Privy Council Appeal No. 161 *of* 1915.

The Toronto Railway Company - - - *Appellants,*

v.

The King - - - - - - - *Respondent,*

AND

His Majesty's Attorney-General for England and His Majesty's Attorney-General for the Dominion of Canada - - - - *Interveners,*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD AUGUST, 1917.

Present at the Hearing:

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD ATKINSON.
LORD PARKER OF WADDINGTON.
LORD PARMOOR.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal, for which special leave was given, from a judgment of the Court of Appeal for Ontario. The question is whether the appellants were properly found guilty on an indictment for having failed, in breach of an alleged legal duty, to take reasonable precautions to avoid undue dangerous and illegal overcrowding of passengers in their tramway cars, whereby the property and comfort of the public, as passengers in these cars, were endangered. The cars were run by electricity, on tracks laid along certain streets of the City of Toronto.

The indictment was brought under the Criminal Code enacted by the Dominion Parliament, which forms cap. 146 of the "Revised Statutes of Canada, 1906." The Code enacts (section 10) that the criminal law of England, existing at a certain date, is to be the criminal law of the Province of

Ontario, except so far as modified by the Code itself or other statutes. It subsequently (section 221) defines a common nuisance to be an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects. Having thus defined a common nuisance, the Code goes on to divide such nuisances into two categories with different consequences attached. By section 222 everyone is to be guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual. By section 223, on the other hand, anyone convicted upon any indictment or information for any common nuisance other than those mentioned in the last section, "shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right." The effect of this section is, in their Lordships' opinion, to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public, or by obstruction of any right, other than one affecting life, safety, or health, which is common to all His Majesty's subjects, has been committed. But it does deprive a conviction on indictment, in these cases, of its criminal character. The method of indictment is at times used in English law as a convenient one for trying a civil right, and the section of the Canadian Statute appears to give recognition to this use of the method, and to deprive it of any result in criminal consequences.

There are other sections of the Code which must be referred to. Section 1013 enacts that an appeal from the verdict or judgment of a Court or Judge having jurisdiction in criminal cases on the trial of any person for an indictable offence shall lie, upon the application of such person, if convicted, to the Court of Appeal in the cases thereinafter provided for, and in no others. When the Judges of the Court of Appeal are unanimous, their decision is to be final; but if any Judge dissents, an appeal will lie to the Supreme Court of Canada. No proceeding in error is to be taken. A case may be stated on a question of law during the trial. Section 1025 enacts that, notwithstanding any Royal prerogative, or anything contained in the Supreme Court Act, or in the Interpretation Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard. A copy of the Act containing this section having been transmitted by the Governor-General of Canada, who had assented to it, to the

Principal Secretary of State for the Colonies, it was allowed by Her then Majesty Queen Victoria, without comment.

The appellants are a street railway company, incorporated by a statute, passed in 1892, by the Legislature of the Province of Ontario. They operate their street railway under an agreement with the Corporation of Toronto, which was confirmed by the statute referred to, and the conditions and tender incorporated in the agreement were declared to be valid and legal, and to be binding on the parties to it. Paragraph 38 of the conditions and tender provided that cars were not to be overcrowded (a comfortable number of passengers for each class of car to be determined by the City Engineer and approved by the City Council). It does not appear that the obligation thus imposed on the appellants was invested by the statute with anything further than the contractual character which it originally possessed.

The indictment brought against the appellants contained a number of counts, some of them for criminal common nuisances, based on section 222 of the Code, which deals with danger to the life, safety, or health of the public. The only count, however, on which the jury found a verdict of guilty at the trial was the count already referred to, which was based on danger to the property and comfort of the public, under section 223. The appellants demurred to the indictment, but, the demurrer being overruled, the appellants pleaded over. At the request of the appellants, Riddell, J., who presided at the trial, stated a case for the Appellate Court of Ontario, which raised, among other questions, the question whether the demurrer should have been allowed.

The Appellate Court found that the appellants were guilty, on the finding of the jury, of a criminal offence on the count referred to; that the demurrer was properly overruled; that there had been no misdirection, and that the conviction should be affirmed. The learned Judges of the Court of Appeal thought that the Code intended to leave untouched the common law right to proceed by indictment for a public nuisance, and merely to alter the punishment on a conviction for what remained a criminal offence. They said that, just as in the case of a nuisance on a public highway, the nuisance was a public one, although it was only those members of the public that had occasion to use the highway that were prejudicially affected, so all those members of the public for whom there was room in the cars had the right to travel in them.

The appellants applied to the Sovereign in Council for special leave to appeal, and this was granted subject to a reservation of liberty to the respondents to raise the question whether leave should have been granted, having regard to the fact that the matters in dispute formed the subject of a criminal charge. It was arranged that, as a question was raised whether section 1025 of the Dominion Statute had effectually abrogated the prerogative right to hear the appeal, the Attorney-General

of England and the Attorney-General of Canada should be notified. They have both of them, as the result, been represented during the argument at the Bar.

It has in the event become unnecessary for their Lordships to express an opinion on the question as to the prerogative, for they have arrived at the conclusion that, on the true construction of the Code, this is not a criminal case within the meaning of section 1025, which purports to limit the prerogative, but is in reality a question of civil right which may properly be made the subject of appeal to the Sovereign in Council, and as to which the prerogative is not affected. The point turns on the construction of section 223, and their Lordships think that although the section preserves indictment and information as modes of procedure in the cases with which alone it deals, those relating to the property or comfort of the public, and to obstruction of rights common to the King's subjects other than those dealt with in section 222, it divests the breach of duty so tried of any criminal character. The section provides that anyone convicted under it is not to be deemed to have committed a criminal offence, and goes on to preserve the possibility of such consequential proceedings or judgments as may be taken or had under the existing law, not for the punishment of the person convicted, but for the abatement or remedy of the mischief done by the nuisance to the public right. The wrong done is therefore, in their Lordships' opinion, only a civil wrong. That indictment should be recognised in a statute as a method of trying a civil right is nothing new. For example, section 1 of the English Evidence Act of 1877 (40 & 41 Vict., c. 14) provides that on an indictment for the purpose of trying or enforcing a civil right only, the defendant and the wife or husband of the defendant are to be admissible witnesses. Their Lordships think that it was competent to the Parliament of Canada under section 91 (27) of "The British North America Act, 1867," which enables it exclusively to legislate as to criminal law including procedure in criminal matters, to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive.

These considerations dispose of the point as to the competency of this appeal. What remains is the question whether the demurrer should have been allowed. Their Lordships are of opinion that this should have been done. The obligation of the appellants was a contractual obligation to the Corporation. There was no duty to the public generally. That the electric cars ran on rails along the streets made no difference in this respect. For these cars were on the street in derogation of the public right which the Legislature of Ontario and the Corporation of Toronto had thought it advantageous to interfere with. The cars were not the less thereby the property of the appellants, which the public could only enter by invitation. Whatever conditions in the grant of the appellants' title the Corporation had contracted for obtained merely between them

and the appellants. The overcrowding was not a matter that affected the public as such, but only those members of the public who had obtained from the appellants licences to enter the cars.

This being in, their Lordships' opinion, the conclusion to which the Court of Appeal ought to have come, it follows that the demurrer should have been allowed and an acquittal directed. Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed and the judgment of the Appellate Division of the Supreme Court of Ontario dated the 9th November, 1915, set aside and the matter remitted to the Supreme Court so that a verdict of acquittal may be pronounced in favour of the appellants. The respondent should pay to the appellants their costs in the Appellate Division and of this appeal; those of the proceedings in the Court of First Instance should be left to the discretion of that Court. The Attorney-General of England and the Attorney-General of Canada will neither receive nor pay costs.

In the Privy Council.

THE TORONTO RAILWAY COMPANY

v.

THE KING

AND

HIS MAJESTY'S ATTORNEY-GENERAL FOR ENGLAND AND HIS MAJESTY'S ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.

DELIVERED BY
VISCOUNT HALDANE.

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