestly believed in the truth of the statements made by him, though the statement that the owners were entitled to the drawback was untrue. In the other cases the matter was carried through and the declaration on the debenture was made by Ferguson—a statutory declaration being made by Musgrove in each case; and I am satisfied, on the evidence, that both Ferguson and Musgrove honestly believed in the truth of the statements made by them respectively, and that neither of them had any intention of defrauding the revenue. In due course the Company received payment of the amount of drawback claimed in respect of each of the above-mentioned films. It is admitted that the Company was not entitled to any sum by way of drawback in any of these cases, all the films having been used and exhibited in Australia. Before making the statutory declaration above referred to, Musgrove was in each case informed by Ferguson that the films in respect of which the declaration was made had not been used in Australia, and accepted that information as sufficient to justify him in making the declaration, without making any further inquiry and without knowledge of the names of the films to which such declaration related. At all relevant times, at least one employee of the Company knew, from information received by him in the course of his duty, that the copy of each of these films on which drawback was claimed had been used and exhibited in Australia; but there is no evidence that any employee of the Company who had this knowledge knew at any relevant time that drawback was being claimed in respect of such copy or knew that any statement had been or was about to be made to the Customs Department that such copy had not been so used or exhibited, or that the Company was entitled to drawback thereon, nor is there any evidence that any employee of the Company knew at any relevant time that any untrue statement had been, was being or was about to be made to the Customs Department in connection with any application for drawback in respect of any of these films. The evidence establishes that inquiry by Musgrove, Ferguson or Johnston from the employee in the Sydney office of the Company who controlled and directed the distribution and exhibition of films would have disclosed the fact

that the copies in respect of which drawback was claimed had been used and exhibited in Australia. At all relevant times Musgrove believed that Ferguson and Johnston were competent to perform the duties assigned to them. At all relevant times both Musgrove and Ferguson believed that drawback could not properly be claimed on export of a copy of a film which had been exhibited in Australia. It is proved that on the occasions on which Ferguson asked Johnston for information about the films in question Johnston knew that the information was required for the purpose of making out a claim for drawback, and that drawback could not be properly claimed on films that had been screened in public; but I accept Johnston's evidence that on every occasion on which he told Ferguson that a film had not been released he believed that that film had not been exhibited in public. In giving information to Ferguson, Johnston in fact relied entirely on the entries in the Film Release Book.

I reserve for the consideration of a Full Court the question whether, on the facts found by me and stated above, the defendant Company can be found to have committed with intent to defraud the revenue the offences charged in respect of the claims for drawback on the export of the films above mentioned, or any of such offences.

Importation of Arc Lamps.—The charges against the Company relate to two shipments—one by the s.s. *Aeon*, which arrived in Sydney in the month of November 1916, and the other by the s.s. *Roscommon*, which arrived in Sydney in the month of March 1917. By virtue of the Customs Tariff, introduced by resolution, of 3rd December 1914, and the *Customs Tariff Validation Act* No. 6 of 1917, duty at the rate of 35 per cent. ad valorem was imposed on kinematographs not produced or manufactured in the United Kingdom, and duty at the rate of 10 per cent. ad valorem was imposed on arc lamps not so produced or manufactured. These duties were payable as from 3rd December 1914 and throughout the years 1916 and 1917. By notice dated 22nd February 1912 and published in the *Commonwealth Government Gazette* on 24th February 1912, the Minister for Customs, in pursuance of the powers conferred on him by the *Customs Tariff* 1908-1911, directed that "parts of any article, machine, or appliance shall, although specifically or generically provided for in the Tariff as parts, if imported with any

H. C. OF A. 1921. THE KING v. AUSTRAL-ASIAN FILMS LTD.

such article, machine, or appliance in a complete or substantially complete state, be classified under the Tariff item applicable to such article, machine or appliance. Articles, machines, and appliances shipped in an unassembled condition ready or practically ready for assembling shall be treated as though actually assembled."

The *Customs Tariff* of 1908-1911, and that of 1914 above referred to, contained the following provision, viz., "Whenever any goods are composed of two or more separate parts, any part though imported by itself shall, if so directed by the Minister, be dealt with under the item applicable to the complete goods." I find as a fact that in the case of both these shipments the arc lamps in respect of which the Company is charged with the offence (among others) of evading payment of duty which was payable (sec. 234 (*a*) of the *Customs Act* 1901-1910) were parts of complete kinematograph machines which had been purchased as complete machines by the Company under the circumstances hereinafter stated, and that such arc lamps were imported with such machines, the machines being shipped in an unassembled condition ready or practically ready for assembling. I find further that in the case of both shipments the arc lamps were shipped under a separate invoice and separately packed in order to obtain the benefit of the lower rate of duty on their value. The defendant Company, by its counsel, admitted during the trial that the offences charged under sec. 234 of the Act in respect of these arc lamps had been committed by the Company, and it was proved that duty had been paid on them at the rate of 10 per cent. instead of at the rate of 35 per cent. The only question in issue before me on this matter was whether the offences charged in respect of these importations or any of them were committed by the Company with intent to defraud the revenue. I find that the relevant facts in connection with this question, in addition to those stated above, are as follows :—

The business of the Company included (*inter alia*) the purchase in America and the importation to Australia of considerable quantities of kinematograph films and machinery for exhibiting such films, and the use and sale in Australia of such machinery and of parts thereof both as complete units and separately. For the purpose of

transacting so much of this portion of its business as fell to be transacted in America, including business connected with the purchase and shipment to Australia of kinematograph films and machines and spare parts, the Company established and at all relevant times maintained an office in New York, where the business of the Company was conducted by one Millard Johnson, whose position was described as that of "American representative" of the Company. In the month of July or August 1916 (the precise date was not fixed) one H. G. Harper, who had up to that time been employed in the office of the Company in Sydney as assistant to the sales manager, one G. F. Todd, was sent to the office of the Company in New York for the purpose of taking charge of that part of the business conducted in the New York office which related to machinery, but Millard Johnson continued after Harper's arrival in New York to occupy the position of American representative of the Company. Todd's duties as sales manager in the Sydney office were to order machinery, to dispose of as much of it as possible, and to supervise the branches in the other States in matters connected with the part of the business of the Company relating to machinery. Before Harper left for America Todd sent him to consult Mr. C. R. Barton, a licensed customs agent, carrying on an extensive business in Sydney, as to the headings under which machinery imported by the Company should be classified for Customs purposes, and particularly for the purpose of finding out what the duty was on kinematograph (or biograph) machines and arc lamps, Mr. Todd apparently holding the view that arc lamps were chargeable only with 10 per cent. ad valorem duty whether imported in the same ship as the machines or in another ship. On 11th July 1916 Todd caused to be written and sent to the New York office, enclosed in a letter from the defendant Musgrove to that office, a letter the material portion of which is as follows:—"As you know, the duty on machines is 35 per cent. while on arc lamps it is only 5 per cent., consequently we would like you to instruct that with future shipments the arc lamps be removed and sent out separately, and that they also be invoiced separately. It is advisable when and wherever possible, to send these out by a different steamer, as if there were six machines by the 'Simplex' people and six arc lamps, the Customs would then, we think, take

H. C. OF A. 1921.

THE KING v. AUSTRAL-ASIAN FILMS LTD.

them as part and parcel of the machines. It will be as well, however, to point out to the manufacturer why these are being sent separately, and that the arc lamps of course be ordered at the same time as the projectors, otherwise they would be getting back to their highly unsatisfactory tactics of only allowing 50 per cent. off the list prices for goods omitted from equipments and again debiting us at list price when they are despatched." It was not proved at what date this letter was received in New York, but it was proved that the course of post between Sydney and New York was about twenty-eight days from the departure of the mail steamer from Sydney. On 25th August 1916 Barton wrote to the secretary of the defendant Company a letter which, omitting formal parts, is in the following terms:—"As promised your Mr. Harper before he left for America, we have now drafted out for your information what is required *re* importing cinematograph machines in parts or else getting spares for complete machines. The position is:—If complete machines are imported at the one time they pay under item 320B of the Tariff at 25 per cent. United Kingdom and 35 per cent. Foreign. If, however, the various parts are imported, some by one vessel and some by another, as long as the quantities brought by the same vessel do not make up reasonably complete machines, they would pay under the separate heading as follows:—" [The separate headings and the rates of duty were then set out]. "Any other parts than the above would be classified according to the material they are made of or the individual Tariff heading, but they would of necessity be only in the minority. Please note it is no use having the various parts *invoiced* separately if they come forward by the same vessel; for if they make up a reasonably complete machine or machines, they will be charged under the rate applying to item 320B. Trusting the above may be of service to you, and at the same time pointing out this is supporting information already given you about eighteen months back, and assuring you of our attention at all times in your interests." The secretary was one Blakeney, who is now dead. Barton's letter was seen by Todd, and he enclosed a copy of it in a letter to Harper dated 13th September 1916. Harper was not called as a witness, and there is no evidence when he received this letter, but he was aware of the interpretation which Barton put on the Tariff

and had discussed it with Todd before he went to America. The material portion of Todd's letter to Harper of 13th September 1916 is as follows :—" Attached hereto please find copy of C. R. Barton's interpretation of the Tariff. It is the best we have been able to elicit, and evidently when the Tariff was framed, according to Barton, it was desired to make importers split up their shipments over a variety of steamers. However, it is on this basis that we are paying duty, and you will need to do the best under the circumstances. Simplex arc lamps and fitments are not independent of the machines inasmuch as we do not carry spare arc lamps, &c. It will be desirable to send them with the projectors until such time as our stocks are good, to obviate the risk of getting incomplete outfits." On 18th October 1916 Mr. Musgrove furnished Todd with the following extract from a letter which he had received from the New York office of the Company :—" *Re Simplex.*—I have ordered and there are ready for us 8 Simplex machines. According to your instructions, I have had the arc lamps packed in a separate case and instructed the Davies Turner Shipping Company to send these, together with two choppers from Hallberg out to Australia by a different steamer, and have invoices showing 8 arc lamps only charged on it. The 8 machines will follow by another steamer almost immediately, and are complete with 240 volt motor attachments. Owing to the great trouble in obtaining place from Frisco when goods are sent by ship freight, I have instructed Davies Turner to send these by direct steamer from New York to Sydney." On the evidence I find that the Simplex machines and arc lamps referred to in this letter were those shipped by s.s. *Aeon* which are the subject of the charges made in this action. I find further that the letter from New York from which this extract was taken was written by the said H. G. Harper, and was received by the defendant Musgrove on or before 18th October 1916.

On 19th September 1916 the Precision Machine Co. of New York, from whom the Simplex kinematograph machines were purchased by the defendant Company, furnished to the Company's New York office two invoices for the machinery which was subsequently shipped by the s.s. *Aeon*. One invoice was for 18 cases, containing all the parts of 8 Simplex machines except the arc lamps,

H. C. OF A. 1921. THE KING v. AUSTRAL-ASIAN FILMS LTD.

and the other was for one case of arc lamps. The *Aeon* sailed from New York on 7th October 1916. These invoices were forwarded by the defendant Company's New York office to Sydney, and came into the possession of C. R. Barton, who was authorized by the Company to act as its customs agent in connection with the importation of the goods shipped by the *Aeon* and *Roscommon*. On the evidence before me I find that these invoices were sent to Barton direct from New York, and that they reached his office on 8th November 1916.

On 12th October 1916 the said Millard Johnson wrote from New York and sent to the defendant Company at Sydney a letter the material portion of which is as follows :—"*Re Simplex.*—Having ordered 8 Simplex machines to make up the balance of your cabled instructions, wanting a further 12, I arranged with the Precision Machine Co. to ship 8 arc lamps in one case and give those to Davies Turner & Co. for shipment on the s.s. *Delhi*, but the goods were crowded out and left on the wharf, and were shipped against my wishes with the 8 machines on the s.s. *Aeon*, which left New York on 7th October as you will see from the dates of the shipping, these were delivered to Davies Turner & Co. in plenty of time to have left on 19th September, the advertised date of sailing of the *Delhi* and the *Aeon*, but both these steamers delayed their sailing until 7th October. It is on account of unforeseen delays on the wharf that it will make it almost impossible to depend on sending posters in hopes of getting cheaper freight. I am having separate bills of lading for the arc lamps and also for the machines, so it will be possible to pass the customs entry for the arc lamps first and a few days later for the machines." This portion of the letter was shown to Todd directly after it arrived in Sydney and before 27th November 1916. I find on the evidence before me that this letter was received by the Company in Sydney not later than 18th November 1916.

Both invoices having been received in Barton's office on 8th November 1916, the invoice for the arc lamps was produced to the Customs Department on 20th November 1916, some days before the arrival of the ship. This was done under the system known as "check to arrive," whereby invoices with entries could be lodged before the arrival of the ship, the entry being left undated and the declaration on

the entry not being made until after the arrival of the ship. Till that event the invoice and undated entry were retained by the Department, and on arrival of the ship the entry was handed to the customs agent or clerk, not to take away, but in order to enable him to sign the declaration on the entry. No entry can be passed until the ship arrives. The other invoice (that in respect of the eighteen cases of machinery) remained in Barton's office until 29th November 1916. The *Aeon* arrived in Sydney on 27th November 1916, and on that day an entry was passed for the case containing the arc lamps, duty being assessed at the rate of 10 per cent. ad valorem. The invoice in respect of the other parts of the machines was not produced to the Customs Department until 29th November 1916, and on that day an entry was passed in respect of the goods covered by that invoice, duty being assessed at the rate of 35 per cent. ad valorem on part of the goods and 30 per cent. on the balance. The declaration on each entry was made by one McKnight, a clerk employed in Barton's office, in the course of his employment, and duty was in each case paid by him under protest. There is no direct evidence that the contents of Millard Johnson's letter of 12th October above referred to were communicated to Barton or to any one in his office. On the completion of the transaction a costing sheet was made up by one J. L. Collins, a clerk employed by the Company, who had charge (*inter alia*) of matters relating to Customs, showing that the amount of duty saved to the Company by the use of separate invoices and entries amounted to £2 1s. 9d. on each of the eight arc lamps, or £16 14s. in all. In making up this statement Collins was acting in the course of his employment. With regard to the shipment of arc lamps *ex Roscommon* the evidence shows that on 5th January 1917 two invoices similar to those above referred to were rendered by the Precision Co. to the New York office of the defendant Company, one invoice being for eight Simplex machines (excluding the arc lamps belonging to them) contained in eighteen cases, and the other for eight arc lamps contained in one case. On 25th January 1917 Millard Johnson wrote and sent to Barton a letter in the following words, viz. :—"Enclosed you will find bill of lading and invoices for 19 cases of motion picture machines. One bill of lading is for 18 cases of motion picture machines, one bill

H. C. OF A. 1921. THE KING v. AUSTRAL-ASIAN FILMS LTD.

of lading for one case containing 8 arc lamps. It is advisable to pass customs entries for these goods, taking care that number 19 is entirely separate from the preceding cases." The invoices above referred to were enclosed in this letter, and were received in Barton's office on 21st February 1917.

On 9th March 1917 the invoice for eighteen cases was produced to the Customs Department under the system above referred to as the "check to arrive" system, with an entry for the goods covered by that invoice. The ship arrived in Sydney on 12th or 13th March 1917, and on the latter day McKnight, in the course of his employment as Barton's clerk, made the declaration on the entry form, passed the entry for the eighteen cases, and paid duty under protest at the rate of 35 per cent. ad valorem on part of the goods and 30 per cent. on the balance. On 14th March 1917 McKnight, in the course of his employment as Barton's clerk, produced to the Customs Department the invoice and entry for the case of arc lamps, made the declaration on the entry form, passed the entry, and paid duty under protest at the rate of 10 per cent. ad valorem. There is no direct evidence as to the reason for the procedure adopted in this case, and I find that it was adopted in compliance with the direction contained in Millard Johnson's letter of 25th January 1917 above referred to. After the evidence had closed I reopened the case and gave Mr. Barton, who had previously been called as a witness, an opportunity of explaining the matter or of suggesting any reason for the procedure adopted in the case of both shipments; but he was unable to give evidence of any value on the matter, or to suggest any valid reason for or explanation of the facts that the invoices had been produced and the entries passed in the manner set out above.

No information appears to have been given to the Customs Department by the Company, or by any officer or agent of the Company or by any person, that the arc lamps in either shipment were part of the kinematograph machines imported by the same ship, or that these machines including the arc lamps had been bought by the Company as complete machines at a single inclusive price for the whole machine including the arc lamp.

The declaration on the entry form is (so far as the same is material)

in the following words, viz. :—"(1) As to the goods entered herein I declare that I am the agent duly authorized by the Australasian Films Limited the owner of the goods mentioned in this entry and enter the goods for home consumption. (2) That the invoice now produced is the genuine invoice, and the only invoice received or expected to be received by me, or by any person to my knowledge, of the goods mentioned in this entry and contained in the packages as marked, numbered and described therein. (4) That to the best of my knowledge and belief the price of the goods stated in the invoice is the usual and ordinary price paid for goods of the same kind and quality at the time of shipment in the country whence they were exported, without any deduction whatever other than such as would be allowed in the ordinary course to any purchaser for cash of similar quantities for consumption or use in the country of export. (5) That to the best of my knowledge and belief the description of the goods in this entry and the particulars in the invoice are true in every respect. (6) That nothing on my part, or to my knowledge on the part of any person, has been done, concealed or suppressed, whereby His Majesty the King may be defrauded of any part of the duty due on the goods."

On the evidence before me I find further as follows :—(1) That in respect of the eight arc lamps shipped by the s.s. *Aeon* the Company evaded payment of duty which was payable, and committed the other offences against the provisions of sec. 234 charged against it in the statement of claim. (2) That at the time of shipment of the said eight arc lamps per s.s. *Aeon* the said Millard Johnson knew that such arc lamps formed part of complete kinematograph machines purchased by the Company as complete machines including the said arc lamps and that the remaining parts of such complete machines were shipped by the same ship as the said arc lamps. (3) That at the time of shipment of the said eight arc lamps per s.s. *Aeon* the said Millard Johnson, the said H. G. Harper, the defendant Musgrove, the said Blakeney and the said G. F. Todd knew that according to the practice of the Customs Department duty would be payable on the said arc lamps, if imported in the same ship as the other parts of the machines of which they formed part, at a higher rate than if imported in another ship, and believed that the Customs

H. C. OF A. 1921.

THE KING v. AUSTRAL-ASIAN FILMS LTD.

Department would insist on duty being paid at the higher rate on such arc lamps if imported in the same ship with the other parts of the machines of which they formed part. (4) That at the time of shipment of the said eight arc lamps per s.s. *Aeon* the said Millard Johnson forwarded a separate invoice for the said lamps, in order to enable the Company to evade payment of duty on the value of the said arc lamps at the high rate applicable to arc lamps imported as parts of complete kinematograph machines if imported with such machines in a complete or substantially complete state; and that he intended that the Company should evade payment of such duty. (5) That on 18th November 1916 the defendant Company had notice by means of the letter received by Musgrove from the New York office of the Company and furnished by Musgrove to Todd on 18th October 1916, and of the letter of 12th October 1916 mentioned above, that the said eight arc lamps per s.s. *Aeon* were parts of complete kinematograph machines purchased as complete machines including the said arc lamps, and that the remaining parts of such complete machines were being imported by the same ship. There is no evidence to show that the defendant Musgrove saw the said letter of 12th October 1916 at any relevant time. (6) That the said letter of 12th October 1916 was written and sent by the said Millard Johnson, acting in the course of his employment as American representative of the defendant Company, with intent to enable the defendant Company to evade payment of the duty properly payable on the importation of the said eight arc lamps. (7) That at the time of making out the said costing slip the said J. L. Collins knew that the said eight arc lamps were part of complete kinematograph machines, and that if an entry had been passed for such arc lamps as parts of complete machines duty would have been payable at a higher rate ad valorem than the rate at which duty was actually paid on them, and that the reduction in the rate of duty was due to the fact that separate invoices had been furnished to the Customs Department for the said arc lamps and for the remaining parts of the said machines respectively. (8) That in respect of the eight arc lamps shipped by s.s. *Roscommon* the Company evaded payment of duty which was payable, and committed the other offences against the provisions of sec. 234 charged against it in the statement of

claim in respect of such arc lamps. (9) That at the time of shipment of the said eight arc lamps per s.s. *Roscommon*, the said Millard Johnson knew that such arc lamps formed part of complete kinematograph machines purchased by the Company as complete machines including the said arc lamps, and that the remaining parts of such complete machines were shipped by the same ship as the said arc lamps. (10) That at the time of shipment of the said eight arc lamps per s.s. *Roscommon*, the said Millard Johnson, the said H. G. Harper, the defendant Musgrove, the said Blakeney and the said G. F. Todd knew that according to the practice of the Customs Department duty would be payable on the said arc lamps, if imported in the same ship as the other parts of the machines of which they formed part, at a higher rate than if imported in another ship, and believed that the Customs Department would insist on duty being paid at the higher rate on such arc lamps if imported in the same ship with the other parts of the machines of which they formed part. (11) That at the time of shipment of the said eight arc lamps per s.s. *Roscommon* the said Millard Johnson forwarded a separate invoice for such lamps, in order to enable the Company to evade payment of duty on the value of the said arc lamps at the higher rate applicable to arc lamps imported as parts of complete kinematograph machines if imported with such machines in a complete or substantially complete state; and that he intended that the Company should evade payment of such duty. (12) That the said letter of 25th January 1917 was written and sent by the said Millard Johnson in the course of his employment as American representative of the defendant Company to the said C. R. Barton, with intent to enable the defendant Company to evade payment of the duty properly payable on the importation of the said arc lamps. (13) That at all relevant times the said C. R. Barton was the duly authorized customs agent of the Company in respect of the goods shipped per s.s. *Aeon* and s.s. *Roscommon*, and that it was part of his duty as such customs agent to attend to all matters in connection with making and passing entries for such goods. (14) That at all relevant times the said C. R. Barton knew that according to the practice of the Customs Department duty was payable on parts of machines at the rate applicable to the complete machines if imported

H. C. OF A. 1921.

THE KING v. AUSTRAL-ASIAN FILMS LTD.

with or in the same ship as the other parts of the said machines, and knew the terms of the direction of the Minister for Trade and Customs of 22nd February and of the provisions of the Customs Tariff hereinbefore referred to. (15) That at all relevant times the said G. McKnight was employed by the said C. R. Barton as a clerk, and that it was part of the duty of the said G. McKnight in the course of such employment to make and pass entries and to make the declaration required in connection therewith in respect of the importation of goods in respect of which the said C. R. Barton was employed as customs agent.

I reserve for the consideration of a Full Court the question whether, on the facts found by me and stated above, the defendant Company can be found to have committed, with intent to defraud the revenue, the offences charged in respect of the importation of arc lamps per s.s. *Aeon* and s.s. *Roscommon*, or any of such offences.

The matter now came on for argument before the Full Court.

*Brissenden* K.C. (with him *Badham*), for the plaintiffs. An intent to defraud the Customs may be imputed to a corporation, and that intent can be inferred from the statements or acts of one or more agents of the corporation. By reason of secs. 22 and 24 of the *Acts Interpretation Act* 1901 and of the definition of "indictable offence" in sec. 4 of the *Acts Interpretation Act* 1904, "person" in sec. 241 of the *Customs Act* 1901-1910 includes a corporation—there being nothing in the section to indicate a contrary intention. In the case of the arc lamps the Company can be convicted on the ordinary principles of agency; for Millard Johnson, who did the acts complained of, did them in the course of his business and with such knowledge and such intent that he would have been guilty if prosecuted under sec. 241 (*Lloyd* v. *Grace, Smith & Co.* (1)). But there is a wider principle which covers also the transaction with regard to the films. A corporation may have a malicious intent (*Citizens' Life Assurance Co.* v. *Brown* (2)); for instance, it may be prosecuted for a criminal libel (*Pharmaceutical Society* v. *London and Provincial Supply Association* (3)). Malice is one of the

(1) (1912) A.C., 716.
(2) (1904) A.C., 423, at p. 425.
(3) 5 App. Cas., 857, at p. 869.

elements of that offence (*R.* v. *Munslow* (1)). If that is so, it is because malice is inferred from the publication of the libel. So here it is a question not of what was the intent of the agents of the Company, but whether the Company is to be presumed to have done what it did, though by different agents, and whether the presumption of intent can be drawn from those acts.

[RICH J. referred to *Pratt* v. *British Medical Association* (2); *Mousell Brothers Ltd.* v. *London and North-Western Railway Co.* (3); *Barwick* v. *English Joint Stock Bank* (4).]

If the agents of a corporation either individually or collectively have done acts which, if done by one person, would indicate a criminal intent, then that intent may be imputed to the corporation. [Counsel also referred to *Dawson* v. *Jack* (5); *Kenny's Outlines of Criminal Law*, 4th ed., p. 62; *Halsbury's Laws of England*, vol. v., p. 311.]

*Shand* K.C. (with him *H. E. Manning*), for the defendants. A contrary intention within the meaning of secs. 22 and 24 of the *Acts Interpretation Act* 1901 appears in sec. 241 of the *Customs Act*. There is no case in which it has been decided that a company is liable to indictment for an offence of which one of the ingredients is a state of mind. As to the cases with regard to criminal libel, what malice means is not a particular state of mind but merely an absence of just cause or excuse.

[KNOX C.J. referred to *Thomas* v. *Bradbury, Agnew & Co.* (6).]

Libel is an exception to the ordinary rule of criminal liability (*R.* v. *Holbrook* (7)). The only cases in which a corporation is held to be criminally responsible is where a statutory duty is imposed on the corporation to do or not to do a particular act.

[RICH J. referred to *Warrington* v. *Windhill Industrial Co-operative Society* (8); *Buckingham* v. *Duck* (9).]

Sec. 241 does not prohibit the doing of a particular act, but provides a larger penalty if a certain prohibited act is done with a certain intent. In *Mousell Brothers Ltd.* v. *London and North-Western Railway Co.* (3) what was prohibited was the doing of an act with

(1) (1895) 1 Q.B., 758, at p. 761.
(2) (1919) 1 K.B., 244, at p. 279.
(3) (1917) 2 K.B., 836.
(4) L.R. 2 Ex., 259.
(5) 28 V.L.R., 634; 24 A.L.T., 140.
(6) (1906) 2 K.B., 627.
(7) 4 Q.B.D., 42.
(8) 88 L.J. K.B., 280.
(9) 88 L.J. K.B., 375.

H. C. OF A. 1921. THE KING v. AUSTRAL-ASIAN FILMS LTD.

a certain intent, and the Court was able to say that the purpose of the statute there in question would be rendered ineffective unless a corporation were hit by it and made liable for the acts of its servants. Here there is no indication of an intention to make a master criminally responsible for the state of mind of his servant, and a corporation is in no worse position than an ordinary master. The intent which is punishable under sec. 241 is the personal intent of the person doing the forbidden act. [Counsel referred to *Kearley* v. *Tonge* (1); *Pearks, Gunston & Tee Ltd.* v. *Ward* (2); *R.* v. *Ascanio Puck & Co.* (3).]

*Brissenden* K.C., in reply, referred to *Stephens* v. *Robert Reid & Co.* (4).

*Cur. adv. vult.*

April 14. THE COURT delivered the following written judgment :—

The answers to be given to the questions reserved for our consideration depend entirely on the true construction of sec. 241 of the *Customs Act* 1901-1910. The substantial question of law involved is whether a company can be convicted of an offence against the Act with intent to defraud the revenue. In *Mousell Brothers Ltd.* v. *London and North-Western Railway Co.* (5) *Atkin* J. says :—"I think that the authorities cited by my Lord make it plain that while *primâ facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed." And, after discussing the provisions of the statute then under consideration, the learned Judge proceeded :—"I see no difficulty in the fact that an intent

(1) 60 L.J. M.C., 159.
(2) (1902) 2 K.B., I, at p. 8.
(3) 76 J.P., 487.
(4) 28 V.L.R., 82, at p. 91; 23 A.L.T. 242, at p. 244.
(5) (1917) 2 K.B., at pp. 845, 846.

to avoid payment is necessary to constitute the offence. That is an intent which the servant might well have, inasmuch as he is the person who has to deal with the particular matter. The penalty is imposed upon the owner for the act of the servant if the servant commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No *mens rea* being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation."

We proceed to consider, by applying the tests suggested by *Atkin* J., whether sec. 241 of the *Customs Act* has the effect of making the principal, if a company, liable for the act of its servant or agent when the person doing the act or some servant or agent of the company from whom he takes his instructions has the intention of defrauding the revenue.

The general object of the statute is to establish machinery for the collection of customs duties in aid of the revenue, and the particular object of Part XIII. (secs. 228-243) is to protect the revenue by imposing penalties upon persons doing acts calculated to lead to evasion of payment of the duties imposed. It is apparent that the effective protection of the revenue requires that the same precautions shall be taken whether a company or an individual be the owner of goods imported, the fact being that companies are engaged to a great extent in the importation of goods. Consequently the object of the statute affords no reason for the exclusion of companies from liability under this part of the Act. The next thing to be considered is the words used in the relevant provisions of the Act read in the light of the *Acts Interpretation Act* 1901. By sec. 22 (*a*) of that Act "person" is defined as including a body corporate, and by sec. 24 it is provided that every provision of an Act relating to offences punishable on indictment or summary conviction shall unless the contrary intention appears be deemed to refer to bodies corporate as well as to persons. Returning to the *Customs Act*, sec. 234 provides that no "person" shall do certain acts under a penalty of £100. It is conceded that under

H. C. OF A. 1921.

THE KING v. AUSTRAL-ASIAN FILMS LTD.

this section individuals are liable for the acts of their agents, and, as there is nothing in the section to indicate a contrary intention within the meaning of secs. 22 (*a*) and 24 of the *Acts Interpretation Act*, it follows that a company is responsible under this section for an act done by its agent in the course of his employment. Sec. 241 does not create any new offence, but imposes a heavier penalty in respect of acts done with intent to defraud the revenue where such acts are offences although done without such intent. Its effect is to make the fraudulent character of the act an element in determining the amount of the penalty to be imposed for the offence. The principal being held responsible for an offence committed by the agent against sec. 234, there is no apparent reason why he should not be liable for the penalty on the higher scale which is imposed if the same offence be committed with intent to defraud the revenue. The probability that it was intended to render the principal liable to the higher penalty is increased by the fact that sec. 241 provides that "any person may *at the same time* be charged with an offence" against sec. 234 and with an intent to defraud the revenue. This provision seems to import that a "person" who is responsible for an offence committed against sec. 234 may be convicted under sec. 241 of an intent to defraud the revenue, the offence in the one case and the intent in the other being chargeable against the principal as a result of the default committed by, or the state of mind of, the agent. The object of the provisions of secs. 234 and 241 seems to be to prevent evasions of duty and to adjust the amount of penalty imposed for an evasion according to the circumstances, increasing the penalty where the evasion is intentional. The conclusion that it was intended to make the principal responsible under sec. 241 as well as under sec. 234 is warranted also by the consideration of the nature of the duty laid down, the person on whom it is imposed, and the person by whom it would, in ordinary circumstances, be performed. The duty laid down is, speaking generally, the furnishing of true information with respect to goods liable to duty. By sec. 37 of the Act the primary liability for delivering an entry is placed on the owner of goods imported; by secs. 116 and 117 obligations are placed on the owner of goods entered for export; by sec. 154 the owner is required to make a declaration as to value of goods,

and by sec. 161 the goods are made liable to seizure and sale in case of undervaluation; and the provisions of Part XI. of the Act (secs. 180-183) authorizing the employment of agents emphasize the fact that the owner is the person primarily subject to the obligations imposed by the Act for the purpose of ensuring the payment of the full amount of duty. Although the obligation is laid on the owner in the first instance, these sections recognize that in many, probably in most, cases that obligation would in ordinary circumstances be performed by an agent rather than by the owner personally, and this affords an additional reason for holding the owner as principal responsible for the acts and defaults and for the state of mind of his agent.

Having regard to all these matters, we think it is clear, from the provisions of the Act, that the intention was to make the principal responsible for an act done by his agent or servant in the course of his employment and for the state of mind of the agent or servant in doing that act. Adopting the language of *Atkin* J. quoted above, we think that the principal is liable in any case in which his servant or agent in the course of his employment "commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No *mens rea* being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation." If the principal is liable for the fraud of the agent actually committing the offence, he is no less liable for the fraud of some superior servant or agent by whose direction the offence is committed, but we see no reason for extending the responsibility of the principal to a case in which it is sought to make the principal responsible for the state of mind or the state of knowledge of some other servant or agent not concerned in the doing of the act.

On the findings of fact submitted to us there is no ground for the contention that the defendant Company can be convicted of intent to defraud the revenue in connection with the charges relating to the claims for drawback on films exported. It is clear on those findings that no servant or agent of the Company knew at any

H. C. OF A. 1921. THE KING v. AUSTRAL-ASIAN FILMS LTD.

relevant time that the revenue was being or was about to be defrauded, or that any false statement was being or was about to be made, and that no servant or agent of the Company who was employed in connection with the exportation of the films or with the claims for drawback in respect of them had any intent to defraud the revenue.

With regard to the arc lamps imported by the *Aeon* and *Roscommon*, we are of opinion that the Company is liable to be convicted of intent to defraud the revenue by reason of the intention existing in the mind of Millard Johnston that the Company should evade payment of duty on these goods coupled with the acts done by him in furtherance of that intention and the fact that payment of duty was evaded. We think it was rightly decided in *Stephens* v. *Abrahams* (1) that preventing something from getting into the revenue which the revenue is entitled to get amounts to defrauding the revenue; and it follows that on the findings of fact Millard Johnston had an intent to defraud the revenue in the acts found to have been done by him in respect of these goods. It is specifically found that the acts done by Millard Johnston with this intent were done by him in the course of his employment (see findings 1, 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15).

The questions submitted should be answered as follows :—

(1) The defendant Company cannot be convicted of intent to defraud the revenue in connection with the offences charged in respect of the claims for drawback on the export of films, or any of such offences.

(2) The defendant Company can be convicted of intent to defraud the revenue in connection with the offences charged in respect of the importation of arc lamps per s.s. *Aeon* and s.s. *Roscommon* respectively.

The costs of this reference will be costs in the action.

*Questions answered accordingly.*

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

Solicitors for the defendants, *Sly & Russell*.

B. L.

(1) 27 V.L.R., 753; 23 A.L.T., 233.