[HIGH COURT OF AUSTRALIA.]

LEWIS . . . . . APPELLANT;
DEFENDANT,

AND

THE KING AND ANOTHER . . . RESPONDENTS.
PLAINTIFFS.

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MELBOURNE, *June* 19, 20.

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

Offences against Customs law—Intent to defraud the revenue—Maximum penalty—Reduction of penalty—Customs Act 1901 (*No.* 6 *of* 1901), *secs.* 234, 240, 241.

Where the penalty provided by the *Customs Act* 1901 for an offence charged is less than three times the value of the goods in respect of which the offence has been committed, and the defendant is at the same time charged with, and convicted of, an intent to defraud the revenue, the maximum penalty is, under secs. 240 and 241 of the Act, six times the value of the goods.

A person desiring to import for his own use furniture for which he had paid in London £189 12s., and to evade payment of duty thereon, had the goods consigned in three separate parcels to two of his employés whom he induced to make statutory declarations that the goods were their own and had been in their use for some years, the value of the goods being also understated, with the result that no customs duties were paid on the goods. In an action to recover penalties for evading customs duties with intent to defraud the revenue, *Higgins* J. imposed the maximum penalties, amounting to £1,211 12s., and ordered the forfeiture of the goods, and that the defendant should pay the duty on them, amounting to £61 2s. 11d., and the costs of the action. On appeal to the Full Court,

Held, that under all the circumstances, and having regard to fresh facts brought before the Full Court, the penalties should be reduced from £1,211 12s. to £300.

APPEAL from *Higgins* J.

An action was brought in the High Court by the King and the Minister of State for the Commonwealth administering the Customs against Warren Lewis charging him under the *Customs Act* 1901 in respect of each of three separate lots of goods with

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the offence of procuring the delivery of the goods for home consumption without the payment of any duty, and thereby evading payment of the duty payable upon them, and in each case the plaintiffs also charged him with having committed the offence with intent to defraud the revenue. The defendant admitted all the allegations of the plaintiffs. A statement of facts was admitted by the parties, and was read at the trial, which was to the following effect:—

The defendant, at all times material to the action, carried on business at 277/279 Lonsdale Street Melbourne and also in Sydney as a manufacturer of hats and caps.

During the year 1910 the defendant was in London on a visit from Australia. While in London he on the 16th and 17th August 1910 purchased the following goods at an auction sale held at Ashby House, Manor Road, Stamford Hill, London N. for the prices hereunder set forth. (Then followed a detailed list of the articles and the prices paid for them, the total amount being £189 12s.)

The whole of the said goods purchased as aforesaid were forwarded by Messrs. E. P. Humphrey and Company the London agents for the defendant to Messrs. Perrott and Perrott Limited, Packers, Shipping and Forwarding Agents, Tenter and White Streets, Moorfields, London E.C. to be packed for transport to Australia. By direction of the defendant part of the goods referred to above namely lot 203 being a grand piano by Kaps and part of lot 62 being a hair mattress and bolster were packed in a case marked [A L]/Melbourne/I.

The balance of the said goods above referred to were by direction of the defendant packed in 10 several cases marked respectively—

[J M]/Melbourne 353, 354, 355, 356, 357, 358, 359, 360, 361, and [J M]/Sydney 837.

Copies of the packing statements prepared by the said Perrott and Perrott Limited and forwarded to the said E. P. Humphrey and Company are produced.

The said E. P. Humphrey and Company by direction of the defendant thereupon prepared three several statements of freight and charges each dated 7th September 1910 as follows:—

(1) Statement purporting to debit A. Levy, Melbourne with £5 7s. 4d. freight and charges (including cost of packing) on one package per s.s. *Orontes*. Such package being the case above referred to marked [A L]/Melbourne/I.

(2) Statement purporting to debit Jacob Michlin, Melbourne with £39 14s. 10d. freight and charges (including cost of packing) on nine packages per s.s. *Orontes*. Such nine packages being the nine several cases above referred to marked [J M]/Melbourne 353 to 361 inclusive.

(3) Statement purporting to debit Jacob Michlin, Sydney, with £4 3s. 7d. freight and charges (including cost of packing) on one package per s.s. *Orontes*. Such package being the case above referred to marked [J M]/Sydney 837.

Copies of the three several statements by E. P. Humphrey and Company above referred to are produced.

The said E. P. Humphrey and Company prepared and forwarded to defendant a further statement dated 9th September 1910 in which the defendant was debited *inter alia* with the three several sums of £5 7s. 4d., £39 14s. 10d. and £4 3s. 7d. referred to in the statements in the last preceding paragraph. A copy of the said further statement is produced.

The defendant has paid the said sums debited against him by E. P. Humphrey and Company and set out in this statement.

All of the said goods purchased by the defendant as aforesaid were by direction of the defendant forwarded to Australia per the s.s. *Orontes* consigned as follows:—

(*a*) The said package marked [A L]/Melbourne/I to Arthur Levy Melbourne.

(*b*) The said nine packages marked respectively [J M]/Melbourne 353 to 361 inclusive to Jacob Michlin, Melbourne.

(*c*) The said package marked [J M]/Sydney 837 to Jacob Michlin, Sydney.

The defendant while in London as aforesaid arranged with one Isaac Levy (known also as Arthur Levy) and with one Jacob

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Michlin to proceed to Australia to work in the defendant's factory in Melbourne. In pursuance of such arrangement the said Isaac Levy arrived in Melbourne in the ship *Bremen* in November 1910 and the said Jacob Michlin in the ship *Seydlitz* in October 1910.

The said goods contained in package marked [A L]/Melbourne and consigned as aforesaid to Isaac Levy Melbourne arrived at Melbourne in the ship *Orontes* and were with the consent of the defendant entered in the name of the said Isaac Levy on the 8th December 1910 Customs Entry Number 177 of the said date produced.

The value of the said goods stated in the said entry was £41 2s. whereas the true value was £46 5s. And no Customs duty was paid on the said piano contained therein.

The said Isaac Levy on the 7th December 1910 made a statutory declaration declaring as follows:—

> "The secondhand piano imported by me in case marked [A L] in the Steamer *Orontes* from London is my own, and has been in my use for some years and is imported for my use and not for trade or sale. I further declare that I arrived in the Commonwealth per Steamer *Bremen* in November 1910. Value being under fifty pounds."

The said declaration was produced to an officer of Customs in support of the said Customs entry Number 177.

The said goods contained in the said package marked [A L]/ Melbourne and referred to in the said Customs entry and declaration were not then and never were the property of the said Isaac Levy and were never in his possession but were at all times material to this action the property of the defendant.

The said goods after clearance at the Customs under the said Customs entry Number 177 were delivered to the defendant at his residence and remained and still remain in the possession of defendant at his residence but subject to Notice of Seizure thereof which has been served under the provisions of the *Customs Act* 1901.

The said goods contained in packages marked [J M]/Melbourne 353 to 361 and consigned as aforesaid to Jacob Michlin, Mel-

bourne, arrived at Melbourne in the ship *Orontes* and were with the consent of the defendant entered in the name of the said Jacob Michlin on the 22nd October 1910 Customs Entry Number 7 of the said date, produced.

The value of the said goods was stated in the said entry as £55, whereas the true value was £122 7s. and no Customs duty was paid thereon.

The said Jacob Michlin on the 19th October 1910 made a statutory declaration declaring as follows:—

> "The nine cases imported by me in the steamer *Orontes* from London marked [J M] contain my own second-hand furniture and personal effects imported for my own use and not for trade or sale. I further declare that I arrived in the Commonwealth by steamer *Seydlitz* on October 17th 1910."

The said declaration was produced to an officer of Customs in support of the said Customs Entry Number 7.

The said goods contained in the said packages marked [J M]/ Melbourne 353 to 361 and referred to in the said Customs entry and declaration were not then and never were the property of the said Jacob Michlin and never were in his possession but were at all times material to this action the property of the defendant.

The said goods after clearance at the Customs under the said Customs Entry Number 7 were delivered to the defendant at his residence and remained and still remain in the possession of defendant at his residence but subject to notice of seizure thereof which has been served under the provisions of the *Customs Act* 1901.

The said goods contained in the package marked [J M]/Sydney 837 and consigned as aforesaid to Jacob Michlin, Sydney, arrived at Sydney in the ship *Orontes* and were with the consent of the defendant entered in the name of Jacob Michlin Customs Entry Number 1455 of the said date amended on the 3rd November 1910 by Customs Entry Number 1268 of the said date.

The said Customs Entries Number 1455 and 1268 are produced.

The value of the said goods was stated in the said entries as £16 10s., whereas the true value was £21, and no Customs duty was paid thereon.

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The said Jacob Michlin on the 28th October 1910 at Melbourne made a statutory declaration declaring as follows :—

> "The case imported by me in the steamer *Orontes* from London and marked [J M] 837 contains a secondhand piano that has been in my use for some years, the value being under fifteen pounds. I further declare that I arrived in the Commonwealth by steamer *Seydlitz* on October 17th 1910."

The said declaration was produced to an officer of Customs in support of the said Customs Entries Numbers 1268 and 1455.

The said goods contained in the said package marked [J M] /Sydney 837 and referred to in the said Customs entries and declarations were not then and never were the property of the said Jacob Michlin and never were in his possession but were at all times material to this action the property of the defendant.

The said goods after clearance at the Customs under the said Customs Entries Numbers 1268 and 1445 were by direction of the defendant delivered at the residence of one Mr. Resouki, an employé of the defendant residing at 214 Commonwealth Street, Surrey Hills, Sydney, and the piano included therein remained in the possession of the said Mr. Resouki until the 22nd September 1911 when the same were seized by the Customs as forfeited and conveyed to the King's Warehouse, Sydney.

The total amount of Customs duty evaded by the defendant on the goods hereinbefore referred to is £61 2s. 11d. The Schedule produced sets forth in detail how such amount of £61 2s. 11d. is arrived at.

The action was heard before *Higgins* J., who convicted the defendant of each of the offences charged, and of the intent to defraud the revenue alleged in each case, and he imposed a penalty of £277 10s. in respect of the first offence, £734 10s. in respect of the second, and £200 in respect of the third. He also ordered the forfeiture of the goods and that the defendant should pay the duty on them, amounting to £61 2s. 11d., and the taxed costs of the action, and committed the defendant to gaol until all the penalties were paid.

From this decision the defendant now appealed to the High Court on the grounds :—

1. That there was no jurisdiction to impose the penalties.

2. That the said penalties were excessive and out of all proportion to the offences.

3. That the amounts of the said penalties were unjust and oppressive.

On the hearing of the appeal counsel for the appellant stated —and the Crown did not dispute the truth of the statements— that the appellant owned land which was mortgaged for £2,400, that the Crown accepted a second mortgage over the land as security for the amount of the penalties and did not enforce the order for commitment; that the appellant's business was such that he could not provide the penalties out of it; and that the appellant had a wife and two children. These facts were not before *Higgins* J.

Starke, for the appellant. The maximum penalty, where the penalty for a particular offence is less than three times the value of the goods in respect of which the offence has been committed, is three times the value of the goods. The word "hereby" in sec. 240 of the *Customs Act* means "by this Act." The penalty under sec. 241, where there is intent to defraud the revenue, is twice the penalty otherwise imposed, and the penalty for an offence under sec. 234 being £100, applying sec. 241, the penalty is £200. That, in the words of sec. 240, is the penalty "hereby" imposed. The effect of sec. 240 upon this penalty of £200 is that, if it is less than three times the value of the goods, the maximum penalty is three times the value of the goods and not six times their value. This is not a case in which the maximum penalty should be imposed. It is not a part of a systematic fraud in the course of the defendant's business, but is an isolated transaction not affecting honest traders. [He referred to *R.* v. *Harris Scarfe & Co. Ltd.* (1).]

Arthur, for the respondents. The discretion of the Judge below as to the amount of the penalty should not be interfered with unless his discretion has been exercised on a wrong principle. The effect of sec. 240 of the *Customs Act* is, in a certain case, that is,

(1) 8 C.L.R., 225.

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when the penaly imposed by the section is less than three times the value of the goods, to place a new penalty in sec. 234, that is a penalty of three times the value of the goods, and then the effect of sec. 241 is that where an intent to defraud the revenue is proved that last mentioned penalty is doubled.

GRIFFITH C.J. delivered the judgment of the Court:—This is an appeal from a sentence passed by our brother *Higgins* on a prosecution for evasion of customs duties with intent to defraud the revenue, in which he imposed the maximum penalties. There were in form three charges, but they were all in respect of what was in substance one transaction. The defendant, by his defence, admitted the charge, including the intent to defraud the revenue. As soon, indeed, as he was charged he admitted everything, and put every facility in the way of the Crown to bring the case on for hearing. The goods in question were furniture, which the defendant had bought at auction in England, at the price of £189. He carries on a small business of a hat and cap manufacturer in Melbourne, and has been importing goods for his business for several years. He desired to import this furniture for his own use and to evade payment of duty upon it. For that purpose he had the goods consigned to two of his employés in three separate parcels, and he induced those employés, when the goods arrived in Australia, to make statutory declarations that the goods were their own, and had been in their use for some years. The value of each parcel was also understated, but, except in one case, the understatement was not material. The learned Judge imposed the maximum penalty in each case, amounting in all to £1,211 12s., to which must be added the forfeiture of the goods, the payment of the duty, and the costs of the action.

The defendant appeals to this Court, as he is entitled to do under the *Judiciary Act*, and asks this Court to exercise its independent judgment, as we are bound to do. The learned Judge assessed the damages in this way:—In respect of two of the charges he took six times the value of the goods, and in respect of the third charge, as three times the value of the goods was less than £200, he imposed £200. So that the amount is absolutely the maximum.

Mr. *Starke* contends that the maximum penalty in a case where an intent to defraud the revenue is charged is only three times the value of the goods. Sec. 234 provides that :—

"No person shall—

"(*a*) Evade payment of any duty which is payable ;

. . . . . .

"Penalty : One hundred pounds."—That by sec. 5 means the maximum penalty.

Sec. 240 provides that :—

"If any penalty hereby provided shall be less than three times the value of any goods in respect of which the offence has been committed the maximum penalty shall be thrice the value of the goods."

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."

Mr. *Starke* contends that the word "hereby" in sec. 240 includes the penalty provided by sec. 241. But sec. 241, when it says that, if an offence is committed with intent to defraud the revenue, the maximum penalty shall be double that which is "otherwise provided," plainly means the penalty provided in the absence of such intent, and as that maximum is three times the value of the goods, it follows that the maximum in the case of an intent to defraud the revenue is six times the value of the goods. So that point fails.

As to the amount of the penalty in this case we have had information before us which apparently was not before the learned Judge. Such evidence is admissible on an appeal from a Justice of this Court, though not on appeal from a State Court.

The legislature has allowed a very large discretion as to the amount of penalties. In the case of an offence committed with intent to defraud the revenue, the range of punishment is from £10 as a minimum to six times the value of the goods as a maximum, unless, indeed, six times the value of the goods is less than £200 when that sum is the maximum. When the legislature allows such a large range of punishment, I read it

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as an instruction to the Court to consider in each case the particular circumstances under which the offence was committed. If it is a very bad offence indeed, committed with deliberation and part of a system of fraud, the Court may well impose the maximum penalty. If it is an isolated offence and not likely to be repeated, the Court may apply a different rule. It is impossible to classify frauds into distinct categories. All the circumstances must be taken into consideration.

I referred during argument to a form of evasion of customs duties which is not uncommon, that is, where one friend asks another to bring for him into Australia some small articles to be given as a present. Of course that is contrary to the law, but people might be surprised if such a violation of law were punished by a fine of six times the value of the goods besides their forfeiture. This case is very much like that, although it is worse. Under all the circumstances we think that the penalty should be reduced, and that a penalty of £100 in respect of each offence will be sufficient punishment, it being understood that in each case the £100 is made up of £50 for the offence regarded without intent to defraud the revenue, and a further £50 in respect of such intent. The judgment, then, will be reduced to a penalty of £300. The result will be that the defendant will lose his goods, pay £300 and all costs, and besides that pay the duty on the goods. Such a result will not, at any rate, encourage others to commit a like offence.

Penalty reduced to £300. *Defendant to be entitled to reduction in amount of security already given.*

Solicitor, for the appellant, *Arthur Phillips.*

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

B. L.