JUDGMENT RENDERED

Findings Made in a Well Known Case

Opinion in Full in the Action of Charles E. Carbonneau vs. Edward Letourneau.

The following is the judgment in full rendered by Mr. Justice Craig in the case of Charles E. and Belinda Carbonneau vs. Edmund Letourneau and Joseph Bernier, a gist of which was published in the Nugget yesterday:

"The plaintiffs, being owners of creek placer mining claim No. 12 Gold Run creek, on the 20th September, 1901, gave what is known as a lay agreement—in other words, a lease—of the said property to the defendants to work the same on shares, the product of the workings to be paid over to the plaintiffs by the defendants, and the defendants to receive back one-half of the gold dust extracted from the claim. At the time of the making of the lay agreement the defendants were indebted to the plaintiffs in several large sums for machinery and supplies, and the lay agreement provides for advances to be made by the plaintiffs to the defendants for the working of the claim. Subsequently, on the 28th day of September, the defendants mortgaged to the plaintiffs their remaining half interest to which they were entitled under the lay agreement and also all their machinery and supplies on the claim, to secure those past due debts and future advances to the extent of $20,000. The defendants entered upon the claim and proceeded to work and so worked up to some time in December of the same year and then onward until these proceedings were taken. The plaintiffs' action now is for the debt owing, for receiver to be appointed under the lay agreement and their mortgage. The action is based on the two instruments, the lay agreement and the mortgage. The evidence on behalf of the plaintiffs shews that some time before the 30th of May the defendant Letourneau was drinking to excess and neglected his work, that the men employed on the claim by the defendants had not been paid and were complaining of Letourneau's conduct, and that some time before the 30th of May these laborers, under the ordinance respecting miners' wages, applied for and had appointed a receiver for the purpose of securing their wages. The mortgage above mentioned fell due on the 1st day of May on its face. The plaintiffs also allege and shew to a certain extent that Letourneau acted in contravention of the lay agreement by refusing to go on with the cleanup and hand over the product of the sluicing. The defendants deny that Letourneau's drunkenness, if he was drinking, affected in any way the working of the claim, and say that the operations conducted were well conducted and that a large quantity of dirt was taken out, much larger than laymen on adjoining claims took out. They further say that the plaintiffs were guilty of a fraud, or there was a mistake in the drawing of the mortgage. In fact, they go so far as to say there was no mortgage, simply a lay agreement, and if there was a mortgage then that it fell due not earlier than the expiration of the lay agreement, which was 1st of September, that the action of the men in asking for a receiver was occasioned solely by the conduct of the plaintiffs who acted in a suspicious manner and who refused to give any account of the advances made by them under these instruments so that the men might know the position in which they stood with relation to the dump and the hope of getting their pay out of their work. As to the evidence on these various matters it seems to me that the issue has been very greatly clouded by a large mass of evidence which has really no relevancy to the main issue, and that main issue is the question whether the mortgage under which the advances were made, fell due on the 1st of May or on the 1st of September, or whether, in short, the defendants were deceived by the plaintiffs in executing that mortgage, falling due upon a date which was not the true date under the agreement. Bernier and Letourneau say that when they signed the document (and they do not deny their signatures) Carbonneau told them it was a copy of the lay agreement or the same as the lay agreement. One Delaurier was present, who went in and out and to whom the papers were handed to be read. Delaurier says that Carbonneau handed him the papers to read, saying it was a copy of the lay agreement, but the papers were not read, the reason given by the defense being that Carbonneau was in a hurry. Another witness was present at this signing—Mr. Goselin. Upon his evidence I have placed very great weight. He really seems to be the only witness who is clear at all or who is not interested in the matter, except Delaurier perhaps. There is no doubt of this, and it is admitted by all parties that there were two lay agreements drawn up. The first one had some objectionable provisions which the plaintiffs consented to alter, and a second one was drawn up, and it may be that Carbonneau said the second one was the same as the first and that this is the document which he spoke of when he told Delaurier it was the same. Now, Mr. Goselin was present when the mortgage was signed. He swears positively that the mortgage was discussed, but while he cannot say that he remembers that the due date of May 1st was mentioned or that he heard it mentioned, he yet swears to this positively, that a date prior to the 1st of August was mentioned, and the reason why a date prior to the 1st of August was mentioned was because Carbonneau insisted that he should be paid before the men were paid. And it is in evidence and undoubted and an agreement is in existence by which the men agreed to wait for their pay until the 1st of August. This agreement is one between the defendants and their workmen. This would bear out almost conclusively the evidence of Mr. Goselin. Mrs. Carbonneau swears conclusively that long before the making of the mortgage the terms of it were discussed and the date was fixed and that she insisted for her own protection that the mortgage should fall due when it did as she wished to have absolute control over the property and over the product of it so that neither the laymen nor the laborers could defeat her prior right as owner of the ground and as mortgagee making advances for the working of it. This seems reasonable. In answer to this the defendants say that if there is a mortgage, which they deny, then it should fall due on the 1st of September, the same as the lay agreement because it covers practically the same matter, and the plaintiffs were well aware that the defendants had no means out of which to pay this mortgage but the product of the lay agreement or the result of the washup, and it was a physical impossibility for the ground to be washed up earlier than the end of May; it was utterly impossible for them, and this impossibility was well-known to both parties to the agreement, to produce any pay dirt from the ground earlier than at least the middle of May, and that under no conditions could they have realized such a large sum from the ground earlier than May and June. To shew some animus on the part of Carbonneau, the defendants gave evidence of an attempt on Carbonneau's part to induce them to salt the claim or to salt the rockers and pans which were being used to shew the result of the working so as to mislead a gentleman called Labelle who was apparently acting for some French company in inspecting the mine with intent to buy. Four men, I think, swore positively that Mr. Carbonneau endeavored to do this on or about the 28th or 29th of May, and upon the refusal of the defendants to aid him in this fraudulent design he became angry and took these proceedings. I very much doubt the admissibility of this evidence under all the circumstances; at all events, it can have no bearing upon the issue which is the real issue, whether this morfgage was or was not payable on the 1st of May, because Carbonneau could not have anticipated in September a request to these men in May following to salt this claim, and Carbonneau's conduct in the end of May, 1902, certainly could have no relevancy to the agreement made by the parties respecting this mortgage in September, 1901. Again, the defendants swear that they became aware of the mortgage and its nature in the end of December. They say that they approached Mr. Goselin about this and that he told them to go on and work, although they then were threatening to throw up their lay or contract, and that Carbonneau would do what was right by them. Goselin denies this absolutely. He says no such conversation took place. He is aware that the defendants got a copy of the mortgage at that time and that they continued to take very large advances under it up to the time these proceedings were taken. The defendants do not deny taking those large advances and taking the benefit of the mortgage but they say they took these advances and continued to work because Mr. Goselin assured them that they were justified in so doing and that the time would be extended for the payment of the mortgage. Mr. Goselin had a power of attorney from the Carbonneaus, who were absent from the country during all this time, to deal with their property, with very large powers, and without considering whether Mr. Goselin's power of attorney is sufficient or not to enable him to grant an extension of time under the mortgage and without considering whether this extension of time should be a document of the same force as the power of attorney, I am compelled upon the evidence and what I think of the credibility of the evidence to say that no such conversation as is detailed by the defendants Bernier and Letourneau took place between them and Mr. Goselin; that Mr. Goselin did not extend the time under the mortgage, but that the defendants went on and took these advances, knowing the date of the mortgage and without any such assurance from Mr. Goselin. This view of the case is further borne out by the fact that the defendants never mentioned this matter to Mr. Carbonneau on his return, in April; no complaint whatever was made to him about this fraud or mistake until long after these proceedings were taken. Carbonneau was in the country from April on until this action was taken on the 27th of May, and not a word was said to him about this fraud. Further, the defendants by their pleadings do not raise this question at all except by an amended plea which is filed and served after Mr. Carbonneau, the plaintiff, who is alleged to have been guilty of the fraud, has left the country on business. The original statement of defense was filed on the 20th day of June. Mr. Carbonneau had left the country in the meantime, and by a subsequent statement of defence filed on the 14th day of July, these allegations of fraud are for the first time set up. I say both these circumstances together with the very positive evidence of Mr. Goselin, a respectable and intelligent witness, confirm me in the belief that no such conversation took place or agreement was made as the defendants allege. Again, the conduct of the defendants creates suspicion, because I believe that they deliberately removed the plate from the engine or boiler as the plaintiffs and the evidence allege they did, for the purpose of delaying and hindering the receiver. Their conduct towards the receiver was threatening and boisterous in the extreme. They were not prevented but were permitted to go on with their lay work, the receiver taking the product which the plaintiffs by the defendants' own admission were entitled to do in any event, the receiver doing only what the plaintiffs had the right to do before action, that is, take the gold.

"The plaintiffs' mortgage has a clause providing for them taking possession if they fear the security is being impaired, and practically an acceleration clause, and we have the fact that the workmen working for the defendants had taken action against them for non-payment of wages and had a receiver put in. The dump was in their possession. Surely this was sufficient to entitle the mortgagees, even supposing the mortgage had not been due on the 1st of May, but under the general provisions of the mortage, to take possession for their own protection. I place very little weight upon the story that the plaintiffs' refusal to give an account prejudiced the minds of the workmen because the defendants had themselves a bookkeeper who kept check of all supplies going on to the claim and the accounts of the plaintiffs and defendants were checked over by this man.

"That I may find all the facts raised, I think that the work done by the defendants was well done and done in a workmanlike manner. The dump got out was an exceedingly large one, but I do not think that the drunkenness of Letourneau, if proven, had any appreciable effect whatever upon the operations, and it did not prejudice the plaintiffs in the slightest degree. At first blush it struck me that considerable hardship had been inflicted upon the defendants but on more calmly considering the whole case, I do not think there has. The action of their own workmen precipitated matters, and there is no reason why a person should not put himself in the power of another if he sees fit to make such a contract and if he cannot obtain work (in this case the lay agreement) upon any other terms. It is not unreasonable that a mortgagee should take a mortgage for advances and that the date of payment of that should be long anterior to the time when in the ordinary course of affairs the mortgagor could pay, and that he should have this power for the purpose of being absolutely secured against any creditors or lein holders of the mortgagor. This is not an unusual proceeding. While it gives the mortgagees very great power, still it is not illegal. The condition of things in this country under the miners' lein ordinance renders the position of parties holding claims precarious, and they are probably justified in taking extraordinary precautions of this nature.

"It was urged very strongly by counsel for the defendants that this contract was one impossible of performance and therefore void. The impossibility alleged was that it is in this country a physical impossibility to wash out placer dumps earlier than May; certainly it would be impossible to wash them out as early as the 1st of May. In considering this argument it must be borne in mind that this is not a contract on the part of the defendants to wash out for the plaintiffs so much placer gold at a given date. It is a contract to pay money. The real gist of the action is on the mortgage. Of course it may be said and with considerable force that the documents are to be read side by side and to cover the one transaction. They do to a limited extent, perhaps to a large extent. Without deciding the question whether it is a physical impossibility or not to wash out placer gold earlier that the end of May, it is not a physical impossibility to pay money, and that is the contract, after all. It was not proven to me beyond a doubt that it is physically impossible to wash out dirt earlier than May. I might infer from the evidence that according to the customs and habits of this country and according to the physical conditions here it would be impossible and that both parties would understand that; but is it not more an unreasonable contract than an impossible one? The law upon this branch of the case is this: 'Where there is an obvious physical or legal impossibility on the face of the documents there is no contract.' Now, it certainly cannot be said that upon the face of these documents, or either of them, there is such an obvious impossibility. There is a clear distinction between 'impossible' and 'unreasonable,' and if a person enters upon an unreasonable contract it is his own fault. 'Where an agreement is not impossible in its own nature but impossible in fact by reason of the circumstances the authorities are agreed that impossibility of this kind does not excuse non-performance,' and I do not think the impossibility in this case as urged is such a one as comes within the rule.

"The defendants ask for a rectification of the mortgage. While the court has full power to rectify, yet I do not think, even on the most favorable view of this case, that they have shewn sufficient ground. I decided that there was a mortgage. The question then is as to its due date. The law is clear that to rectify a mistake there must be clear proof of the real agreement on both sides different from the expressed agreement, and a different intention or mistake of one party alone is not a ground to vary the agreement expressed in writing. Now, in this case we have no evidence of any other date than the 1st of May, the only other evidence to help out the parole evidence which is given in support of the request to rectify being the lay agreement, but that gives us no light as to what the real date of the mortgage should be. The defendants must succeed upon the ground of fraud, if at all, and upon this I think they must fail. There is no evidence whatever to satisfy me that Carbonneau misled them as to the date of the mortgage. Two men were present during at least part of the interview; one during the whole of it, that is, Mr. Goselin. He says that there was no undue haste whatever. The papers were there open and to be read; the date of the mortgage was discussed, that there should be some date prior to the 1st of August, and there was no concealment whatever on the part of Carbonneau, and I do not believe there was. In general one is not bound in law to disclose in a treaty for a contract all known facts that may be material to the other party's judgment. If one party asks a question which the other is not bound to answer and it is not answered, he is not entitled to treat the other's silence as a representation that is, when there is really nothing beyond silence. A very slight departure from a passive acquiescence may be enough to convert a lawful though scarcely laudable reserve into an actionable deceit. This must in every case be a question of fact.'

"This is the law laid down by Pollock upon that breach of the law of fraud. I do not think that covers his case. What the defendants here allege is not so much silence as the due date as a direct representation that there was no mortgage at all, although they are somewhat hazy in the evidence which they give. If there had been a direct misrepresentation or wilful concealment and by that the defendants had been induced to enter into this contract there is no doubt that if I found the facts in their favor I could relieve them. But the parties asking for relief of this nature should at once on discovery of the error, have asked for a rescision of the contract. They did not do that. They chose to go on and take the benefit of the contract as it stood and to receive fresh advances and very large advances. Pollock, page 558, further says: 'It is for the party defrauded to elect whether he will be bound, but if he does affirm the contract he must affirm it in all its terms. A shareholder cannot repudiate his share on the ground of misrepresentations in the prospectus if he has paid a call without protest or received a dividend after he has had in his hands a report shewing to a reader of ordinary intelligence that the statements of the prospectus were not true, and when the right of repudiation has once been waived by acting upon the contract as subsisting with knowledge of facts establishing a case of fraud, the party claiming the benefit of the right to repudiate is, I think, estopped, and an omission to repudiate within a reasonable time may be conclusive evidence of an election to affirm the contract.' This law I state upon the defendants' case and upon the most favorable view of it. As I have already found the facts against them I do not think it is pertinent.

"There will be judgment for the plaintiffs as claimed.

"As to the receiver, this is one case of many in this territory where the appointment of irresponsible and unskilled persons as receivers has worked injury. I do not know that any positive injury in this case has been worked to either parties by the act of the receiver, but in some cases it has been done. It will be a lesson to me, I know, to very carefully in the future guard this matter of receivership and to appoint only those who are absolutely capable and absolutely responsible. This man had the positive orders of the court to do certain things and he directly disobeyed those orders. He probably did so in all innocence and thinking he was justified in doing so, but I will punish him by not allowing him any costs as against the defendants."

"The plaintiffs will have their costs of the action."

Notice

Messrs. Epting and Burrington are requested to call at the Nugget office.

CHICAGO EXPLOSION

Terrible Scenes Attending the Disaster.

Chicago, Nov. 29.—Seventeen identified dead, with an assured total of eighteen dead, with nearly half a dozen persons still missing and twenty persons injured, is the story of the explosion of the refrigerating plant of Swift & Co. today. Like the rumbling roar of a 13-inch gun, fourteen boilers in the refrigerating plant blew up at 10 o'clock this morning. The towering walls of the plant collapsed and a riot call, which brought policemen, firemen and hundreds of doctors, was sent in. Ambulances dashed through the narrow lanes of the Union Stock Yards conveying the dead or injured to hospitals.

Panic reigned for a time among the tens of thousands of spectators, and reports of killed reached as high as sixty. There are at least four persons missing, and it is agreed that they will be added to the death roll. Fifteen persons were removed to the hospital, the majority so badly injured that they will die. The collection of the dead and injured cannot be completed until the ruins have been cleared away.

ANOTHER RICH STRIKE.

Seattle River in the Koyukuk is Said to be Good.

Mr. Gandolfo received a letter in the mail last night from Coldfoot in the Koyukuk, which was dated November 19th, and this is pretty good time for the second mail out from there since the freeze-up. It is from Judge D. A. McKenzie, of Coldfoot, and refers to the latest stampede in that country, of which this is the first word. The judge says:

"We are all excitement over the strike on the Seattle river, which is about 25 miles northwest of here. I may add that I believe the country to be rich, in fact far richer than any heretofore struck in the Koyukuk country."

The richness of the new diggings is borne out by other letters Mr. Gandolfo received on the same mail from other parties.

Dawsonite Dies in Arizona

Private advices received in Dawson last week note the death of Mr. Ernest L. Donohue, of Seattle, Wash. Mr. Donohue started for Dawson in the fall of '97, arriving here in the spring of '98, and remained for two years, during which time he made a large number of friends. Being in ill health he returned to Seattle and entered the office of the Seattle Daily Times, where he remained until this fall, when he went to Arizona for the benefit of his health, but had only been there a short time when he died of consumption. His death will be regretted by his many friends.