

DECEMBER 22ND, 1903.

C.A.

REX v. CALLAGHAN.

Criminal Law—Conviction for Theft—Leave to Appeal—Evidence for Jury—Weight of Evidence—Conduct of Case.

Motion by prisoner for leave to appeal from his conviction for theft at the General Sessions of the Peace for the county of York.

E. E. A. DuVernet and J. A. Macdonald, for the prisoner.

J. R. Cartwright, K.C., and H. H. Dewart, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—It would serve no useful purpose to accede to the prisoner's application. There was evidence on which it was open to the jury to find, if they believed the witnesses for the Crown, that the statutory offence created by sec. 308 of the Criminal Code had been committed. The document which the prisoner relied upon as evidencing that the transaction was one of actual sale to him of the piano was not conclusive of that fact. It was open to explanation quite as much as a receipt is so, and it was proper to shew the circumstances under which it was given and everything else connected with the transaction in order to demonstrate its real character. No estoppel arose out of it. The only parties concerned were the original parties to the dealing, and neither of them had changed his position in consequence of anything stated in the invoice. It might have been very different had the question arisen between a third party and Crossin, and the authorities cited by counsel for the prisoner, *Holton v. Sanson*, 11 C. P. 606, and cases collected in *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 11, pp. 429-431, would have been apt enough in such a case. It is quite clear that the trial Judge could not properly have withdrawn the case from the jury or directed an acquittal. On such a motion as the present the Court has nothing to do with the question whether the verdict was against the weight of evidence. That can only come before the Court on leave granted by the trial Judge. No evidence was improperly rejected or admitted. None at all events was admitted, looking at the case as a whole, which