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Whittingham (supra) which I feel bound to follow, an order for his costs must be made: and that is accordingly done.

As however these proceedings have been rendered necessary by the neglect of the plaintiff to follow the more convenient and usual practice of applying for costs at the trial; and as his right to make the application now is perhaps open to question and certainly fairly open to dispute on the part of the defendants the order for costs is made on the terms that the plaintiff do pay to the defendants the costs of this application, liberty being given to the defendant to set-off such costs against such as may be payable by him.

Order made accordingly.

Nov. 22.

[APPELLATE JURISDICTION.]

RECEIVER-GENERAL v. BRODZIAK AND COMPANY.

(No. 2.)

Case stated—Appeals Ordinance 1876. ss. 3, 11—Customs Ordinance 1881. ss. 90 (4), 100—Forfeiture.

An appeal lies by way of a case stated under s. 11 of the Appeals Ordinance 1876 from the dismissal of a prosecution although the amount involved is under 5*l.* s. 3 of that Ordinance only referring to cases of conviction and fine.

The Chief Police Magistrate having declined to make an absolute order of forfeiture of tobacco imported contrary to provisions of s. 90 (4) of the Customs Ordinance 1881, there being no suggestion of fraud,

Held. that the prohibition in that section was not an absolute one, but only one *sub modo*, and that the magistrate, accordingly, had a discretion under s. 100 whether he would order a forfeiture or not.*

This was an appeal by way of a case stated from a decision of the Chief Police Magistrate at Suva, dated

* See now Ordinance I. of 1895, s. 34, as to forfeitures.

the 28th September, the judgment in which, omitting the formal parts, was as follows :—

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In this case, the defendants, A. M. Brodziak & Co., are charged with that they did on the 12th day of May last, unlawfully import certain quantities of tobacco in a package containing other goods contrary to the provisions of s. 90 of Ordinance XVI. of 1881, and the Receiver-General, in whose name the prosecution is brought, now asks this Court to make an order forfeiting the goods in question.

There is no dispute as to the facts in this case. It is proved and admitted that the tobacco, some 80 lbs. in weight, was brought to this Colony in a case containing other goods in contravention of the provisions of s. 90 of the Customs Ordinance.

The learned counsel for the prosecution argues that, the facts being proved, the Court has no discretionary power to make any order other than one for forfeiture under s. 90 sub-s. 4 and s. 100; and in support of this contention urges that the goods enumerated in s. 90 are "prohibited by law to be imported."

For the defence it is urged—(1) That there being no proof of fraud or attempted fraud, nor even an insinuation or suggestion of fraud, nor any attempt to evade the duties on the part of the defendants, they cannot be made *particeps criminis* and punished for the fault of the firm in Calcutta who shipped the tobacco without orders. (2) That under s. 100 the Court has power to make such an order as the circumstances require. That the order of forfeiture is not compulsory but discretionary, and should be made to meet the ends of justice, and in accordance with the merits of the case and, in support, quotes the judgment of his Honour Chief Justice Berkeley in the appeal case of *A. M. Brodziak & Co., appellants, and the Receiver-General, respondent*, decided in the Supreme Court on 14th June, 1887.*

The question I have to decide is whether, under s. 90 sub-s. 4 and s. 100, I am compelled to order the forfeiture of the goods or whether I can make such order as the circumstances require.

I do not agree with the counsel for the prosecution that tobacco comes under one of the prohibitions described by s. 90. The section reads, "The goods enumerated and described in the following table of prohibitions and restrictions." As I read the section, tobacco is not one of the class of goods prohibited to be imported like counterfeit coin, or obscene books or prints, but tobacco may be imported under

* *Ante* p. 141.

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certain restrictions. (1) That it must be more than 40 lbs. in weight.
 (2) That it must be packed by itself and not with other goods.

In this case the weight imported is in excess of the minimum required by law; thus the only restriction evaded is that the tobacco was packed in the same case with other goods, and to me appears to be similar to an evasion of the restriction required by s. 77 which also carries forfeiture of the goods.

After reading the judgment of his Honour the Chief Justice in the case of *A. M. Brodziak & Co., appellants, and the Receiver-General, respondent*, as to the legal interpretation of s. 100, I am clearly of opinion that I have the power and I am required by law to make such an order as will, in my opinion (based on the facts elicited by the evidence), meet the circumstances of the case.

In this case I do not think there are any grounds for believing there was any intention on the part of the defendants to defraud the Customs, no attempt was made to prove such intent, in fact the learned counsel for the prosecution stated that he made no suggestion of fraud on the part of the defendants. The case of *Budenburg, appellant, and Roberts, respondent* (1) quoted during the hearing, supports the judgment of his Honour the Chief Justice as to the necessity of "guilty intent" on the part of an importer being a condition requisite for a conviction, which in this case would be an order for forfeiture.

Holding this opinion I must refuse to make an order for the forfeiture of the goods. I therefore order that the goods be delivered to the defendants on the payment of all duties and of other legal charges.

From this decision the Receiver-General appealed, and the appeal came on for hearing on the 5th October last before his Honour the Chief Justice, when Mr. Garrick raised a preliminary and constitutional objection that his Honour, who was (in the absence of the Governor at the time from the Colony) also Administrator, could not hear the case which was one between the Crown and one of its subjects.

His Honour, whilst declining to accede to Mr. Garrick's contention that he had no jurisdiction to hear the case, decided to adjourn it until after the conclusion of the ensuing civil sittings.

(1) L. R. 1 C. P. 575.

On the 22nd November the case again came on for hearing.

The Attorney-General (Mr. Udal) for the appellants.

Mr. Garrick for the respondents.

Mr. Garrick raised the preliminary objection that under the Appeals Ordinance 1876, no appeal lay, as the amount involved was under 5*l.*, and cited s. 3 of the Ordinance.

After some argument his Honour decided he could not decide that point on a preliminary objection, but would hear the appeal.

The Attorney-General then contended that on the facts admitted in the case the Chief Police Magistrate was wrong in making the order he did, viz., to return the tobacco to Messrs. Brodziak & Co., as the goods in question were prohibited to be imported into the Colony under s. 90, and the Chief Police Magistrate accordingly had no jurisdiction to make any other order than one of forfeiture, as that was the only order "which the circumstances required" under s. 100, and that he had no discretion to order the return of the forfeited goods to the importer, even though he was not guilty of any fraudulent intention. Such a discretion might well exist in cases coming under s. 77, where the Receiver-General has the option given him by that section as to whether he shall forfeit or not, but that option is not allowed him in cases coming within s. 90. On this ground he distinguished the present case from that of the *Receiver-General v. Brodziak & Co.*, decided by his Honour in June, 1887.*

He also referred to *The Attorney-General v. Key* (1) decided under the old Revenue Act of 6 Geo. IV. c. 107,

* *Ante* p. 141.

(1) 1 Cr. & J. 159.

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to which statute he referred at some length, and contended that the words of s. 90 of the present Customs Ordinance (XVI. of 1881) were on all fours with the old Act; and that the tobacco in question not coming within the restrictions as to importation allowed under s. 90 was to be treated as being "absolutely prohibited," and was therefore properly forfeited.

With regard to the objection that there was no appeal in this case, the learned counsel referred to s. 11 of the Appeals Ordinance 1876, by which it was clear that an appeal by way of a case stated on a point of law was contemplated by *either* party—and that if Mr. Garrick's contention was correct that no appeal lay under s. 3 when the amount or value was under 5*l.*—no prosecutor ever could appeal, as he could not be the subject of such a fine, and the words "either party" in s. 11 would consequently be useless. Section 3 not only provided for an appeal in cases where a person was convicted and fined in a sum exceeding 5*l.*, but also where an order had been made by a magistrate against any person, without reference to any amount. The proviso in that section only applied to cases where a fine or penalty had been imposed. In the present case the magistrate had made an order against the Receiver-General to return the tobacco to the respondents on payment of all duty, and it was from that order that he was now appealing.

Mr. Garrick was not called upon.

H. S. BERKELEY, C.J. I had at first considerable doubt whether an appeal lay from the magistrate's decision in the present case, but I have come to the conclusion that it does. The Appeals Ordinance 1876 is certainly defective and wanting in explicitness, and an early opportunity should be taken to amend it. [His

Honour then referred to ss. 3 and 11 of the Ordinance.] There are two classes of cases in which appeals are allowed—one referring to convictions and fines, the other where an order only is made. The proviso in the section relating to amount, or value, refers only to the first class of cases, and has no application to where an order merely is made. Section 3, as worded, would apply solely to persons convicted or against whom an order is made, but s. 11 extends the right of appeal to *either* party in cases coming within its provisions.

The question then before me to consider is whether tobacco imported into the Colony in packages with other things should have been forfeited by the stipendiary magistrate, or whether he had any discretion to make the order he did. The answer to that question would depend upon the construction to be placed upon s. 90 of the Customs Ordinance 1881.

[His Honour referred to s. 90 and the table of goods "prohibited and restricted," and read sub-s. 4 under which the present proceedings were taken.]

It is taken as admitted that the goods were found on board ship. Section 90 prohibits the importation of goods mentioned in sub-s. 4 "save as thereby excepted." Therefore tobacco is prohibited in packages containing other goods, but otherwise may be imported. It was carefully considered by the stipendiary magistrate whether the prohibition of such tobacco was absolute and gave him no discretion but to forfeit, or whether it was a prohibition *sub modo*, and would allow him a discretion to inquire as to the *mens rea* of the importer and to make an order according to the surrounding circumstances.

The stipendiary magistrate thought he had such a discretion, and, reading ss. 90 and 100 together, as he

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thought must be done when, as in this case, the prohibition is *sub modo* only and not absolute, I agree with him in that opinion. I regard s. 90 as amounting only to a prohibition *sub modo*—that is to say, only in particular circumstances or in a particular way. Does that section then confer upon the stipendiary magistrate a discretionary power? The stipendiary magistrate came to the conclusion that he had that power, and I consider he is right in that opinion. Assuming therefore that the goods were prohibited only *sub modo* they were liable to forfeiture, and the stipendiary magistrate had it in his power to order their forfeiture; for in order to be forfeited they must come before him under s. 100—which in express terms confers upon the stipendiary magistrate the power to order forfeiture, or to “make such order as the circumstances require.”

These goods then not being absolutely prohibited the stipendiary magistrate was right in taking the view he did as to making what order he considered the circumstances required; and there being no intention to defraud he had the right to make the order he did and to require the tobacco to be given up to the importer on payment of duty. The burden of proof lay on the importer, but if there was no fraud it was only right he should be acquitted and that there should be allowed such a discretion to the stipendiary magistrate.

The decision must therefore be affirmed, and the respondents be allowed their costs of the appeal.

Appeal dismissed with costs.