

57, 1934

In the Privy Council.

No. 22 of 1934.

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*

AND

10 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 RESPONDENTS.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 8th June 1933 reversing a judgment of the Court of Appeal of British Columbia dated the 7th March 1933 which had affirmed a judgment of the Supreme Court of British Columbia dated the 10th December 1932 in favour of the Appellant as administratrix of the estate of Hiram Stevenson but not as suing on behalf of the heirs of James Proudfoot.

Record.
p. 201.
p. 194.
p. 181.

2. The appeal arises indirectly out of an action begun in 1928 by one Harris against Daniel Lindeborg (personally and as administrator of his brother Andrew's estate), Duncan Barbrick (as administrator of the estate of James Proudfoot) and the Appellant (as administratrix of the estate of her brother Hiram Stevenson). The question is whether a certain conversation between Daniel Lindeborg and the solicitor who was acting for all the defendants in the Harris action was intended to constitute a contract, and if so whether the Appellant could and did ratify the contract so as to become entitled to sue upon it.

p. 224, l. 11.

3. From 1904 or 1905 Daniel and Andrew Lindeborg as partners had been active in staking mineral claims in the Stewart River District

p. 146,
ll. 1-43.

Record.

p. 145, ll. 14,
et. seq.
p. 147, ll. 1-6.
p. 230, l. 38—
p. 231, l. 14.

of British Columbia. In 1904 Harris had also staked claims there. In 1905 Proudfoot and Stevenson were prospecting in the district. In 1909 Harris met Stevenson and Proudfoot at Queen Charlotte Islands and there agreed with them, as he alleged, that Stevenson and Proudfoot would develop and exploit his claims and other claims to be grouped therewith, and would account to Harris for one-third of the profits.

4. Under the Mineral Act all mineral claims for which Crown grants had not issued lapse unless on or before the anniversary of the date when such mineral claims were recorded with the Mining Recorder of the district proof is made to the Recorder that at least one hundred dollars has been expended on each such mineral claim and a certificate obtained to that effect. These conditions not having been complied with, Harris's title lapsed in August 1909, his mineral claims ceased to exist and the area formerly occupied by such mineral claims was open to any free miner to locate and record another mineral claim. The areas comprising Harris's former claims were re-located by Stevenson and Daniel Lindeborg. These with other adjoining claims were exploited by Stevenson, Proudfoot and the Lindeborgs. All the moneys received were divided equally between Proudfoot, Stevenson, and the Lindeborgs or their respective personal representatives. Expenses were also equally shared.

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p. 243, l. 32.
p. 80, l. 15.

5. Proudfoot died on the 22nd December 1910 and one Barbrick became administrator of his estate. Stevenson was killed in action on the 9th April 1917 and the Appellant became administratrix of his estate. Andrew Lindeborg died on the 15th February 1925 and Daniel Lindeborg became administrator of his estate.

p. 169, l. 1.
p. 244, l. 11.

p. 225.

pp. 225, 227,
229.
p. 46, l. 16,
p. 228.

6. On the 18th July 1928 Harris commenced his action claiming a one-third interest in the said group. Barbrick instructed a solicitor, one Reginald Murray Macdonald of the firm of Macdonald and Pepler of Vancouver to act for him. Macdonald also sought and obtained instructions to act for the Appellant. Daniel Lindeborg returned from a trip to Sweden at the beginning of September and also instructed Macdonald on behalf of himself and his brother's estate.

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pp. 230-234.
p. 30, l. 8—
p. 31, l. 35.

7. On the 11th September 1928 Harris delivered his Statement of Claim. Macdonald, according to his evidence, realised that every defence available to the representatives of Proudfoot and Stevenson would also be available to Daniel Lindeborg but that Daniel Lindeborg had an additional defence in that neither he nor Andrew Lindeborg had had any dealings with Harris, or had any knowledge of any agreement between Harris and Proudfoot and Stevenson or had given any authority to Proudfoot or Stevenson to contract on their behalf.

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p. 31, l. 43—
p. 33, l. 3.

8. Macdonald accordingly considered whether he could properly represent all the Defendants. In the Respondents' respectful submission

Macdonald's conduct then and thereafter showed that Macdonald thought that Daniel Lindeborg was the only Defendant who could suffer detriment if Macdonald acted for all the Defendants. Macdonald was willing to act only for Lindeborg or to have Lindeborg instruct another solicitor. In these circumstances Macdonald asked Lindeborg for a definite decision.

Record.

9. Macdonald's account of his interview with Lindeborg and its effect on his actions appears from the following extracts from his evidence :—

10 “ Well, having explained the situation as it appeared to me to
 “ Mr. Lindeborg, I asked him whether under the circumstances it
 “ might not be necessary, in his opinion, for other solicitors to be
 “ engaged ; either I represent the Lindeborgs and somebody else
 “ represent the Proudfoot and Stevenson estates or I represent the
 “ Proudfoot and Stevenson estates and somebody else represent the
 “ Lindeborg interests. And Mr. Lindeborg's answer was, ‘ There is
 “ ‘ no necessity for that at all ; all the defendants in this matter
 “ ‘ stand or fall together ; whatever the outcome of it is, we share
 “ ‘ and share alike. You can go on and act for all and take any
 “ ‘ point of defence that you—— ’ ”

p. 31, l. 43—
 p. 32, l. 8.

20 “ He further told me at that time to take any defense I could on
 “ behalf of any one of the defendants, that was available, as any
 “ such, if successful, would inure to the benefit of them all. Now,
 “ that is the substance of that conversation as well as I can recollect
 “ it. It satisfied me at the time that I was justified—— ” (He
 was stopped by the Court.)

p. 32,
 ll. 38-43.

 “ I did exactly what Mr. Lindeborg told me to do, and
 “ continued to act for all parties by delivering a separate defense
 “ raising this particular issue on their behalf.”

p. 33, ll. 1-3.

30 10. Macdonald did not record his interview by any entry in his books
 or by letter either to the Appellant, to Barbrick or to Lindeborg. Macdonald
 did not tell the Appellant of his interview until shortly before her present
 claim was put forward in 1931 in which the interview was set up as
 constituting a contract between her and Lindeborg.

p. 45, l. 40—
 p. 46, l. 7.
 p. 91,
 ll. 27-41.

40 11. In the Respondents' respectful submission the only contractual
 element in the interview was the continued employment by Lindeborg of
 Macdonald as his solicitor. Macdonald was not purporting to contract on
 behalf of the Appellant or of Barbrick and had no authority so to contract.
 On the other hand Macdonald was acting and purporting to act on his own
 behalf in giving Lindeborg the opportunity to cease or to continue to
 employ Macdonald as his solicitor. Lindeborg gave his reason for thinking
 he would not be prejudiced by continuing to employ Macdonald, but to
 read into his words a contract with the Appellant is, in the Respondents'
 submission, to give them a strained construction.

Record.
p. 251.

p. 254,
ll. 30-34.
p. 52, l. 10.

pp. 254-5.

12. On the 18th June 1929 the Supreme Court of British Columbia gave judgment in favour of Harris against all the defendants in his action for \$100,000. The defendants appealed, and on the appeal Lindeborg was separately represented by E. P. Davis K.C. Before judgment was given Barbrick died on the 28th October 1929 and the Appellant was appointed to represent the Proudfoot estate in the Harris action. On the 7th January 1930 the appeal was allowed with costs, the action against Lindeborg was dismissed with costs, and the judgment against the Appellant as representative of both the Proudfoot and Stevenson estates was reduced to \$15,789 with trial costs on the appropriate scale.

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p. 262, l. 30.

pp. 262-4.
p. 263,
ll. 11-30.
p. 263,
ll. 38-43.
p. 264,
ll. 3-10.
p. 263,
ll. 30-38.
p. 269, l. 20.
p. 269.

13. Harris appealed to the Supreme Court of Canada before which Lindeborg was again separately represented. The Appellant cross-appealed. By a judgment dated the 23rd December 1930 the Supreme Court allowed the appeal as against the Appellant and awarded Harris \$50,000, dismissed the Appellant's cross-appeal with costs, and ordered the Appellant to pay Harris's costs in the Courts below and in the Supreme Court of Canada. As against Lindeborg, Harris's appeal was dismissed with costs.

14. On the 6th January 1931 Lindeborg died and the Respondents as the executors named therein duly proved his will. As such executors the Respondents represented the estate of Andrew Lindeborg.

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p. 60,
ll. 20-30.

pp. 265-6.
p. 266, l. 13.
pp. 267-8.

15. The Appellant, who had contemplated an appeal to His Majesty in Council, negotiated a settlement with Harris to which the Respondents refused to be parties. On the 25th February 1931 formal demand was made on behalf of the Appellant upon the Respondents to provide half the amount to be paid under the settlement. The agreement of settlement was executed on the 27th February 1931. The Appellant agreed not to appeal and she and Harris each agreed to bear their own costs throughout the litigation. Harris agreed to pay Lindeborg's taxed costs but the Appellant agreed to repay to Harris half the excess over \$1,000.

p. 268, ll. 1-6.

p. 1.
pp. 2-6.

16. On the 5th August 1931 the writ was issued in the present action, 30 and the Statement of Claim by paragraphs 14, 15 and 16 alleged agreements by Lindeborg on behalf of himself and as administrator of his brother's estate to share equally with the Appellant and Barbrick as to principal and costs and as to principal and interest in any judgment in Harris's favour. The Appellant claimed \$27,724.52.

p. 181.

p. 181,
ll. 31-33.
p. 181,
ll. 34-38.

17. The action was tried before the Honourable Mr. Justice Fisher on the 22nd, 23rd, 24th, 29th and 30th November 1932 and on the 10th December 1932 Mr. Justice Fisher gave judgment holding that the Appellant was not entitled to sue on behalf of the heirs of Proudfoot, but giving judgment for her as administratrix of Stevenson's estate for one-half 40 the amount claimed and three-quarters of her taxed costs.

Record.

18. In the reasons for his judgment Mr. Justice Fisher held that although Macdonald's evidence might be inaccurate in some details, the conversation with Lindeborg of which he gave evidence took place. Macdonald was solicitor for all parties and in return for Lindeborg's promise continued so to act and, on behalf of the Appellant and Barbrick, abandoned any question of their obtaining independent advice or taking any position in opposition to Lindeborg's. The learned Judge held that Macdonald had authority to represent the Appellant and supplied consideration for Lindeborg's promise. The Appellant, however, was not
 10 entitled to sue on behalf of the heirs of Proudfoot.

pp. 170-180.
 p. 173, l. 13—
 p. 174, l. 11.

p. 174, l. 12—
 p. 177, l. 43.

p. 178, l. 1—
 p. 180, l. 3.

19. The Respondents appealed to the Court of Appeal. The appeal was heard on the 2nd, 3rd and 6th February 1933 and on the 7th March 1933 the appeal was dismissed with costs.

pp. 182-183.
 p. 194.

20. In the reasons for his judgment the Honourable Chief Justice J. A. Macdonald purported to quote the words in which Macdonald described his interview with Lindeborg. The words quoted, however, do not appear in Macdonald's evidence. With the exception of six introductory words the words are taken from paragraph 16 of the Statement of Claim wherein a direct contract between Lindeborg and the Appellant and Barbrick was
 20 alleged. This alleged contract was clearly not proved at the trial. In the Respondents' respectful submission this confusion between the pleadings and the evidence resulted in the Chief Justice's wrongly assuming in the Appellant's favour that a contract had been proved. The Chief Justice proceeded to deal with the case as if the only substantial question was whether the evidence which he thus purported to set out was corroborated. The Chief Justice found that corroboration, if required, existed; that the contract was made on the Appellant's behalf; that the Appellant had ratified it, and that there was consideration since the parties co-operated, and acquiesced in it throughout the whole legal proceedings.

pp. 184-185.

p. 5, ll. 24-31

p. 184, l. 37.

p. 184, l. 37—
 p. 185, l. 28.
 p. 185,
 ll. 29-36.

30 21. The Honourable Mr. Justice Martin thought, though not without some doubt, that the learned judge below should not be held to have reached a wrong conclusion. The Honourable Mr. Justice McPhillips agreed with the Chief Justice.

p. 186.

p. 186, l. 20.

22. The Honourable Mr. Justice M. A. Macdonald considered that, assuming there to be evidence of a contract, the evidence of the witness Macdonald did not require corroboration, nor was the evidence inadmissible on the ground of professional privilege. Examining the evidence of a contract the learned judge held that there was an offer by Lindeborg of a promise to assume a possible liability in consideration of the Appellant
 40 instructing her solicitor to proceed in the terms of the offer. The Appellant, however, did not know of the offer until after final judgment in the Supreme Court of Canada. Macdonald, in his lordship's view, assumed

pp. 187-193.
 p. 187, l. 20—
 p. 189, l. 8.
 p. 189, ll. 9-28
 p. 189, l. 29—
 p. 191, l. 29.

p. 191,
 ll. 30-32.

p. 191, l. 32—
 p. 193, l. 5.

Record. without authority to accept the offer and therefore ratification was necessary, but there was ratification which related back to the assumed acceptance of the offer by Macdonald, resulting in a binding enforceable contract.

p. 195. **23.** The Respondents appealed to the Supreme Court of Canada
p. 201. which heard the appeal on the 25th and 26th April 1933 and by a judgment dated the 8th June 1933 allowed the appeal, dismissed the Appellant's action and ordered the Appellant to pay the Respondents' costs in all courts.

pp. 196-200. **24.** The reasons for the unanimous judgment of the Supreme Court 10
p. 198, ll. 8-11 of Canada were given by the Honourable Mr. Justice Smith. After pointing out that no evidence was offered of the agreement alleged in paragraph 16 of the Statement of Claim Mr. Justice Smith examined Macdonald's evidence and pointed out that this evidence failed to establish the contract pleaded. Macdonald did not state that he entered into any agreement whatever on behalf of the Appellant and Barbrick, and he gave no undertaking on their behalf. The argument that the Appellant ratified the contract by bringing this action could only mean, in the circumstances, that there was then an outstanding offer. This contention, in the Court's opinion, was untenable. 20

25. The Respondents respectfully submit that the judgment of the Supreme Court of Canada was right and should be affirmed for the following amongst other

REASONS.

- (1) BECAUSE the evidence does not establish any contract between the Appellant and Daniel Lindeborg.
- (2) BECAUSE Macdonald did not purport or intend to contract as agent for the Appellant and had no authority so to contract.
- (3) BECAUSE the Appellant did not effectively ratify 30 Macdonald's acts (if any) done as her agent.
- (4) BECAUSE the Appellant neither personally nor by agent accepted the offer (if any) made by Daniel Lindeborg.
- (5) BECAUSE no consideration moved from the Appellant.
- (6) FOR the other reasons given by the Supreme Court of Canada.

A. H. MACNEILL.

FRANK GAHAN.

In the Privy Council.

No. 22 of 1934.

*On Appeal from the Supreme Court of
Canada.*

BETWEEN

LAURA McEWAN, administratrix of the estate
of HIRAM STEVENSON, deceased, suing as such
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PROUDFOOT, deceased (Plaintiff) - *Appellant*

AND

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and JOHN HUBERT HEMSWORTH, executors
of the estate of DANIEL LINDBORG, deceased,
and administrators of the estate of ANDREW
LINDBORG, deceased (Defendants) *Respondents.*

CASE FOR THE RESPONDENTS.

BLAKE & REDDEN,

17 Victoria Street, S.W.1.