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JANUARY 25TH, 1906.

DIVISIONAL COURT.

BRADLEY v. ELLIOTT.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Authority of Agent—Execution of Contract for Vendor—Statute of Frauds—Memorandum in Writing—Name of Vendor not Given—Delay—Inadequacy of Price.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., of 31st October, 1905, in favour of plaintiff in an action by an alleged purchaser to compel specific performance or for damages for breach of a contract for the sale to plaintiff of land owned by defendant.

H. L. Drayton and A. G. Slaght, for defendant, contended that the price was grossly inadequate; that one Black, who purported to make the agreement, was not authorized by defendant to do more than find a purchaser, and received a secret commission from the purchaser; and that the vendor was not described in the written contract; and relied on the Statute of Frauds. They also contended that the suit was defective for want of parties, because plaintiff's associates in the alleged purchase were not made parties.

W. S. Middleboro, Owen Sound, for plaintiff.

The judgment of the Court (BOYD, C., CLUTE, J., MABEE, J.), was delivered by

BOYD, C.:—The contract sued on by Bradley is evidenced by the following memorandum of its terms in the shape of a receipt, thus: "Owen Sound, Nov. 9th, 1903. Received from Bradley $100 in part payment of lot 16, 12th con. Albemarle; balance, $1,175, to be paid on the delivery of satisfactory deed. P.W. Black, agent."

The name of the vendor or owner is not given or referred to; Black signs the receipt as agent; but agent for whom? To arrive at that, extrinsic parol evidence is sought to be given, which is against the provisions of the Statute of Frauds. Dart says: "When the parties to the contract appearing in the memorandum are agents, the names of their principals may be proved by parol evidence, but this will only be so if the agents contracted as principals. If an agent contracts as agent, the memorandum must sufficiently identify his principal:" 7th ed., p. 235. The leading case is Porter v. Duffield, L. R. 18 Eq. 4, in which, like this, there was a memorandum, with one of the contracting parties neither named nor described, and Jessel, M.R., says: "I should be thrown upon parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing:" p. 8. That case is approved and followed in Jarrett v. Hunter, 34 Ch. D. 184, and 10 years later in Filby v. Hunsell, [1896] 2 Ch. 741. Here you cannot gather from the receipt (signed by agent Black) the identity of one of the contracting parties. The agent himself does not purport to be the contracting party, but merely the recipient of the money, and one will have to find out by verbal and conflicting evidence for whom the property was sold. This seems to be a fatal legal objection at the outset to the success of the plaintiff: see White v. Tomalin, 19 O. R. 573.

The defendant was out of the country when this sale was made by Black, and she appears not to have returned till after the action was begun on 27th July, 1904. She writes a letter from California on 11th July, 1904, saying she is going to return at the end of the month. She had no interview with the purchaser nor any correspondence with him, and there were no papers available to plaintiff to supply the defect in the memorandum under the Statute of Frauds, as to the name of the other contracting party.

Then to deal with the merits. Whatever negotiations occurred prior to the first letter in evidence, 8th September, 1902, in which Mrs. Elliott sends Black a list of lots, in which this one, 16 in 12, Albermarle, appears, at the price of $1,800, they came to nothing, and should not enter into consideration in order to construe the correspondence which arose the next year, in July, 1903. The matter is opened by Black writing to her in California: "Have you sold the Harrison lot (the one in question); have sent a lumber man to see this lot, and he reports it worth about $1,000. The timber is small, and Harrison took the oak off before selling it to Mr. Elliott. Supposing I can get $1,200 cash, would you take it? An answer at your earliest convenience would oblige."

Answer is 24th September, 1903, from California: "In reference to that lot you wrote me some time ago, I mislaid it somehow. Now here is my best offer, $1,275. I have forgotten those parties' names whom you wrote me about, but I know timber is certainly more valuable than when Mr. Elliott bought."

No answer was sent to this, but on 9th November, 1903, Black undertook to sell to Bradley for $1,275, and advised defendant by telegram of same day, post card dated 10th November, and lawyer's letter of 12th November, enclosing a deed for her signature. On 19th November she writes Black, objecting to the form of the deed, that it should be "an administratrix deed . . . so there is no use wasting money, and I will wait till I hear from you. I was just writing you to take it off the market when I got the cablegram; because my valuator must have been away out far." No reply to this apparently.

On 27th November she writes again: . . . "I have decided not to sell that lot unless I get more money. Had I received it shortly after I wrote you, I had a chance to invest here, but now I think it just as safe in timber. I wrote you in reference to deed. Had I known I would have had you prepare papers in Chesley, but I feel I made a mistake to sell for that, so I have signed no paper nor will until I hear of more money."

And sent telegram of 28th November: "Will not sell for what I offered; mistake in deed."

Black's answer is of 2nd December, 1903, in which he says: "I sold the lot on the authority of your letter of 24th September—took a deposit, gave a receipt therefor. Deed made out, but I don't like to be doing business in this way. If all the heirs of your late husband have signed off, the deed is all right." Black himself therefore places his authority on the letter of 24th September, 1903, and in that all that is said by the owner is: "Here is my best offer, $1,275." That gave the opportunity to Black of accepting that offer on his own behalf or on behalf of another—but no right to close a sale without submitting the offer of the owner. That is what she says in her evidence she expected to be done (p. 37). and that is the sound legal position. True, in her later letter, after Black sends deed, she writes as if Black might sell, but she ought not to be held too strictly to her comments on what had happened, as if she were acting under advice. No authority was given except in the letter, and that cannot be rightly construed as giving plenary power to sell and conclude the bargain without reference to her. Indeed I should be disposed to think it would be open to her to resile from the offer after the long delay—it should be accepted promptly and a delay of less than a month has been held unreasonable and fatal: Thornbury v. Bennett, 1 Y. & C. C. C. 563.

She repudiates the sale in the letters to Black, and suspects his fidelity to her interests in dealing with the property, both in lowering the value in his letter to her prior to the sale, and in his receiving a sum for commission from the purchaser without her privity. Apart from the legal objection, I think the Court should be slow to enforce the specific performance, in the circumstances, when the land is about double the value of what the purchaser gets it for from Black. But on the want of a sufficient memorandum, I would dismiss the action and allow the appeal with costs to defendant.

As to this being not an authority to sell, the cases are collected in Rosenbaum v. Belson, [1900] 2 Ch. 267, and perhaps the nearest to this is Prior v. Moore, 3 Times L. R. 624, where the agent was told to put the lot on his list and was given the lowest price.

JANUARY 12TH, 1906.

C.A.

RE QUALIFICATION OF TEACHERS IN ROMAN CATHOLIC SEPARATE SCHOOLS IN ONTARIO.

Separate Schools—Qualifications of Teachers—Status of Members of Religious Communities—Construction of Statutes —"Persons"—History of Legislation.

Case stated by the Lieutenant-Governor of Ontario by order in council of 18th August, 1905, for hearing and consideration by the Court of Appeal.

The case stated that certain religious communities for educational purposes, including the Brothers of the Christian Schools, and certain religious communities composed of persons of the female sex, including the Community General Hospital, Alms House, and Seminary of Learning of the Sisters of Charity of Ottawa (commonly called the "Grey Nuns"), were in the year 1860, and had been for several years prior thereto, engaged in educational work in the province of Lower Canada, and the members of such communities were at the time of the passing of the British North America Act, 1867, exempt from undergoing an examination as teachers in the province of Quebec under the provisions of C. S. L. C. 1860 ch. 15.

And the question submitted was: Having regard to the various pre-confederation provincial enactments relating to the subject of education in the late provinces of Upper and Lower Canada, and to the terms of the British North America Act, and to the enactments of the province of Ontario since Confederation, and especially to the provisions contained in the following statutes, viz.: C. S. L. C. ch. 15, sec. 110, sub-sec. 10, paragraph 5; 26 Vict. ch. 5, sec. 13 (C.); the British North America Act, 1867, sec. 93, sub-sec. 1; R. S. O. 1877, ch. 206, sec. 30; 49 Vict. ch. 46, sec. 62 (O.); R. S. O. 1887 ch. 294, sec. 36:—Are members of the above-mentioned communities who became members of such communities since the passing of the British North America Act, 1867, to be considered qualified teachers for the purposes of the Separate Schools Act, and therefore eligible for employment as teachers in the Roman Catholic

Separate Schools within the province of Ontario, when such members have not received certificates of qualification to teach in the public schools of the province?

The case came on for hearing on 10th October, 1905, and was presented by counsel without argument.

G. F. Shepley, K.C., for the religious communities.

G. F. Henderson, Ottawa, for lay teachers.

W. D. McPherson, for the Ontario Department of Education.

The Court expressed the opinion that the question must be answered in the negative, but withheld the formal pronouncing of an opinion in order to prepare the certificate to the Lieutenant-Governor in council, and the reasons therefor, as required by the statute.

The following is extracted from the certificate of the Court, dated 12th January, 1906, and is the opinion of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), delivered by

MOSS, C.J.O.:—A question very similar to this arose in an action inter partes, and was dealt with by MacMahon, J., and afterwards by this Court, in Grattan v. Ottawa Separate School Trustees, 8 O. L. R. 135, 9 O. L. R. 433, 4 O. W. R. 58, 389.

The legislation bearing on the question, including the Acts specially referred to in the stated case, was fully considered in the course of that case, and for present purposes a brief reference to some of the Acts will suffice.

The present statute law of Ontario respecting the qualification of teachers of separate schools is contained in R. S. O. 1897 ch. 294. Section 36 declares that "the teachers of a separate school under this Act shall be subject to the same examinations and receive their certificate of qualification in the same manner as public school teachers generally; but the persons qualified by law as teachers, either in the province of Ontario, or at the time of the passing of the British North America Act, 1867, in the province of Quebec, shall be considered qualified teachers for the purposes of this Act."

Under the Public Schools Act, R. S. O. 1897 ch. 292, a person must, in order to qualify as a public school teacher,

besides being not less than 18 years of age and of good moral character, have passed the examinations prescribed by the Education Department and received a first, second, or third class certificate, according to the standards required by such examination (sec. 78), and no person engaged to teach a public school shall be deemed a qualified teacher who does not at the time of entering into an agreement with the trustees, and during the whole of such agreement, hold a legal certificate of qualification: sec. 77 (3).

Looking at these enactments, it will be seen that, save in so far as the proviso or saving clause at the end of sec. 36 of the Separate Schools Act has application, teachers of separate schools must qualify by undergoing examinations and receiving certificates. The purpose of the stated case is to ascertain the meaning and extent of the proviso or saving clause as it now appears in the section. It was first enacted —though not precisely in its present form—in 1863 by the legislature of the then united provinces of Upper and Lower Canada as sec. 13 of the Act 26 Vict. ch. 5, which reads as follows: "The teachers of separate schools under this Act shall be subject to the same examinations and receive their certificates of qualification in the same manner as common school teachers generally; provided that persons qualified by law as teachers either in Upper or Lower Canada shall be considered qualified teachers for the purposes of this Act." This Act applied only to the separate schools of Upper Canada. It is next found revised and re-enacted as ch. 208 of R. S. O. 1877, sec. 30 of which reads as follows: "The teachers of separate schools under this Act shall be subject to the same examinations and receive their certificates of qualification in the same manner as public school teachers generally; but the persons qualified by law as teachers shall be considered qualified teachers for the purpose of this Act." The difference between this and sec. 13 of 26 Vict. ch. 5 is the omission of the words "either in Upper or Lower Canada," contained in sec. 13. And, obviously, the effect was to confine the operation of the saving clause to persons qualified by law as teachers in Ontario. And so the enactment remained until the year 1886, when the Act 49 Vict. ch. 46 was passed, repealing R. S. O. 1877 ch. 206, and enacting instead thereof the Separate Schools Act, 1886. Section 62 of the latter Act took the place of sec. 30 of the revised

statute, and is in substance the same as sec. 36 of the revised statutes of 1897.

When the Act 26 Vict. ch. 5 was passed, there were persons qualified by law as teachers in Upper Canada under the provisions of C. S. U. C. ch. 65, sec. 28, and evidently the persons aimed at in this province were those individuals. At the same time there was in force in Lower Canada, ch. 15 of C. S. L. C. 1860, applicable exclusively to Lower Canada. By this Act boards of examiners were created, whose duty it was, amongst other things, to subject all candidates for the position of school teacher to a prescribed examination. By sec. 110, sub-sec. 10, all teachers . . . were required to undergo an examination before one of the boards of examiners, and to be provided with a certificate of qualification, and school commissioners and trustees and all persons intrusted with the management of schools were inhibited from employing as teachers any other than persons who were provided with such certificate. Then followed an exception in these words: "Nevertheless every priest, minister, ecclesiastic, or person forming part of a religious community instituted for educational purposes, and every person of the female sex being a member of any religious community, shall be in every case exempt from undergoing an examination before any of the said boards."

It seems clear that sec. 30 of R. S. O. 1877 ch. 206 excepted from its general operation no others than persons qualified by law as teachers in Ontario. But it is urged that the present provision brings in all the persons mentioned in the stated case, i.e., all persons now members of the various communities and bodies mentioned, and not merely those who at the time of the passing of the B. N. A. Act were qualified by law as teachers in Quebec.

Why the date of the passing of the B. N. A. Act and not the date of the passing of 26 Vict. ch. 5 was chosen, is not very apparent. It may be that the language of sec. 93 (1) of the B. N. A. Act suggested it, or it may be that it was considered a convenient time to fix. In any case it could scarcely have been thought that the personal or individual exemption from an examination for qualification as a teacher fell within the terms of sec. 93 (1) of the B. N. A. Act. That does not appear to apply to individuals who, by virtue of their priestly or ecclesiastic office, whether

Catholic or Protestant, or their connection with some institution, were accorded a personal right or privilege in regard to qualification as teachers. And the matter resolves itself into the question, to whom by its terms is the present section made to apply? It speaks of the persons qualified by law at a particular date, and gives them a special standing. Their status as individuals exempt from the operation of the general policy of the enactment, because of the earlier provision regarding them, is recognized and preserved. It is evident that it was considered that there were some persons who, by virtue of 26 Vict. ch. 5, were entitled to exemption whose claims were overlooked by the legislation of R. S. O. 1877 ch. 206, and it was thought proper to continue their exemption.

It is to be observed that in all these enactments the word "persons" is employed indicating individuals, and in construing these enactments the word "persons" ought, unless there appears to be some good reason to the contrary, to be given the same meaning in its application to both provinces. And, as already pointed out, the persons aimed at in Upper Canada were persons having certificates of qualification under C. S. U. C. ch. 65, that is, individuals in being when the Act 26 Vict. ch. 5 took effect. And there is no good reason for extending the signification of the term as applied to Lower Canada so as to include more than the individual at that time entitled to engage in teaching without undergoing examination.

There is nothing else to restrict the general and comprehensive terms of the earlier portions of the present section or extending exemption to others than the individuals entitled to exemption at the specified date.

If there was an intention to place a greater restriction upon the plain unambiguous declaration as to the qualification required in general, we would expect to find it so expressed in unmistakable language.

The legislative authority of the province in relation to education, involving as it does the power of establishing public schools for the education of the youth of the country, necessarily includes the power to declare and prescribe the quality of the teaching to be given to the pupils attending them, and, as necessary and incident thereto, the control of the qualification of the teachers in the schools. The general policy shewn in the legislation is the requiring from persons

engaged as teachers in the public schools, separate or otherwise, the qualifications obtained by the courses and examinations prescribed under the Public Schools Act, R. S. O. 1897 ch. 292.

And, giving to the language of the latter part of sec. 3 of R. S. O. 1897 ch. 294, the fair and natural meaning that should be attributed to it, there is nothing in it requiring any greater restriction upon the earlier part than is necessary to protect the rights of those persons who, at the date mentioned, were entitled to exemption from such examinations.

BRITTON, J. JANUARY 29TH, 1906.

TRIAL.

WHITE v. CAMPBELL.

Fraudulent Conveyance—Husband and Wife—Parent and Child—Gift—Absence of Insolvency and Fraudulent Intent—Business Carried on by Wife—Attempt to have Stock in Trade Declared Available for Husband's Creditors—Remedy—Sheriff—Interpleader.

Action to set aside as fraudulent certain conveyances of land and to have it declared that a liquor business carried on at Windsor in the name of defendant Julia Campbell was in reality the business of defendant John R. Campbell, plaintiff being the assignee of a judgment against the latter, and having an unsatisfied execution for about $500 in the hands of the sheriff of Essex.

F. D. Davis, Windsor, for plaintiff.

R. F. Sutherland, K.C., for defendants.

BRITTON, J.:— . . . On 24th April, 1895, defendant John R. Campbell was the owner of a very considerable amount of property in Windsor, and on that day he conveyed to his wife, defendant Julia Campbell, 2 parcels of land, having 3 houses thereon. . . .

On 27th May, 1895, Campbell conveyed to his daughter, defendant Esther Drouillard, another parcel of land with a house upon it.

Both conveyances were registered . . . on 6th June, 1895.

It is alleged that defendant John R. Campbell was then in insolvent circumstances and unable to pay his debts in full, and that these conveyances were in fraud of creditors; . . that these conveyances were made without consideration and . . . with the intent of allowing defendant John R. Campbell to incur liabilities, and of hindering or defeating those who might become creditors in recovering their debts.

. . .

[Review of evidence.]

I find that John R. Campbell was not in insolvent circumstances at the time of making the impeached conveyances. . . . The attack upon the conveyance to Julia Campbell must fail, upon the grounds that it was for value, that defendant John R. Campbell was solvent when the conveyance was made, that plaintiff is a subsequent creditor, that there is no evidence of fraudulent intent on the part of either husband or wife. . . .

The conveyance to the defendant Esther Drouillard was voluntary. The property was a wedding present from her father when he was in a position to make such a present. Esther was married on 5th June, 1895, and very soon after that date she and her husband went upon the property to reside, and they have resided there ever since, making permanent improvements thereon. Their right was never questioned until the commencement of this action, almost 10 years after the conveyance. Plaintiff must have known of this conveyance and of the Drouillard occupation. . . . There was no intent to defeat or defraud or hinder creditors or those who might become creditors, and I do not see that Esther had any reason to suspect any scheme or plan or contrivance on the part of her father. I am of opinion that the conveyance to Esther must stand.

Upon the last branch of the case, plaintiff cannot succeed in this action. The writ of fi. fa. was placed in the sheriff's hands on 10th June, 1897. Some time after that date the sheriff made a seizure of goods then upon the premises where the liquor business was carried on; no property was removed; it was claimed by defendant Julia Campbell; her claim was reported to plaintiff's solicitor, and plaintiff declined to interplead. The seizure was then abandoned. The property then seized by the sheriff has, in the ordinary course of

business, probably since been sold and removed. At all events there is no evidence that the property seized now remains, and there is no evidence as to any particular goods and chattels on the premises upon which the ownership can be determined. It seems to me it would be quite improper to declare upon the evidence before me that the goods and chattels in the liquor store mentioned at the time of the issue of the writ in this action, or that the goods and chattels now there, were or are liable to seizure under plaintiff's execution by the sheriff of Essex. The proper way to determine the question of ownership of particular goods is by interpleader at the instance of the sheriff, or by an action against the sheriff. My present decision will not prevent plaintiff from testing the right of defendant Julia Campbell to any goods in the possession of defendant John R. Campbell, if there are any such, and if a seizure is made of them by plaintiff.

The evidence before me is, that at the time of the failure of Scott & Co., defendant Julia Campbell purchased the stock in trade, whatever there was there, of that firm, and she did this with what must be considered her separate property, and she then became the owner of the premises where the business was continued; that new goods were bought upon her credit; and the business was carried on in her name. The case so far would be within Dominion Savings Co. v. Kilroy, 15 A. R. 487.

If plaintiff can shew upon any interpleader issue, or in any action as to goods that may hereafter be seized, that such goods have been paid for out of the proceeds and profits of the business, and if for that reason plaintiff is entitled to recover, my present decision would not, in my opinion, be a bar to his doing so.

Defendant Julia Campbell complained that the attack after so many years was made upon the conveyance to her and upon the business she was carrying on, without first giving her a chance to settle. There is nothing in that complaint. It must have been just as well known to defendant John R. Campbell, at least, that this unsatisfied execution was in the hands of the sheriff, as it was to plaintiff that the property which had been John R. Campbell's was in possession of and claimed by his wife.

The action should be dismissed with costs.

JANUARY 29TH, 1906.

DIVISIONAL COURT.

LEE v. NISBET.

Chattel Mortgage—Ownership of Goods—Estoppel—Fraudulent Intent of True Owner—Actual Advance by Mortgagee —Absence of Knowledge.

Appeal by plaintiff from judgment of MAGEE, J., at the trial in favour of defendant John R. Green, in an interpleader issue.

The issue was between Richard Lee, assignee for the benefit of creditors of J. B. Hill & Co., as plaintiffs, and Richard A. Nisbet and John R. Green, as defendants. Plaintiff affirmed that goods in the premises occupied by W. G. Hill, at St. Thomas, seized by the sheriff under an execution issued by Nisbet, were at the time of the seizure the property of plaintiff as against Nisbet and also against Green, who had a chattel mortgage from W. G. Hill upon these goods.

The trial Judge found that the goods were the property of John R. Green as against plaintiff, holding the chattel mortgage to be good. No finding was made as between plaintiff and Nisbet.

F. Arnoldi, K.C., for plaintiff.

T. W. Crothers, St. Thomas, for defendant Green.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON J., CLUTE, J.), was delivered by

BRITTON, J.:—Plaintiff contends that the goods which W. G. Hill assumed to mortgage to defendant Green were in fact the goods of J. B. Hill & Co., and that the doctrine of estoppel cannot be invoked against plaintiff, who represents the creditors of J. B. Hill & Co.; and plaintiff further contends that the giving of this chattel mortgage by W. G. Hill was a fraudulent scheme and contrivance entered into between J. B. Hill, W. G. Hill, and defendant Green, to defraud the creditors of J. B. Hill.

J. B. Hill carried on a large business at St. Thomas as a dry goods merchant, and in another part of the city a large business was being carried on under the name of "Shaw's

Fair." This was ostensibly managed by W. G. Hill. Defendant Green says he thought this business and the goods in Shaw's Fair were the property of W. G. Hill. The trial Judge found, and there was abundant evidence to warrant the finding, that the goods in Shaw's Fair were in fact the property of J. B. Hill. But he also found that by reason of the representation and conduct of J. B. Hill in allowing W. G. Hill to make the mortgage, plaintiff is estopped from disputing W. G. Hill's title, and that the mortgage to Green is good. The Judge has not found that the mortgage was vitiated by fraud.

The facts established compel the gravest suspicions as to the bona fides of the mortgagor and mortgagee.

J. B. Hill on 31st December, 1904, was hopelessly insolvent, and on that day was known by many in St. Thomas to be in financial difficulty. On that afternoon he applied, nominally for his brother W. G. Hill, to defendant Green for a loan of $2,000 upon the goods in Shaw's Fair. Shortly after the J. B. Hill and Green interview, W. G. Hill wrote to Green and completed the arrangement for a loan of $2,000 upon the security of the chattel mortgage in question. The mortgage carried interest at the rate of 12 per cent. per annum, and to the $2,000 was added $500 as a bonus for making this so-called "short loan." The loan was pushed through on Monday 2nd January, 1905, a legal holiday, and made when Green in fact had only $6.25 to his credit in the bank. The whole course of conduct of defendant Green and of his partner in reference to the mortgage itself, in reference to the goods in Shaw's Fair after the mortgage was given, as to the application by W. G. Hill of the money which Green gave to him, as to the subsequent purchase of the goods, and sale of them to the mother of the Hills—in fact everything from first to last in connection with this mortgage—makes it difficult to regard the transaction as other than one conceived and carried out in fraud.

And yet there is not evidence of knowledge on the part of Green that the goods were really the goods of J. B. Hill; and there are not such facts established as warrant the clear inference that Green had that knowledge. Green did in fact raise the money at the bank, and did hand over $2,000 to W. G. Hill. In the absence of knowledge on the part of Green or of facts from which knowledge may be inferred, I do not feel at liberty to say that the trial Judge is wrong.

Whatever of suspicion there may be, knowledge of the financial difficulty of J. B. Hill is not brought home to defendant until immediately after the chattel mortgage transaction. Green took only "a glance" at the stock. . . No valuation or careful inspection or estimate was shewn. Then Green took a statutory declaration from W. G. Hill that he (Hill) was the owner, and a paper from the wife of W. G. Hill that she had no claim. There was a good deal of attention to certain details not usual in a business transaction . . .

Again, $200 of the money was immediately handed back to Green to pay a note held by him or his firm. . . . W. G. Hill was not upon this note. Other notes were at once paid to the bank whose manager had been so obliging as to assist in procuring the money for Green on the holiday.

On 3rd January, the day after the mortgage was given, Green's partner, acting for a client named Honsinger, went to "Shaw's Fair," and with the consent of W. G. Hill took goods from the store to the amount of $479.95, and stored them in his (Green's partner's) cellar.

Upholding the chattel mortgage in question seems to open the door to another means of getting around the Act requiring chattel mortgages to have the affidavit of bona fides of the mortgagee, so as to protect creditors of mortgagors.

Assume that this mortgage is good by estoppel. The goods were really the property of J. B. Hill. His creditors were the persons to be protected. The affidavit is as to the creditors of W. G. Hill, and his creditors are in no way concerned.

Holding the mortgage good by estoppel, and that is the logical result of the transaction, may offer an easy way to make a mortgage good which would not be so if given by the owner of the goods.

It is greatly to be regretted that the evidence of J. B. Hill was not obtained. As the matter stands, I do not feel at liberty to interfere with the findings of the trial Judge as to the actual advance by the mortgagee and that there is not evidence of knowledge by the mortgagee of the fraudulent intent of J. B. Hill, the debtor and owner of the goods.

It must be considered as an actual advance to a fraudulent debtor, without notice of any fraudulent intention on the part of the debtor, and without fraud on the part of the mortgagee.

Appeal dismissed without costs.

JANUARY 29TH, 1906.

DIVISIONAL COURT.

MUIR v. GUINANE.

Pleading—Statement of Claim—Non-conformity with Writ of Summons—Statute of Limitations—Action Begun by Co-partnership—Statement of Claim in Name of Incorporated Company.

Appeal by plaintiffs from order of MABEE, J., in Chambers (ante 54), upon appeal from orders of Master in Chambers (6 O. W. R. 383, 844), dismissing motions to strike out part of the statement of claim and the whole amended statement of claim. MABEE, J., varied the latter order of the Master in Chambers by providing that defendant should be at liberty to plead the Statute of Limitations as against plaintiffs' claim upon bills of exchange as if the action had been commenced at the date of delivery of statement of claim, viz., 7th September, 1905.

A. R. Clute, for plaintiffs.

W. C. MacKay, for defendant.

THE COURT (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), varied the order by limiting right to set up Statute of Limitations as if action begun at date of amended statement of claim, to such acceptances sued on as plaintiffs shall at the trial fail to prove were included in their claim filed with Clarkson & Cross, assignees. With this alteration, appeal dismissed. Costs here and below to be costs in cause.

CARTWRIGHT, MASTER. JANUARY 30TH, 1906.

CHAMBERS.

CROIL v. McCULLOUGH.

Writ of Summons—Service out of Jurisdiction—Appearance—Motion for Leave to Withdraw—Attornment to Jurisdiction—Opposing Motion for Judgment—Declared Intention to Counterclaim.

This action was brought to recover the amounts of two promissory notes which it was alleged were payable (if at

all) only at Montreal, where defendant resided. An order for service of the writ of summons out of the jurisdiction was made by the local Judge at Cornwall on an affidavit of plaintiff's solicitor that the case came within Rule 162 (h). By an order made in the action of Campbell v. Croil, 6 O. W. R. 933, the defendant McCullough (the sole defendant in this action) was found entitled to about $550 of money now in Court.

In this action defendant duly appeared and successfully opposed a motion for speedy judgment. After this he moved to be allowed to withdraw his appearance and put in a conditional appearance as in Burson v. German Union Ins. Co., 3 O. W. R. 372.

D. W. Saunders, for defendant.

G. A. Stiles, Cornwall, for plaintiff.

THE MASTER:—It might be sufficient to rest a refusal of the motion on the authority of Sears v. Myers, 15 P. R. 381. The principle of that decision is a fortiori as applied to the present case, as the entry by defendant's solicitor of the ordinary appearance was not in any sense under compulsion. The only excuse here is that the solicitor was not aware that the notes sued on were payable at Montreal only, as defendant contends.

What my view is of the effect of a bona fide mistake of the solicitor is shewn in Muir v. Guinane, 10 O. L. R. 367, 6 O. W. R. 64.

If this were a similar case, it would be properly dealt with in the same way.

Here, however, the fact of the opposition to the motion for judgment is a conclusive answer. For in the affidavit of defendant on that motion (which is his main material on the present motion also), he says that he intends to counterclaim to have the partnership between plaintiff and himself wound up. This partnership was of a business carried on in Ontario, and could only be wound up by the Courts of this province. He will in this way have the benefit of the necessary litigation without having to give security, as he must do if he had to proceed independently.

This intention to counterclaim of itself seems a distinct and so to say necessary attornment to the jurisdiction of this Court, and the motion must be dismissed with costs to plaintiff in any event.

CARTWRIGHT, MASTER. JANUARY 30TH, 1906.

CHAMBERS.

DONN v. TORONTO FERRY CO.

Third Parties—Addition of—Action for Negligence of Ferry Company—Claim for Relief over against Municipal Corporation—Neglect to Fence Wharf—Contract—Indemnity.

After the judgment of MEREDITH, C.J., in this case, 6 O. W. R. 973, the defendants' motion for directions as to trial of issues raised between defendants and third parties was renewed.

R. H. Greer, for defendants.

F. R. MacKelcan, for third parties.

D. C. Ross, for plaintiff.

THE MASTER:—The action is brought to recover damages for injuries sustained by plaintiff by reason of the alleged negligence of the defendant company in not having the sides of the Brock street wharf and the gang-plank fenced in, so as to prevent plaintiff from being pushed into the water, and in not having a staff able to control the crowd waiting on the 24th of May to board the ferry boat.

The statement of defence merely denies the allegations in the statement of claim and pleads want of prudence, care, and caution on plaintiff's part.

Defendants obtained an order ex parte to add the corporation of the city of Toronto as third parties, and the present motion is in effect to determine whether that now should be rescinded or confirmed.

The usual test is, I think, as laid down in Wade v. Pakenham, 2 O. W. R. 1183, at p. 1185.

Here there is really no ground of contract on which to base any claim for indemnity; nor does this come within that class of cases of which Sheffield v. Barclay, [1905] A. C. 392, is the most recent example.

If there was any duty on the part of the city corporation to fence the wharf, they may be liable to an action by defendants for breach of such duty. But in such an action

the damages would not be such as to conform to the rule laid down in Miller v. Sarnia Gas Co., 2 O. L. R. 546. Defendants are trying to do here what a municipality could not do until the power was given which now appears in 3 Edw. VII. ch. 19, sec. 609.

There is no evidence of any contract or promise of any kind, nor does it follow that even if the city corporation might be held liable under Denny v. Montreal Telegraph Co., 3 A. R. 628, as a general principle, they would not be excused for any accident occurring on a public holiday, on the principle of the decision in Garfield v. City of Toronto, 22 A. R. 128, that they are not liable for damages caused by an abnormal rainfall. However that may be, there is here no ground on which the third party notice can be supported, and it must be set aside with costs throughout payable by defendants.

The following cases may be referred to: Township of Vespra v. Cook, 26 C. P. 182; The Englishman v. The Australia, [1895] P. 212.

STREET, J. JANUARY 30TH, 1906.

CHAMBERS.

RE HARSHA.

Extradition—Discharge of Prisoner—New Information and Warrant—Re-arrest of Prisoner—Habeas Corpus—Rule Nisi.

Application for a writ of habeas corpus to bring before the Court Fred. Harsha, who was in custody under a warrant issued on or about the 23rd January, 1906, by the senior Judge of the County Court of York, as a Judge under the Extradition Act, upon an information alleging that the prisoner had committed forgery in the city of Chicago, in the State of Illinois, and was in the city of Toronto, in the province of Ontario, as a fugitive from justice.

In November, 1905, the prisoner was arrested upon a charge made in precisely the same terms under the Extradition Act; he was committed for extradition under that Act; he obtained a writ of habeas corpus, and was finally discharged by the Court of Appeal (ante 97).

J. B. Mackenzie, for the prisoner, contended that he was not subject to a second arrest upon the same charge.

STREET, J.:—The question intended to be raised upon the present application is whether a person who has been discharged upon habeas corpus in extradition proceedings, after having been committed to gaol by the Extradition Judge, can properly be again taken in custody under a new information and warrant under the Extradition Act, charging the same offence.

I have been unable to find any case in which a second arrest in such circumstances has been made, although I am inclined to think that in the Quebec case of The United States v. Gaynor and Green it was done, but I can find no report of the second proceedings.

There is nothing in the Extradition Act which seems to forbid it, and I cannot see why upon principle it is objectionable, for the alleged fugitive is not put upon his trial, in any sense, in the proceedings under the Act; those proceedings are more in the nature of a preliminary examination before a magistrate upon a criminal charge under the Criminal Code. In such proceedings it is by no means unusual for a prosecutor who has failed in procuring evidence upon a first charge, to lay a new information for the same charge upon the discovery of further evidence, notwithstanding the discharge of the prisoner by the magistrate upon the preliminary examination upon the first charge. Nor does it seem to be contrary to sec. 5 of the Habeas Corpus Act, 31 Car. II. ch. 2, upon which the applicant relies. That section has been interpreted by the Privy Council in Attorney-General for Hong Kong v. Kwok-a-Sing, L. R. 5 P. C. 179, at pp. 201-2, as applying only in two classes of cases, neither of which includes that which is found here, for the prisoner here, having been arrested upon a charge under the extradition Act, could not be admitted to bail; and he was discharged, not because of any defect in the warrant of commitment, but for lack of evidence to support the charge, so that the question to be determined upon a return to a writ of habeas is by no means necessarily the same as that determined by the Court of Appeal upon the former writ.

In order that an opportunity may be given to the authorities who are demanding the extradition of the prisoner to shew the grounds upon which the second information was laid and the second warrant issued, counsel for the prisoner accepts the convenient practice pointed out by Sir Henry James, the Attorney-General, in Regina v. Ganz, 9 Q. B. D.

93, for the determination of questions arising upon habeas corpus under the Extradition Act, of a rule nisi calling upon the Secretary of the Department of State of the United States of America, the Attorney-General for Ontario, and the senior Judge of the County Court of York, to shew cause why a writ of habeas corpus should not issue, and I direct that such a rule nisi be granted, returnable before a Divisional Court.

MEREDITH, C.J. JANUARY 30TH, 1906.

CHAMBERS.

CAMPBELL v. CROIL.

Appeal—Master's Report—Extension of Time—Delay—Explanation—Grounds of Appeal.

Appeal by defendant Croil from order of Master in Chambers, ante 86, dismissing appellant's motion for leave to appeal and to extend the time for appealing from the Master's report of 19th June, 1905, which was confirmed by consent on 27th June.

G. A. Stiles, Cornwall, for defendant Croil.

D. W. Saunders, for defendant McCullough.

W. E. Middleton, for plaintiff.

MEREDITH, C.J., dismissed the appeal with costs.

MEREDITH, C.J. JANUARY 30TH, 1906.

WEEKLY COURT.

WILE v. BRUCE MINES AND ALGOMA R. W. CO.

Railway—Appointment of Receiver—Jurisdiction of Provincial Courts—Railway wholly within Province—Absence of Federal Legislation.

Motion by plaintiff, a creditor of defendants, whose railway was situate wholly within the province of Ontario, for the appointment of a receiver.

M. C. Cameron, for plaintiff.

Britton Osler, for defendants.

MEREDITH, C.J.:—It is clear that if the railway is under provincial legislative jurisdiction, a receiver may be appointed

by the High Court in a proper case. If the railway is under federal legislative jurisdiction, being situated within the province, the like jurisdiction, in the absence of federal legislation providing otherwise, is possessed by the High Court to that which it has in regard to railways under provincial legislative jurisdiction. There being no such federal legislation, it is unnecessary to consider under which legislative jurisdiction the railway falls. . . . [Reference to Grey v. Manitoba and North-Western R. W. Co., [1897] A. C. 254, and Toronto General Trusts Corporation v. Central Ontario R. W. Co., 6 O. L. R. 1, 2 O. W. R. 259, 8 O. L. R. 312, 3 O. W. R. 910, 21 Times L. R. 732, [1905] A. C. 576.

In both of these cases the railways in question were under Dominion legislative jurisdiction; and no doubt appears to have been suggested as to the authority of the provincial Court to exercise even a larger jurisdiction than the Court is in this case asked to exercise, where the railway lies wholly within the province.

I am not to be understood as expressing any opinion as to the power of the Parliament of Canada, in the case of a railway under its jurisdiction, to take away the power of the provincial Courts to exercise the jurisdiction exercised in this case.

Order made as asked.

BOYD, C. JANUARY 30TH, 1906.

WEEKLY COURT.

NELLIS v. MCNEE.

Landlord and Tenant—Breach of Covenant to Repair—Tenant's Fixtures—Alteration in Premises—Breach of Covenant not to Assign or Sublet—Waiver—Acceptance of Rent—School Taxes—Action—Scale of Costs.

Appeal by plaintiff from report of local Master at Ottawa in an action by landlord against tenant for rent and cost of restoring building where altered by defendant, and for damages for breach of covenant to repair and covenant not to assign or sublet without leave. The Master found plaintiff entitled to $75 for rent and $2 damages for non-repair of a hot air register and to costs on the Division Court scale,

with a set-off to defendant under Rule 1132. Plaintiff appealed on the ground that damages should have been allowed for breaches of the covenants mentioned.

R. B. Matheson, Ottawa, for plaintiff.

M. J. Gorman, K.C., for defendant.

BOYD, C.:—There is no ground to disturb the finding of the Master as to the first ground of appeal. Granted that the piano hoist put in at the expense of the tenant and with the permission of the landlord was a tenant's fixture, and was removable by him at the end of the term. It was not so removed, but was left on the premises, and it thereby became permanently affixed to the property, and as a part of the freehold could not be disturbed by the tenant after the expiry of his term and his relinquishment of possession. His conditional right to remove disappeared by his inaction and he simply went out and left the building in its changed state to be the landlord's property. It was not competent for the landlord to remove his piano hoist and put in a smaller hoist and to have the building restored to its former condition and seek to charge this to the tenant on the theory that the tenant had committed a breach of the covenant to leave the premises in good repair, because he had not restored them to the original condition. The original condition had been structurally changed at the expense of the tenant, and he went out, abandoning any possible right he might have to remove what he had put in, on the ground of its being a tenant's fixture, and thereby he left the premises in good repair. That is the result of the cases, the last of which is Stack v. T. Eaton Co., 4 O. L. R. 335, 338, 1 O. W. R. 511.

And equally well founded appears to be the Master's judgment on the other point appealed. The covenant not to assign without leave was broken when an assignment was made to the company without the written consent of the landlord—but, knowing this, the landlord verbally assented to the change, and afterwards received his rent from the newcomer. That operates as a waiver of the covenant and an election by the landlord to treat the illegal occupier as a lawful tenant. This is an election for all purposes—he cannot afterwards claim . . . damages on a breach of the covenant such as here set up. It appears that the company was assessed as a separate school supporter, and a larger assessment for taxes was thereby imposed upon the demised

premises. But under the terms of the lease the landlord was to pay these taxes, and, having paid them, he cannot sue his covenanting tenant for the amount as damages under the covenant not to assign without written leave. It was an incident of the tenancy (if by a separate school supporter) that these extra taxes should be paid—but having accepted the separate school supporter as his tenant, there is no breach of the covenant applicable to the situation. The Master founds himself on Walrond v. Hawkins, L. R. 10 C. P. 342, and that is an authority recognized as of decisive weight in Lawrie v. Lees, 14 Ch. D. 249, . . . 7 App. Cas. 19, 30.

The report is confirmed with costs, and judgment to be entered for plaintiff for $77 and Division Court costs, with set-off to defendant for costs on High Court scale of action and appeal as between solicitor and client pursuant to Rule 1132, and the difference to be paid by the party indebted.

CARTWRIGHT, MASTER. JANUARY 31ST, 1906.

CHAMBERS.

WENDOVER v. RYAN.

Security for Costs—Rule 1198 (d)—Costs of Former Proceeding Unpaid—Merits—Discretion.

After the judgment in Wendover v. Nicholson, 6 O. W. R. 529, the plaintiff brought this action against Mrs. Ryan to set aside the mortgage made to her by the defendant in the former action.

The defendant in this action moved for security for costs under Rule 1198 (d), because the costs awarded against plaintiff under order of 22nd April, 1905, had not been paid.

R. D. Gunn, K.C., for defendant.

W. H. Blake, K.C., for plaintiff.

THE MASTER:—If the proceedings which were set aside by the order of Mr. Justice Teetzel can properly be considered as interlocutory, and as an unsuccessful attempt to enforce execution, then under the decision in Keogh v. Brady, 6 O. W. R. 846, the motion must be dismissed. If, however, this is a wrong view of the former proceeding, still on the merits I do not think the motion should prevail. The poverty of plaintiff has been caused by the conduct of defendant's

father, and, so far as the facts have been made to appear, I am of opinion that plaintiff was justified in her action, as appears from the disposition of the costs on the motion before me. I think that Rule 1198 (d) was intended to be applied only where the plaintiff has been defeated on the merits or has allowed his action to be dismissed for default, and in such cases a second action may be thought to be prima facie so frivolous or vexatious as to require security as a term of being allowed to proceed.

The motion is dismissed; costs in the cause. Even if plaintiff fails in this action, I do not think she would be condemned in the costs.

CARTWRIGHT, MASTER. JANUARY 31ST, 1906.

CHAMBERS.

GILLARD v. McKINNON.

Venue—Change—Convenience — Witnesses—Expense—Fair Trial—Jury—Undertaking—Costs.

Motion by defendants to change venue from Stratford to Cornwall. The facts are stated in a report of a previous motion, 6 O. W. R. 365.

Grayson Smith, for defendants.

R. C. H. Cassels, for plaintiff.

THE MASTER:—In addition to what appeared on the previous motion, defendants now set up a defence similar to that which was successful in Jones v. Reid, 6 O. W. R. 608, affirmed by a Divisional Court on 24th instant, ante 131. This may account for their swearing to there being 15 witnesses necessary to their case, while plaintiff in reply swears to 5. This would leave a balance of 10 in favour of defendants, involving a net difference in expense of witness fees of about $200.

If it were an ordinary case, this might perhaps be thought a sufficient defence to justify the change. But it is to be remembered that defendants had allowed judgment to go against them by default, and are only defending as a matter of indulgence. The amount of $200, though in one sense large in itself, is small in comparison with the amount involved, which must now be approaching $12,500, besides costs. Then nothing is found by experience to be truer

than the remark of the Chancellor in one case of this kind that the number of witnesses sworn to on these motions "usually shrinks before the test of the witness box."

The defendants have given a jury notice, which is urged as a reason against the motion, because one of the defendants is reeve of the township of Lochiel.

It would appear to be a case in which the jury will probably be dispensed with.

After much consideration and having regard to the special facts of the case, I think the motion should not be granted, if the plaintiff will agree to allow the jury notice to be struck out at the trial and let the difference in cost of a trial at Stratford as compared with one at Cornwall be to defendants in any event.

The costs of the motion will be in the cause.

JANUARY 31ST, 1906.

C.A.

DESERONTO IRON CO. v. RATHBUN CO.

Appeal—Third Party—Right of Appeal on his own Behalf—Third Party Procedure—Directions.

Motion by plaintiffs to quash the appeal of the Standard Chemical Co., third parties, as against plaintiffs, from the judgment of BRITTON, J., 3 O. W. R. 697. The motion was made upon the hearing of the appeal, but no order was then made upon it: see 6 O. W. R. 688, 689, 690.

The motion was renewed after the judgment in 6 O. W. R. 688, and was argued on 20th January, 1906.

J. H. Moss, for plaintiffs.

J. Bicknell, K.C., and J. W. Bain, for the third parties.

E. D. Armour, K.C., and C. A. Masten, for defendants.

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

MOSS, C.J.O.:—A party served with a third party notice under Rule 209, and in respect of whom an order for directions is made under Rule 213, giving him leave to appear at the trial and to adduce evidence and examine witnesses and take such part therein as may seem proper to the Judge

presiding at the trial, does not thereby become a party defendant to the action. The plaintiff is not entitled to any relief against him except, perhaps, a judgment for costs, if it appears that he is the person who is really fighting the plaintiff: Edison and Swan United Electric Light Co. v. Holland, 41 Ch. D. 28. If the plaintiff is unsuccessful, he cannot appeal against the third party. His appeal can only be against the defendant. The third party would be entitled to notice of the appeal, but only for the purpose of enabling him to support the defendant claiming relief over against him: Eckensweiller v. Coyle, 18 P. R. 423; O'Sullivan v. Lake, 12 P. R. 550.

The order of directions giving the third party the right to appear at the trial is not equivalent to an order giving him leave to defend, which is only given upon his admitting that in the event of the plaintiff succeeding against the defendant, he is liable to the defendant: Coles v. Civil Service Supply Assn., 26 Ch. D. 529. An order giving him the right to appear at the trial, adduce evidence, and examine witnesses, may put him in the same position as a defendant as regards production and examination for discovery, but apparently the position does not extend beyond the trial: Eden v. Weardale Iron and Coal Co., 35 Ch. D. 287. . . .

In the same case, 34 Ch. D. 223, it was decided that third parties were not defendants so as to entitle them to counterclaim against the plaintiffs, and it seems clear that in no case are they defendants for all purposes. See Barton v. London and North-Western R. W. Co., 38 Ch. D. 144. Their rights are defined and limited by the Judicature Act and the Rules, and nowhere in them is there to be found given either expressly or by implication a right to third parties to appeal against a judgment obtained by the plaintiff against the defendant alone. For that relief they must rely upon such rights as they may have to require or compel the defendant to appeal for their benefit. And in the majority of cases this will be found to afford ample protection.

In the present case the third parties were not given leave to defend, but were given ample scope for contesting plaintiffs' claim, a liberty of which they availed themselves to the fullest extent.

Under the old practice they would not have been necessary parties to the action.

There is no privity between plaintiffs and them, and plaintiffs have no judgment against them, not even for costs. . . .

[Reference to The "Millwall," [1905] P. 155.]

The third parties in the present case did not obtain an order allowing them to defend the action. On the other hand, they did obtain an order allowing them to appeal, not in their own name, but in the name of the defendants, an order which they acted upon, and prosecuted an appeal to this Court in defendants' name.

This right of appeal to this Court is the extent of the third parties' right here, and it follows that the appeal launched on their own behalf and in their own name against plaintiffs' judgment is not competent. . . .

[Gaby v. City of Toronto, 1 O. W. R. 635, distinguished.]

The motion to quash should be granted, but . . . without costs.

JANUARY 31ST, 1906.

C.A.

REX v. BURDELL.

Criminal Law—Burglary—Conviction—Motion for Leave to Appeal—Polling Jury—Disagreement—Sending Jury back—Subsequent Agreement—Comment upon Failure of Prisoner to Testify—Evidence as to Guilt of Prisoner—Circumstances Warranting Inference of Guilt—Lapse of Time—Presumption.

Motion on behalf of prisoner for leave to appeal (and for a direction to state a case) from the conviction of prisoner by STREET, J., and a jury at London, for burglary of Jacob Obernesser's hotel in London. A verdict of guilty was recorded and prisoner sentenced to 15 years in the Kingston penitentiary.

J. F. Faulds, for the prisoner, contended that the Judge in effect commented upon the failure of the prisoner to testify on his own behalf; that the jurors disagreed, as was disclosed when they were polled; and that there was no evidence of prisoner's guilt to go to the jury.

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

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

OSLER, J.A.:—In my opinion, there is no ground for allowing an appeal.

As to the first objection, I think the learned trial Judge was quite within his right in sending the jury back for further deliberation when, upon being polled after they had announced their verdict, one of them answered "not guilty," dissenting from the verdict as announced by the foreman.

The practice is properly stated in the Encyclopædia of Pleading and Practice, vol. 22, p. 937: "When the jury is polled, any juror may dissent from the verdict as announced, and when one or more of the jurors dissent therefrom, there can be no valid verdict. The jury may, however, be sent back for further deliberation, when they may, if all subsequently agree, render a verdict similar in all respects to the former finding," or, as I may add, quite different from it.

The question is one which does not often arise, and I have not succeeded in finding any discussion of it in the English works on Practice. I have, however, a distinct recollection of a case, in which I was engaged when at the bar, tried before the late Sir Adam Wilson, C.J., a very high authority on common law practice, in which the jury was twice polled, one juror dissenting on each occasion, and were twice sent back to reconsider their verdict, on which they finally agreed.

The practice is really only an application of the settled rule that until their verdict has been recorded, or they have been discharged as unable to agree, their connection with the case has not come to an end. Even though not polled, they may be sent back after having announced their verdict, if the trial Judge is not satisfied that they have given the case proper consideration, where they do not insist upon their verdict, as announced, being recorded: Regina v. Meany, 1 Leigh & Cave 213.

As to the second objection, after a careful consideration of the charge, I am quite satisfied that the trial Judge did not intimate or intend to intimate to the jury that the prisoner might have given evidence in his own behalf, and that an inference unfavourable to him might be drawn from the fact that he had not done so. The learned Judge merely told the jury of the presumption which might, under all the circumstances of the case, be drawn from the fact of his not having

given an account of how the stolen property came into his possession, an account and presumption entirely unconnected with his not giving evidence on his own behalf as a witness at the trial.

Then upon the merits. The prisoner was not charged with burglary alone, but with burglariously stealing property of which the pouch or purse found upon him at the time of his arrest formed part. I do not think the trial Judge could properly have ruled, under all the circumstances of the case, that the lapse of time between the burglary and the arrest was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary, at which, as the evidence strongly tended to shew, the property had been stolen. It was a piece of property of rather a peculiar or unusual kind, not a thing likely to be the subject of daily sale or constant passing from hand to hand. It bore on its face evidence of an attempt to destroy its identity; and the prisoner's possession of it, his intimate association with the deceased man Wilson, in whose possession was found other property stolen on the same occasion, and the latter's prompt response to the prisoner's call to resist his arrest, even unto death, were all circumstances from which the jury might well draw an inference of guilt, more especially if they concluded, as they evidently did, that the witness Richardson was put forward or had come forward to give a false account or explanation of how the prisoner came into possession of the purse.

I refer to Regina v. Exall, 4 F. & F. 922; Rex v. Adams, 3 C. & P. 600; Rex v. Patridge, 7 C. & P. 551; The Queen v. Dredge, 1 Cox C. C. 235; Rex v. Furnival, Russ. & Ryan 445.

FEBRUARY 1ST, 1906.

DIVISIONAL COURT.

METELLI v. ROSCOE.

Sale of Goods—Contract—Appropriation of Goods to Contract—Interception by Assignment—Fraud—Warehoused Goods.

Appeal by plaintiff from judgment of BRITTON, J. (6 O. W. R. 880), dismissing action to recover possession of certain goods in the possession of defendant Roscoe at Toronto, and declaring that the goods in question were the goods of defendant Clarkson as against plaintiff. Plaintiff claimed title

to the goods by purchase from one Badalamenti in New York, the goods being at the time in Toronto. The trial Judge held that the property in the goods did not pass to plaintiff, but passed under a general assignment to defendant Clarkson.

J. G. O'Donoghue, for plaintiff.

R. McKay, for defendant Clarkson.

THE COURT (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs.

FEBRUARY 1ST, 1906.

DIVISIONAL COURT.

REX v. MORNINGSTAR.

Justice of the Peace—Order for Imprisonment for Non-payment of Costs Merely—Absence of Accused—Quashing Order—Power of Court to Impose Terms—Protection from Action.

Motion by defendant to make absolute a rule nisi to quash an order of James Cruickshank, a justice of the peace for the county of York, directing defendant to pay the complainant's costs of certain proceedings before the justice upon a charge that defendant had unlawfully used insulting and abusive language towards the complainant.

After taking some evidence, which went far to prove the offence charged, the magistrate, at the instance of counsel for the complainant, permitted the withdrawal of the charge, apparently moved by compassion for the accused. It was a term of this arrangement, to which all parties appeared to have assented, that defendant should pay the complainant's costs. Upon her failure to carry out this term of the understanding, the magistrate wrote to defendant, warning her that if she did not make payment, he would record a conviction against her, "including penalty and costs of collecting—in default imprisonment for 21 days." Payment not yet being made, the justice, without further notice to defendant, made the order now impeached, whereby, without convicting defendant of any offence, he ordered payment by her of costs amounting to $5.50, and in default authorized the levy of this amount by distress, and in default of sufficient distress

adjudged the imprisonment of defendant for 21 days, &c. The defendant paid the $5.50 and instituted proceedings to quash the order.

J. B. Mackenzie, for defendant.

A. G. Slaght, for the magistrate.

J. W. St. John, for complainant.

The judgment of the Court (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), was delivered by

ANGLIN, J.:—Upon the argument we expressed our opinion that this order could not be maintained, for several reasons, of which it is sufficient to state that it was made in the absence of the accused, and that it awards imprisonment for non-payment of costs merely, in contravention of R. S. O. 1897 ch. 90, sec. 5, sub-sec. 4.

But, in view of the circumstances surrounding this case, the understanding as to payment of costs by defendant, upon which the proceedings against her were discontinued, the fact that the more objectionable part of the magistrate's order has never been in any way acted upon, the fact that the costs paid by defendant were tendered back to her before this motion was launched, the pettiness of the entire matter, and the obvious purpose of defendant to institute an action against the magistrate, and perhaps also against the officer charged with enforcing his order—an action of which the most conspicuous feature, it would seem, would probably be its entire lack of merit—the Court is of opinion that the exercise of any power it may have to protect the magistrate and his officer against such an action is urgently called for. If, as defendant contends, she is entitled to have the order in question granted ex debito justitiæ, the Court probably cannot, by virtue of any inherent power, impose terms which it might prescribe were its action discretionary: Downey's Case, 7 Q. B. 281, 283. We therefore look for statutory authority.

. . .

We find that by 1 Edw. VII., ch. 13, sec. 1 (O.), the provisions of secs. 889 to 896, both inclusive, of the Criminal Code, are made applicable to any conviction or order made by a justice of the peace under the authority of any statute of the province of Ontario, and to any warrant for enforcing the same.

Section 891 of the Code is as follows: "If an application is made to quash a conviction or order made by a justice, on the ground that such justice has exceeded his jurisdiction, the Court or Judge to which or whom the application is made may, as a condition of quashing the same, if the Court or Judge thinks fit so to do, provide that no action shall be brought against the justice who made the conviction, or any officer acting under any warrant issued to enforce such conviction or order." . . . .

Exercising the jurisdiction thus conferred, while quashing the order attacked, we do so upon the terms and condition that no action shall be brought against the justice who made it or against any officer who may have acted under it or under any warrant issued to enforce it. If these terms are not accepted, the present motion will be dismissed with costs. If they are accepted, the circumstances of this case above alluded to are such that, in the opinion of the Court, costs of this application should be withheld. The $5.50, the tender of which we are told was rejected, should now be repaid to defendant.

TEETZEL, J. FEBRUARY 2ND, 1906.

WEEKLY COURT.

RE McLEAN AND TOWN OF NORTH BAY.

Municipal Corporations—By-Law Closing Street—Public Interest—Discrimination—Substitution of Convenient Way—Compensation to Land Owner—Providing Access to Land—Construction of Statute—Costs.

Motion by one McLean to quash by-law 192 of the town of North Bay, providing for closing a portion of Regina street in that town.

I. F. Hellmuth, K.C., for applicant.

H. E. Rose, for town corporation.

TEETZEL, J.:—The by-law was passed pursuant to an agreement between the town corporation and the Canadian Pacific Railway Company, providing that, in return for certain expenditures by the company in the town, the parts of certain streets, including Regina street, crossed by the railway, should be closed, and the part so closed conveyed to the company.

The street in question runs from the lake shore in a north-easterly direction to the town, passing the applicant's lands.

The section of the street closed is 240 feet long, and lies between the applicant's lands and the town, about 100 feet of the closed section adjoining the applicant's land, so that all ingress and egress to and from the applicant's land is shut off, except as between the land and the lake shore, a few hundred feet to the south-west, and at the time of the passing of the by-law there existed no other road available for ingress and egress to and from his land.

The by-law was passed on 24th July, 1905, and simply enacts that the portion of Regina street in question "be stopped up and closed." On the same day a by-law was passed opening up a new street several hundred feet to the north-east of applicant's lands, and purporting to be in lieu of that part of Regina street closed by by-law 192.

This new street, used in connection with a crossing constructed by the railway company, and connecting with Lorne street, would furnish access from the town to a point 2 feet east of applicant's land, where Lorne street ends.

The owner of the land, who had laid out Lorne street and dedicated it to the public, had reserved a strip 2 feet wide between the applicant's land and the westerly terminus of Lorne street, apparently for the purpose of preventing access to and from the land by way of Lorne street.

The notice of motion was served on 4th November, 1905, and on the 11th of the same month the corporation . . . obtained from the owner of the two-feet strip a deed thereof, and it now forms part of Lorne street.

Three objections are raised to the by-law: (1) That it is not in the public interest, and is discriminating and unfair as against the applicant; (2) that it contains no provision for compensation to the applicant; and (3) that the council has not provided, for the applicant's use, some other convenient road or way of access to his lands.

Having regard to the agreement between the corporation and the railway company, above referred to, it is impossible for me to say, upon the material filed, that the by-law is not in the public interest, and I do not think it is open to any objection on the score of unfair discrimination as against the applicant. He may suffer more than any one else, on account of the peculiar location of his property, but he will probably

be entitled to compensation under the statute commensurate with his injury, but, if not, that will be the fault of the law and not of the by-law in question. . . .

The by-law was passed under sec. 637 of the Municipal Act, 1903. The general power given by this section to pass by-laws to stop up roads, etc., is qualified by sec. 629. . . .

Sub-section 1 of sec. 629 has been in force in its present form since 1873, but sub-sec. 2 was not added until 49 Vict. ch. 37, sec. 15. Prior to the amendment it had been held in several cases that making provision for compensation was not a condition precedent to the validity of a by-law closing a road. . . .

[Reference to In re Thurston and Corporation of Verulam, 25 C. P. 593; In re McArthur and Corporation of Southwold, 3 A. R. 295, 303, 305.]

It was contended by Mr. Hellmuth that the effect of sub-sec. 2 was to make both an offer of compensation and the provision of another convenient road conditions precedent to the right of the council to pass a by-law to close a road. I do not think it was intended by this sub-section to change the law as laid down in the McArthur case. I think the purpose and effect of the sub-section was to expressly confer by statute what the Courts had already held to be the interpretation of sub-sec. 1 as to the method of fixing the compensation, and, in addition, to provide for an arbitration upon the question of the road provided for the owner, in lieu of the original road, in the event of no agreement as to it.

Prior to this enactment there was no express provision for an arbitration in regard to the substituted road, though its disadvantages as compared with the original road would, no doubt, be a proper question to consider in fixing the compensation for the lands injuriously affected: see the McArthur case, 3 A. R. at p. 302.

What would be the proper scope of such an arbitration it is not necessary for me to decide on this motion, but I am clearly of opinion that the words "compensation offered" in sub-sec. 2 must be read in the light of the decisions upon sub-sec. 1, and therefore not necessarily before the by-law is passed.

Therefore, while I think the by-law is not voidable by reason of no compensation having been first offered or fixed,

I am of opinion that until the corporation acquired the two-feet strip which lay between the applicant's land and Lorne street, so as to give the applicant another road or way of access to his land, the by-law could have been quashed as being passed in violation of sub-sec. 1 of sec. 629.

It is well settled that, in the absence of another existing road or way of access to an applicant's lands, when the by-law is passed to close, and no other road is by the same or another by-law provided for, the by-law closing up is voidable. . . .

[Reference to Vandecar v. Corporation of East Oxford, 3 A. R. 131, 144; McArthur case, supra; Adams v. Corporation of Whitby, 2 O. R. 473; In re Laplante and Corporation of Peterborough, 5 O. R. 634; Saunby v. London Water Commissioners, 22 Times L. R. 37.]

Notwithstanding the defects in the substituted road, and that it is manifestly not as convenient as the original road (all of which can be compensated for under the provisions for arbitration), I think it is a convenient road within the meaning of the Act. The road has been accepted by the corporation as a highway, and the applicant will not be without remedy if it is not properly maintained as such.

What the statute proposes to secure is some other convenient road or way of access to the lands, not a convenient access from the lands to the nearest market or post office: see the Vandecar case, 3 A. R. at p. 142.

Objection to the by-law, as it now stands, has, I think, been cured by the deed of 11th November. Should I be wrong in this view, it may be to the advantage of the corporation, to avoid the by-law being questioned in other proceedings, to have the by-law quashed and a new by-law passed, and I give the corporation 3 weeks within which to elect to have the by-law quashed with costs; otherwise, as the applicant was justified in launching the motion, the application will be dismissed, but the costs will be paid by the corporation.