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:

3 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 Page307] 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.

12 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.

14 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.

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DOMINION
LAW REPORTS

CITED [1926] D.L.R.

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

VOL. 4

[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.

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Rowlett on Principal & Surety, 2nd ed., p. 240; De Colyar on Guarantees, 3rd ed., pp. 360-1).

It follows then that upon McNeill paying the whole indebtedness of the company to the bank he was entitled to—and in fact he received—an assignment first of the mortgage made by the company to the bank, secondly, of all other securities, the property of the company, held by the bank as security for the debt, thirdly, of the mortgage made by Short (McNeill's co-surety) upon Short's own individual property. But McNeill's rights with respect to the Short mortgage were limited to the recovery upon it of the amount in respect to which Short was bound to pay him by way of contribution as a co-surety and, I think it clear, to such part of the amount of such contribution in respect of the whole debt as represented the amount of contribution owing in respect only of the debt of $20,000 for which specifically the Short mortgage was given, leaving the balance of the amount of contribution a personal claim only against 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, in other words, though there was a personal liability on the part of Short to pay his full proper share of the $36,000 odd to McNeill as his co-surety, yet the land comprised in the Short mortgage was liable only for the $20,000 debt, it seems to me that with regard to this land if the bank had realized upon it by enforcing the mortgage against it the bank would have been obliged to have credited the proceeds upon the $20,000 and that any surplus would have been the property of Short which the bank could have refused to hand over to him only on the principle of set-off; and that, McNeill having taken the place of the bank, his position with regard to Short would be the same, that is to say, that if there was any surplus arising from the Short property, McNeill would have no legal claim upon that surplus except, having got it into his hands, on the principle 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. Although the transfer obtained by Robertson from Short was not registered, Robertson was entitled beneficially, with the re-

sult, which I think is clear, that after Robertson acquired this beneficial title, namely, December 31, 1920, neither the bank nor McNeill were in a position to get from the proceeds of the Short property anything beyond the precise amount payable in respect of the $20,000 mortgage.

What I have said seems to be sufficient for the purpose of deciding all that it is necessary to decide at this stage, namely, what ought to be contained in the "order *nisi*" by way of a declaration of rights upon redemption.

In order to avoid complications I shall assume, what we gather is correct, that Short abandons his right to redeem and that all that we need deal with is the right of the Robertsons. In order to meet any possible claim of Short or any other person there should be a reservation in the order of a right to apply.

Subject to this the order should be modified so as to declare that upon payment by the defendants, the Robertsons or either of them, of the monies found owing upon the Short $20,000 mortgage for principal, interest costs and other proper charges, the plaintiff McNeill is to transfer to the defendant paying, the said Short mortgage and also the mortgage made by the company upon its own property for the same amount.

The Robertsons will, of course, hold the company's mortgage only by way of security for the repayment of the amount representing the amount paid in respect of the Short mortgage with any subsequent proper charges.

As to the costs the defendants Robertson should have the costs of the appeal; they should also have their costs below and the judgment for costs against them should be set aside.

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, 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 there is no real informant and the Crown produces no evidence of value.

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

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Macdonald, C.J.A.

D. Armour, K.C., for appellant; W. M. McKay, for Crown.

MACDONALD, C.J.A.:—I would allow the motion for leave to appeal and would also allow the appeal.

The appellant was charged with fraudulently converting monies collected for another to his own use. The facts as told by the appellant are as follows:

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

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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.

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The conviction should be set aside.

MARTIN, J.A. (dissenting):—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 shown 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. 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."

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GALLIGHER, J.A. (dissenting):—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; *Rex* v. *Van Meter* (1906), 11 Can. C.C. 207; *Reg.* v. *Madden* (1894), 14 C.L.T. Occ. N. 505; *Reg.* v. *Williams* (1897), 28 O.R. 583.

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

MCPHILLIPS and MACDONALD, JJ.A., would allow the appeal.

Conviction quashed.

McPHERSON v. L'HIRONDELLE AND SOLDIER SETTLEMENT BD.

Alberta Supreme Court, Appellate Division, Harvey, C.J.A., Beck, Hyndman and Mitchell, JJ.A., and Ford, J. October 29, 1926.

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

A document alleged to be a declaration of trust of land is not sufficient unless it clearly show the object and intention of the donor.

APPEAL by the defendant, L'Hirondelle, from the judgment of Simmons, C.J., [1926] 3 D.L.R. 445, in favour of the plaintiff. Reversed.

H. P. O. Savary, K.C., for appellant.

J. S. Mavor, K.C., for respondent.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—This is an appeal by the defendant L'Hirondelle from the judgment of Simmons, C.J., [1926] 3 D.L.R. 445. The facts material to the issues in question are substantially as follows:—

The plaintiff was the owner of the S.W.-¼-17-20-2-W./5th, including the mineral rights except coal, which mineral rights

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are the subject of the dispute herein. He also owned the surface rights only of the S.E. ¼-18 as well as 240 acres, including the minerals, part of sect. 8 in the same township and range. He acquired these several properties long prior to the time of the events leading up to the present action.

The plaintiff is an old time resident of the Turner Valley, wherein the land lies, having lived there since 1869. The defendant L'Hirondelle is a half-breed, born on the trail near Winnipeg in the year 1883. His mother tongue was Cree Indian, which was his only language, except a little French, until he went to school at the age of about 12 or 13. At this time he attended a school in Calgary for about a year and a half, where he learned English, which he has spoken ever since. After leaving school he was engaged chiefly as a labourer and for 7 years was a teamster for a cartage company. There is no blood relationship between him and the plaintiff, but he is connected by marriage, having married a neice of plaintiff's wife. Whilst he and McPherson were on good terms, it cannot be said that they were very intimate. L'Hirondelle went overseas during the war, where he remained about four years, returning to Calgary in 1919.

In December, 1920, arrangements were made between these parties whereby McPherson was to sell and convey to the Soldier Settlement Board the S.E. ¼-18 and the S.W. ¼-17, above mentioned, for the consideration of $5000 cash, the board immediately thereafter to sell the said land at the same price, but on long terms of payment, to L'Hirondelle. The arrangement was finally completed by the registration of a transfer from McPherson to the Soldier Settlement Board in the Calgary land titles office on January 29, 1921. The conveyance vested in the board the whole of McPherson's title in the said 2 quarter-sections, that is, it included the mineral rights, except coal, under the S.W. ¼-17 aforesaid, and L'Hirondelle by purchase from the board became the equitable owner of the property and went into possession thereof, on which he has 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 on the case.

In March, 1926, L'Hirondelle agreed to sell the 2 quarter-sections 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