

57, 1934



No. 22 of 1934.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

LAURA McEWAN, Administratrix of the Estate of
HIRAM STEVENSON, deceased, suing as such and
also on behalf of all others the heirs of JAMES
PROUDFOOT, deceased (Plaintiff) - - - - *Appellant*

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AND

ARTHUR COSENS, VERENA MABEL COSENS
and JOHN HUBERT HEMSWORTH, Executors
of the Estate of DANIEL LINDEBORG, deceased,
and Administrators of the Estate of ANDREW
LINDEBORG, deceased (Defendants) - - - - *Respondents.*

Case for the Appellant.

RECORD.

1. This is an appeal by special leave from a Judgment of the
Supreme Court of Canada allowing the Respondents' appeal from a judgment
of the Court of Appeal for British Columbia, which had dismissed the
20 Respondents' appeal from the judgment of the Supreme Court of British
Columbia (Fisher, J.) in favour of the Appellant, for the sum of \$13,862.26.

2. The circumstances of the cause of action are as follows :—

James Proudfoot, Hiram Stevenson, Andrew Lindeborg and
Daniel Lindeborg, all now deceased, were Miners and Prospectors,
and ultimately became the owners jointly and equally of the
Big Missouri group of Mineral Claims in Northern British Columbia.

The Appellant is the successor in interest to Stevenson and the
Respondents are the successors in interest to Andrew and Daniel Lindeborg.

3. In 1925 the Big Missouri group of claims was sold under a mining
30 option agreement for \$300,000.00 and the last payment of \$100,000.00
on the purchase price was made through the Canadian Bank of Commerce

APPELLANT'S CASE.

in 1928. In that year one Harris, the former owner of the Jumbo Group of Mineral Claims (afterwards included in the Big Missouri group) commenced action against the Lindeborgs and against the Estates of Proudfoot and Stevenson for \$100,000.00 under an agreement made in 1909 between the said Harris and Stevenson and Proudfoot, whereby Stevenson and Proudfoot agreed to do certain assessment work on the aforementioned Jumbo group of claims to keep them in good standing and, in return, were to receive two-thirds of the proceeds of any sale or disposition thereof, one-third to go to Harris.

p. 251. 4. Harris obtained Judgment in the Supreme Court of British Columbia for \$100,000.00 against all the Defendants. The Court of Appeal for British Columbia reduced the judgment to \$15,789.00 as against the Appellant alone. On appeal to the Supreme Court of Canada judgment was finally given for Harris for \$50,000.00 against the Appellant alone, the claim as against both Lindeborgs being dismissed.

p. 254.
p. 262.

5. During the course of the proceedings Barbrick, the representative of the Proudfoot Estate died, and the present Appellant was, by order of Court, made the representative of that estate for the purposes of the action.

6. The Appellant has settled the Harris judgment by paying the amount thereof and costs, and claimed against the two Lindeborg Estates for \$27,724.52, being one-half the amount paid by her in settlement of the Harris judgment. The trial Judge held that the Plaintiff had not established her right to represent the Proudfoot Estate in this second action, but gave her judgment, as representing the Stevenson Estate for \$13,826.26, one-half the amount claimed by her. The judgment was upheld unanimously by the Court of Appeal of British Columbia and reversed by the Supreme Court of Canada.

p. 181.
pp. 184 to 193.
pp. 196 to 200.

7. The Plaintiff's claim against the Lindeborg Estates is based on an agreement made by Daniel Lindeborg in his lifetime personally and as administrator of the estate of his brother, Andrew Lindeborg, to pay one-half of any judgment and costs which might be recovered by Harris, the agreement being made between Daniel Lindeborg and Mr. R. M. Macdonald, a Barrister and Solicitor of Vancouver, on behalf of the Appellant, in the following circumstances.

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p. 30, l. 8, to p. 31, l. 15. On perusal of the Statement of Claim in the Harris action Macdonald explained to Daniel Lindeborg that a defence was available to himself and the estate of his brother, which was not open to the Stevenson and Proudfoot Estates, namely, that the Lindeborgs were not parties to the 1909 agreement with Harris and could not be bound thereby and he, Macdonald, thereupon suggested to Lindeborg that the defences should be separated and either Lindeborg or the others should retain another

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p. 31, l. 43, to p. 32, l. 4.

solicitor and file a separate defence. Lindeborg thereupon requested Macdonald to continue to act for him and for the Estate of Andrew Lindeborg as well as to act for the Proudfoot and Stevenson Estates and to take any defences he wished on behalf of any of the parties, as any such would enure to the benefit of them all as all were to stand or fall together and share and share alike. Macdonald assented to this. He continued to act for all parties. He refrained from securing any independent advice for his clients representing the Proudfoot and Stevenson Estates. He put in the separate and inconsistent defence for Lindeborg and neither in the pleadings nor during the course of the trial nor appeals did he, on behalf of the Appellant, offer any resistance to Lindeborg's defence.

8. As Lindeborg's separate defence prevailed the Appellant was left liable for one-half of the judgment instead of one-quarter, which would have been her share if Lindeborg had been included in the liability. The Appellant's opportunity to contest this defence of Lindeborg's had been surrendered by her Solicitor in consideration of Lindeborg's promise to pay his share of any judgment obtained.

9. The trial Judge accepted the evidence of Mr. Macdonald, found in accordance therewith that a valid contract had been made, and gave Judgment for the Appellant, which was upheld by the Court of Appeal of British Columbia. The Supreme Court of Canada held that the evidence of Mr. Macdonald was not sufficient to establish an enforceable contract and allowed the Respondents' appeal.

10. The Appellant therefore humbly submits that this appeal should be allowed for the following amongst other

REASONS.

- (1) THE evidence of Mr. Macdonald was uncontradicted and discloses a binding and valid agreement between the said Macdonald, acting on behalf of the Appellant, and the said Daniel Lindeborg, on behalf of himself personally and as administrator of the Estate of Andrew Lindeborg.
- (2) THE Supreme Court of Canada failed to recognise the legal significance of the evidence of Mr. Macdonald as constituting a valid and binding contract, and that there was an executed consideration by the Appellant.
- (3) FOR the reasons given by the learned trial Judge and the learned Judges of the Court of Appeal of British Columbia.

J. W. DE B. FARRIS.

No. 22 of 1934.

In the Privy Council.

ON APPEAL

From the Supreme Court of Canada.

BETWEEN

LAURA McEWAN as Administratrix

of the Estate of Hiram Stevenson,

deceased - - (Plaintiff) Appellant

AND

ARTHUR COSENS and Others

(Defendants) Respondents.

Case for the Appellant.

GARD, LYELL & CO.,

47 Gresham Street, E.C.2,

Appellant's Solicitors.