Present: The Hon. Sir Joseph T. Hutchinson and Mr. Justice Middleton.

May 9, 1910

FORREST *v.* LEEFE.

P. C., Galle, 47,198.

Criminal Procedure Code, ss. 105, 109, 338, and 425—Order to abate a nuisance—Appeal lies—What constitutes a public nuisance.

An appeal lies against an order absolute (under section 109, Criminal Procedure Code) to abate a public nuisance.

A person cannot by long continuance of his practice acquire a right to carry on a business in such a way as to be a public nuisance. If the place where he carried it on was at first surrounded by land on which there were no dwellings, but houses gradually approach it, so that it becomes a nuisance to the inhabitants, they have a right to have it abated. He cannot by making injurious noises or smells for a long time deprive the public of the right to live peaceably and comfortably on the land near him. The doctrine that a man who "goes to" a nuisance has no legal right to have it abated is not now accepted; there are things which would be a nuisance in a quiet village, which we would not consider to be a nuisance in a crowded manufacturing town.

THIS was an appeal against an order absolute to abate a public nuisance made under section 109 of the Criminal Procedure Code. The facts appear sufficiently from the judgments. The case was first argued before Middleton J.

H. J. C. Pereira, for the appellant.

Garvin, C.C. (with him *Akbar*), raised the preliminary objection that no appeal lay against an order made under section 109. Middleton J. referred the point for the consideration of a Bench of two Judges.

Garvin, C.C. (with him *Akbar, C.C.*), for the respondent.—No appeal lies against an order under section 109. The order is not a final order for the reasons given by the Full Court in *Culantaivalu v. Somasundram.*[1] The powers of the Court are not exhausted with the order made under section 109. See sections 110 and 111.

H. J. C. Pereira (with him *H. A. Jayewardene*), for the appellant.—This is a final order. The moment the conditional order is made absolute, finality is reached. The fact that the Court has not exhausted all its powers with the making of the order is immaterial; otherwise no judgment of a criminal court will be final until the

[1] *(1905) 2 Bal. 122.*

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accused had suffered the punishment imposed. Numerous appeals have been entertained by this Court and in India against orders made under section 109.

[Their Lordships took time to consider their decision on the point argued, and after consideration intimated that they would hear the appeal.]

H. J. C. Pereira, for the appellant.—The proceedings in this case are irregular. The first Magistrate, Mr. Forrest, appears to have acted both as prosecutor and judge when he made the order under section 105. Under section 105 the Magistrate has no power to initiate proceedings *ex mero motu suo*. He can only act on receiving a report or other information. The special procedure provided by chapter IX. was not followed; the Magistrate, Mr. Forrest, originally purported to act under section 148 (*c*), and not under section 105. [Hutchinson C.J.: Every criminal proceeding must commence under section 148.] But there is a special procedure under section 105. In ordinary cases a Magistrate may initiate proceedings of his own knowledge and only issue summons. In this case Mr. Forrest has made an order against the accused under section 105; and it was for the accused to show cause against the order. The Magistrate may only initiate proceedings under section 148 for "offences." Section 105 does not refer to offences only, but also to various matters which are not offences. See Penal Code, section 3, for definition of offence. The order under section 105 merely says that the noise interferes with the business of the Court; it does not say that the noise was injurious to the health or physical comfort of the community. Though it must be admitted that a person cannot, strictly speaking, acquire a prescriptive right to commit a public nuisance, yet the public would be estopped from complaining of the nuisance after the lapse of a long time. Here the cooperage had existed for forty years. The Crown itself sold the land to the accused for the cooperage. Counsel cited the following authorities: *Directors of St. Helen's Smelting Company v. Tipping*,[1] *3 Nathan's Common Law of South Africa 1793 and 1794*, *Du Toit v. De Bot*,[2] *Rex v. Cross*,[3] *Rex v. Watts*,[4] *The King v. Lloyd*,[5] *Polsue and Alfieri v. Rushmer*,[6] *Jeeks v. Omera*.[7]

Akbar, C.C., for the respondent.— The case was tried, not by Mr. Forrest, but by Mr. Kindersley. Even if the proceedings before Mr. Forrest were irregular, that would not vitiate the whole proceedings (see section 425, Criminal Procedure Code). The Crown cannot grant to any person a right to commit a public nuisance (see *The Attorney-General v. Burridge*[8]). *Rex v. Cross*[3] was

[1] (*1865*) *11 House of Lords 642.*
[2] *2 S. C. 213.*
[3] (*1826*) *2 C. & P. 483.*
[4] (*1829*) *Moody and Malkins 281.*
[5] (*1803*) *4 Espinassis Nisi Prius Reports 200.*
[6] (*1907*) *A. C. 121.*
[7] *3 Trans. Reports 284.*
[8] (*1822*) *10 Price 350.*

over-ruled by *Hole v. Barlow*,[1] *Archibald's Pleading and Evidence 1027 (21st edition)*. Counsel also cited *Pollock on Torts 408 (8th edition); Encyclopædia of the Laws of England, VI., 232.*

Cur. adv. vult.

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The Magistrate made a conditional order under section 105 of the Criminal Procedure Code requiring the appellant forthwith to remove his cooperage from the vicinity of the Magistrate's Court at Galle, or to appear and show cause why the order should be modified or set aside. The appellant duly appeared and showed cause; evidence was taken, and the Magistrate after hearing the appellant and the complainant made the order absolute. This is an appeal against the order made on March 4, making the conditional order absolute.

The respondent's counsel took the preliminary objection that no appeal lies.

Section 338 of the Criminal Procedure Code enacts that, "Subject to the provisions of the last three preceding sections," which do not apply in this case, " any person who shall be dissatisfied with any judgment or final order pronounced by any Police Court or District Court in a criminal cause or matter to which he is a party may prefer an appeal to the Supreme Court against such judgment for any error in law or in fact." The wording is curious; it looks as if the Legislature here meant " judgment " and " final order " to be the same thing; or at least that a final order is a judgment; otherwise there is no appeal given against a final order. There is no definition of " judgment " in the Code; the definition of it in the Civil Procedure Code as the statement given by the Judge of the grounds of his order perhaps does not apply. A Magistrate or District Judge " records a verdict of acquittal " or " records a verdict of conviction and passes sentence " (sections 190, 214); in Supreme Court trials the jury returns a verdict, and the Judge in case of conviction " passes judgment on the accused according to law " (section 251). Chapter XXIV. treats of " the judgment," and directs how it is to be pronounced and what it is to contain; it speaks of a " judgment of death," section 305; and enacts that when a person is sentenced to death, "the sentence shall direct " so and so, and when he is sentenced to whipping, " the judgment " shall state so and so. And then chapter XXV. deals with " sentences and the carrying out thereof." All this seems to show that the word " judgment " is used rather loosely. Section 338, with which we are now dealing, does not speak of appeals against the " verdict " or " sentence " of a Magistrate or a District Court, but only against a " judgment." Is the order of March 4 a " judgment," or is it a

[1] *27 L. J. (C. P.) 208.*

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" final order," or is it an order which is not " final "? In *Culantaivalu v. Somasundram*[1] the Full Court held that an order under section 88 requiring a person to execute a bond to be of good behaviour for a certain period is not a final order, because it is not the last order which the Magistrate has power to make in the case; for if it is not obeyed, there is a further order to be made under section 93 committing the defendant to prison. It seems that the Court thought that the final order in such a case would be the order for imprisonment; at any rate, Middleton J. said that he thought there would be an appeal against the order for imprisonment if an appeal was not precluded by section 335. Layard C.J. did not consider the question whether it was a " judgment "; but Middleton J. said that it was an order and not a judgment. And both those Judges, with whom Moncreiff J. doubtfully concurred, held that it was not " final."

The judgment pronounced by the Magistrate in this case dealt with the evidence, decided that the appellant's cooperage was a public nuisance, and decided against his plea of right to continue it, and ordered him to remove it; it did in fact finally dispose of all the questions in dispute, and all that remained to be done was to enforce the order and (possibly—about that I do not express any opinion) also to punish the appellant if he disobeyed it. Assuming that we ought to hold in accordance with the above-cited decision that the order was not a final order, I nevertheless think that this is an appeal against a judgment. The Magistrate heard evidence, dealt with it, and decided all the questions of law and fact which were raised, and thereupon made an order in accordance with his findings. In ordinary language, he gave judgment; his statement of his reasons and his findings and his order constitute his " judgment."

I think, therefore, that the preliminary objection should be over-ruled. And I think that the Magistrate was right in considering that the appellant's coopering was injurious to the physical comfort of the community, and should therefore be removed. The evidence proves that the coopering goes on every day and all day, and that the noise from it at times makes it impossible for the Magistrate and the proctors and the interpretor and the witnesses to hear each other; that it is a nuisance to all persons attending the Court; and so it is injurious to their physical comfort.

The appellant's counsel urged that the powers given by section 105 should be exercised on the same principles on which a Court acts in dealing with nuisances under the Penal Code, and that where a thing has been done for a great many years, a right to go on doing it is acquired, even though it may have become a nuisance, and that if people then go and live within reach of it they must put up with it. I agree that the same principles ought to be applied; but I do not think that it is the law that a man can by long continuance of

[1] *(1905) 2 Bal. 122.*

his practice acquire a right to carry on a business in such a way as to be a public nuisance. If the place where he carried it on was at first surrounded by land on which there were no dwellings, but houses gradually approach it so that it becomes a nuisance to the inhabitants, they have a right to have it abated. He cannot by making injurious noises or smells for a long time deprive the public of the right to live peaceably and comfortably on the land near him. The doctrine that a man who "goes to" a nuisance has no legal right to have it abated is not now accepted: the only question is whether or not the thing complained of is a nuisance. No doubt there are things which would be a nuisance in a quiet village which we would not consider to be a nuisance in a crowded manufacturing town. But once it is proved that the thing is a nuisance, having regard to all the surroundings, the public have the right to have it abated.

It was objected that the Government, which sold the land to the appellant, and which is the real complainant, is derogating from its grant. But it did not purport to grant the right to carry on any business, and there is no evidence that it even knew that the purchasers were intending to carry on this business on the land.

Another objection taken was that the appellant set up a *bona fide* claim of right, and so the Magistrate's jurisdiction was ousted. But a man cannot set up a *bona fide* claim of right to commit a public nuisance, unless he is empowered by statute to do so.

Lastly, it is objected that the conditional order, which was afterwards made absolute, is bad on the face of it. It is in these terms: "Whereas it has been made to appear to me that you are carrying on, as Manager of Messrs. Clark, Spence & Co., Galle, the trade or occupation of coopering, and the noise proceeding from the coopering yard seriously interferes with the business of this Court, it being frequently impossible to hear what is being said." And it does not state what is the enactment under which it is made. It is, of course, irregular; it should have followed the words of the enactment by alleging that the coopering is injurious to the physical comfort of the community. It is urged that the judgment of the Magistrate should, therefore, be set aside. Section 425 of the Criminal Procedure Code enacts that no judgment shall be reversed on appeal on account of any irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial, unless the irregularity has occasioned a failure of justice. I do not think that this irregularity occasioned a failure of justice. The appellant before the day when he showed cause, which was on March 4, the conditional order having been made on January 28, had ample notice what the complaint against him was; he made no objection to the form of the order then or in his petition of appeal and I do not think that this objection should prevail now. I would dismiss the appeal.

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The first point in this case was whether an appeal would lie, it being contended for the respondent that the order was not a final one. The question as to whether it was a judgment was not referred to in the argument. It is clear, I think, that the decision appealed from is a judgment within the meaning of that term as given in section 306 (1), Criminal Procedure Code. It becomes, therefore, appealable under section 338, C iminal Procedure Code.

As regards the merits of the case, I cannot see that the proceedings were wholly irregular either under section 105 or section 148 of the Criminal Procedure Code. A public nuisance as described in section 261 of the Penal Code is an offence under the Code, and this would enable the Magistrate to act on his own knowledge or suspicion under section 148 (*c*), and I see no objection to his obtaining information direct through his own sense of hearing of the fact of its presumptive existence and acting thereon under section 105 and making a conditional order.

The case was in fact tried by Mr. Kindersley, another Magistrate, and no prejudice occurred to the defendant in the case. As regards the objection that the order itself does not disclose that defendant committed any offence under section 105, this is capable of amendment under section 425.

The only point on which I felt doubt was the last raised for the appellant, *i.e.*, that the evidence did not disclose the commission of a breach of section 105, *i.e.*, the carrying on of a trade injurious to the health or physical comfort of the community.

On reconsideration of the evidence, however, I think the fact that all the witnesses depose to the existence of a noise which, in their opinion, is a nuisance to those having duties to perform in a public Court and prevent the hearing of the proceedings, is sufficient to show that their physical comfort is interfered with and injured; and this, coupled with the evidence of Mr. Forrest, seems to prove that the coopering in question would be and is injurious both to the health and physical comfort of the community. It affects the comfort of all who have business to transact in the public Police Court, and this is I think sufficient evidence of its injury to the community in general.

The law as laid down in *Rex v. Cross*[1] relied on for the appellant is at the present day obsolete. See per Byles J. in *Hole v. Barlow*.[2] The argument, therefore, that the Police Court was taken to its present site many years after the respondents established their cooperage loses its force.

In the case of a nuisance from smells, it is sufficient to prove that they are offensive to the senses (*R. v. Neil*[3]), and so in the case of a noise, from analogy that it affects the hearing of things and

[1] *(1826) 2 C. & P. 483.* [2] *27 L. J. (C. P.) 203.*
[3] *2 C. & P. 435.*

intereferes with comfort. Personally I can conceive no more intolerable nuisance than a cooperage in the close vicinity of a Court of Justice, and have no difficulty in understanding as a juryman that such noises must be injurious to the physical comfort of all those whose duties compel them to resort thither, and that so affecting daily a considerable section of the community they are in fact and in law injurious to the physical comfort of the community. In my opinion the appeal should be dismissed.

Appeal dismissed.