[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . PLAINTIFF;

AND

GEORGE P. HARRIS, SCARFE AND COMPANY LIMITED . . . . . DEFENDANTS.

H. C. OF A. 1908.

ADELAIDE, *October* 28.

MELBOURNE, *November* 12.

Isaacs J.

1909.

MELBOURNE, *March* 24.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Customs—Offence—Minimum penalty—Mode of fixing—Offence in respect of goods—Duty of importer employing agent to pass entries—Customs Act 1901 (*No.* 6 *of* 1901), *secs.* 4, 234, 240, 243.

The words "the maximum which is prescribed in pounds" in sec. 243 of the *Customs Act* 1901 refer to the penalties the amounts of which are stated in money at the foot of various sections of the Act.

Held, therefore, that where an offence against the *Customs Act* 1901 in respect of goods has been committed, and thrice the value of the goods is more than the penalty prescribed by the section creating the offence, then the minimum penalty is one-twentieth of the penalty prescribed by the section creating the offence, and not one-twentieth of thrice the value of the goods.

By *Isaacs* J.—In order that a principal who conducts his business with the Customs by an agent may have the full benefit of the minimum penalty in respect of frauds committed by the agent without the knowledge or participation of the principal, the principal must have taken all reasonable precautions to prevent the frauds being committed.

TRIAL of action and question of law reserved for the Full Court of the High Court thereon.

An action was brought in the High Court by His Majesty the King against George P. Harris, Scarfe & Co. Ltd., who carried on business in Adelaide and Port Adelaide, in South Australia, as merchants and importers, to recover penalties in respect of offences against sec. 234 of the *Customs Act* 1901.

H. C. OF A. 1908.

THE KING v. HARRIS, SCARFE & CO. LTD.

Prior to the hearing a settlement was arrived at between the parties under which all charges of fraud against the defendants were withdrawn, and the only matter left for the Court was the fixing of the amount of the penalties.

The action was heard before *Isaacs* J., and the facts are sufficiently set out in his judgment hereunder.

Piper, for the plaintiff.

Sir Josiah Symon K.C. (with him *Isbister*), for the defendants.

Cur. adv. vult.

Melbourne, Nov. 12.

ISAACS J. read the following judgment:—

The defendants are a limited company formed and registered in South Australia and carry on the business of merchants and importers. Their registered and principal office is at Gawler Place, in the City of Adelaide, and they have also a place of business at Port Adelaide, which during the period material to this action was managed by one Frewin, assisted by two subordinates, Skinner and Adams.

The action is to recover penalties under the *Customs Act* 1901 in respect of seventeen separate entries. The statement of claim as originally framed included a variety of charges said to arise out of the same facts in respect of each entry, and to constitute distinct statutory offences. It was also alleged that each of the offences charged was committed with intent to defraud the revenue.

From time to time the pleadings have been amended, finally at the trial, and as they now stand, they embrace seventeen charges, one in respect of each entry. The charge is of the same description throughout, namely, a contravention of sec. 234 (*d*), which provides that:—"No person shall . . . make any entry which is false in any particular."

With regard to each of the seventeen entries the Crown alleges that the defendants by their agent made an entry which was false and untrue in certain particulars. The defendants admit these charges and the values of the goods, and that they are liable to a penalty in each case. The only question is what penalty?

That is a matter partly of fact and partly of law. The construction of sec. 243 declaring the minimum pecuniary penalty is in dispute, and I shall refer to this later.

So far as relates to the facts the matter stands thus. All the alleged contraventions other than the one under sec. 234 (*d*) have been withdrawn, and the allegation of fraudulent intent has been abandoned.

The Crown does not explicitly press for more than the minimum penalty, but on the other hand does not admit that the minimum penalty is sufficient to meet the case. It urges that the defendants did not exercise the reasonable care which would have averted the frauds of their employé Frewin, and it asks the Court to impose such penalties as in the circumstances it thinks proper. The defendants contend, in view of the facts, that all the care that could be reasonably demanded of them was taken and that, all charges of fraud and other contraventions having been withdrawn, the minimum penalty alone in each case should be awarded.

The parties have adopted the course of agreeing upon a statement of facts subject to my seeking further enlightenment. It is not clear whether that reservation extended to eliciting further facts, or was confined to explanation of and comment on the facts already agreed upon. However, during the hearing some additional information which I asked for as material was afforded me by the mutual agreement of the parties, and I shall state the material circumstances as agreed upon, and the inferences I draw from them.

The contraventions alleged and admitted extend over the period commencing 24th February 1902, and ending 23rd May 1906. So far as Frewin is concerned they were evidently systematic. The seventeen involved in this case were apparently only portion of his misdeeds because shortages considerably beyond the total amount involved in the instances before me—which as I was informed does not exceed about £220—undoubtedly occurred and are included in the agreement between the parties of 16th March 1908 placed before me, though they do not in any way affect this case.

Frewin's operations were of the most clearly fraudulent charac-

H. C. OF A. 1908.

THE KING v. HARRIS, SCARFE & CO. LTD.

Isaacs J.

ter. He deceived the Customs, and he deceived his employers. Whatever benefit arose from his acts, he got and retained; the defendants did not profit by them to the smallest degree. The defendants beyond question, and so much is admitted fully and unequivocally, stand clear of all actual participation in, or knowledge of the malfeasance of Frewin. For over 30 years Frewin was in the employ of the company and the private firm, its predecessor—trusted, and to all appearance reliable. He had during that time occupied the position of local manager of the Port office, and not only in his dealings with the Customs, but in all matters between him and the company his integrity remained unquestioned. Unfortunately he traded on the confidence he had established and used it as the means of committing fraud and escaping detection. The course of business in paying the Customs duties has been stated by the parties. In the first instance, an invoice, which for the sake of identification has been called the original invoice, was received at the head office of the company and there always remained. Duplicate invoices were also received direct from London at the company's Port Adelaide office. These duplicates were taken into Adelaide, compared with the original line by line, and there marked, or rather, as it appears to me, one of them was marked with the correct duty payable in accordance with the tariff, and after being so compared and marked were taken back to the Port office. So far, the head office did all that was business-like. It thenceforward entrusted to the Port office—that is to Frewin—the task of clearing the goods and paying the duty. To enable this and other business payments of the Port office to be made a local bank account, fed from the head office, was opened at the Port and operated on by Frewin. It appears the Customs required payment in specie, and so Frewin drew cheques which were cashed, and the money wherewith the duties were paid was handed by him to a clerk who paid it over to the Customs. Cheques therefore were not available as a means of testing the accuracy of his accounts for duty. His *modus operandi* in clearing the goods was by having prepared under his supervision from the duplicate invoices, one of which was accurately marked with the amount of duty, an analysis of the goods contained in them. Four copies of the necessary entries

were then made, three to be left with the Customs, the fourth, which is called the office copy entry, to be ultimately retained at the Port office. It is manifest that if the analysis had been accurate, and showed the true result as to the sum to be paid for duty, the entries would have had to be correct, and no fraud would have been possible. But it was just at this point the criminal act of Frewin began. In each of the instances referred to in this case the analysis was false. It naturally corresponded with the entries, but differed from the invoices the effect of which it was supposed to truly represent. Although one of the duplicate invoices was presented to the Customs approving officer together with the analysis, the entries were passed as correct. I can only conjecture two things as probable in connection with this operation—first, that the head office marked only one of the duplicates with the amount of duty—as it naturally would—and it was the unmarked duplicate which Frewin had caused to be presented to the approving officer; and next, that the officer was misled by the complicated nature of the invoices, and the goods described therein. Probably Frewin relied on the complication of the matter with regard to the officer, just as he built upon the confidence of his employers at the other end of the transaction. The approving officer having passed the entries, the rest was easy. The documents were passed on to the Customs cashier, who received the money indicated by the entry and analysis, stamped and initialled the office copy entry showing the exact amount paid, which was in all the cases under consideration deficient, and then handed that document back to the clerk. Frewin obtained and kept possession of the document. From it, altered or unaltered, the entries were made in the Port books—always showing the proper amounts that should have been paid—also in his returns special and monthly for head office. These returns, consisting of duty statements and monthly cash statements, invariably showed the amounts he ought to have paid according to the sum which the head office originally marked on the duplicate, and evidently noted on the original. A sample return was shown to me and admitted to be marked "correct" by a clerk at the head office on the basis stated. The head office was thus deceived by Frewin's direct false representation, and always

H. C. OF A. 1908.

THE KING v. HARRIS, SCARFE & CO. LTD.

Isaacs J.

believed the true amount had been paid for Customs duties. Had the company required to see the actual books kept at the Port office the matter would not have been further advanced directly as to amounts paid for duty—the books would have only so far confirmed the returns; though probably a general audit of the books and vouchers would have disclosed depletions of money which might ultimately have been traced back to Customs operations.

So far, the head office calculated and marked down the correct amount to be paid; practically in every instance it gave express instructions to pay that amount, it provided the necessary funds with which to do it, kept a record of the amount for future reference, and employed a trusted and approved servant to carry out its instructions. It required and obtained regular statements by him as to whether its directions had been complied with, checked those statements and found them to agree with its own record. Nevertheless the instructions were in fact disobeyed, the Customs were cheated, so were the company themselves—the returns were false, the trusted employé a thief.

The defendants, while admitting their liability to penalties, urge that no carelessness is imputable to the company—that nothing more could be required of ordinary prudent men—and, consequently, as no personal blame whatever can be laid at their door, the minimum penalty fairly meets the case, which it is contended should be regarded, so far as the company are concerned, as a purely technical breach of the Act. It is also pointed out that they have been sufferers, by having not merely to pay the minimum penalty, whatever it may turn out to be, but also to pay over again the shortage of duty—already handed to Frewin and by him misapplied.

Three methods have been suggested as prudent procedure which could have afforded the necessary means of knowledge to the company, and which being omitted, the defendants must be taken to have neglected a reasonable mode of checking the Customs payments, and so conduced by negligence to Frewin's contraventions. One method very lightly referred to was application from time to time to the Customs direct for information as to the amounts actually paid on each occasion. That seems to

me an expedient so unusual and so obviously cumbersome and impracticable, whether regarded from the mercantile or the official standpoint, that I lay it aside for the purpose of testing the reasonableness of the defendants' conduct. The next which was definitely urged is an audit of all the company's books and records as they stood, and the third also pressed is insisting on having regularly from Frewin not merely a report of what he had expended in Customs duties, but also some receipt or voucher from the Customs, particularly the office copy entries. I shall deal with both these suggestions together. It is not to be doubted that if the company had obtained from Frewin the office copy entries stamped and initialled by the cashier, and which I regard as equivalent to vouchers, then either these documents would have at once disclosed upon their face the short payments, or, by their constant alteration of items and totals, must have aroused suspicion and led to detection. Probably it was the knowledge that these documents would never reach the company, either as regular evidence of the returns or by audit, that emboldened Frewin to embark and continue on his illicit course.

But the question is, does that raise a case of negligence against the defendants?

In ordinary circumstances an audit of a merchant's books and accounts, though extremely convenient and in many cases satisfying, is a matter which concerns himself alone. Provided he is and continues solvent, he may please himself whether he keeps accounts and audits his affairs or not. He is under no duty to any other person to ascertain whether he is being cheated or not, and though his omission to check his accounts may be imprudent or unwise, it raises no case of negligence of which any other person has a right to complain. An importer, for instance, may well repose personal trust in an employé, whether he has known him a month or twenty years; he may rely implicitly on his honesty and integrity, and he is under no obligation to anyone else to watch or distrust him, so far as relates to accounting to himself. His want of precautions to test the fidelity of his servant or agent to himself as principal concerns no one but himself. But I apprehend the case is entirely different when the principal deputes his representative to perform a duty which the principal

H. C. OF A. 1908.

THE KING v. HARRIS, SCARFE & CO. LTD.

Isaacs J.

owes to another, and in the performance of which that other may be injured. Then the nature of the duty must be considered, and it may be, according to the nature and extent of the duty, that the principal is under a more or less onerous obligation to see that it is properly performed. The due payment of Customs duties is an extremely important public obligation which is thrown, of course, primarily upon the importer, but which is permitted by law to be discharged through the instrumentality of an agent, and in the case of a corporation must be performed by individuals representing the principal.

Besides inevitable difficulties that present themselves in passing Customs entries, deception is sometimes so comparatively easy owing to the intricacies of the subject, to the celerity with which the business is necessarily despatched, and to the superior means of knowledge possessed by the importer or his agent over the Customs, that the same amount of reliance which would be sufficient if an agent were deputed to pay a fixed inalterable amount to an ordinary creditor may not be sufficient when so much remains in the agent's power to ascertain and disclose the creditor's claim. In my opinion it is incumbent upon every importer, at the peril of not obtaining the fullest mitigation in the event of contravention, to take all reasonable precautions to make sure that his public obligation of paying the proper amount of Customs duties is properly performed when delegated to a servant or agent. No personal confidence in his representative, no sense of delicacy can exonerate the principal who fails to take such business precautions for the legal satisfaction of the rights of the Customs as the reasonable conduct of his affairs will permit. And in proportion to the extent of his departure in any particular case from the point of absolute compliance with the law, in proportion to his care or want of care, his honest intention or his fraud, so the penalty may be adjusted anywhere within the limits of the minimum and the ultimate maximum.

The audit of the company's books and accounts, as they stood, would probably, as I have said, in view of the existence of the stamped and initialled vouchers, have indirectly and incidentally revealed the truth as to these duties, but I do not regard the omission of a general audit of the whole of the company's busi-

ness as negligence towards the Government in relation to the Customs.

The last suggestion that the company, though not constantly appealing for independent corroborative information as to the payments made, or instituting a general investigation of its affairs, should have required Frewin to obtain and produce Customs vouchers, is more serious.

If there had been any generally known practice of the Customs to hand over receipts or vouchers for duties paid, whether asked for or not, the defendants could not well have escaped the accusation of carelessness in not insisting upon seeing them; or if they had been aware that the Customs, as was the fact—while not spontaneously offering such receipts or vouchers, readily gave them on request—they would have equally been open to the charge of want of reasonable care. The position of the defendants is not so easy to define. I may best state the situation by quoting the company's own view of it, contained in paragraph 23 of the joint statement of the parties, dated 27th October 1908. It is in these words:—"The defendants were not aware of the routine or practice of the Port office as regards the payment of Customs duties, and they implicitly trusted the duty of correctly transacting its Customs business to such office. They did not know that office copy entries were made or kept, nor were they aware of their existence, or that any voucher was given by the Customs for duty paid, but on the contrary they had been informed by their Port Adelaide manager and believed that no voucher was given by the Customs for duty paid, nor in fact was any voucher other than the said office copy entries ever given if such office copy entries are to be regarded as vouchers."

As I have before indicated these office copy entries, stamped and initialled as they were, served all the purposes of and were really effective as vouchers and should be so considered. The statements in paragraph 23 being admitted, it appears as uncontested therefore that the company were distinctly informed by Frewin that the Customs never gave vouchers for duty payments, and that they believed his statements, that they were altogether unaware that any voucher of any kind had been given, and rested content with his unchecked method of clearing the goods,

H. C. OF A. 1908.

THE KING v. HARRIS, SCARFE & CO. LTD.

Isaacs J.

and with his own reports as to how he had disbursed the money given him for payment to the Customs.

Should the company have rested content with Frewin's own statement that the Customs never gave vouchers? The question of negligence is reduced to that. Honesty of purpose, actual belief of proper payment, actual belief that no vouchers could be got are all conceded, and are established to my satisfaction. On the conceded facts no other conclusion could be reached. The defendants say that ends the matter, and relieves them from any imputation of carelessness. The Crown nevertheless contends that the defendants have not exercised due caution in protecting the revenue, and so have, however unwittingly, facilitated fraud. Now, one thing presses itself on my mind with great force. True it is that the defendants believed that the Customs gave no vouchers for the moneys paid by Frewin on behalf of the company, but that belief, however honest and firmly grounded, rested absolutely and solely upon the mere statement of Frewin. The fact that some expectation existed in the defendants' corporate mind as represented at the head office that vouchers would be forthcoming underlies the statement that the company relied on Frewin's statement that none were given. Although the company's confidence was given to him in their own affairs apart from the Customs as well as in Customs transactions, yet it is, and was apparently felt by the defendants to be, an unusual thing not to get some sort of voucher for money paid; and yet for over four years covered by these transactions the company rested satisfied with the statement of Frewin that none was ever given. As between themselves and Frewin I say nothing as to whether the company felt bound to accept his statement—they were at liberty to do so or not at their own pleasure—but as between themselves and the Customs, to whom they owed a duty which was delegated to Frewin, it seems to me the defendants accepted and relied on his interested statement — interested because it was that of the very person they had to check—at the peril of not sufficiently observing their own obligations to the Customs. That is something beyond the mere obligation of making up shortages that might afterwards appear. It is an

obligation to do all that can reasonably be done to prevent shortages occurring.

There, I think, lies the key of the situation. The defendants might by a simple and short method, as for instance a letter direct from head office to the Customs, or a personal request by some person at head office to the Customs, have asked that vouchers be given for duty payments as an ordinary and necessary incident of business operations. One communication would have settled the whole matter. Frewin threw the company off their guard, but his principals had to choose between the course of giving Frewin a free hand, and so letting the Customs run a risk as well as themselves, and that of procuring, if possible, some ordinary means of checking its local manager. Other merchants got vouchers—so did Frewin. They only had to be asked for. Inquiry from any independent mercantile source would almost certainly have informed the company that vouchers could be had. I cannot, therefore, regard it as anything but natural to seek for information somewhere outside the one person whose conduct, according to all canons of business, was the subject of check and audit, more particularly in the case of a limited company which have obligations quite outside their external relations with the Customs.

The trouble of inquiry was so slight, the desirability so evident, the means so self-suggestive, and the effect so certain, that when the public consequences of abstaining from making it are considered, the mere *bonâ fide* belief that reliance could be placed on Frewin's word is in my opinion inadequate to absolve the defendants from the charge of want of necessary care incident to their position as principals. To do so here would be contrary, as I conceive, to the spirit and intention of the *Customs Act* as decipherable from its actual provisions.

Further, it might create misunderstanding as to the vigilance required of importers with regard to the Customs, and lead to a looseness of practice in many instances unfair to other traders, as well as prejudicial to the revenue. As is apparent also in the present case, the result may prove to be most lamentably detrimental to the parties concerned. I can scarcely think in ordinary business affairs a principal would rest content with the mere

H. C. OF A. 1908.

THE KING v. HARRIS, SCARFE & CO. LTD.

Isaacs J.

statement by his agent, entrusted with large sums for disbursement, that a creditor receiving payments declined to give some kind of acknowledgment, however informal. A government department might rather be expected to give a receipt as a matter of routine. And where so many penalties are enacted for even simple and possibly accidental failures to comply with the law—thus calling for special care in observing it,—one would expect an importer to be rather more than less vigilant to have the desired vouchers.

It is to be observed that where fraudulent intention appears sec. 241 doubles the maximum otherwise prevailing. That is to say, apart from that provision the clearest honesty of purpose and action is no answer to infliction of the full ordinary penalty. Extreme carelessness might justify it, and so, while giving to the defendants the fullest credit for honesty, that affords no reason for confining the penalty to the minimum. At the same time there are certain considerations which weigh with me in regulating the penalty. The defendants were careful up to a certain degree to see that the strictly correct amount was paid. No possible advantage could accrue to the defendants by any fraud of an employé so long as that amount was paid. That is a very material circumstance. They had no reason to believe that Frewin was in fact perpetrating any injustice either to the Crown or his employers, and they had a thirty years' record to look back on. The defendants also suffer a considerable loss—over £1,000 in any event independently of their own costs. Their lesson, therefore, is no light one.

Although, too, the charges are seventeen in number, and spread over a considerable period, they are repetitions of the same thing, and the circumstances remained the same at the end as at the beginning. The Crown's attitude is this: While properly urging that the defendants should not be recognized as blameless in the matter, it has after full investigation not presented the defendants' own neglect as in any way heinous or deeply censurable. Indeed, it has, by the agreement of 16th March 1908, significantly consented that the parties shall bear their own costs, with two trifling exceptions.

I therefore think—while laying down in terms as clear as I can

select the principle which in my opinion governs the case, and must be borne in mind in all importing operations, as, indeed, I believe it must have been generally speaking in the practice of merchants hitherto observed—it would be unnecessarily harsh if I were to inflict a heavy penalty in excess of the minimum.

I think the requirements of justice will be best met by determining that in respect of each and every of the seventeen offences set out and admitted on the pleadings, and of which I formally declare the defendants guilty, it shall pay to the Crown a penalty, consisting of the amount of the minimum provided by law, and the further sum of £5. The principle will thus be publicly established and vindicated, and no room will be left for doubt as to the supervision required at the hands of importers.

As to what is the legal minimum I have had some argument. The Act, by sec. 243, provides that: "the minimum pecuniary penalty for any offence against this Act shall be one-twentieth of the maximum which is prescribed in pounds." The Crown substantially contends that the meaning of "in pounds" is "in money," and that wherever the penalty primarily prescribed by the Act is less than three times the value of the goods, the minimum penalty, by combined force of secs. 240 and 243, is one-twentieth of three times the value.

The defendants urge that the expression "in pounds" is different from "in money," and that it refers to a penalty such as the one prescribed at the foot of sec. 234—"Penalty: One hundred pounds"; and that an indefinite sum, though ascertainable upon evidence or admission, such as the value of the goods, which may have to be expressed in pounds, shillings, pence and farthings, is not within the words "prescribed in pounds."

Taking the case of the first Dunblane shipment alone, the difference would be very great. The defendants' contention would make the minimum penalty £5, that of the Crown would raise it to about £225.

The matter is one of some doubt, but, as may be seen, of immense importance, and most desirable to be placed on a certain basis for the guidance of all the Courts throughout the Commonwealth. I have been referred to a case of *R.* v. *Lyons* (1), in

(1) Sydney *Morning Herald*, 7th April 1906.

H. C. OF A. 1908.

THE KING v. HARRIS, SCARFE & CO. LTD.

Isaacs J.

which it is said my learned brother *O'Connor* J. decided in the manner contended for by the Crown, though in that case the fine was, by consent of the Crown, fixed at £5.

Though not having formed any final opinion on this point, I am not at present able to satisfy my mind so as to follow that decision.

As possibly differing views of single Judges on the matter would be highly inconvenient, and as the Crown has in this case pressed for a definite decision on this point, I shall reserve the question of law so raised for the determination of the Full Court.

His Honor reserved for the consideration of the Full Court the following question of law:—

Where an offence has been committed against the provisions of sec. 234 of the *Customs Act* 1901, without an intent to defraud the revenue, and three times the value of the goods in respect of which the offence was committed exceeds £100, what is the minimum penalty? Is the minimum penalty provided by the Act (*a*) one-twentieth of £100; or (*b*) one-twentieth of thrice the value of the goods?

March 24.

Starke, for the plaintiff. The minimum penalty in this case is one-twentieth of the value of the goods. The maximum penalty for the offence in question here is not prescribed by sec. 234 but by sec. 240, and is thrice the value of the goods. That value must be expressed in money. Then the effect of sec. 243 is that the minimum penalty is to be determined by dividing the maximum penalty so determined by twenty, with the qualification introduced by the words "in pounds" that in performing the division shillings and pence are to be neglected. *O'Connor* J. fixed the minimum penalty in this way in *R.* v. *Lyon* (1).

Mitchell K.C. (with him *Isbister*), for the defendants. The words "the maximum which is prescribed in pounds" in sec. 243 refer to the penalties stated in pounds at the foot of various sections of the Act. That is the ordinary natural meaning of the words, and the only construction which will give some meaning

(1) *Sydney Morning Herald*, 7th April 1906.

to every word in the section. This construction enlarges the discretion of the Court and allows it to fix penalties in proportion to offences.

GRIFFITH C.J. The effect of sec. 5 and sec. 240 of the *Customs Act* 1901 is that, whenever a penalty is named in a section, that penalty is to be taken to be the maximum penalty unless the offence is committed in respect of goods, in which case the maximum penalty is three times the value of the goods if that is more than the penalty named. Every penalty is to be read in that way. Then sec. 243 comes in with a proviso that the minimum penalty for any offence shall be "one-twentieth of the maximum which is prescribed in pounds." If all that were in one section I fail to see that there would be any ambiguity. The reference to the "maximum which is prescribed in pounds," where the maximum is prescribed in two ways, viz., in pounds and as thrice the value of the goods, can, I think, only refer to the first amount mentioned.

If there were any ambiguity—which I am unable to see—the reasons which have been pointed out in argument are overwhelming for coming to the conclusion that it could never have been the intention that an offence against the *Customs Act*, which may be most trivial, must always be followed by a very large pecuniary penalty if the goods in respect of which it is committed happen to be of a large value. In my opinion "the minimum penalty prescribed in pounds" is one-twentieth of the maximum penalty mentioned at the foot of the section. Any other construction fails to give any rational meaning to the words "in pounds." It is suggested that these words were put in for the purpose of excluding the necessity of taking into consideration the possible shillings and pence in the dividend and quotient used in ascertaining the maximum penalty under sec. 240. I think that is a fantastic notion, and quite insufficient, even if there were an ambiguity.

BARTON J. I am entirely of the same opinion.

O'CONNOR J. When this question came before me on the hear-

H. C. OF A. 1909.

THE KING v. HARRIS, SCARFE & CO. LTD.

O'Connor J.

ing of a prosecution under the *Customs Act* 1901 I took the view which has been put forward to-day by Mr. *Starke*. But, on the fuller consideration which has been possible here, I think that is not the right view. The Act prescribes two ways in which the maximum penalty may be ascertained. One by the statement of it in amount, as in the phrase "penalty £100," the other by prescribing, as in sec. 240, that the maximum shall be thrice the value of the goods, and as in sec. 243 that the minimum shall be one-twentieth of the "maximum which is prescribed in pounds." I think "prescribed in pounds" must be taken to refer to the sections which state in pounds what the penalty is to be, not to those which fix the penalty by a calculation of the value of the goods.

That construction is, I think, strongly borne out by sec. 257 which prevents the minimum penalty from being reduced. As was pointed out during the argument, if Mr. *Starke's* contention is to be adopted, it is possible that, in a case where the value of the goods is large, the minimum penalty which a Judge could impose would be altogether out of proportion to the offence. Under these circumstances I think the proper construction to be adopted is that which Mr. *Mitchell* has put forward.

ISAACS J. I concur.

HIGGINS J. I concur.

Question answered accordingly.

Solicitor, for the plaintiff, *C. Powers*, Commonwealth Crown Solicitor.

Solicitors, for the defendants, *Blake & Riggall* for *Gall & Isbister*, Adelaide

B. L.