1904
*May 25, 26.
*June 8.

EDMOND LETOURNEAU AND JOSEPH BERNIER (DEFENDANTS) ..... APPELLANTS;

AND

CHARLES EUGENE CARBONNEAU AND BELINDA ANN CARBONNEAU (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Mistake—Misrepresentation — Lay agreement — Mortgage — Execution of documents by illiterate persons—Evidence.

The plaintiffs leased mining rights under lay agreement to the defendants providing for division of profits and payment of an existing debt and for advances to be made out of the clean-ups on dates therein mentioned, a mortgage to be given on the dumps to secure the advances. Owing to some inaccuracy in the lay agreement a new lay agreement was executed at the same time as the mortgage. The mortgage provided for payments at earlier dates than the lay agreement, and was not read over to the defendants, who were unable to read and had requested that it should be read over to them. In an action on the mortgage evidence was given that a document signed on that date was represented to be in terms similar to the lay agreement as first drawn but it might, possibly, have been the new lay agreement that was thus spoken of, and it appeared that, although the defendants became aware of the difference in the terms of payment mentioned in the mortgage and complained of this to the plaintiffs' agent, they continued to work on the lay, assuming that the altered terms of payment would not be insisted upon.

Held, reversing the judgment appealed from, Sedgewick and Killam JJ. dissenting, that there was not sufficient evidence of acquiescence in the altered terms of payment and that, as the evidence shewed that defendants were illiterate and the mortgage had not been read over to them on request, and they had been misled as to its contents, they could not be bound by its altered provisions as to the payments.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

APPEAL from the judgment of the Territorial Court of Yukon Territory *in banco*, affirming the judgment of Craig J., at the trial by which the plaintiffs' action was maintained and the counter-claim of the defendants dismissed with costs.

The circumstances of the case and the questions at issue on the appeal are stated in the above head-note and the judgments now reported.

Noel K.C. for the appellants.

Aylesworth K.C. for the respondents.

SEDGEWICK J. (dissenting).—For the reasons stated in the written judgment of my brother Killam, I am of opinion that this appeal should be dismissed with costs.

GIROUARD and DAVIES JJ. concurred in the judgment allowing the appeal with costs for the reasons stated by Nesbitt J.

NESBITT J. The authorities are clear that where a party executing a document cannot read or write except to sign his name, even when the document is in his own language, it is held not to be executed where there is either, (*a*) a request that the document shall be read by the party putting it forward, which is refused, or (*b*) where it is mis-read, or (*c*) where the contents are misrepresented.

In this case I have read the evidence relating to the execution of the mortgage several times and my mind is irresistibly drawn to the conclusion that the mortgage, differing as it does in the most material particular from the lay agreement, was not explained, as to that particular, to the defendants, but, on the contrary, it was represented to them, and they believed, that it

1904
LETOURNEAU v. CARBONNEAU
Nesbitt J.

complied with the terms of the lay agreement. I am greatly influenced in coming to this conclusion by the evidence of Mr. Gosselin, the agent of the plaintiffs, who says that there was no idea of receiving payment except out of the clean-ups from the dumps, and that the agreement as to payment under such circumstances at a date when it was, practically, physically impossible that the payment could have been made from the clean-ups, was the first one of the kind he had ever seen in the territory.

It is further to be observed that the lay agreement provided specifically, first, for the retention, absolutely, of fifty per cent of the product of each wash-up, and, secondly, for the retention, out of the fifty per cent, (*a*) of the then existing indebtedness, and (*b*) any further indebtedness from the defendants to the plaintiffs for future supplies. It was urged that in December the defendants became aware of the terms of the mortgage and, subsequently, went on and received supplies under its terms, and, therefore, must be held to have ratified it or to have acquiesced in its provisions. The defendants both swear that when the terms of payment, the first day of May, first came to their knowledge, they declined to go on with the work, and said they would have to throw up the whole job, but that Mr. Gosselin, the plaintiffs' agent, stated that the plaintiffs would not insist upon such a term and induced them to go on with their work, and I think that the language of Lord Chancellor, in *Morse* v. *Royal* (1) is applicable. In that case the Lord Chancellor said:—

As to the doctrine of confirmation, it stands upon several authorities; where a man having been defrauded, with complete knowledge chooses to come again in contact with the person who defrauded him; abandons his right to abrogate the contract; and enters into a plain, distinct transaction of confirmation. But when the original fraud is clearly established by circumstances not liable to doubt, a confirmation

(1) 12 Ves. 355 at p. 373.

1904
LETOURNEAU
v.
CARBONNEAU
Nesbitt J.

of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud that it ought to be watched with the utmost strictness ; as an act, done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which, in justice, ought never to have taken place.

We think that there was an agreement to give a mortgage to secure the further advances, but there was no bargain for an alteration of the terms of payment provided for in the lay agreement, and we think it would follow that, under the taking of accounts prayed for by the counter-claim, the plaintiffs on the argument were now entitled to payment for large advances, and we refer the whole question of taking accounts and the claim for damages under the counter-claim back to be tried and disposed of by the courts below. All costs of the previous trial and of the proceedings in the court below and in this court of the appellants, defendants, to be payable forthwith out of the moneys in court with power to either party to apply with reference to such moneys and full power of amendment to dispose of all questions which may arise out of the counter-claim,

I would refer to *Thoroughgood's Case* (1) ; *Rex* v. *Longhor* (2) ; *Owens* v. *Thomas* (3) ; *Murray* v. *Jenkins* (4) ; Addison on Contracts, (9 ed.) 114 and following ; and to *Jones Stacker Co.* v. *Green* (5).

KILLAM J. (dissenting).—This is an appeal from a judgment of the Territorial Court of the Yukon Territory. The action was brought upon a mortgage of chattels, for the appointment of a receiver and manager of a mining claim and chattel property connected therewith, and for payment of the mortgage moneys in the manner claimed by the plaintiffs. The plain-

(1) 1 Co. 444.
(2) 1 Nev. & M. (M.C.) 128.
(3) 6 U. C. C. P. 383.
(4) 28 Can. S. C. R. 565.
(5) 14 Man. L. R. 61.

1904
LETOURNEAU
v.
CARBONNEAU
Killam J.

tiffs, a husband and wife, had a mining claim in the Yukon Territory; they entered into an agreement with the defendants, Letourneau and Bernier, by which the latter were to work the claim for a certain time upon shares. To give effect to their arrangement the parties entered into an agreement in writing, called in the case a "lay" agreement. By this document the plaintiffs leased the mining claim to the defendants from the 10th day of September, 1901, until and including the 1st day of September, 1902. The document required the defendants to pay over to the plaintiffs all gold as fast as it was realized from the claim, and the lessors were to retain one half of the gross amount and pay the remainder to the defendants. It was also provided that the defendants should purchase certain machinery from the plaintiffs, to be paid for by the retention of the amount of the purchase money out of the defendants' share of the gold that had been paid over to the plaintiffs. It was also provided that the plaintiffs should have the right to retain out of the defendants' share of the gold sufficient to repay to the plaintiffs the sum of $40,000, being the amount of the defendants' indebtedness to the plaintiffs for certain groceries, provisions and supplies. It was further provided that the plaintiffs should also have a right to retain out of the defendants' share of the gold to be extracted during the wash-ups during the spring of the year 1900, or such other wash-ups as might take place during the year, sufficient gold to reimburse the plaintiffs for all debts for supplies to be thereafter furnished by the plaintiffs to the defendants. At or about the same time at which this agreement was made, the plaintiffs claimed that the defendants executed an indenture of mortgage by which, after reciting that the defendants had applied to the plaintiffs for advances of goods and supplies to enable

them to carry out the terms of their lay agreement, and that the plaintiffs, on the faith of the security given or to be given by the mortgage, had agreed to provide such advances of goods and supplies, provided that they should not be bound to advance in all more than $20,000 in value, and provided that the terms of credit for any such goods should not in any case extend beyond the first day of May, 1902, the defendants mortgaged to the plaintiffs all of the defendants' share in and to the dump and dumps extracted during the life of the lay agreement, and the gold and gold dust extracted from such dump or dumps, and all gold and gold dust to be extracted from the claim in any manner whatever during the terms of the lay agreement, and also all groceries, provisions, fixtures, machinery, etc., on the claim, to secure payment of all moneys which should become payable by the defendants to the plaintiffs on or before the first day of May, 1902, with certain interest.

By the original statement of defence the defendants alleged that it was agreed between the plaintiffs and the defendants that all the money due on the mortgage was to be paid after each clean-up, until the full debt should be satisfied, during the continuance of the lay agreement, and the defendants put in a counterclaim alleging that they mortgaged all their interests in the claim and in the dumps thereon to secure future advances from the plaintiffs, and that by a subsequent agreement the amount due under the mortgage should be paid after each clean-up until the full mortgage money was satisfied, and that the lay agreement would end on the first day of September, 1902, and the mortgage would become due on that date. Subsequently the defendants put in an amended statement of defence and counterclaim by which they set up that on the 28th September, 1901, it was agreed between the

1904
LETOURNEAU
v.
CARBONNEAU
Killam J.

plaintiffs and the defendants that the defendants were to give a mortgage on the dump or dumps to be extracted under their agreement, and on all gold or gold dust to be extracted therefrom, and all the groceries, supplies, machinery, etc., for the sum of $20,000, to secure all or any advances made by the plaintiffs to the defendants, the mortgage to be payable out of the proceeds of the lay agreement coming from each wash-up, and the mortgage to become due and payable on the first September, 1902; that the plaintiffs were authorized to draw up a mortgage upon those terms, and the plaintiffs did draw and produce to the defendants for their signature a form of mortgage pretending that it contained the terms of the agreement just alleged, and that it was payable as so agreed, and falsely represented to the defendants that the mortgage was only payable from their share of the proceeds of the claim as washed up by them and would not be due until the first September, 1902, and that the defendants need not read the paper as it only contained the terms of such agreement, and the defendants relied upon the false representations made by the plaintiffs as to the terms of such mortgage, and signed it, having full trust and confidence in the plaintiffs, which was the mortgage now sued on.

The defendant (Bernier) gave evidence which, upon its face, very fully bore out the allegations of this amended statement of defence. Apparently he meant to swear that the particular document which embodied the mortgage was signed by the defendants upon the representation that it contained only similar terms to those of the lay agreement, and that Mr. Carbonneau induced them to sign it without having it read to them, claiming to be in a hurry.

Letourneau gave evidence of having been induced to sign some document on the representation that it

was in terms similar to those of the lay agreement. He, Letourneau, said that he first heard of the mortgage in question in December, 1901, and that he did not know until December that there was a mortgage.

It is clear, upon the evidence, that after one document had been drawn up and signed as embodying the lay agreement, another document was drawn up and signed by the parties which was either a copy of the original or varied slightly therefrom.

Upon Letourneau's evidence, it is quite open to believe that the document to which he refers as having been signed by him upon the representation that it was similar to the lay agreement, was this second agreement. Both Letourneau and Bernier were illiterate men whose native language was French, but who, to some extent, understood English, though unable to read it. One cannot rely, under these circumstances, with any great confidence upon the accuracy of statements by either of them that the document which they signed upon the representation that it embodied the same terms as the first lay agreement, was the mortgage rather than the second copy of the lay agreement.

Mrs. Carbonneau gave evidence of a preliminary discussion before the documents were signed, in which the mortgage was distinctly agreed upon, and in which it was agreed that it should be made payable at any rate before the first day of August, 1902.

Bernier does not deny that there was to be a mortgage.

Upon all the evidence, it seems very clear that the hypothesis that the defendants were induced to sign a mortgage, not knowing that it was such, but on the faith of the representation that it was a copy of the lay agreement and believing that it was a lay agreement only, is not open. Gosselin, who acted as book-keeper

1904

LETOURNEAU v. CARBONNEAU

Killam J.

and agent of the plaintiffs, gave some evidence which seems to me to be rather confused. The learned judge who tried the cause said that he placed very great weight upon Gosselin's evidence, that he seemed to be the only witness who was at all clear. I am not able to place so great reliance upon Mr. Gosselin's evidence. He did speak of the signing of the second lay agreement and admitted that there was at that time a representation that it was similar to the former one; but he said, also, that Carbonneau explained that there were the two documents, the lay agreement and the mortgage. He also said that he did not pay very particular attention to what occurred.

If the evidence of the defendants as to the alleged misrepresentation which induced them to sign the mortgage were clear and upon its face reliable, I would think that Mr. Gosselin's evidence went a long way to corroborate it. But, upon the evidence as a whole, I am not satisfied that any such representation was made with reference to the mortgage, or that the defendants were misled into signing a mortgage upon different terms from those understood by them to be contained in the document. It is true that it could not have been expected at the time that, before the first May, 1902, sufficient would be realized out of the claim to pay these additional advances; but still it was competent to the plaintiffs to refuse those advances except upon the terms that the amounts therefor were to be deemed payable on the first day of May so as to enable the plaintiffs to enforce the security if circumstances should appear to render it advisable. Certainly, a misunderstanding in this respect might easily have occurred between the parties, or the defendants might easily have been induced to sign a document embodying these terms without having really agreed to them. But the execution of the do-

cument was *primâ facie* proved by proof of the defendants' signatures, which are admitted by them, and I am unable to find sufficient in the evidence to warrant the inference that the defendants were misled or executed a document embodying different terms from those which they understood it to embody.

The defendants claim that, in December, 1901, or January, 1902, they learned of the contents of the instrument of mortgage and, as soon thereafter as possible, made objection to Gosselin respecting the terms of payment, claiming that the money was only to be paid as realized out of the claim. Gosselin does not dispute this absolutely; he admits that there was some question raised by the defendants, though he does not remember exactly what it was. He, however, gave them certain assurances, as they say, which induced them to go on as before.

Possibly, if there had been misrepresentation, the continuance of the defendants under the circumstances would not be sufficient to prevent their now disputing the mortgage.

The Carbonneaus left the Yukon Territory in October, 1901; they returned about the middle of April, 1902, and had conversations with the defendants between that time and the commencement of this action, on or about the 27th May, 1902. Both the plaintiffs deny that, before the commencement of the action, they heard of any complaint respecting the terms of payment of the mortgage, and the defendants did not pretend that they made any such complaint to them. It must be assumed, then, that no such complaint was made, which strengthens my distrust of the defence, as does, also, the course of the pleading.

1904
LETOURNEAU v. CARBONNEAU
Killam J.

I think, therefore, that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellants : *Noel, Noel & Ledieu.*

Solicitors for the respondants : *M. J. A. Ackman.*