The Customs Consolidation Act[1] 39 and 40 Vict., c. 36, s. 186, was referred to in the argument, and here it is clear the " knowingly " does not mean " with intent to defraud." S. 186 renders liable to a penalty any person who shall be " knowingly concerned in the carrying of such " (as those authorized in the section) " with intent to defraud "; here " knowingly " cannot mean " with intent "; it has, in my opinion, a meaning similar to that which I attribute to it in s. 87 of our Ordinance.

I may observe that the same section (186) of the English Act makes it an offence to remove from a ship certain goods " unless under the care or authority " of a customs officer ; can it be contended that if these words did not appear in the section they would be implied ? Surely not.

To revert once more to s. 87 of our Ordinance, it is significant that after dealing with the offence of knowingly delivering it goes on to provide that any person " assisting " in their removal is also punishable if he does so " knowing that the same were liable to the payment of duty "—exactly the meaning which, in my view, " knowingly " has in the case of the person delivering the goods to be removed.

It seems clear then that the legislature has absolutely prohibited the acts dealt with in this section ; that hard cases may arise under such stringent provisions is undoubted and this is probably why a discretion to prosecuting is given to the Receiver-General, enabling him to hold his hand where he is satisfied that the offence is purely technical.

The appeal is dismissed with costs.

WALKER FOR THE RECEIVER-GENERAL *ats.* CHOONILAL AND JADHAVJEE.

[Appellate Jurisdiction (Davson, C.J.) January 25, 1921.]

Conviction under Ordinance 10 *of* 1905[2] *for unlawfully importing gunjah—penalty under s.* 3*—fine or imprisonment—enforcement of—form of conviction—proper authority to lay information—whether authority may be delegated—no valid information before the Court—proceedings void ab initio.*

In a prosecution under the Indian Hemp Prohibition Ordinance, 1905, the informaton was laid by " Alfred Walker on behalf of the Receiver-General ". It was objected at the trial before a court of summary jurisdiction that the complaint in this form was invalid.

HELD.—(1) There being no valid information before the Court the proceedings were void *ab initio*.

(2) There being no statutory provision allowing a complaint to be made by one person on behalf of another, in this instance, the information could have been laid by Walker in his own name but there is no law giving the Receiver-General a general power to authorize another to take proceedings.

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[1] 1876.
[2] *Indian Hemp Prohibition Ordinance,* 1905 (*Repealed*).

[**EDITORIAL NOTE.**—The Indian Hemp Prohibition Ordinance, 1905, (rep.) did not require proceedings to be in the name of the Receiver-General and the decision in this case is apparently on the basis that apart from statutory authority an information purporting on its face to be made in exercise of a delegated authority is invalid. The Indian Hemp Ordinance was as follows :—

" 1. This Ordinance may be cited for all purposes as ' The " Indian Hemp Prohibition Ordinance, 1905.'

" 2. From and after the coming into operation of this Ordi- " nance it shall be unlawful for any one to import or bring into the " Colony except with the written consent of the Chief Medical " Officer any Indian hemp or any product or preparation therefrom " including gunjah bang and charas or any article capable in the " opinion of the Chief Medical Officer of the Colony of being used " in substitution therefor. A certificate signed by the Chief " Medical Officer shall be accepted as sufficient evidence of such " opinion.

" 3. Any person unlawfully importing or bringing into the " Colony any of the Articles in the second section mentioned shall " be liable to a penalty not exceeding one hundred pounds or to " imprisonment for a term not exceeding six months.

" 4. If any of the articles in the second section mentioned shall " be unlawfully imported or brought into the Colony such articles " shall be absolutely and peremptorily forfeited and may be dis- " posed of in any way the Receiver-General may direct without any " further proceedings.

" 5. In ' The Gunjah Prohibition Ordinance 1886 ' the expres- " sion ' bang or gunjah ' shall be deemed to include the plant " Indian hemp and any product or preparation therefrom or any " article capable in the opinion of the Chief Medical Officer of " being used in substitution therefor."

APPEAL against conviction. The facts appear from the judgment.

H. M. Scott, K.C., for the appellant.

The Acting Attorney-General, *C. G. B. Francis*, for the respondent.

DAVSON, C.J.—This is an appeal from a conviction under Ordinance 10 of 1905 for unlawfully importing gunjah. S. 2 of the Ordinance makes it unlawful to import gunjah and certain other articles without the written consent of the Chief Medical Officer and section 3 provides that any person so importing any of these articles shall be liable to fine or imprisonment.

There are several grounds of appeal, and I will take first those relating to the conviction, leaving to the end the first ground which relates to the information.

It was contended, in the first place that, as the two accused were tried together on one information, there should not have been two separate convictions. I do not agree ; the penalty is imposed on each person convicted and each was liable to a separate penalty ; no application for separate trials was made, nor do I see any reason for such a course, but the accused could have been tried separately.

It was further argued that the conviction (the two are in the same terms) is bad because it ordered that the fine should be levied by distress. In considering this point, a question has presented itself to me

which was not dealt with at the hearing of the appeal and on which, therefore, I have not had the advantage of hearing counsel. The conviction, of course, must depend on the judgment. Now the judgment was " Fined £100 or 6 months' imprisonment." If this judgment is good in form the conviction is not, for it should have been according to Form 14 of the Summary Jurisdiction Ordinance (No. 4 of 1876)[1] instead of, as it is, according to Form 13. The section under which appellants were convicted provides that the convicted person shall be liable to a penalty or to imprisonment. In the Summary Conviction Offences Ordinance (5 of 1876)[1] there are numerous sections imposing a fine and, in default of payment, imprisonment. It appears to me therefore, though I should have been glad to have heard the point argued, that Ordinance 10 of 1905 does not provide imprisonment in default of payment of the fine, but that the punishments are distinct and alternative. In that case the judgment should have been either :—

(*a*) a fine, which could have been levied by distress, or

(*b*) peremptory imprisonment.

If the judgment had been (*a*), the form of the conviction appealed against would have been the correct one, but the term of imprisonment (6 months) is excessive, the limit under s. 51 of the Summary Jurisdiction Ordinance being 3 months. If the judgment had been (*b*), Form 15 would have been appropriate.

The conviction, further, orders each defendant to pay £23 13s. 0d., and it is not disputed that if this were done, the prosecutor would recover at least some of his expenses twice over, e.g., the cost of the attendance of a witness from Suva was £9 and each defendant was ordered to pay this ; these expenses should have been apportioned.

It was further objected that a note had been added to the conviction, after the day of adjudication, to the effect that the sentence was to be cumulative on another sentence passed the same day for another offence under the same Ordinance. I do not consider this an irregularity if the Court so adjudged when sentence was pronounced, though I must point out that the record is silent as to this.

I now come to the evidence. It is contended that the evidence of Mr. Woolcott was irrelevant and inadmissible. With this I am inclined to agree but, seeing what that evidence is, would not quash the conviction on this ground.

Then it is said that there is nothing to show that the parcel in which the gunjah was sent to the analyst reached him intact. The parcel was sealed and it is hard to understand why the analyst was not asked the simple and obvious question " Were the seal and wrappings intact when you received the parcel "? It happens, fortunately, that the seal itself was produced at the hearing of the appeal and it was then intact so this objection would not hold good, especially as appellants were represented, in the Court below, by counsel who did not cross-examine on the point.

It is objected generally that the conviction is against the weight of evidence. I am of a different opinion. Mr. Scott contended that, as regards Jadavjee at any rate, there was not sufficient evidence, as there

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[1] *Rep.*

must be some overt act proved in connection with the particular shipment ; to allow this contention would be to make the Ordinance a dead letter. If the forbidden article is imported, the importer is liable.

As to the ground that the penalty was excessive, each case must be taken on its merits and I do not think the penalty was excessive in the circumstances.

In view of the course I propose to take on the first ground of appeal it was not, strictly, necessary for me to deal with any of these objections, but, having regard to the possibility of further proceedings in this case and the practical certainty of similar prosecutions in the future, I have thought it my duty to state the views of this Court on the points raised.

The first ground of appeal is a technical one. The information is laid in the name of " Alfred Walker . . . on behalf of the Acting Receiver-General," and it is contended that the Receiver-General could not delegate his authority to another. Under the Customs Ordinance 1881[1] (s. 124) every prosecution must be in the name of the Receiver-General, and it may be said that this gives him an implied power to authorize another to institute proceedings in his name, but Ordinance 10 of 1905 is not the Customs Ordinance, nor is it to be read with that Ordinance. There are enactments which allow a complaint to be made by one person on behalf of another (e.g., s. 3 of Ordinance 5 of 1876[2], but there is no such enactment in Ordinance 10 of 1905. The information could have been laid by Mr. Walker in his own name, but there is no law giving the Receiver-General a general power to authorize another to take proceedings.

Now, I have the greatest reluctance to quash a conviction on technical grounds where the facts appear to warrant a conviction. I am willing to go and have in some cases, gone, to considerable length, so far as the law allows, in the direction of disregarding technicalities and amending defects and irregularities, but appellants have their rights and there are limits beyond which I am not prepared to go, my functions being those of a Court of Appeal and not those of a sort of judicial tinker.

I have come to the conclusion that I ought to quash the convictions on the first ground of appeal. Had this objection not been taken at the hearing, I should have been bound to ignore it by s. 23 of the Appeals Ordinance 1903, but the objection was taken and over-ruled. The convictions are therefore quashed on the ground that there was no valid information before the Court, and therefore, as contended by appellants' counsel, the proceedings were void *ab initio*. The effect of this will be that fresh proceedings can be taken against the appellants in respect of the alleged offences ; for a certificate of dismissal, which would be a bar to further proceedings, could only have been given by the Court below after hearing the evidence, and the appeal succeeds on the ground that there was no information on which evidence could be heard.

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[1] *Now Cap.* 147.
[2] *Summary Conviction Offences Ordinance* 1876 (*Rep.*). S. 3 *authorized complaints of assault and battery " by or on behalf of the party aggrieved."*