

There was evidence that the complainant had been struck on the head with a bottle by the prisoner Edmondstone, and severely wounded.

The questions stated for the Court were whether the verdict had been rightly recorded, and whether it had been rightly interpreted.

The case was heard by MOSS, C.J.O., OSLER, GARKOW, MACLAREN, MEREDITH, J.J.A.

M. J. O'Reilly, Hamilton, for the prisoners.

J. R. Cartwright, K.C., for the Crown.

OSLER, JA.:— . . . Section 951 of the Criminal Code, 1906, enacts that every count shall be deemed divisible, and if the commission of the offence charged as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved.

This was sec. 713 of the Criminal Code of 1892, of which Taschereau, J., in his annotated edition, p. 819, observes that it is an extension of sec. 191 of ch. 174, R. S. C. 1886, under which, upon the trial of any person for any felony whatever, if the crime charged included an assault against the person, though not charged in terms, the jury might acquit of the felony and find a verdict of guilty of assault against the person indicted. Under corresponding Imperial legislation it was held that upon an indictment for aggravated robbery, i.e., robbery accompanied with violence, as in the case mentioned in sec. 446 of the Code, the person charged, though acquitted of the robbery, might be convicted of a common assault, though not of an assault constituting a substantive felony: *Regina v. Burrit*, 1 Den. C. C. 185; *Regina v. Reid*, 2 Den. C. C. 88; and see *Regina v. Smith*, 34 U. C. R. 552, 560, per Wilson, J.

Under the section as it now stands, there is nothing that I can see to prevent the jury, if they acquit of the robbing, from finding on such an indictment as we have before us, awkwardly framed as it is, a verdict of common assault under sec. 291 of the Code, or of unlawful wounding or inflicting grievous bodily harm under sec. 274, for the prisoners are charged not only with an assault simpliciter in connection