DECISION IN FULL.

(Continued from Page 1.)

ment made between themselves. It also appears that none of these three parties, McCaul, Fancy and Averett ever staked their claims, but that they perpetrated a fraud upon the goyernment and perjured themselves by alleging that they had staked. How does it come then that D'Avignon appears in the line of recorders in the middle of this group of false swearers? If he had been at the beginning of the line or anywhere in the line but right in the center of this group perhaps not much force could be given to what I will afterwards state. D'Avignon at the request of Barlow records and about 10 or 11 o'clock of the same day he meets Barlow in the Pioneer hotel and gives him a power of attorney to deal with this claim, but starngely enough does not sign this power of attorney, alleging as an excuse that his hands were numbed with cold. There must have been a fire in the building and the excuse given for standing in the line of recorders on this date could not apply because it appears from the books of the recording office that only nineteen persons recorded during the whole day. So that on that day there was no rush and no need for any person to be at the recording office at 3 o'clock in the morning. D'Avignon then, from his own evidence, leaves the country, and Barlow on the same day enters into an arrangement with the defendant Rutledge, giving an option to one Jones. Barlow says that at the same time he left with Rutledge for future use a deed in blank signed by him in the name of D'Avignon which was to be filled in with the name of the future purchaser. Some time after this Rutledge informs D'Avignon (and in this there was no dispute) that the option given to Jones had gone off. Then Barlow on behalf of D'Avignon enters into another agreement or option upon the 16th day of July, 1898, for the sale of two claims, this one in question and another one, 253 on Dominion. According to Barlow's story, $500 was paid on this option. This Rutledge denies. At all events both agree and there is no question that papers were drawn up giving an option of both these properties for the payment of $750 each and these papers were deposited with the N. A. T. Company in escrow to be held until the 1st of July of the year following. These papers remained in escrow as so deposited until some time after the 1st of July. Rutledge claims under a deed which he says Barlow executed to him two days after the escorw papers, that Barlow came to him and said he was hard up and disgusted with the country and wanted to get out and agreed to take $1000 for the claim in cash, which Rutledge swears he paid him. This Barlow positively denies. On the same day Rutledge says he bought for the one and the same consideration the other claim, 253 Dominion. Now, the curious part of this transaction is that the deed under which Rutledge claims and which D'Avignon, or Barlow for him, says he never delivered, bears date on the 25th day of March, the very day on which it is admitted the original transaction with Jones took place, on the day of the recording, and corresponds exactly with the date on which Barlow says he left the deed in blank with Rutledge. Barlow does not deny that the signature is his. The deed of the Dominion creek property which Barlow says was executed on the same day as the Gold Run deed, namely, the 20th of July, bears date on a different date, namely the 15th day of March, in neither case the true date of the actual transaction. Rutledge when asked to explain why the Gold Run deed was antedated to the 25th of March says he thought to take in the title from the beginning, that is, from the time when D'Avignon's title commenced, by the record. He said that a similar rule ought to apply to the Dominion property, but when the records are hunted up it is found that that is not so, that the record of the Dominion p roperty was first made in January preceding. Therefore, Rutledge's explanation of why the deed of the Gold Run property was antedated does not seem to be a reasonable one. This is the most striking piece of evidence against Rutledge, particulary in view of the fact that the escrow deeds are dated upon the real date of the transaction, the 16th day of July, and are not antedated. It is hard to understand why, two days before, Mr. Rultedge should date the deeds of the real date of the transaction and two days afterwards should deliberately antedate two other deeds and that the same reason for that antedating should not apply in both cases. Another singular thing in regard to these deeds is that although they were both executed at the same time for the one consideration and by the one party acting in two interests, yet that different witnesses appear upon them. In the case of the Gold Run property the witnesses are William Abbott and Nelson In the case of the Dominion property the witnesses are Hyde and Frank McCau.] Rutledge explains this by saying that he never knew Barlow as Barlow, that he always knew him as D'Avignon That is also singular in view of the fact that Barlow signed his own name to the escrow papers. These were all attached. Upon these papers are endorsed directions in the handwriting of Rutledge. Prior to this Rutledge had dealings with Barlow as Barlow. Rutledge further tries to explain this by saying that thousands of transactions passed through his hands, that everything was done in a most iregular and hurried manner at that time and that paper was scarce and various excuses of a similar nature owing to the unsettled state of the country and the utter disregard which people had for any regularity of proceeding. Well, paper was not so scarce that duplicates were not made of the escrow deeds. In fact duplicates were made, and paper was as plentiful two days after in Dawson on the 18th or 20th as it was on the 16th. That excuse is not tenable. Barlow alleges that he had previous dealings with Rutledge in regard to Dominion property and left with him in that case also a deed in blank. Rutledge denies ever receiving any deed in blank from Barlow on any occasion and that these deeds were actually drawn up at the time he alleges, namely, two days alter the escrow papers. Why the escrow papers were not taken up when the property covered by them was sold is not apparent. Rutledge says he dropped the matter and took no more concern about the matter as he had bought the property. It is clear that Barlow went to the outside, that he wrote to the N. A. T. Company, who held the papers in escrow, inquiring as to whether payment had been made. He received unsatisfactory replies and determined to come in. He gave directions and orders to parties to call for these papers. His whole conduct in that respect was consistent with his story that the property was lying under the option with the defendants in escrow. His story was not shaken in any respect and both his account and the account of D'Avignon and Hildebrand seem to be consistent and a straightforward story. On the other hand the evidence of Rutledge was not given in a manner which impressed me with its sincerity. It may be and perhaps is the fact that having had so many transactions passing through his hands, the value of the property being so great, the apparent inconsistencies being so clear, that Rutledge became rattled in giving his evidence and to save his property told inconsistent stories. However this may be, I must view the evidence as it is before me. Upon the issue as framed and if evidence had not been given to discredit the testimony of Barlow, D'Avignon and Hildebrand, I would be disposed to think that the inherent evidence in the documents themselves being such as to confirm the story of D'Avignon and Barlow, the dealings of D'Avignon and Barlow with the escrow papers being also consistent with their story, the plaintiffs must succeed. But the defendnats were allowed to give evidence to shake the credibility and honesty of these parties for the purpose of showing, I take it, that having told a false story in regard to one part of their case, their evidence could not be believed as to the balance. I must investigate that and give my finding upon it as I view it. In the first place it seems to me to be extraordinary that D'Avignon should come down from Stewart river on a special trip carrying freight and immediately go to Gold Run, a very great distance away, passing over creeks which were then better known and better thought of and go to stake a claim upon a practically unknown creek, which had no reputation in the market whatever, in fact stake an absolute wildcat. The expense of going there must have been great and D'Avignon himself says that he had no intention, was utterly indifferent whether he recorded or not. I cannot understand a man going that great distance to stake a claim and then have no desire to record it for the sake of saving the small fee of $15. That is improbable on its face. Then Hildebrand, it seems, secured no claim. It is true he swears he staked 20, and this number should also be borne in mind in view of what transpires afterwards; when he came to rcord it he found it had been previously recorded against him. There were lots of vacant claims on the creek, as it appears by subsequent staking, which Hildebrand might have got. In connection with this question of whether Barlow or D'Avignon really staked this claim, we have the story of D'Avignon that some strange man gave them these numbers. A witness, Christie, swears that he was a layman upon the same claim upon which Barlow worked, No. 39, along with McCaul, Fancy and Averett and in discussing with these men possible claims open for staking he agrees with them to go to Dawson and find out from the gold commissioner's office what claims were open for staking. He finds out that these very claims are open; he enters them in a note book at the time and he allots to these four parties the various claims which are afterwards staked, with one exception, that is, he allots to Barlow 13, to McCaul 20, to Fancy 43 and to Averett 119; 20 is the claim which Hildebrand says he staked but could not record. These were the claims afterwards actually recorded by these parties with the exception of. 20, and McCaul records No. 12 instead of 20. There is no doubt in my mind that Barlow acquired knowledge of 13 through Christie, Some one staked 13 because the defendants have brought into court the post marked "Joe D'Avignon." The question is did D'Avignon or did Barlow actually stake claim 13? It is also in evidence (and Barlow admits it) that his right of staking in that district had been exhausted as he had already staked a claim in the same district and could not under the law stake another claim. Here was a motive for his using the name of another man to acquire a property. Then D'Avignon seems to have lost all interest in the matter since that date. His refusal or his non-signing of the power of attorney is in itself suspicious. If Barlow got from Rutledge the $500 which he says was paid to him on the escrow papers, he has given us no clear evidence of what application he made of it or whether he paid D'Avignon his share of it in cash. He says D'Avignon got an equivalent but does not tell us what that equivalent was. Then Barlow began this suit. D'Avignon from his evidence and from his conduct appears to have been entirely indifferent. The power of attorney to bring the action was signed by Barlow for D'Avignon. Barlow and D'Avignon, it seems, were old friends of some 40 years standing. His name was a convenient one to use, because I have no doubt that D'Avignon was in the country at that time, but a singular coincidence strikes one in that at the very time in which D'Avignon was in the country and at which he claims to have staked 13 Gold Run, Barlow had received this very number from Christie as a possible claim to stake; that he should strike upon D'Avignon at that time; that at that very time of day D'Avignon should go over the hills and come across Barlow working on 39 Hunker, as he said he did, is also a strange thing; that D'Avignon who was only in the Dawson district three or four days at the most or thereabouts should go directly to the very claim which his friend Barlow had in his pocket then for staking; that he should come to Dawson without intent to record that claim, and at the suggestion of Barlow record it and leave the country and pay no more attention to it is also singular; that he should on his return trip, on the way down to Nome, have passed Dawson, the only settlement of any importance on the river, without stopping is altogether singular.

A great deal of evidence was given as to the hand writing and all those who gave evidence agree and are very emphatic upon the latter, that the signature "Joseph D'Avignon" in the recording book or the application book of the gold commissioner's office, is in the same handwriting as the signature "Joseph D'Avignon" on the power of attorney; that it is also the same handwriting as is upon the stake and upon the various other documents which Barlow signs for D'Avignon. D'Avignon on examination for discovery and prior to the trial signed his name for the purpose of identification and comparison and the experts who have evidence are also all agreed that the signature "Joseph D'Avignon" made by the admitted D'Avignon is not in the handwriting of the man who wrote the "Joseph D'Avignon" in the application book and on the post and power of attorney. It is true that the evidence of handwriting experts is to be received with considerable hesitation but when all the parties agree upon the matter and no evidence in contradiction is given, I must give due weight to the opinion of these men. Barlow was in company with the party of men who staked these claims, admitted by him to be perjurers and fraudulent claimants against the government. One theory suggests itself to me and it may be the true one, but I cannot give effect to it as I view the evidence afterwards given, is that Barlow did perpetrate a fraud upon the government; that he used D'Avignon's name to stake for the purpose of acquiring more property than he was entitled to acquire under the regulations governing placer mining; that Rutledge did use the blank forms afterwards to defraud Barlow out of his claim. The evidence of the documents and the evidence of the dealings of the parties would seem to indicate that both these views might be correct. I am of opinion that Barlow did stake this claim himself and that D'Avignon did not stake it, from the evidence which I have recited. If that is so then he came into the box and swore that D'Avignon staked it, knowing that he himself had staked it. I may be wrong in this conclusion. These men all seem to be honest and all seem to be respectable, but they are all concerned in the result of this action and in the proceeds of a very valuable property. The evidence as it affects the credibility of both Barlow, D'Avignon and Rutledge is about evenly divided, the scale rather in favor of the plaintiffs. I must now look to see what evidence I have to turn the scale if there is any. This case is practically a trial of Rutledge for forgery. If he used the document, as it is alleged he used it, then he was guilty of a fraud. It is hard to conceive that any man would be guilty of such an atrocious crime for the sake of saving $750. Then I say what evidence have we got to rebut the presumption of fraud. In the first place we have the evidence of one William Abbott who seems to me to be a decent, honest witness, and he gave his evidence with very great care. He says he came into this country about the 11th of July of the year in question and that some few days afterwards he was in the office of Rutledge and was called upon to witness a document which is the very document in question. He identified his signature upon the document under which Rutledge, Jones and Davis claim title. He says he did not know the parties executing it and will not swear he actually saw the signature made but he does say that it was in an open office at a desk where a real transaction appeared to be going on between the parties to the document and Rutledge, that he signed openly in the presence of those who were there but cannot say that he knows Barlow or D'Avignon or that he saw the actual signature made but he does know that he did sign that document as a witness at that time. Here is another singular coincidence: If Rutledge had been guilty of fraud, how did he strike this very date; what was the reason of him using the 20th day of July to perpetrate this fraud when the property in Gold Run had not then advanced in price. It was not till afterwards and long afterwards that any hint of advance in price of Gold Run property was made public. That it was about the 20th of July, the date which Rutledge gives, that Abbott signed the document is quite clear from Abbott's evidence because he says that was a week or thereabouts after his arrival in the country. He cannot of course now define the exact date. If Abbott were a dishonest witness he would have gone further and sworn that he saw the party sign the document. That he is an absolutely honest witness is evidenced by the fact of the care with which he gave his evidence and therefore he must have witnessed that document at the time when he says he did and as openly as he says he did, which would be a strange way for Rutledge to carry out a fraud. Then we have another witness and I conceive perhaps the most important witness in the case. He was wholly independent, so far as it appears, in the matter—one White—who swears first as to the original staking and he says that Barlow told him some time after March, 1898, that he himself had staked 13 Gold Run. White is clear as to this. Says there is no question that Barlow told him he had staked it. If that is true then Barlow has not told the truth when he said that D'Avignon staked it. He did not tell the truth in the commissioner's office and he is not telling the truth here. Further White swears that he is an old friend of Barlow's or an old acquaintance of his, that after the 20th of July, the date of the alleged sale, he saw Barlow at Whatcom, Washington, his home, and he then told him that he had sold his property to Rutledge—this property in question—and had got his money, being disgusted with the country and anxious to get out. This confirms Rutledge's account of the matter that Barlow came to him after the escrow papers were signed and said he was willing to sell at a less sum for cash, which Rutledge gave him. Davis' evidence is wholly unsatisfactory, I think it is so unsatisfactory that it may be absolutely ignored. An affidavit which was filed in the case says that he paid $500 when the deal was made and $500 when the paper was recorded. This would seem to confirm the evidence of Barlow that $500 was paid on the escrow papers. He comes into court and swears that he paid $1000 all at one time and on further cross-examination he does not seem to know what he paid at all. I think Mr. Davis paid absolutely no attention whatever to the transaction and has only a very hazy and indistinct recollection of the matter. If his story regarding the $1000 payment at once is correct it confirms Rutledge. It is true that Rutledge was out of the country at the time the action was brought and the affidavit was sworn which might account for Davis' ignorance of the facts in question. It Rutledge had been present and made a similar affidavit it would have had a much more important bearing on the case. As I said before, it practically amounts to this, that if I find for the plaintiffs I must find the defendant Rutledge guilty of forgery. I can find no sufficient motive for that or any motive which should move a man of his apparent respectability. While the documents are strange and not reconciliable with any proper mode of procedure, yet it is possible that his story may be correct and that the things did happen as he says they did, however strange it may seem. But I think the evidence of Abbott and White turn the scale in his favor and I must believe them. I cannot say that I am satisfied even with my own judgment in the matter. The whole thing is such a kaleidoscope of inconsistencies and improbabilities that one is lost in trying to reconcile all the discrepancies in the evidence. Another judge or jury might come to a very different conclusion upon the facts, but this is my finding as I view the evidence. I might even give the old Scotch verdict "not proven."

There will be judgment dismissing the plaintiff's action.

JAS. CRAIG, Judge.

F. A. Cleveland is prepared to do heavy or light freghting and packing to Montana and Eureka creeks, the Black Hills country and the conglomerate mines across the Indian river. crt

Any kind of wine $5 per bottle at the Regina Club hotel.