R. v. Nozaki

Between Rex, and Nozaki

[1926] B.C.J. No. 36

[1926] 4 D.L.R. 955

British Columbia Court of Appeal Vancouver, British Columbia

Macdonald C.J.A., Martin, Galliher, McPhillips and Macdonald JJ.A.

Heard: March 24, 1926. Judgment: June 1, 1926.

- **1 MACDONALD C.J.A.**:-- I would allow the motion for leave to appeal and would also allow the appeal.
- 2 The appellant was charged with fraudulently converting moneys collected for another to his own use. The facts as told by the appellant are as follows:
- Akazawa, a Japanese, died in 1921, leaving a widow who engaged the appellant, after her husband's death, to look after a large rooming-house which, I gather, had been conducted by her late husband, and some other business of hers. She agreed, as appellant alleges, to pay him \$50 a month for this service. The services were rendered over a period from 1921 to 1924, when the widow went to Japan. Before leaving, the appellant, who had not had a settlement with her, mentioned his wages or salary, and she told him that she would need the money to pay her expenses to Japan and to put her children to school there, and asked him as a favour to continue the collections under a power of attorney which she gave him, and take what was coming to him out of the proceeds. The widow did not return as was expected, and a dispute afterwards arose with respect to the accounts between the appellant and herself. An action was brought in her name in the Supreme Court wherein both claim and counterclaim were considered. She was adjudged entitled to something over \$1,600 on her claim and he to nearly \$1,000 [37 BCR Page 307] on his counterclaim, the one was set off against the other, and she obtained judgment for \$734. The appellant was then examined as a judgment debtor. The only evidence for the Crown on the trial of this charge was his own. The Japanese widow was not called, nor was her evidence procured on commission. The learned magistrate seems to have been, at one period of the trial, in great doubt, for he said:

"All I am concerned with is, whether he had a reasonable-well a reasonable right to suppose that that money was coming to him."

4 And again:

"It is almost impossible for me, Mr. McKay, with the present knowledge which we have, to decide that this man had not what he considered a colour of right."

5 After reserving decision, however, the magistrate said:

"I have carefully considered this case and reading the evidence, I have come to the conclusion that this is, if you like, a fake defence, there is no merit in it at all, and I find him guilty as charged of stealing the money."

- 6 Now, as I have already said, there is no evidence to support the prosecution, except that of the appellant himself, and if his story be a false one, there is nothing to support the case for the Crown.
- 7 The appellant's story is not an unreasonable one, and is corroborated to some extent by two witnesses called on his behalf. In the face of this, and of the fact that the person alleged to have been injured, was not called to clear up the matter as she might have done, I think it would be most unsafe to sustain the conviction.
- 8 This is another case of using the criminal Courts to enforce a civil demand. It was not until after judgment in the civil action, and after the examination of the appellant as a judgment debtor, and failure to execute the judgment, that these proceedings before the magistrate were instituted. I do not say that there was not the right to institute them, but in all the circumstances of this case, there being no real informant at all and no effort having been made by the Crown to obtain evidence of value, the proceedings ought not to have been taken.
- 9 I do not find it necessary to consider the question of the admissibility on behalf of the Crown, of the evidence taken on appellant's examination as a judgment debtor. On the trial he gave evidence and was taken over the same ground again, and [37 BCR Page308] did not object to answer on the ground that his answers would incriminate him.
- 10 The conviction should be set aside.
- 11 MARTIN J.A.:-- Upon the point of the admission of the evidence the authorities cited are in the circumstances, sufficient, I think, to sustain that ruling.
- As to the other branch of the appeal upon the facts, I am of opinion, after a careful consideration of the evidence, that a case has not been shewn which would warrant our interference with the view taken by the convicting magistrate as set out in his decision at the time and in his report to us, viz., that the defence set up was a sham one. Even if the story told by the accused could be regarded as uncontradicted by witnesses yet it was pointed out by the Privy Council in Berney v. Bishop of Norwich (1867), 36 L.J., Ecc. 10 at p. 12, that

"Daily experience shows that a tribunal trying questions of fact, ill performs its duty if it adopts as true every statement on oath not contradicted by counter-testimony, it being in accordance with that experience that many such statements ought to be disbelieved, and that without imputing perjury."

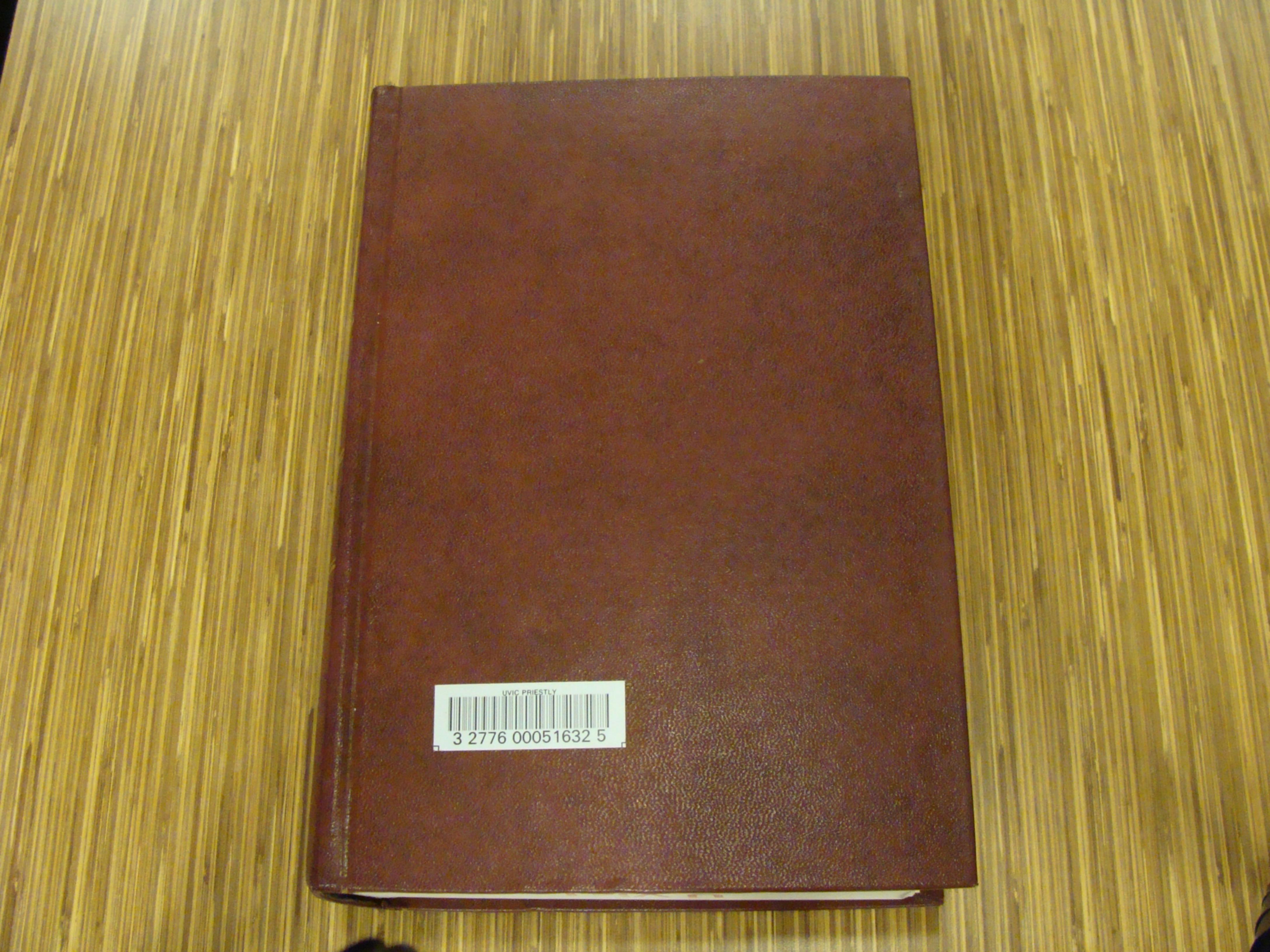
13 But here there is the additional fact that the statements made by the accused to the magistrate are in important respects not in accord with his statements previously made in the civil proceedings

in the Supreme Court which were, we hold, properly in evidence, and so I find it impossible to hold that the magistrate reached a conclusion contrary to that which reasonable men might well arrive at, and so the appeal should be dismissed.

- GALLIHER J.A.:-- The authorities to which we have been referred all bear out the contention of the Crown, that the evidence of the accused on examination for discovery in aid of execution, are admissible against him in a subsequent criminal charge, unless the witness at the time objects to answer on the ground that his answers may tend to incriminate him in any subsequent criminal proceedings. See Reg. v. Coote (1873), L.R. 4 P.C. 599 at p. 607; Rex v. Van Meter (1906), 11 C.C.C. 207; Reg. v. Madden and Bowerman (1894), 14 C.L.T. 505; Reg. v. Williams (1898), 28 Out. 583.
- 15 I am not inclined to disagree with the magistrate below that [37 BCR Page309] the defence set up is a fake defence, and would dismiss the appeal.
- 16 McPHILLIPS and MACDONALD JJ.A. would allow the appeal.

Appeal allowed, Martin and Galliher JJ.A. dissenting.

Solicitor for appellant: Douglas Armour. Solicitor for respondent: W.M. McKay.



LAW REPORTS CITED [1926] D.L.R.

REPORTS OF ALL REPORTABLE CANADIAN CASES
FROM ALL THE COURTS OF CANADA INCLUD.
ING ALL DECISIONS OF THE SUPREME
COURT OF CANADA AND ALL CANADIAN DECISIONS OF THE
PRIVY COUNCIL.

[1926]

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ANNOTATED

Annotations or briefs, prepared by experts in their respective branches of law, covering the whole law of Canada are included in the D.L.R. to date. A consolidated table of Annotations is published at the beginning of each completed volume.

> TORONTO CANADA LAW BOOK CO. LIMITED 234 BAY STREET. 1926.

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B.C.

DOMINION LAW REPORTS. [[1926] 4 D.L.R Rowlett on Principal & Surety, 2nd ed., p. 240; De Colyar antees, 3rd ed., pp. 360-1). Guarantees, 3rd ed., pp. 360-1).

Juarantees, 3rd ed., pp.

Juarantees, 3rd ed It follows then that up to the bank he was entitled to whole indebted ness of the company to the bank he was entitled to and in factorized—an assignment first of the mortgage made in factorized—an assignment first of all other see made in factorized. ness of the company to the most of the mortgage and in he received—an assignment first of all other securities by he received—an assignment of all other securities, the land of the company to the bank, secondly, of all other securities, the land of the company, held by the bank as security for the land of the l he received—as he rec covery upon it of the amount of such short rebound to pay him by way of contribution as a co-surety way
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Short.

From the fact that the Short mortgage was a specific security only for the debt of \$20,000 which throughout was kept entirely separate and distinct from the rest of the indebtedness tirely separate words, though there was a personal liability words. tirely separate and distribution of the separate and distribution of the words, though there was a personal liability on the part of Short to pay his full proper share of the \$36,000 on the part of Short to pay his co-surety, yet the land comprised in the contribution of the separate and distribution of the separate and distribu part of Short to pay his part of Short to pay his co-surety, yet the land comprised in the odd to McNeill as his co-surety, for the \$20,000 debt, it seems that McNeill as his co-surety, something the \$20,000 debt, it seems to me mortgage was liable only for the \$20,000 debt, it seems to me mortgage was liable only mortgage was liable only that with regard to this land if the bank had realized upon that would have it by enforcing the mortgage against it the bank would have it by enforcing the included the proceeds upon the would have been obliged to have credited the proceeds upon the \$20,000 and been obliged to have been the property of Short which that any surplus would have refused to hand over to him only which the bank could have refused to hand over to him only on the the bank could have to that, McNeill having taken the principle of set-off; and that, McNeill having taken the place of the bank, his position with regard to Short would be the of the bank, his possible of the bank, his possible the same, that is to say, that if there was any surplus arising from same, that is to say, that if there was any surplus arising from same, that is to say, the same, that is to say, the Short property, McNeill would have no legal claim upon that the Short property, and it into his hands, on the principle of the same of the Short property, and got it into his hands, on the principle of surplus except, having got it into his hands, on the principle of surplus except, having sight view the question of the position of set-off. If this is the right view the question of the position of the Robertsons immediately arises.

It seems to be admitted that the defendant W. Robertson is a bona fide purchaser for value of the Short property under circumstances which not only did not place him under an obligation to Short to discharge the \$20,000 mortgage but left Short under an obligation to discharge it for his benefit. Al. though the transfer obtained by Robertson from Short was not registered, Robertson was entitled beneficially, with the re-

[1926] 4 D.L.R.] DOMINION LAW REPORTS. sult, which I think is clear, that after Robertson acquired this sult, which ittle, namely, December 31, 1920, neither the base of the sult, were in a position to get from the sult, which I think December 31, 1920, neither the bank beneficial title, namely, December 31, 1920, neither the bank beneficial were in a position to get from the proceeds of the proceed of the proceed of the proceeds of the proceed of the proceed of the proceed of the beneficial title, have in a position to get from the proceeds of the beneficial were in a position to get from the proceeds of the nor property anything beyond the precise amount payout the street property \$20,000 mortgage. benefit weill were saything beyond the precise amount payable in short property \$20,000 mortgage.

Short prop the \$20,000 mortgage. short of the said seems to be sufficient for the purpose of what I have said is necessary to decide at this stage respect I have it is necessary to decide at this stage, namely, deciding all that it is necessary to decide at this stage, namely, deciding all to be contained in the "order nisi" by way, deciding all that to be contained in the "order nisi" by way of a what ought to frights upon redemption.

what ought of rights upon redemption.

declaration of rights upon redemption. declaration of read avoid complications I shall assume, what we is correct, that Short abandons his right to reduce to In order to that Short abandons his right to redeem and gather is correct, that Short abandons his right to redeem and gather is correct, need deal with is the right of the Robertsons.

that all that we need any possible claim of Short or any other to meet any possible claim of the Robertsons. that all that we any possible claim of Short or any other per-that order to meet any possible claim of Short or any other per-In order should be a reservation in the order of a right to In order to meet be a reservation in the order of a right to apply.

son there should be a reservation in the order of a right to apply. In there should be modified so as to declare subject to this the order should be modified so as to declare subject to this the defendants, the Robertsons Subject to the support of the defendants, the Robertsons or either that upon payment by the defendants, the Robertsons or either that upon of the monies found owing upon the Short documents that upon the short documents interest the state of the short documents and interest the short documents are supply that upon the short documents are supply the short document that upon payment monies found owing upon the Short \$20,000 of them, of the principal, interest costs and other proper is of them, of the short \$20,000 of them, of principal, interest costs and other proper charges, mortgage for principal is to transfer to the defendant periodes, ortgage for proper charges, ortgage for McNeill is to transfer to the defendant paying, the the plaintill mortgage and also the mortgage made by the com-

the Short mortgage that the same amount.

said Short mortgage that the same amount.

pany upon its own property for the same amount.

pany upon its own property for the company's mortgage

The Robertsons will, of course, hold the company's mortgage The Roberts of security for the repayment of the amount reponly by way of security for the repayment of the amount reponly by the amount paid in respect of the Short mort only by way the amount paid in respect of the Short mortgage with resenting the amount proper charges.

any subsequent proper charges. any subsequents the defendants Robertson should have the As to the appeal; they should also have their court it has appeal; As to the appeal; they should also have their costs below and costs of the appeal; they should also have their costs below and

the judgment for costs against them should be set aside. the judgment the appeal is allowed and the order nisi varied In the result the appeal is allowed and the order nisi varied as above indicated.

Judgment accordingly.

REX v. NOZAKI.

British Columbia Court of Appeal. Macdonald, C.J.A., Martin, Galliher, McPhillips and Macdonald, JJ.A. June 1 1996. McPhillips and Macdonald, JJ.A. June 1, 1926.

Courts I A-Criminal process to enforce civil demand-Rejection.

A Court will not look with favour upon a case which amounts to the use of criminal process to enforce a civil demand where to the disc no real informant and the Crown produces no evidence

APPEAL by the accused from his conviction of theft by a Magistrate. Reversed.

by the appellant are as follows:

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1926.

The appellant was charged on the sound use. The converting monies collected for another to his own use. The facts as told the appellant are as follows: Akazawa, a Japanese, died in 1921, leaving a widow who gaged the appellant, after her husband's death, to look who large rooming house which, I gather, had been conducted. REX gaged the appellant, artering gather, had been some other business of her late husband, and some other business of hers, by her late husband alleges, to pay him \$50 a month of hers. by her late husband, and some some standard of hers of hers agreed, as appellant alleges, to pay him \$50 a month for the service. The services were rendered over a period of from this to 1924, when the widow went to Japan. Before leaving the to 1924, who had not had a settlement with her, mention and she told him that she work mention. to 1924, when the widow went to superior leaving 1921 appellant, who had not had a settlement with her, mentioned his wages or salary, and she told him that she would need the money to pay her expenses to Japan and to put her children the head there, and asked him as a favour to continue the the money to pay her expenses to sapan and to put her dead the to school there, and asked him as a favour to continue the children lections under a power of attorney which she gave him equal take what was coming to him out of the proceeds. The widow arose with respect to the accounts between the appellant and herself. An action was brought in her name in the Supremental Court wherein both claim and counter-claim were considerable was adjudged entitled to something over the considerable was adjudged entitle herself. An action was herself. An action was and counter-claim were supreme court wherein both claim and counter-claim were considered Court wherein both claim.

Court wherein both claim to something over \$1600 considered.

She was adjudged entitled to something over \$1600 on her She was adjudged that a \$1000 on his counter-claim, on her claim and he to nearly a \$1000 on his counter-claim, the her against the other, and she obtained judgme one claim and he to hearry and she obtained judgment the one was set off against the other, and she obtained judgment one was set off against the samined as a judgment for \$734. The appellant was then examined as a judgment debtor. The only evidence for the Crown on the trial of this charge The only evidence for was not called, nor was his own. The Japanese widow was not called, nor was her was his own. The superior on commission. The Magistrate was her evidence procured on commission. The Magistrate seems to evidence procured on have been, at one period of the trial, in great doubt, for he

"All I am concerned with is, whether he had a reasonable -well a reasonable right to suppose that that money was com. ing to him."

And again:—"It is almost impossible for me, Mr. McKay, with the present knowledge which we have, to decide that this man had not what he considered a colour of a right."

After reserving decision, however, the Magistrate said: After reserving considered this case and reading the evidence, I have come to the conclusion that this is, if you like, a fake defence, there is no merit in it at all, and I find him

Now, as I have already said, there is no evidence to support

[1926] 4 D.L.R.] DOMINION LAW REPORTS. the prosecution, except that of the appellant himself, and if his the prosecution one, there is nothing to support the one the prosecution, there is nothing to support the case for story be a false one, there is nothing to support the case for

story Crown.

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ter as the conviction.

sustain the conviction. ter the control the Criminal Courts to enforce This is another case of using the Criminal Courts to enforce This is another. It was not until after judgment in the civil a civil and after the examination of the appellant, as a civil demand.

a civil demand.

a civil demand.

and after the examination of the appellant as a judgaction, and failure to execute the judgment. that action, and area and failure to execute the judgment, that these ment debtor, before the Magistrate were instituted. It is these ment debtor, and the Magistrate were instituted. I do not proceedings before was not the right to institute them but not proceedings between the right to instituted. I do not say that there was not the right to institute them, but in all say aircumstances of this case, there being no real inc the circumstances of this case, there being no real informant the pland no effort having been made by the Crown to the circumstant and no effort having been made by the Crown to obtain at all and no value, the proceedings ought not to have been made at lance of value, the proceedings ought not to have been made at lance of value, the proceedings ought not to have been made by the Crown to obtain at all and not value, the proceedings ought not to have been taken.

evidence of value, it necessary to consider the question vidence of vard it necessary to consider the question of the I do not line do not the Crown, of the evidence taken admissibility on behalf of the Crown, of the evidence taken admissibility of the evidence taken and the appellant's examination as a judgment debtor. On the on the appearance and was taken over the same ground trial he gave evidence and was taken over the same ground trial he gave did not object to answer on the ground that his ansagain, and did not incriminate him. wers would incriminate him.

The conviction should be set aside. The con.

J.A. (dissenting):-Upon the point of the admis-MARTIN, by the evidence the authorities cited are in the circumstances, sufficient, I think, to sustain that ruling.

As to the other branch of the appeal upon the facts, I am of As to the a careful consideration of the evidence, that a opinion, after a careful consideration of the evidence, that a opinion, are been shown which would warrant our interference case has not been shown by the convicting Magistrate with the view taken by the convicting Magistrate as set out in with the vision at the time and in his report to us, viz., that the his decision, that the defence set up was a sham one. Even if the story told by the defence sould be regarded as uncontradicted by witnesses yet it was pointed out by the Privy Council in Berney v. Bishop of it was pour (1867), 36 L.J. Eccl. 10, at p. 12, that, "daily experience shews that a tribunal trying questions of fact, ill performs its duty if it adopts as true every statement on oath not contradicted by counter-testimony, it being in accordance with that experience that many such statements ought to be disbelieved, and that without imputing perjury."

But here there is the additional fact that the statements made by the accused to the Magistrate are in important respects not

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DOMINION LAW REPORTS. [[1926] 4 D. L. R. Proviously made. in accord with his statements previously made in accord with his Supreme Court which were in proceedings in the Supreme Court which were, we the proceedings in evidence, and so I find it impossible to he hold proceedings in the Supremental it impossible were, we the perly in evidence, and so I find it impossible to he hold the perly in evidence a conclusion contrary to that the perly in trate reached a conclusion contrary to that perly in evidence, and a conclusion contrary to the hold magistrate reached a conclusion contrary to that well arrive at, and so the Magistrate reached a magistrate reached a well arrive at, and so the appeal which sonable men might well arrive at, and so the appeal which show dismissed.

GALLIGHER, J.A. (dissenting):—The authorities to Which the accused on examination of the Which GALLIGHER, J.A. (disself out the contention of which have been referred all bear out the contention of the which are admissible against him; have been referred and becaused on examination of the which that the evidence of the accused on examination for the Cro that the evidence of the admissible against him in a discretion aid of execution, are admissible against him in a discretion and of execution, are admissible against him in a discretion and of execution, are admissible against him in a subscription of the Cretion of the Creti in aid of execution, are the witness at the time objects to subsequent criminal charge, unless the witness at the time objects to subsequent criminal charge, unless the witness at the time objects to subsequent criminal proceedings. eriminal charge, unless answers may tend to objects to stop on the ground that his answers may tend to incriminate on the gubsequent criminal proceedings. See Reminate on the ground that reminal proceedings. See Reginal in any subsequent criminal proceedings. See Reg. v. Van Meter (1906) v. the grown any subsequent criminal production of the grown and the

I am not inclined to disagree with the Magistrate below I am not inclined to the defence, and would dismiss the the defence set up is a fake defence, and would dismiss the that

McPhillips and MacDonald, JJ.A., would allow the Conviction appeal

McPHERSON v. L'HIRONDELLE AND SOLDIER SETTLEMENT

Alberta Supreme Court. Appellate Division, Harvey. C.J.A. Hyndman and Mitcheli, J.J.A. and Ford. J. October 29, Beck.

Trusts and Trustees I A—Declaration—Document—Intention of donor.

A document alleged to be a declaration of trust of land is unless it clearly show the object and intention is A document alleged to show the object and intention of land is a sufficient unless it clearly show the object and intention of

APPEAL by the defendant, L'Hirondelle, from the judgment APPEAL by the delegal 3 D.L.R. 445, in favour of the plain.

H. P. O. Savary, K.C., for appellant. J. S. Mavor, K.C., for respondent.

The judgment of the Court was delivered by

The judgment of Hyndman, J.A.:—This is an appeal by the defendant Hyndman, J.A..

L'Hirondelle from the judgment of Simmons, C.J., [1926] 3 D.L.R. 445. The facts material to the issues in question are

The plaintiff was the owner of the S.W.-1/4-17-20-2-W./5th including the mineral rights except coal, which mineral rights

[1926] 4 D.L.R.] DOMINION LAW REPORTS. are the subject of the dispute herein. He also owned the surare the subject of the S.E. 1/4-18 as well as 240 acres, inface rights minerals, part of sect. 8 in the same townships acquired these several property face rights only minerals, part of sect. 8 in the same township and cluding He acquired these several properties long prior to the process of the seconds leading up to the second leading up to the seconds leading up to the second leading up to the se face the inner the same township and the several properties long prior to the range of the events leading up to the present action.

range, the events leading up to the present action. range of the events an old time resident of the Turner Valley,

time plaintiff is an old time resident of the Turner Valley,

The plaintiff is an old time resident of the Turner Valley, The plainting is a half-breed, born on the trail wherein L'Hirondelle is a half-breed, born on the trail wherein the year 1883. His mother of the Turner Valley, Mopherson. wherein L'Hirondelle is a half-breed, born on the trail near fendant L'Hirondelle is a half-breed, born on the trail near where L'Hirond year 1883. His mother tongue was Cree Settlement Winnipeg which was his only language, except a little French Winnipeg in the was his only language, except a little French, Indian, went to school at the age of about 12 or 13 Indian, went to school at the age of about 12 or 13. At this Hyndman, until he attended a school in Calgary for about a year and a Hyndman, until he went to a school in Calgary for about 12 or 13. At this time he attended a school in Calgary for about a year and a time where he learned English, which he has spoken over a school in Calgary for about 12 or 13. At this time where he learned English, which he has spoken ever since. half, leaving school he was engaged chiefly as a labour since. half, where he school he was engaged chiefly as a labourer and After years was a teamster for a cartage company. After leaving was a teamster for a cartage company. There is for 7 years was a teamster him and the plaintiff of blood relationship between him and the plaintiff. for 7 years was blood relationship between him and the plaintiff, but he no blood lend marriage, having married a neice of plaintiff's is connected by marriage, having married a neice of plaintiff's Whilst he and McPherson were on good terms. is connected by and McPherson were on good terms, it cannot wife. A that they were very intimate. L'Hirondella wife. Whist they were very intimate. L'Hirondelle went overbe said that the war, where he remained about four years, reseas during to Calgary in 1919. turning to Calgary in 1919.

In December, 1920, arrangements were made between these In December, McPherson was to sell and convey to the Sol-parties whereby Board the S.E. 1/4-18 and the S.W. parties whereby Board the S.E. 1/4-18 and the S.W. 1/4-17, dier Settlement Board the consideration of \$5000 and the S.W. 1/4-17, dier Settlementioned, for the consideration of \$5000 cash, the board above mentioned, thereafter to sell the said land at the above mental the said land at the same price, immediately thereafter to sell the said land at the same price, immediately terms of payment, to L'Hirondelle. The arrange-but on long terms of payment, to L'Hirondelle. The arrangebut on long finally completed by the registration of a transfer ment was finally to the Soldier Settlement Board a transfer ment was
McPherson to the Soldier Settlement Board in the Calfrom McPherson office on January 29 1921 from life the Callary land titles office on January 29, 1921. The conveyance gary land the board the whole of McPherson's title in the said vested in the board that is, it included the minor decided in the said vested in the said 2 quarter-sections, that is, it included the mineral rights, except 2 quarted the S.W. 1/4-17 aforesaid, and L'Hirondelle by purchase from the board became the equitable owner of the purchase and went into possession thereof, on which he has property resided ever since. The board also purchased about \$3000 worth of farm equipment from McPherson and in turn agreed to sell them to L'Hirondelle, but this fact has no material bearing

In March, 1926, L'Hirondelle agreed to sell the 2 quartersections in question to one Herron for \$20,800, on terms; \$1,000 cash and the balance spread over a term of 2 years.

Having learned of this sale McPherson caused to be fyled in the land titles office a caveat in which he claimed a one-half

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