

1904
 •Nov. 28.

ARTHUR GEORGE.....APPELLANT ;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA
 SCOTIA.

*Criminal law—Crown case reserved—Form of charge—Theft—Taking
 “fraudulently and without colour of right”—Criminal Code, 1892,
 secs. 305 and 611—Form FF—County Court Judges’ Criminal Court
 —Court in banco—Jurisdiction of quorum.*

The Supreme Court of Nova Scotia, composed of a quorum of four judges only, has jurisdiction to hear and decide a Crown case reserved stated by the judge of the County Court Judges’ Criminal Court for the opinion of the Supreme Court.

The prisoner was charged before the County Court Judges’ Criminal Court with unlawfully stealing goods, but the charge did not allege that the offence was committed fraudulently and without colour of right.

Held, affirming the decision appealed from, that the offence of which the prisoner was accused was sufficiently stated in the charge.

APPEAL from the Supreme Court of Nova Scotia, declaring that the charge to which the prisoner pleaded and on which he was tried and convicted in the County Court Judges’ Criminal Court was not bad by reason of the omission to charge the offence of theft as having been committed fraudulently and without colour of right. The case stated for the opinion of the court below was as follows :

“CASE STATED FOR THE OPINION OF THE COURT.

OCT. 11, 1901.

“The prisoner was charged before me under section 305 of the Code, that on a certain day in the month of April, A.D. 1901, he unlawfully did steal one piece of

•PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

Oregon pine wood, of the value of five dollars and forty cents, the property of His Majesty the King.

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“ At the conclusion of the evidence, Mr. Power, counsel for the accused, objected that the charge of stealing in this case must allege that the offence was committed fraudulently and without colour of right, etc.

“ I found the prisoner guilty, but at the request of his counsel I suspended sentence, and granted a reserved case, upon the following question :

“ 1. Is the charge to which the prisoner pleaded, and on which he was tried, bad by reason of its omitting to charge the offence as having been committed fraudulently and without colour of right, and, if yes, is the conviction therefore bad, the accused not having objected until after the close of the evidence ?

“ The only doubt which I entertain in respect of the sufficiency of the charge is caused by the opinion expressed by Mr. Justice Taschereau in his work on the Code, at page 675, as to the restricted application of section 611 of the Code and the Form FF given in schedule one. But for that opinion I would have had no doubt whatever as to the sufficiency of the charge, and would have refused the application for a reserved case.

“ (Signed), W. B. WALLACE,

“ *Judge of County Court, District No. 1,
and Judge of the County Court Judges’
Criminal Court for the County of Halifax.*”

When the case was heard by the Supreme Court of Nova Scotia, sitting *in banco*, that court was constituted of four of its judges only, being a quorum according to the rules of practice. The majority of the judges, Weatherbe J. dissenting, were of opinion that the charge to which the prisoner pleaded and

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upon which he was tried and convicted was not bad by reason of the omission to charge the offence as having been committed fraudulently and without colour of right, and ordered the case to be remitted to the trial court and the proper sentence passed upon the prisoner. The prisoner appealed to the Supreme Court of Canada.

John J. Power for the appellant. The charge was insufficient. It should have set out in substance all the elements which under sec. 305 of the Criminal Code constitute the offence of theft or stealing; in other words, it should have been averred that it was done "fraudulently and without colour of right" and with "intent, etc."

There was no jurisdiction in the court below to render the decision now under appeal. The Supreme Court of Nova Scotia, by sec. 5 of the Nova Scotia Judicature Act, is composed of seven judges and, as constituted, *in banco*, of a number less than seven judges, it had no jurisdiction to hear or determine the case reserved by the judge of the County Court Judges' Criminal Court. Section 3, (e, iii) of the Criminal Code requires criminal appeals or cases reserved, in Nova Scotia, to be heard before the court *in banco*. See definition of "Court *in banco*" in the Century Dictionary, also in the Imperial Dictionary. Order 58, Rule 7, and Order 61, Rule 1, of the Nova Scotia Judicature Act, fixing the quorum of judges on the hearing of appeals, relate merely to civil matters and do not affect procedure in criminal and matrimonial cases. These rules are rules of procedure only, passed under section 45 of the Nova Scotia Judicature Act, and do not relate to the "constitution" of a court. See British North America Act, 1867, sec. 92, s.s. 14. Section 15 of the Imperial Judicature Act of 1881 allows a court composed of five judges to hear criminal appeals in Eng-

land. Prior to the passing of that Act all the judges of the Court of Queen's Bench attended during arguments of Crown cases reserved. As no such provision regarding the proper quorum in criminal cases exists in Nova Scotia, the attendance of all the judges of the Supreme Court of that province is necessary to give jurisdiction.

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Longley K.C., Attorney General for Nova Scotia, for the Crown, was not called upon for any argument.

The judgment of the court was delivered by

SEDGEWICK J. (Oral).—We are all of the opinion that there was jurisdiction in the court below to hear and decide the case reserved and that the court as then constituted, composed of a quorum of the judges only, was properly constituted for that purpose.

We are also of opinion that the offence of which the appellant was accused is sufficiently stated in the charge upon which he was convicted in the County Court Judges' Criminal Court.

The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitor for the appellant: *John J. Power.*

Solicitor for the Attorney General for Canada: *F. F. Mathers.*

Solicitor for the respondent: The Attorney General for Nova Scotia.